FOUR PHASES IN THE DEVELOPMENT OF MODERN LEGAL SCIENCE

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1. INTRODUCTION[1]

The science of science occupies a central position among the many new sciences which have emerged during the last few decades. No more than other sciences has this science arisen from nothing. Among its predecessors are the philosophy of science, i.e. the branch of philosophy that examines the logical and epistemological status of scientific statements, and the history of science, which often has been studied in close connection with the individual sciences and has described their development as an isolated phenomenon. The science of science comprises such trends of research, but in addition is characterized by an interdisciplinary orientation and a more general theoretical purpose. Its aim is, on the basis of an empirical exploration of the emergence and development of the individual sciences, to arrive at a general theoretical understanding of the factors determining the course of scientific development. In this the science of science differs from previous research traditions in this field. Thus it does not primarily study the great isolated achievements within the history of science in order to discover what characterizes a unique achievement. Such studies have often been made within the theory of science with the aim of telling the scientists of the future how they should proceed if they want to make scientific conquests. On the contrary, it describes science as a social institution among other such institutions, and tries to explain its rise and development along lines similar to those which are used where the object of study is, e.g., the family or the administration.[2]

There are many and widely different reasons why such studies have flourished in recent years. Perhaps one ought rather to wonder, as *Kuhn*

[1] The present paper is based on my book, *Retsvidenskaben som samfundsvidenskab. Et retshistorisk tema i historisk og aktuel belysning* ("Legal Science as a Social Science"), Copenhagen 1977. This book comprises a detailed documentation of the periods of evolution dealt with in this article. "Legal science" is a translation of the Danish word "retsvidenskab". This in turn is translated from the German word "Rechtswissenschaft", a designation introduced in Germany at the beginning of last century by von Savigny in replacement of the word "Jurisprudenz". He did so precisely in order to underline that the subject had a *scientific* character distinct from the sort of craftsmanship status implied by the previous designation. Shortly afterwards the designation "retsvidenskab" was introduced into Denmark by A. S. Ørsted for the same reason, and equivalent terms were adopted in many other European countries.

[2] A classic in this field is Thomas S. Kuhn, *The Structure of Scientific Revolutions,* Chicago 1962.

does, why science itself has not previously studied science with the same empirical and theoretical methods as are used in the study of other phenomena. A possible explanation might be the immense quantitative development of sciences during the last few decades. As a consequence of this expansion the evolution of sciences has, to a great extent, become a question of money and accordingly also a matter of politics. If only for that reason, it would be interesting to find a way of ensuring, by various institutional means, that the costly research efforts shall pay as well as possible. Thus, much investigation into scientific research serves, in a very direct way, purposes connected with research policy.

Legal science has also been studied from the above-mentioned philosophical and historical points of view. Thus, frequent attempts have been made—by interpreting statements by legal scholars in such a way that they become scientifically acceptable according to the predominant criteria of science at the time concerned—to show how legal science could be characterized as a "regular science". In making these attempts, the students of legal science have often been baffled by the almost insoluble problem of fitting that science into patterns drawn from the methodology of the natural sciences.[3] Or they have studied the evolution of legal writing in each country as a special subject of legal history where the national legal system sets limits to the scope of the subject.[4]

Both theoretical and practical considerations can be adduced for trying to form a connection between the general science of science and the theory of legal science. There are weighty reasons for believing that the fact that legal research has essentially been performed at the universities and within relatively well-defined "scientific communities" has meant that it has at least partly evolved in a manner similar to that obtaining in other scientific communities and that legal scholars have been confronted with the same kinds of demands and expectations as other scientists. In addition, such studies have a more direct practical interest within legal science than within most other branches of science. It would seem to be generally accepted today that legal writing has a considerable influence on how the law has

[3] Such reconstructions have particularly taken place since Newton's efforts in the field of experimental natural science. Another course has been followed by those who have rejected the entire existing form of legal thinking, trying to establish a genuine science of law in a totally new form. In this connection special mention should be made of Jeremy Bentham, who saw himself as carrying out a scientific revolution within legal science as a counterpart to Newton's revolution within natural science.

