Fragments and sediments, system and tradition

A Venetian tribute to Kaarlo Tuori

Joxerramon Bengoetxea

The need to explore the common elements of Nordic legal cultures was mentioned during the kick-off seminar held at the end of January 2008 in Helsinki for the inauguration of the Centre of Excellence in Foundations of European Law and Polity Research. This is something I found intriguing. Many things Nordic tend to exert a special influence in Southern Europe, and especially in the Basque Country, where an important number of academics are in search of social, economic, educational and political models that could be transplanted. True, Finland gained independence comparatively late and had its own civil war in 1918 with a brutal and cruel aftermath, but this was brief and followed by democratic elections and rapid progress to consolidate a true welfare state. In Spain, however, the aftermath of the Civil War lasted not a few months, but 40 years of right-wing confessional dictatorship, with traces of Francoism still detectable in the political culture of the Spanish Right. As Spanish Basques, we suffered a double oppression: that inflicted on all democrats who had sided with the Republic, and the added oppression of national identity, an aspect we shared with the Catalans. But the aim of this Tribute to Kaarlo Tuori is not to speak about Spain or the Basque Country, but rather to engage in a rather curious genre of tying up ideas, impressions and thoughts that I associate with some episodes of Kaarlo's life and time, and also with his legal philosophy.

Finland is seen by many as Nordic, almost as Nordic as you can get, but also as a sort of promised land politically. Finland and its parliamentary system, its democratic culture, its bilingual status, its educational system, its constitutional recognition of the special status of the Åland archipelago (see Jääskinen 2005), and even its pro-Europe and pro-neutrality stance are all features that inspire our political thinking and aspirations.

This political attraction of Finland is not just a matter of perspective. It is a matter of looking at the right indicators for progress. Finland is eleventh on the

United Nations' Human Development Index[1] and ranked as the sixth happiest nation in the world in a study conducted at the University of Leicester,[2] a fact that might nevertheless be met with skepticism from the Finns. According to the World Audit Democracy profile, Finland is the freest nation in the world in terms of civil liberties, freedom of the press, low corruption levels and high levels of political rights.[3] This is something to which any civilized nation would aspire. Finland is rated the sixth most peaceful country in the world in the Global Peace Index compiled by the Economist Intelligence Unit,[4] and since 1945, Finland has been at peace, adopting neutrality in wartime. Finland was rated the best country to live in by Reader's Digest study released in October 2007, which looked at issues such as the quality of drinking water and the level of greenhouse gas emissions as well as factors such as education and income.[5] The frequent visits I have made to this part of Europe since the Nordic accession to the EU in 1995 have given me enough reasons to agree with such statements.

My personal experience with the programs of Centres of Excellence, sponsored by the Finnish Academy of Science, and the impressive launch of the Centre of Excellence in Foundations of European Law and Polity Research have only confirmed this impression and given me an enhanced understanding of what it means to be, and to wish to remain, at the very top of academic achievement and university culture. The meeting of minds with different theoretical interests and scholarly training within one or more related disciplines, i.e. kaleidoscopic *multidisciplinary* approaches or more integrated and dialogical *interdisciplinary* approaches are usually advocated by all research funding programs. It is difficult to find academic applications or bids responding to calls for funding proposals and projects that do not pay lip service to cross-discipline approaches. Despite this, such approaches are not always put to practice, because they are not easy to realize. They are truly challenging and perhaps only feasible when the training of researchers has

---

[1] Statistics of the Human Development Report are available at: <http://hdr.undp.org/en/statistics>.

[2] The study produced 'the first world map of happiness' (White 2007).

[3] Finland's World Audit Democracy profile can be found at: <www.worldaudit.org/countries/finland.htm>.

[4] The Global Peace Index is available at: <www.visionofhumanity.com/rankings/>.

[5] The country rankings are available at: <www.rd.com/special-reports/the-environment/best-places-to-live-green/article.html>.

allowed for exposure to different disciplines. Yet so far, our faculties and universities have not furthered such pursuits.

Multidisciplinary approaches to research would require an environment where younger researchers are exposed to inter-disciplinary stimuli.

