

THE STORIES WE TELL OURSELVES,
ABOUT NORDIC LAW IN SPECIFIC

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I. INTRODUCTION

Comparative law is accustomed to deal with big packages. Obviously, general books about comparative law are filled with such packages: legal families, legal spheres, legal cultures, legal traditions and so on. This long standing practice has been criticised and praised. This is hardly any news to anyone who has read comparative law literature during the last 15 or so years. However, much less is said about the fact that jurists and especially internationally or comparatively oriented jurists actually apply these big packages as a part of their professional communication. Curiously, even those who deeply dislike traditional macro-comparative law are no exception to this. We may note that in international congresses even those colleagues who are known from their publications to be highly critical toward Western-law-oriented macro-comparative law may, and in fact do, use the language of orthodox comparative law. The ideas that this is stirring are, to say the least, ambiguous. On the one hand, one would expect critical comparatists not to speak of such mega-concepts like common law and civil law. But they do. The fact that traditionalists do this raises hardly anyone's eyebrows; what else there is to be expected.

But, above said does not suggest that we should necessarily be content with macro-concepts of mainstream comparative law. They seem to be useful even while we do not like them and, moreover, it is hard not to use macro-concepts when one speaks with a colleague from other side of the world. To be sure, such catch-words like common law, Germanic law, Asian law, Nordic law are sure to surface at some stage even while one would struggle in order not to use these burdened concepts. One should, however, not just give in and to say that "alright, I don't like these macro-concepts but I can't help but to use them". It is very much possible that the mystery with

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the macro-concepts goes even deeper. There is one fascinating picture of the place of macro-concepts and the accompanying endless debate about them. I mean *Richard Hyland's* entertaining story about the Circles of comparative law which is a version of Dante's famous story about the Circles of Hell. In Hyland's version in each Circle there are different problems with comparative law pestering comparatist, but by far the most terrifying is the seventh Circle where the true comparative law professionals dwell. Agony taking place in this deep layer is basically this:

A denizen stands up and, for all eternity, argues that the common law and the civil law, when studied from the perspective of praesumptio similitudinis do not differ much from one another. Then another denizen takes the floor and criticises the first colleague for focusing solely on the practical results of the two systems, thereby ignoring the doctrinal differences. This denizen also speaks for all eternity. A third follows and, again for an eternity, suggests that the differences should be systematized and the legal systems of the world classified into families.¹

This wonderful but crafty story is the best description of the intellectual pains of macro-concepts that there is. We are not progressing. This is easy to see, if one takes the massive comparative study of gift law by the very same writer: his impressive and learned opus is filled with "common law this" and "civil law that".²

In this paper it is not sought after to offer a solution to the problematic nature of macro-concepts. Rather, what is sought after is to regard macro-concepts as *stories* about law forged and used by comparatists. However, since the field is a vast one and legal families/spheres/cultures/traditions contain tremendously huge amount of information this short paper must remain quite modest in its approach and scope. So, in this paper the Nordic law is discussed specifically. Because Finland, the home-country of this author, is one of the Nordic countries this paper is also a national report. The point here is not to tell what Nordic law is or what it is not truly about. Instead, the Nordic law serves as an example of typical macro-construct of modern comparative law as it has been practiced since the World Congress 1900 in Paris.

Let us first look what is the place of Nordic law in the world of macro-comparative law.

¹ Richard Hyland, "Evening in Lisbon", *Festschrift für Claus-Wilhelm Canaris zum 70. Geburtstag*, Beck, München, 2007, pp. 1135-1154, at 1145.

² See Richard Hyland, *Gifts: a Study in Comparative Law* (Oxford University Press, New York 2009).

2. *Stories about Nordic Law*

Nordic law or as it is also called Scandinavian law is certainly not a major legal macro-construct. There are classifications and groupings which do not even recognise its existence. In order to be able to embark deeper into the nature of Nordic law it makes sense first to say something about the great macro-constructs and only after then look into the nature of Nordic law.