[4] Such works often concentrate on paying tribute to the great names of the past such as, e.g., Savigny in Germany and A. S. Ørsted in Denmark. Because of the national frontiers, however, the more general factors determining the evolution of legal science have been examined only to a limited extent.

developed and on its functions in society in various periods. Where the training of lawyers takes place at the universities, the members of the faculties of law have had an important influence on legal practice. They have exerted this influence partly through their lectures and courses and partly by participating in legislative work, writing textbooks and law commentaries and guiding legal practice in other ways. Therefore, an increased understanding of the factors which have determined the evolution of legal science also means a better understanding of the factors that have determined the legal development in general. In the context of research policy this means that the discussion of the future of legal research is also bound up with the current general discussion of what kind of society and what kind of legal system we want for the future.

A very rough distinction may be made between the two principal schools of thought within that part of the science of science which, on the basis of historical studies, has tried to formulate general theories about the causes of the emergence and evolution of sciences. According to one of these schools of thought, that which is mainly identified with the name of *Kuhn*, the causes are primarily to be found in circumstances within the institution of science itself. But according to the other school, which is historically rooted in, above all, the works of Marx and Weber, the explanation must be looked for outside science itself.[5] Thus a distinction may be made between *internal* and *external* theories. In what follows an attempt will be made to confront these two types of explanation with each other in order to find out which of them is the better fitted to explain the evolution of jurisprudence in a certain period. The question will also be discussed whether special legal factors can explain the evolution of jurisprudence better than can the general theories of science. The investigation will embrace four recent specific periods, viz. the years around 1850 and 1900 respectively, the decades before World War II, and finally the last 10–15 years. The reason for starting around 1850 is that then a new turn in the theory and practice of jurisprudence took place in many countries—a new *paradigm* of science gained ground, as Kuhn puts it. Several countries have this paradigm in common, and it is the reason for the emergence and spread of this new sort of legal science that I shall try to elucidate. Around 1900 there is again a common orientation in a number of countries, but with a new paradigm. What conditioned this second new turn, and why did it take place simultaneously in several countries? This is the subject of the following section. Next, the period from the early twenties to the late

[5] A highly influential work in this category is J. D. Bernal, *Science in History*, I–II, London 1954, revised edition in four volumes 1965.

thirties of this century is discussed. Here, however, it is apparently impossible to find a common paradigm. What is the explanation of this, and what can explain the situation of legal science in this period? Finally, the recent debate on the character of that discipline and its future orientation is treated. Having treated each of these four periods separately, I shall try to arrive at some general conclusions, first of a theoretical kind and finally concerning research policy.

Obviously it is impossible to describe the development in detail in the limited space available here. I shall therefore have to refer the reader to more detailed expositions of the theoretical evolution in each of the countries concerned. Thus the purpose of the article is rather to show how it is necessary to pass beyond the strictly national writing of legal history in order to apply to an investigation into the legal development of the different countries a more general perspective, using general theories of science as a basis. Of course, this does not mean that I consider the special, national background of the development in each country to be irrelevant as an explanatory factor. Nevertheless, in my opinion there is a tendency to overlook some common causes if one concentrates one's studies on isolated national lines of development. Finally, it has been part of my intention to place the special Danish-Norwegian evolution of jurisprudence in a wider perspective. Among other things this involves an elucidation of part of the historical background of modern Scandinavian Realism, which is probably the only school within Nordic legal theory which is to some extent known outside the Nordic region.

2. THE FORMAL STYLE IN JURISPRUDENCE AROUND 1850

The new turn that took place at the middle of last century cannot be attributed to any one event within or outside the legal world. By the time when the reorientation occurred the evolution of a formalistic type of jurisprudence already had a long history, and in this connection the evolution within *German* legal science is decisive. Just after 1800 *von Savigny* exercised great influence as the founder of the historical school, which came to hold for some time a dominating position in legal science. This happened almost at the same time as Bentham (in England) and Ørsted (in Denmark) laid the foundations for a new direction of legal writing in their countries. These three scholars shared the ambition to introduce a strictly scientific kind of legal studies, which would have as its main task to inquire

into the origin of law in society and its functions in that society.[6] This "social" attitude to the study of law was slowly modified in the following decades, as is perhaps most clearly demonstrated by Puchta's taking over in 1842 of Savigny's professorship in the University of Berlin. A fundamental break with the earlier approach never took place, least of all in Germany. However, essential elements of the views on law of the old theorists were in course of time discarded, and the result of this process was that the new school ended up by defending the idea of an autonomous type of legal science, the aim of which was to study law as a closed system of norms, where the social causes and effects were completely irrelevant for legal science.