What I have seen in the Centres of Excellence of the Helsinki Faculty of Law has made me believe that reaching such an objective is possible. This requires that scholars make an effort to understand what their colleagues are doing in other disciplines and to incorporate this understanding into their own analyses. We have become accustomed to carrying out our research individually and almost in isolation even from the colleagues who work in the same area, even in the same department, literally next door. It will take some practice and training to work collectively with colleagues who share our academic interests; it probably implies a mixture of competition and cooperation. Even more practice and training is needed for working with fellow academics in neighbouring legal disciplines who are often competing for the same research funds and other financial 'freebies'. Analyses made in the fields of history, economics, political science, philosophy, cultural anthropology, and sociology can all contribute to an enhanced account of legal phenomena. This is also the vision of the Centre of Excellence, which Kaarlo and his colleagues have deployed.

The term excellence might seem slightly pretentious or ambitious, but it is clearly in the *aire du temps*. Quality management and standards are now the *leitmotiv* of so many collective endeavors, and the European Foundation for Quality Management (EFQM) has managed to show that institutions, especially educational institutions, are a very proper forum for seeking autonomous or self-referential indicators of quality. I have been interested in quality discourse as regards courts and in particular decision-making by courts (see Bengoetxea 2007) and have become convinced of the need to develop autonomous quality approaches adjusted by the main players concerned in each institution. This is not to downplay the importance of external evaluation of quality and excellence, but rather to stress the importance of the endogenous or autonomous drives to quality of the very persons concerned with a common aim in any institution, judges, researchers, academics, or students. The rational reconstruction of criteria, of the standards or indicators of good decision-making might lead to an enhanced control opportunity because judges and decision-makers are assessed according to the very criteria which they themselves consider relevant and significant. External control and critique on the basis of other criteria is also important and necessary, but perhaps not so efficient when it comes to encouraging judges to change their own practices and methods.

Whether all these drives have to lead to more or less formalized procedures and paperwork is of course another matter, a matter that makes academics often feel uncomfortable.

But in any case quality of control and quality of processes enhance participation and satisfaction and therefore legitimacy in courts, as in any other institution.[6] Setting objectives, planning activities, evaluating results and procedures, control mechanisms that are available to all participants and the redefinition of objectives in the light of experience will all lead to excellence as long as the processes are fully participatory and cooperative. These methods will bring interesting results also in research and academia.

Great things are therefore to be expected of this collective endeavor unto which academics like Pia Letto-Vanamo, Thomas Willhelmsson and Kaarlo Tuori, to mention the most senior members, have pooled so much of their time and intelligence. The theme of the Centre of Excellence in Foundations of European Law and Polity Research is certainly ambitious. European law and polity are being mostly examined from the point of view of contemporary developments such as the law of the EC and the constitutional process of the EU, but what is interesting is the stress on the foundations, which takes us to areas like legal and political philosophy, constitutionalism, legal culture, and legal traditions. Foundations of European law is furthermore a subject that will immediately arouse the attention of many legal scholars in the continent, thus carrying on with a well settled line of much admired and respected Nordic legal thinking.

Indeed, Nordic legal thinking has often exerted a peculiar attraction in continental European circles traditionally dominated by the positivist philosophy of law. True, this has very much been a consequence of Scandinavian legal realism, a welcome change of focus in the approaches to the validity and effectiveness of law that opened new gateways for sociological understandings of law in the twentieth century. Finland, though, has been a rather continental exception, with its special focus on analytical jurisprudence, perhaps due to a greater historical influence of German legal theory and conceptual jurisprudence. 'For historical reasons, faith in the law and in the courts as interpreters of law [in the mechanical application of the law and the possibility of only a single correct solution existing] had remained strong in Finland' (Letto-Vanamo & Honkanen 2005, 23).

---

[6] 'Trust in the courts and the necessity of open and under-control decision-making are key issues also in the 21st Century […] It is necessary that the parties, and society at large, can understand why and through which thought processes a given decision has been arrived at.' (Letto-Vanamo & Honkanen 2005, 23.)

Interestingly, the Finnish association with legal realism and its post-modern heir, the critical legal studies movement, has come, again, from the ranks of international law, more so than from mainstream legal philosophers. This has been a feature shared by most realist and critical legal scholars dealing with the field of international law and international relations in which the weight and presence of dogmatic approaches and sovereign *voluntas* has been less imposing. It has been sufficiently removed from the nation-state paradigm to be conceived of from more realistic approaches. After all, the interesting work carried out by scholars like Koskenniemi and Klabbers has maintained a balance between realist approaches and legal analysis, and this balance is precisely the locus where sociologically minded legal philosophers find comfort. I have always thought of Nordic jurisprudence as fitting rather well in this constellation of disciplines. It was, however, very intriguing for me to witness Kaarlo's interest in 'traditions', a topic that could be considered heterodox or even 'deviant' by critical legal scholars.