A. *Main Story: Part of Larger Whole*³

From the 1800s to the 21st Century numerous classification attempts have been made. However, at the same time it has been admitted that it is virtually impossible to construct an ideal system of classification that would be even reasonably comparable to the taxonomies of those made by zoologists or botanists. The main difficulty for classification of legal systems has been in finding a suitable criterion for division. Previously the classification attempts were by large made on the basis of one or only few criteria, however, the contemporary approach is to take into account several different criteria that contain many factors held to be relevant. Even though there are some differences the elements that are taken into account are very much of similar type: history, ideology, legal style, legal argumentation and thinking, codification level of law, judicial reasoning, structural system of law, structure of court system, spirit and mentality of legal actors, training of lawyers, law's relation to religion and to politics, the economical base of law, the background philosophy of legal thinking, the doctrine of sources of the law, the empirical effectiveness of formal legal rules, the role of tradition in law, paradigmatic societal beliefs about law, etcetera.

Today, we are accustomed to speak of common law, Roman-German law (or civil law), Asian law, mixed legal systems and religious law even without really thinking that we are using the conceptual devices constructed by comparative lawyers. It is right here where the actual strength of such macro-constructs may be seen; even while there is justified and sound criticism it is hard to create better concepts that would fulfil the same function. On the bottom line there is a specific epistemic way to think about law: the legal systems, legal cultures or specific legal traditions grouped into larger wholes have something important in common even though there is undisputable diversity among them.

As an outcome of the first international Congress of comparative law in Paris 1900, *Esmeyn* presented a classification based on a multiple criteria.

³ This part is based on Husa, Jaakko, "Legal Families", in Jan M. Smits (ed.), *Elgar Encyclopaedia of Comparative Law*, Cheltenham et Northampton, 2006, pp. 382-393.

The base of division was on history, geography and religion. However, he also took into account the race as one dividing criterion. He came up with five different families of law which were Roman, Germanic, Anglo-Saxon, Slavic and Islamic law. This systematization does not strike as completely outdated even today more than 100 years later. It is easy to see that the basic elements of today's systems of legal families were already present by then. Even the passing of the time has not really challenged the basic elements: Roman-German law, common law, and the "other" systems. But today, the evolving EU-law has caused some changes in classification attempts.

However, the earlier classifications were constructed in a very different kind of intellectual climate of that of today. Many of the classification criteria used then are sure to attract a very critical eye of today. As an example we may mention the *Sauser-Hall's* infamous classification in which the grouping was based on the idea of dividing the humanity into different races. From this parameter he came up with law of the Aryan or Indo-European people, Semitic, Mongolic (mainly China and Japan) and the law of barbarous people (i.e. mainly Africans and Melanesians). However, today this kind of classification based on obviously racist thinking is hardly regarded as valid macro-comparative law. As a criterion for classification the idea of a race is simply and irreversibly out of a question for contemporary comparative law as an academic exercise. At least this has changed.

When we are coming closer to modern comparative law we find the influential grouping attempt by *Arminjon, Nolde* and *Wolff*. It took into account history, legal sources, legal technique, legal terms and concepts, and culture. Yet, their attempt was perhaps further inspired on the criterion of language resulting in seven families. These were French, German, Scandinavian, English, Russian, Islamic and Hindu. Their classification attempt does look in many ways quite modern. Most of their single ingredients are taken into account of even today, even while the change that has took place in the world in general, has quite obviously located their grouping into the history of comparative law. Nonetheless, their grouping was the intellectual base on which the later wide-spread taxonomy by *Zweigert* and *Kötz* was constructed upon.