In *England* this evolution had already been anticipated by the analytical jurisprudence of John Austin in the 1830s. In *Denmark* it is demonstrated by F. C. Bornemann's succession in 1840 to a professorship in the University of Copenhagen.[7] In the *United States* it gained a foothold with Langdell's and Ames' common-law version of a constructivist legal theory which was introduced about 1870 at Harvard University.[8] Many other countries were also influenced by this constructivist movement.

In an attempt to try to explain this common international evolution it seems appropriate to start by examining the tendency towards a strengthening of the position of the universities in general and of academic legal writing in particular which made itself felt at that time, especially outside Germany. There was, at this period, a growing demand for well-educated officials to hold various posts in society. At the same time the education of law students was organized as a theoretical, scientific study to a higher degree than previously. To the many countries outside Germany passing through this evolution the position of legal science in Germany inevitably appeared almost as an ideal. Especially since Savigny's foundation of the new school, the Germans succeeded in giving the study of law a central position both among the other academic subjects and in the legal

[6] See *Retsvidenskaben som samfundsvidenskab*, part II.

[7] Bornemann (1810–61) reacts especially against the "realism" of the great Danish jurist A. S. Ørsted (1778–1860). The conception of law held by Ørsted and his contemporary supporters can be regarded as constituting the first expression of Danish (Scandinavian) realism. See Ditlev Tamm, "Anders Sandøe Ørsted and the influence from civil law upon Danish private law at the beginning of the 19th century", 22 *Sc.St.L.* 1978 The second period of realism begins around 1900, and one of its slogans demanded "a return to Ørsted". However, at least to start with, the internationally known form of Scandinavian Realism constitutes a new reaction against the realism inspired by Ørsted and based on an almost diametrically opposed conception of realism of a distinctly philosophical character. See *infra*, sections 3 and 4. See also Stig Jørgensen, "Idealism and realism in jurisprudence", 21 *Sc.St.L.* 1977, and the same author's "Grundzüge der Entwicklung der skandinavischen Rechtswissenschaft", *Juristenzeitung* 1970, pp. 529ff.

[8] Cf. Torstein Eckhoff, *Rettsvesen og rettsvitenskap i USA*, Oslo 1953.

profession. It was therefore quite natural for ambitious young law students from other countries to go to Germany to study at the leading universities there, and these students came home desirous of applying their learning in their own countries. Before starting his short academic career, Austin had also studied in Germany, from which he returned with a great admiration for the historical school. He even claimed his predecessor within English analytical jurisprudence, Bentham, as a member of this school, in order to make his two main ideals correspond.[9] Bornemann, Ames, and many of their contemporaries also went to Germany to study.

In Germany the students of law were taught and adopted what Savigny and his successors studied, i.e. the constructivist, formalistic orientation and not the historical orientation, which was left to legal historians.

What was remarkable about this orientation was above all its capacity to delimit a specifically juristic field of inquiry and a specific juristic method. Thus it became possible to fix the limits of this science distinctly in relation to other sciences, and also to define the special legal expertise of the lawyer in relation to the views of specialists in politics and economics and to those of laymen.

So far I have pointed out some internal scientific or specifically juristic explanations of the fact that a formal, constructivist type of legal science became predominant in this period. I shall now pass on to some quite different factors for the understanding of the evolution of legal writing. These are the reasons for the active or passive acceptance of this type of legal thinking by the social environment. And because the development is the same in many different countries, we must of course concern ourselves with explanations on a rather general level. If one starts by looking at the influence of a legal science of this kind, and of a legal practice following the theory, from the point of each individual citizen, one will find that the effects for the citizen are to enhance his possibilities of predicting what will happen in a number of situations in which he is going to be involved in legal transactions. This is due to the systematical descriptions of the contents of the existing law which are made by the jurists belonging to this school of thought. When the legal status is clearly and unambiguously described, a businessman, e.g., will be able to recognize the consequences in various respects of a specific mode of conduct. He will then have some stable limits to move within, in the sure knowledge that specific modes of conduct will result in specific legal reactions.[1]

When considering the influence more generally, it is worth noting that,

[9] Cf. Lord Lloyd of Hampstead, *Introduction to Jurisprudence*, London 1972, p. 176.