In the early spring of 2007 the Oñati Institute for the Sociology of Law had the honour of hosting Kaarlo as a visiting Oñati fellow[7] and invited him to give a talk for a selected group of world-known sociolegal scholars who were meeting in Oñati to discuss the state of the discipline and the project for a world consortium of scholarly associations dealing with social scientific approaches to the law.[8] Kaarlo, who was traveling from Venice where he had held a meeting of the Council of Europe Commission on Democracy through Law, seemed pleased to find in Oñati the snow he had failed to see in his hometown, Helsinki, though perhaps naturally

---

[7] Here are a few passages from the Institute's Newsletter in which one can read Kaarlo's account of his time at Oñati:'In the spring of 2007, I spent two months as an Onati fellow. I was on a sabbatical and working on a book. I wanted to spend some months abroad in order to be able to concentrate on research and to write in peace. I had participated in the inauguration ceremony of the institute back in 1989 and had a memory of the magnificent renaissance palace where the institute is located and the breathtaking landscape surrounding the town... The institute had of course changed after my first visit. The main change concerned the library, the collections of which had grown to cover, not only literature on sociology of law, but quite extensively legal theory, too. The library, which also has an on-line catalogue, perfectly matched my needs so that I did not have to carry my own library with me.. The infrastructure functioned perfectly. The residence was an optimal place to stay. The students of the yearly Masters course also lived there; if you wanted social life you had it there. The residence also housed participants of the various congresses held at the institute. I was able to attend these congresses, which provided a welcome intellectual break. Actually, one needed some internal discipline in order to leave sufficient time for one's own work. The friendliness and the hospitality of the institute and all the staff were remarkable.'

[8] See information on the Consortium at <www.iisj.net>.

sad to leave the Adriatic city, itself filled with so many invisible cities.[9] The subject of his presentation to the socio-legal scholars was 'traditions in law'. Of course, it takes a minimal effort for socio-legal scholars dealing with cultures to engage in a debate about traditions in law and the deeper normative structures resulting from processes of sedimentation, but for classical analytical lawyers brought up in the more positivistic circles, the understanding and interpretation of norms from the perspective of cultural jurisprudence is nevertheless an innovative move. Was Tuori's choice of subject then due to the influence of some special Nordic sensitivity towards the (social and cultural) environment of legal norms?

The special awareness of the environment of legal norms allows the socio-legal scholar to try out incursions into the perlocutionary aspects of norms; historical accounts, sociological understandings of the interests and power struggles of the main actors and the economic conditions determining the way laws operate. It also allows approaching the range of things for which rules are used in the context of socio-economic, historical, or even psychological explanation and looking at the sociopolitical aspects of normativity without, however, losing sight of the autonomous normative discourse with its own illocutions and deontic expectations: norms and institutions as action guiding and action-justifying pieces of discourse. Law is not diluted in the power struggles between the relevant stakeholders and legal professions; it is an autonomous normative institutional discourse and practice that can be analyzed as part of a normative system and interacting with other normative orders. This is where the work of Kaarlo Tuori is making major contributions by enquiring into the notion of traditions in law.

Tradition has had an ambivalent press. 'Those who have studied the history of attitudes towards tradition locate the origins of a sharp dichotomy between tradition and rationality in the enlightenment of the seventeenth century'.[10] The dominant idea at the time was that the inequalities of existing European societies at the time were rooted in tradition and that tradition itself had to be overcome and destroyed as an operative social concept. Modernity was thus seen as a break with tradition. This of course carried along a rather fixed view of tradition, linked with stability and perhaps conservatism. But historians have since told us that we are all part of a tradition or perhaps a mixture of several traditions, and that we cannot really detach ourselves from them in order to treat them as given. Tradition then becomes a

---

[9] The reference is, of course, to Italo Calvino.

[10] Glenn 2007, 2. For the following two paragraphs I draw heavily from Glenn's work, especially Chapter One.

common feature of societies and laws, and thinking theoretically about tradition implies relativising and suspending conviction relating to the tradition in which we are enmeshed and also being ready to learn from other traditions.