Also we may mention the one made by *Schnitzer* aiming to build a system that would reflect the legal history as well the previous classification attempts by others. He divided five basic groups of legal systems that were the law of the primitive people (in a broad meaning of the word), the law of the culture-people of the Mediterranean, Euro-American legal sphere, religious law containing Jewish, Christian and Islamic law, and the law of African-Asian people. He further refined this system so that the law of Euro-American legal sphere was divided into a four different groups that were

Roman, German, Slavic and Anglo-American law. Within these subgroups he divided, for example, French, Italian, German, Nordic, Baltic, Soviet, Polish, Hungarian, US and English law. Schnitzer's tendency to stress the culture has today many followers in comparative law, albeit, in a different form.

There are Classifications and classifications. There are two powerful and seemingly quite enduring modern groupings that have survived some changes and even challenge by the others. Their scholarly power has been multiplied due to numerous editions and translations into other languages through-out the years. However, even these semi-paradigms were obliged to yield while facing the pressures of the 1990s. These are the classifications made by David, and Zweigert and Kötz. Even though their systems are the very base on which the comparative law has built upon for the last 40 years, their position in all else but secure. In some sense, they are not considered to be accurate or satisfying for contemporary needs and yet their system and specific way of thinking is still with us.

David is very famous of his influential *Grands Systèmes* –approach which is build upon the epistemic foundation of private law mainly of the Western nation-states. He distinguished four great legal families. They were Roman-German, common law, Socialist law and philosophical or religious systems. In the last group he included Muslim law, Hindu law, law of the Far-East and the law of Africa and Madagascar. However, David's last group was not actually legal family because the systems allocated in there were quite independent of each other as in contrast to the systems within the other genuine legal families. The main criteria in classification were ideology and legal technique, nevertheless, the first criterion was of more importance. Unlike, Arminjon and co, Schnitzer and Zweigert and Kötz, David did not saw distinct place for Nordic law.

After David, the place of orthodoxy in macro-comparative law has been, in practice, taken by the influential and widely spread system of legal families by Zweigert and Kötz. The grouping by them is not actually very different from that of Arminjon, Nolde and Wolff. They discern, now that Socialist law has collapsed, Romanist, Germanic, Nordic, Common law families. Besides, they also recognise the law of the People's Republic of China, Japanese law, Islamic law and Hindu law. Based on this scholarly macro-tradition the Nordic law has survived as a legal family of its own; part of the system of classification of legal families and also a kind of a part of Germanic legal tradition.

B. *Sub-Story: What Kind of Part?*⁴

Today the most widespread opinion seems to be that Nordic law constitutes a legal family of its own.⁵ Now, perhaps one of the most fitting descriptions of the state of affairs is the one by *Ole Lando* who sees neighbourhood, nature, history, languages, religion and the special Scandinavian mentality and common legal habits as grounds from which it is possible to say that Nordic law is, indeed, a legal family in the true sense of the word.⁶ This statement importantly asserts that there are many legal-cultural similarities between Nordic countries. However, it is of importance to understand that the most relevant similarities do not concern formal legal rules but, rather, the *legal mentality* which proves that certain basic values concerning social justice, social ethics and law in general are close to each other.⁷ Accordingly, from the point of view of comparative law we may generally speaking characterise Nordic law as a legal family that is close to continental law but separate from common law.⁸ Zweigert and Kötz have said that: “it would be right to attribute the Nordic laws to Civil Law, even although, by reason of their close relationship and their common *stylistic* hallmarks, they must undoubtedly be admitted to form a special legal family, alongside Romanistic and German legal families”.⁹

The key difference between civil law and Nordic law is the lack of extensive private law codifications, which is a similarity between English common law and Nordic law. In accordance, the private law legislation is as to its nature practical and concrete, not theoretical and abstract.¹⁰ But, when it comes to the common law legal family one of the most decisive factors is the role of precedent. Even while the precedents play a significant practical role in Nordic legal systems, one may say, that their legal-formal and doctrinal position is relatively weak. But, when one describes English law the situation seems to be completely different, because precedents may be formally binding on future cases. In numerous accounts it has been repeated that one of the most obvious differences between common law and civil law

⁴ This part relies heavily on Husa, Jaakko, “Nordic Constitutionalism and European Human Rights – Mixing Oil and Water?”, 55 *Scandinavian Studies in Law*, 2010, forthcoming.

⁵ See, e.g., Konrad Zweigert & Hein Kötz, *An Introduction to Comparative Law* 3 ed., 1998, pp. 63-73. They followed Pierre Arminjon, Boris Nolde, and Martin Wolff, *Traité de droit compare I*, 1950, pp. 42-53.

⁶ See Ole Lando, “Nordic Countries, A Legal Family? A Diagnosis and a Prognosis”, 1 *Global Jurist Advances*, 2001, pp. 10 and 11. Cf. Zweigert & Kötz, 1998, pp. 284 and 285.

⁷ See (eds.) Husa, Jaakko, Kimmo Nuotio, Heikki Pihlajamäki, *Nordic Law – Between Tradition Dynamism*, Intersentia and METRO, Antwerp-Oxford, 2007.

⁸ See Ditlev Tamm, “The Nordic Legal Tradition in European Context – Roman Law and the Nordic Countries”, in Pia Letto-Vanamo (ed.), *Nordisk Identitet – nordisk rätt i europeisk gemenskap*, KATTI, Helsinki, 1998, pp. 15-31, 16-18.

⁹ Zweigert & Kötz, 1998, p. 277.

¹⁰ Cf. Lando, 2001, p. 7.

is the importance of precedent. Especially the way how Nordic law normally tends to identify precedents is highly informative. The Nordic attitude toward precedent is quite telling about how Nordic legal culture tends to perceive constitutionally the role of the courts and the accompanying role of the legislator. These two factors reveal something potentially important concerning the inherent suspicion toward judge-made rules. This seems to be part of what Italian comparatists *Simoni* and *Valguarnera* call “lo spirito della tradizione Nordica”.¹¹

In Nordic law the lack of theory concerning the formal and strongly binding precedent is evident; however, there are some differences between the countries. In the Eastern area of Nordic law, i.e. Finland and Sweden, the role of precedent has been remarkably weak in the formal and doctrinal sense. One crucial factor is the Finnish and Swedish legal-cultural attitude according to which moral questions should be left to national Parliaments, not to courts of law.¹² Moreover, in Sweden we may also refer to the significance of the Uppsala school which certainly has contributed – having its echoes also in Finnish legal doctrine – to an idea according to which one should regard rights with suspicion.¹³ Nordic states have put their faith in politics rather than in the hands of judiciary. To understand all this, one must take look deeper than into general Nordic law. In the following the sub-story of Nordic is discussed in the area of constitutional law.

C. *Sub-Story of a Sub-Story: Family of Nordic Constitutional Law?*

Nordic constitutional law clearly has many features of the continental legal tradition.¹⁴ These features are however not completely identical: legal systematics is – basically – continental in upholding the division between private and public law. Key constitutional documents (Constitutional Acts) in the Nordic countries are written by governmental key institutions even though they are supplemented in various ways by formal amendments, constitutional conventions or other customary rules and praxis. All the Nordic systems trust their Constitutional Acts *lex superior* status, where all these Acts are located at the peak of the national hierarchy of legal

¹¹ Simoni, Alessandro and Valguarnera, Filippo, *La tradizione giuridica dei Paesi nordici*, Giappichelli, Torino, 2008, p. 97.

¹² Cf. Cameron, Iain, “The Influence of European Human rights Law on National Law”, in E. Hollo (ed.), *National Law and Europeanisation*, Suomalainen lakimiesyhdistys, Helsinki, 2009, pp. 63-84, at p. 73.

¹³ As Max Lyles notes: in Hägerström’s thinking such things like human rights ‘reflect special interests rather than universal values’, Lyles, *A Call for Scientific Purity: Axel Hägerström’s Critique of Legal Science* (Olin Foundation, Stockholm, 2006) p. 368.