Tradition involves the extension of the past to the present, the transmission or *traditio* of communicative information, including normative expectations, in a given social context. The transmitted information has an illocutionary element and is largely constitutive of social identity: 'the actors in a given tradition will preserve that which may be of future value'.[11] However, no tradition can exercise full control over the capture and selection of present information in the concrete social context in which it is embedded. All traditions are therefore incomplete when looked at from their own perspective and never reach a definitive form; they are always in the making since unless a tradition dies or fades away, it involves a permanent series of interactive flows of information, and there is no élite or hierarchy to finally settle the question of what information is to be transmitted.

This is why linking stability and tradition does not always work. Traditions become resources from which reasons for change may also be derived: the past is mobilized to invent a future. In this sense, looking at the foundations of law or polity, or at the origins of international law can be understood as a way of suggesting directions for legal and constitutional development. Such a return to the sources can be seen as a process of revolving and as a means of providing grounds, or foundations, for a radical disruption of the existing structures and hierarchies. Interestingly, traditions can then acquire revolutionary potential. The histories of many Christian movements seeking inspiration in the life of Jesus and the early Christian martyrs, moving away from the development of the Catholic Church, or revolutions in art like the Renaissance are often seen as returns to the sources. This brings me to the occasion when I first met Kaarlo, which has a lot to do with tradition and revolution.

I have known Kaarlo and his work since the late 1980s, when I was a doctoral student with Neil MacCormick in Edinburgh. Neil and the Centre for Criminology and the Social and Philosophical Study of Law, as it was then called, organized and hosted the 1989 IVR World Conference in the Scottish capital. For a young and excited doctoral candidate it was a real treat to meet in person so many good Finnish legal theorists. The key themes of the conference were 'enlightenment' and 'revolution'. The first term obviously referred to the globally well known Scottish

[11] Glenn 2007, 14. What is of value will in turn change from tradition to tradition, from culture to culture, and even within particular traditions.

contribution to modernity, probably originally meant as a shift from the paradigm of tradition. The second term celebrated or rather revisited the French Revolution and evoked the Soviet revolution, a movement of especial significance to Finland.

The Conference was to become prophetic because the events that led to the fall of the Iron Curtain, the destruction of the Berlin wall, the re-unification of Germany, the repositioning of Central Europe as more than just a geographical cleavage between East and West, glasnost and the subsequent collapse of the Soviet Union were all being ruminated as the Conference attempted to discuss the concepts and significance of silent and noisy revolutions. Those who thought that revolutions were only conceivable in science and philosophy began to treat history, and tradition, with special respect and found it difficult to sympathize with other intellectuals who rushed to proclaim the *end of history*. Were the seeds of revolution contained in a certain version of European tradition? Events accelerated and made it difficult to even keep political maps up to date.

But, interestingly, social scientists had failed to predict or anticipate any of the above-mentioned events. Could a different world be conceived after all, one where the *European Third Way* could become a continental model for the whole world? As for legal scholars, I have always been surprised by how slow we are at reacting to international events which even historians seem capable of accommodating. Perhaps we need proof of sedimentation, after all. In any case, different approaches to the events of the late 1980s can be observed. Some seemed happy with what they saw as the end of ideological battles, and with the opportunity to reach important international agreements on issues like trade or Human Rights that divided the world and the UN. Others seemed sad about the very same phenomenon perhaps because their critique of Western capitalism would now find it difficult to invoke real alternatives.

Yet others had become accustomed to a given view of legal practice and even of scholarship as a neutral, mechanical intellectual operation dealing with dogmatics and the doctrinal exposition of law as a value neutral discourse, a sort of analytical jurisprudence of the cold war, which however allowed for some communication across the iron curtain. Analytical legal philosophers in Italy, Spain, the UK, Austria, Germany, Israel, Finland, Hungary or Poland could and indeed did avoid certain more political issues and shared common approaches during the end of the 1980s. Was this now the end of jurists' neutrality? Would we all be required to embrace substantive conceptions of integrity and to engage in collective writing and continuation of chain novels uprooted from our liberal constitutional traditions? Would we as legal philosophers be expected to uncover the *ratio* which flows from

the deeper layers of legal culture and which we had in fact neglected? We had neglected this enquiry because we actually thought that we could perfectly well get on with our academic pursuits by restricting our analysis to the surface materials and instruments of law, the sources dealing with expressions of the *voluntas*, be they expressions of the executive, the legislature or the judiciary in a nation-state.

> The rapid pace of change is a quality of the law's surface, consisting of explicit, discursively formulated normative material; here the activity of the legislator maintains continuous movement. The deeper layers of the law also change, but according to a slower rhythm. The legislator's omnipotence does not extend to the legal culture, which changes only gradually, as a joint effect of legal practices. The legal culture, which governs the application and interpretation of the legislation, is a conservative counter-weight to the radicalism of the legislator, committed to the ideology of societal progress. The *voluntas* of the legislator engenders surface-level turbulences, which are calmed down by the ratio sedimented into the law's deeper layers. The constitutive tension between voluntas and ratio displays a temporal aspect too: the law's voluntas and ratio follow different times.[12]

What the development of the legal and political discourse in the former Soviet block shows us, is that there is an element of will or re-invention of tradition that finds its way into the deeper layers, or decides what has passed to the deeper layers and what remains on the surface. This is no innocent operation of the mind. It is interesting to see how many Central European legal scholars have started using tradition in such a selective way: the Soviet influence is thought to have left little or no trace in tradition, it had not *sedimented*, but had rather remained on the surface level of posited law, of the sheer *voluntas*. If one wishes to decipher the *ratio*, the hidden code of the national legal culture, one has to look deeper into the liberal past of the country. Traditions are hence reinvented together with nations. The rest is left to legal education and recent history is forced to oblivion. All that is Solid Melts

[12] Kaarlo Tuori's lecture at the Oñati Institute, 26 March 2007.

into Air,[13] or crumbles, and Marx is remembered as a social thinker rather than a prophet.

That was the context in which I met Kaarlo Tuori, whose work I had read before, in the context of thinking about what was going on in our divided Europe. The next time I met him was in 2005, on the occasion of my visit as an evaluator for the Finnish Academy of Science. Kaarlo's work on traditions in law, as I now see it, fits the hermeneutic evolution very well:

> 'Tradition' in this sense is equivalent to the preconceptions ('pre-understanding') and prejudices which – as Gadamer emphasizes – are necessary in order for the process of understanding and interpretation to be launched. We draw this 'pre-understanding' from the culture into which we have been 'thrown', in which we have grown up and internalized our fundamental conceptions of the world. The human artifacts which constitute the object of interpretation are, in a sense, products of the same tradition as the subject, the interpreter; the object, say a piece of literature or art, has become what it is through a culturally bound history of effect (*Wirkungsgeschichte*) to which all the previous interpretations have made their cumulative contribution. This accounts for an inevitable intermingling of the subject and the object of interpretation.[14]

The hermeneutic understanding of our legal traditions is perhaps the factor that provides some coherence to the otherwise fragmented landscape on the surface of the legal sphere. And this takes me to the second theme of the Centre of Excellence, that of fragmentation. I find this a very Helsinkian notion, and a common theme to the two Centres of Excellence in which the Faculty of Law is involved, i.e. 'Foundations of European Law and Polity' and 'Global Governance'.

During the Kick-off seminar held at the end of January 2008 I was invited to reflect on the issue of fragmentation and legal culture. I was teased by Wojciech

---

[13] Berman 1982, and Marx & Engels 1848. Allow me to quote Berman, an author dear to Kaarlo, on an event that made this Marxian motto look even more real: 'Nobody knows what the long-term results of 9/11 will be. So far, though, it has raised the scale of violence and chaos erupting from what was already the most violent and chaotic part of the world. And it has lowered the level of discourse and action close to home. Two years later, our White House orchestrates aggressive brutality, not only toward despotisms in the Middle East but toward democracies in "the old Europe," toward the United Nations, and toward large parts of our own population. For months, our mass media acted like groupies cheering the president on, while our political leaders devolved into living dead. Lately, though, as troubles have escalated and approval ratings dropped, a few have begun to stir.' (Berman 2004.)

[14] Kaarlo Tuori's lecture at the Oñati Institute, 26 March 2007.

Sadurski on having perhaps abused recourse to metaphors, and indeed I have always believed that metaphors are interesting thought-experiments that can only take you to a certain point, but are interesting even when they run out. I wondered whether fragmentation of law could be likened to finding the fragments of an old mosaic or a mural painting that one struggles to reconstruct, or to a Venetian Murano vase that falls into the ground and breaks into many fragments, themselves further breaking into even more fragments.[15] Both metaphors reflect the concept of an original image or figure that has been lost, either by the passing of time or by voluntary or involuntary action. At present we only face fragments which we assume to belong to the original figure. The fragments in both cases are not of a fractal type, i.e. by looking at the fragments we cannot really recompose the whole figure to which they belong. Fractal figures on the contrary contain within themselves the geometric structure of which they are a part, as in a cauliflower.