¹⁴ This part of the article relies on the author’s book *Nordic Reflections on Constitutional Law: a Comparative Nordic Perspective* (Peter Lang, Frankfurt am Main, 2002), see especially Chapter 6. However, the text here has been updated and modified for the present purpose.

norms. Sweden represents the only Nordic system having many formal constitutional documents all with *de jure* constitutional status. However, even in Sweden one constitutional Act is more important than the others (i.e. the form of Government). Finland abandoned the tradition of many constitutional Acts only in 2000.

The Nordic systems have some kind of mechanism for judicial review. And, these systems presuppose some form of separation of powers. There are different constitutional arrangements on how the judicial review is organised. Norway and Denmark do not have explicit constitutional rules that would contain judicial review. However, they both recognise judicial review as a part of their systems. Finland and Sweden have explicit written constitutional rules containing limited judicial review, but in practice judicial review is resorted to seldom and cautiously. Also it has to be taken into account, that in Finland *a priori* form of control has been greatly stressed. The real difference is, nevertheless, between the levels of judicial activism. Both Sweden and Finland accommodate some kind of judicial self-restraint. Differences in judicial review are also reflected elsewhere; Sweden and Finland do not recognise the clear principle of separation of powers, whereas Norway and Denmark are perhaps inclined more towards separation of powers, although in a parliamentary form.

Similarities, Nordic legal mentality if you like, are obvious in the ways that Supreme Courts take into account the will of the legislators. As *Peczenik* and *Bergholz* have said “travaux préparatoires should be taken into account because they form a part of a democratic and rationally justifiable legislative procedure”.¹⁵ The word democracy is of utmost importance in this context. Nordic judicial systems have great respect for their national Parliaments as democratically chosen legislators. Respect is reflected in the use of travaux. Even though, the Norwegian Supreme Court has been most active it tries to avoid open power conflicts with the Norwegian Parliament. It does not seek to replace or challenge a democratically chosen legislator, although, it may set some legal limits for its legislative competence. There are also some common law type features that can be found in the Nordic systems. All Nordic systems have room for norms or doctrines that are unwritten but still have an important constitutional position. In Norway and perhaps in Denmark too, the case law of the Supreme Court is in an important position. Those parts of the Constitutional Act that deals with the Monarch are *de facto* in a state of desuetudo. The Finnish system contains some crucial customary norms as, for example, the *de facto* binding force of

¹⁵ Peczenik, Aleksander and Bergholz, Gunnar, “Statutory Interpretation in Sweden” in Neil D. McCormick and Robert S. Summers (eds.), *Interpreting Statutes*, Aldershot, Dartmouth, 1991, pp. 311-358, at p. 328.

the Constitutional Committee of Parliament's opinions and the position that constitutional specialists have in the *a priori* form of control.

Consequently, all this brings about some aspects of legal thinking that is more pragmatic (lacking formalism and the deductive and scholarly nature of *Juristenrecht*) than in civil law. However, the distinction between public and private law stemming from Roman law is obviously a common law feature, although, the distinction is not sharp in the Nordic systems. This may be seen by the fact that in Denmark and Norway there are no separate administrative courts. Besides, all the Nordic systems are parliamentary. Denmark, Norway and Sweden are obviously parliamentary systems, and so is Finland after the total reform of the Constitution in 2000. In Finland the President's role was diminished so that the Parliament's and Cabinet's position was strengthened, thus, it has become much closer to other Nordic systems in this respect too. The fact that Parliaments have such a crucial role is one of the reasons for the cautiousness of Nordic forms of judicial review (with the possible exception of Norway): there is not much room for courts to fight over power with a highly legitimate national Parliament.