The fine glass vase metaphor is perhaps the more telling one. At the risk of overstretching it, allow me to indulge in a sketch of a theory of legal systems. Imagine for a moment that the image or figure of the original vase is lost and that there only are fragments, a myriad of fragments, some of which can be recomposed to something that looks like the wall of the vase. It would take all the skills of commissario Brunetti, the Venetian detective in Donna Leon's 'Through a Glass, Darkly', to reconstitute the fragments into the vase. The main question is whether and how can a vision or a recollection of the original model of the vase be acquired? A variant of this question is who is entitled to say what the vase was like originally, and how is the knowledge acquired or is it generally shared knowledge? Could it be said that the image of the vase is shared by legal culture, that it is somehow sedimented into the deeper layers of the law and passed on through generations as part of tradition? Or rather that the image is further refined through legal training and through a more detailed examination of the individual fragments and that legal experts end up sharing this particular view? Or is it up to insightful experts and historians to pronounce what the vase really was like and how wrong any subsequent perceptions might have been? Or will a new approach and a shift of paradigm be required with a philosopher explaining that it is not important what the original vase was like because it is broken and fragmented for ever as in the big

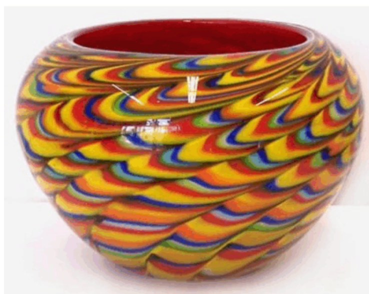
---

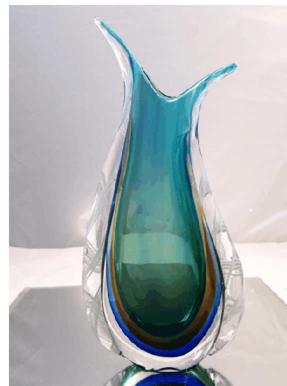
[15] I was being particularly naughty to Kaarlo in the choice of this image since I knew about his interest and expertise in Murano glass, and the thought of a vase breaking into pieces is a nightmare that not even a good insurance policy can compensate.

bang of the universe, but what is important, however, is what we do with the fragments and how we can fit them into a coherent picture.

Metaphors only work up to a point, and of course the difference is that the law is not a fixed figure but rather one that changes, develops and adapts with time. But the metaphor does reveal something meaningful; the fragment or collections of fragments that can be gathered are to be conceived of as parts of a larger figure, the legal system, which needs to be reconstructed or reconstituted by the operators, agents, counsels, scholars and decision-makers dealing with the fragments. One thinks one needs the image of the vase as a whole when dealing with the fragments as a scholar or as a practitioner. The legislator also uses the image of the vase when introducing a new fragment of legislation that fits into the legal system. The constituent power is probably the only one institutionally or politically entitled to propose a new figure of the vase, but it has to be one that will be ultimately shared by the *demos*. Perhaps a constitutional discussion at the Supreme Court can attempt a reconstruction of the vase. At any rate, such constitutional moments where the original image is collectively reconstructed are rare.[16]

Since the vase can only be recomposed mentally, it can be that the original vase itself starts losing some of its original significance and *gravitas*. The discussion can then turn to the question of how to imagine a better vase, one that perhaps suits the taste of the day and the modern aesthetic trends, and to the question of identifying the contending visions. Take the following two Murano vases:[17]





[16] We were all inspired by Emilios Christodoulidis' critique of B. Ackerman at the Kick-off seminar.

[17] Pictures were found in the Internet: <www.ebay.com>, search with item number 380003300052 (visited 12 March 2008); <www.amazon.com/Murano-Glass-Vase-Certificate-3145/dp/B0012V4DSQ/> (visited 12 March 2008).

The shapes are different, the colours are different, but they can both be considered as modern art examples of Murano vases. Some fragments of blue or green could perhaps belong to either vase, but they could also belong to a completely different vase altogether. The dialectic between fragmentation and coherence seems to concern the recomposition of a coherent view of the legal system.

The notion of a legal system is used as a regulative ideal (see Bengoetxea 1994, Koch & Neumann 1994, 65–80), an idea of law as a complete, consistent, closed and decidable whole, which is shared collectively and on the different levels of law – dogmatic or doctrinal, law-making, law-interpreting and law-applying – and shared perhaps also as a part of our legal culture. The contention is often about the most coherent interpretation of the fragments in a specific point in time and space, and in a specific social context. Although a coherent idea of the legal system cannot be fully realized *a priori* because the law has gaps, suffers from contradictions and indeterminacy, and we do not have the vase to look at, yet legal dogmatics, legislation and judicial interpretation treat the law as a system which has precisely these qualities. This results in the law becoming a legal system *a posteriori* at the post-interpretative stage: it becomes a recomposed vase again. The concept of law as a system exists in the real practices and discourses of jurists as a part of a background concept of law deeply rooted in legal culture and in political morality. It operates as a regulative institutional ideal of law, and using the ideal as action- or decision-guiding and action- or decision-justifying reason, legal agents and scholars are engaging in social action and practical reason.

Coherence is thus to be seen as a quality that we seek in our reasoning, rather than a quality to be found in the object of our interpretation, in the vase. It is part of our form of life and tradition in a Wittgensteinian sense of the term, a social-political-legal practice of justification, giving good reasons and controlling discretion as much as possible. Judges and decision-makers should be explicit when they enter a politically or morally sensitive area, rather than hiding the policy impact of their opinion under a methodological cover which is meant to give the impression that the result has been more or less inevitable. Winfried Hassemer has introduced a new term into this debate: proceduralisation (Hassemer 2008), which is supposed to capture the role of constitutional courts as 'clearing stations'. A 'clearing station' only locates the constitutional impact of the problem, gives constitutional law's account of it, wraps it up again and sends it back to those who are competent to make a (new) decision and to declare how the fragments exactly fit in the view of the vase. This is not quite the same as judicial restraint, since the court will express itself on merits and pronounce its own view of the vase. Yet, a

'clearing station' will refrain from a final decision for respect for the ultimate authority of the other institution that has to create the new fragment. Ultimately, we can never see the vase with other eyes but our own and it is for the democratically representative legislature, depending on the agreed federal division of competences, to decide what the vase is like and how a fragment fits into it.

> There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them – inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs. [...] In this mental background every problem finds it setting. We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own. (Cardozo 1921.)

Bibliography

Bengoetxea, Joxerramon: 'Legal System as a Regulative Ideal'. 53 *ARSP Beiheft* (1994).

Bengoetxea, Joxerramon: 'Quality Standards in Judicial Adjudication: The European Court of Justice'. In Müller-Dietz, Müller, Kunz, Radtke, Britz, Momsen & Koriath (Hrsg.): *Festschrift für Heike Jung.* Nomos Verlag, Baden-Baden 2007.

Berman, Marshall: *All That Is Solid Melts Into Air.* Penguin Books, New York 1982.

Berman, Marshall: 'Standing in the Doorway'. *Dissent* (Winter 2004).

Cardozo, Benjamin: *The Nature of the Judicial Process.* Yale University Press, Yale 1921.

Glenn, Patrick: *Legal Traditions of the World.* Oxford University Press, Oxford 2007.

Hassemer, Winfried: 'Politik aus Karlsruhe?'. 63(1) *JuristenZeitung* (2008).

Jääskinen, Niilo: 'The Case of the Åland Islands – Regional Autonomy versus the European Union of States'. In Stephen Weatherill and Ulf Bernitz (eds): *The Role of Regions and Sub- National Actors in Europe.* Hart Publishing, Oxford 2005.

Koch, Hans-Joachim & Ulfrid Neumann (Hrsg.): *Praktische Vernunft und Rechtsanwendung.* Franz Steiner Verlag, Stuttgart 1994.

Letto-Vanamo, Pia & Timo Honkanen*: Lain nojalla ja Kansan tuella. Moments of Finnish Justice in the 1970's.* Edita, Helsinki 2005.

Marx, Karl & Friedrich Engels: *Das Manifest.* London 1848.

White, A. (2007). 'A Global Projection of Subjective Well-being: A Challenge To Positive Psychology?' 56 *Psychtalk* (2007) 17–20.