However, the respect for the will of the legislator does not take the same form as, for example, in France where the judicial style of the courts is much less argumentative than in the Nordic systems; Nordic forms of judicial review do not stick so closely to the written statutory text but seek a rather more general argumentative base for justification purposes. There is a certain general Nordic openness of argumentation, thus, it differs from French style. And, none of the Nordic Supreme Courts have clearly such a political role as do continental Constitutional Courts. The doctrine of "political question" is to be found in all Nordic systems; the politicisation of Courts is not applauded in Nordic systems since it is the national Parliament that has the role of legislator. None of the Supreme Courts or other controlling organs possesses the competence to formally nullify the Acts of Parliament. In this sense the Nordic systems are unique; they encompass both the idea of popular sovereignty (as a legitimate form of political democracy) and also the idea of separation of powers. This probably partially explains the seemingly low political profile of Supreme Courts – they do not willingly challenge the legitimacy of Parliamentary Acts, although, they are very much legally independent of legislator's direct impact through statutory law. Generally, all courts seem to feel a great deal of *loyalty* toward the Parliament.

But, the recent slow Nordic expansion in judicial review may bring about a novel challenge to the traditional democratic theory: are the systems moving towards rule by judges instead of rule by parliamentarians? Moreover, if judicial activism expands to the traditional Nordic

understanding of democracy (popular sovereignty in an important position) this understanding may become a target for more significant and changes. Nordic Supreme Courts and other constitutionality control-organs have traditionally had a stabilising and mediatory role between various branches of government. In short, “In Nordic countries, it is universally accepted that it is elected politicians who should take the most important decisions in the public sphere”.¹⁶ So, even Supreme Courts willingly stay in the background and, thus, practice judicial self-restraint.

The Nordic experience seems to confirm that constitutional law is both “law” and “politics”, i.e. the Constitution or a Constitutional Act does not offer defence against “politics” because constitutions are themselves so deeply and profoundly of a political nature. However, this does not prevent us – the Nordic peoples – from entrusting political actors with an obligation to take constitutional rules seriously. This can also be seen in the way fundamental rights are protected in Denmark, Finland and Sweden: even though there has not been an active form of judicial review, the level of protection for fundamental rights has been high even though these systems do not always meet the requirements set forth by the European Court of Human Rights.

In Norway and Denmark, Constitutional Acts are held as important national symbols, not only as a collection of written rules. However, in Finland and Sweden, Constitutional Acts do not have equally strong symbolic functions; thus, interpretation of the Constitution is more pragmatic. To summarise, the Nordic version of constitutionalism contains a few common macro-elements, including legal, cultural and political elements, which can be listed as follows: a parliamentary system with a mixture of separation of powers as political meta-ideology; consensual democracy (avoidance of open conflicts in politics, stable multi-party system); cautious systems of judicial review (judicial self-restraint, no strong culture of rights); respect for the will of the legislator (avoidance of conflicts between Parliament and Supreme Courts; great significance of travaux as source of law); political question doctrine in use by the courts¹⁷; no separate Constitutional Courts; combination of written and unwritten rules and principles (Constitutions also contain customary material); strong elements of constitutionalism (general respect for the rules of Constitution within parliamentary frames; effective hierarchy of rules i.e. Constitution Acts are not political manifestos, separation of powers); and a pragmatic and practical legal style (argumentation used in control of constitutionality although grammatical, is also teleological and intentional, and the nature of

¹⁶ Cameron, 2009, at p. 72.

¹⁷ Cf. Rytter, Jens Elo, *Grundrettigheder: domstolenes fortolkning og kontrol med lovgivningsmakten*, Thomson-GadJura, København, 2000, pp. 46-47.

argumentation is not so “heavy” as in Germanic law, nor so cryptic as in French law, and to some extent there is a casuistic nature). We may also note that the Constitutions seem to have a certain degree of flexibility: although Constitutional Acts are written, alteration takes place in various forms i.e. in formal amendment, customs, conventions and case law.¹⁸

But, and this is an important but, *there are differences*. The greatest differences appears between the Eastern and Western members of Nordic law; by extending the family metaphor one might say that Sweden and Finland are the Eastern brothers of Denmark and Norway in the West. Sweden and Finland are (or at least have been) closer to each other than the country-pair of Denmark and Norway. Denmark and Norway are NATO members whereas Finland and Sweden are militarily neutral countries, although, this neutrality must be seen in a different light than before due to membership of the EU and recent peace-enforcement mission in Afghanistan. Norway’s (limited) judicial activism in constitutional judicial review and the Finnish *a priori* form of constitutionality control are the most striking, different features of Nordic systems. Also the level of political isolationism varies from Norway’s relatively high level of isolationism to (present day) Finland’s relatively high level of internationalism. And, it seems fair to describe Finnish and Swedish system as being more receptive toward the European human rights law than Denmark and Norway.

Altogether, it seems that significant doctrinal, functional, political, cultural and historical similarities can be pointed out even though there are some great institutional differences. Nordic Constitutions may be characterised as socially and politically successful constitutions because they have provided a stable framework for government. Summarily, Nordic constitutions appear as systems operating with similar foundational values although there are differences in constitutional cultures. Importantly, we see that Norway and Denmark are closer to each other than Sweden and Finland (East-Nordic). At least, we should divide Nordic constitutional law into two groups which follow the general division between Eastern and Western Nordic law.

3. *Macro-Stories as Discursive Formations?*

What has been said above seems to generate few conclusions. No one really likes macro-constructs of comparative law; notwithstanding, most comparatists still use the concepts of macro-comparative law. Many times it seems that only the name-tags keep changing. So, even while it is clear the

¹⁸ See also the conclusions drawn by Italian constitutional comparist Duranti, Francesco, *Gli ordinamenti costituzionali nordici: Profili di diritto pubblico comparato*, Giappichelli, Torino, 2009, pp. 243-245.

H. Patrick Glenn's classification into different legal traditions is different in many important ways with Zweigert and Kötz's classification they still look the same: generalizing big-packages. This has caused some comparatists to regard this eternal debate as being in the deep circles of hell.

In order to be able to analyze the hell one must however look into the devices of torture themselves: what these macro-constructs are and what they consist of. In order to do so, one needs to look into smaller compartments of macro-comparative law. Here the Nordic law, which is sub-group of Germanic law, was looked into. There were indeed many crucial things on the level of legal culture and normative legal systems also which seem to suggest that there are important commonalities. But, when the sub-story of this sub-story was looked deeper in the area of constitutional law even more fractures surfaced. Importantly, there seems to be one great fracture in between the Eastern and Western Nordic laws. And, yet it can be claimed that there are important similarities between the Nordic systems: legal culture and legal mentality seem to have similar ingredients including ideas of social justice and social ethos. And, if compared with other countries Nordic systems appear to have features which other systems do not have (e.g. small separate Acts instead of huge codes, welfare-ideology, lenient penal law system, etcetera).

So, are these macro-constructs but stories we tell ourselves? Are they not empirical descriptions of legal reality which are compressed and simplified in order to do what they are required i.e. to generalise masses of detailed legal pieces of information? The real issue is actually this: what is the relationship between the reality of each legal system (classified in a macro-construct) and the outcome (common law, civil law, Asian law, African law, religious law, Nordic law, etcetera). What is proposed here is that this question may be too simplified to make sense. Perhaps it is not really a question of what the truth is and what is not. This has to do with the fact that comparative law is not an exact science but rather a human science in which the role of the language is of great importance. Language is the medium to reality and an instrument with which we approach different systems of law. If this is really so, then, it would make sense to look into the methodological and theoretical discussion of human sciences. We may learn something about the nature of our theoretical-conceptual macro-devices.

In human sciences it has been discussed for decades about the relationship between the reality and the language. To make this story short, realists argue that reality is outside the language and language is just a means to describe this outside reality. On the other end, constructivist are saying that some elements of language (especially those which have to do with human, society and culture) do not only describe the reality but also

construct our pictures of reality and, thus, take part in constructing the reality. Now, one may or may not like either of these extreme ends but from the point of view of comparative law macro-constructs the argument by constructivists seems to make sense: we do not only speak of legal systems and of them in the sense of objectively describing the reality. Instead, how we speak of this reality affects although indirectly to this reality. If we follow this line of argumentation, then, macro constructs are actually *discourses*.

According to cultural theorist and sociologist *Stuart Hall* a discourse: “is a group of statements which provide a language for talking about - i.e. a way of representing - a particular kind of knowledge about a topic”.¹⁹ These discourses are produced through language and practices i.e. they do not actually arise from any reality in empirical sense. Their relation to social reality is curious: they are ways of talking about and also acting towards an idea. One of the key insights concerning discourses is that: “anyone deploying a discourse must position themselves *as if* they were the subject of the discourse”.²⁰ This is very much the way comparatists speak of macro-constructs; they are not talking something which is out there but rather something which they also themselves are included in: my system is part of the Nordic law group, which belongs to civil law legal family, which in its turn belongs to Western legal tradition.

Discourse is a group of statements which provide language in order to be able to speak of certain information concerning certain object i.e. discourse offers language-device through which we can represent information. So, when one speaks of, say, Nordic law, and this is done inside the discourse of macro-comparative law, then, speaking of Nordic law offers a certain way to conceive it in specific manner: certain order of things appears. And, while doing this other possible ways to speak of Nordic law are limited. Other representations became difficult if not impossible, because if one wishes to stay inside the professional discourse of macro-comparative law one must use its language. This language, in turn, consists of statements (precedent law vs. enacted law, divided court system vs. uniform court system, code law vs. case law etc.) which are produced through the use of comparatist-language. But, where does all this leave us?

4. *Conclusion - Not Just Stories*

One possible way to deal with the problems that concern the big-packages i.e. the stories we tell ourselves is to regard them as in-between

¹⁹ Hall, Stuart, “The West and the Rest: Discourse and power”, in (eds.) Hall, Held, Hubert and Thompson, *Modernity: An introduction to Modern Societies*, Blackwell, MA: Malden, 1996, pp. 185-225, at 201.

²⁰ *Ibidem*, at 202 (emphasis original).

creatures which *do not only describe the reality but also effect on our understanding of that reality*. So, if one investigates Nordic law and is already filled with ideas about what Nordic law really is, then, the conclusions are not drawn of blank paper: there is already certain structure and certain theoretical language which inescapably keeps us in its grip. Situation is pretty much the same which philosopher of science *Otto Neurath* once described in the following manner:

*There is no way of taking conclusively established pure protocol sentences as the starting point of the sciences. No tabula rasa exists. We are like sailors who must rebuild their ship on the open sea, never able to dismantle it in dry-dock and to reconstruct it there out of the best materials... Vague linguist conglomerations always remain in one way or another as components of the ship.*²¹

If this is really so, then, we just have to keep telling these stories to ourselves: we need to stay in our ships in order not to drown in the sea of foreign law. No matter how much we may dislike these kinds of “vague linguistic conglomerations”. In fact, there has not been a single really serious attempt to build a new ship on the open sea. So, common law and civil law as well as Nordic law as a subgroup of civil law are still here as pieces of organised macro-comparative discourse. But, to be sure, these are not *just* stories if we regard them as discourses. At the end of the day, even sub-stories may matter. I mean to say that the story about Nordic law is a good one even while it seems to me that sometimes it is a catchword which Nordic lawyers utter to outsiders when making a point and to insiders when padding colleagues to their shoulders in the spirit of “our Nordic law”. But, outsiders may have a point when they utter suspicions about the “particular Nordic characteristics” without investigating whether or not these supposed characteristics really exist.²²

²¹ Neurath, Otto “Protocol sentences”, in A. J. Ayer (ed.), *Logical Positivism*, Free Press, Glencoe, 1959, pp. 199-208, at 201.

²² Smits, Jan, “Nordic Law in a European Context: Some Comparative Observations”, in J. Husa, J. et al., (eds.), *Nordic Law – Between Tradition and Dynamism*, Intersentia, Antwerp-Oxford, 2007, pp. 55-64, at 64.