[1] This means a better formal rationality in the legal system according to Weber's terminology.

by adopting the theory just characterized, it is easy to have some important topics excluded from the general political debate. The subject areas which are the especial concern of constructivist legal science are reformulated as technical, legal topics, where the proper solution is not dependent on political or economic argumentation but on how the problem can be overcome within a legal-systematic context. This solution is put into effect by incorporating it in the already existing legal system. For those who hold the theory now discussed the solution so found is both scientifically and legally correct, and the opposite view can easily be dismissed as emotional or demagogic. This type of legal thinking was first developed in connection with the study of the central parts of civil law.[2] Soon, however, it was also taken up in the study of public law[3] and criminal law, with the effect of bringing these areas too outside the political debate. Depending on one's temperament and political convictions, one might regard this way of transforming political topics into legal-technical questions either as a necessity in a transitional period when parliamentary democracy was increasingly bringing all traditional values up for discussion or, alternatively, as an eminently efficient way of preventing political debate precisely in those areas where it was most essential and thus as a means of avoiding a change of *status quo* in favour of the new political forces that were beginning to manifest themselves at that time.

3. THE GOAL-ORIENTATED STYLE IN LEGAL SCIENCE AROUND 1900

The new, and in due time international, school of legal science which I am now going to deal with began, like the previous one, in Germany, *von Jhering* being its pioneer and later its ideal. However, its initial position was somewhat different from that of the formalistic school, especially because there was now in many countries a uniform type of legal science—precisely the formalistic one—which could serve as a target of criticism. Shortly after the debate on the future form and contents of legal writing had started, there appeared a general agreement on some common points of attack against a form of legal thinking that dealt exclusively with the internal relations between the individual parts of the legal system and excluded the relationship between law and the surroundings from the field of study.

[2] Cf. the pronouncement of the German socialist Ferdinand Lassalle, "Wo sich das Juristische als das Privatrecht völlig aus dem Politischen abzulösen beginnt, da ist es noch viel politischer als das Politische selbst", *Das System der erworbenen Rechte,* Leipzig 1861.

[3] Cf. Walther Wilhelm, *Zur juristischen Methodenlehre im 19. Jahrhundert,* Frankfurt/M 1958.

Von Jhering's book *Der Kampf ums Recht,* which appeared in 1872, quickly gained an international reputation such as few earlier law books had enjoyed; this was also the case with *Der Zweck im Recht,* the first volume of which appeared in 1877.[4] Within this movement demands were made for radical modifications of the theories, methods, and objects of legal science, modifications which, if realized, could only be described as constituting a genuine paradigmatic change in Kuhn's sense of the word. Now the rules of law were to be systematized not according to their contents but according to their functions in society. And they were no longer only to be interpreted logically and systematically, but in the way that would best enable the interests or purposes they had to serve to be realized. Altogether legal science was now mainly defined as a practical discipline which, on the basis of knowledge of social conditions and the influence of law thereon, produced knowledge useful for the legal profession. The aim of establishing legal science as a genuine science was replaced by the aim of producing an applicable sort of knowledge. Instead of recommending writers to cultivate their own specific form of method, an inclusion of the perspectives and methods of the other social sciences into jurisprudence itself was demanded.

In *Germany* this evolution resulted in the formation of two schools, both emerging about 1900, viz. "die Freirechtsschule" and "die Interessenjurisprudenz". In a number of other countries groups of academic lawyers put forward similar programmes. In *Denmark* and *Norway* Viggo Bentzon and Fredrik Stang respectively were among the pioneers in this activity.[5] In the *United States* Roscoe Pound, at first alone but later on with increasing support, crusaded against purely formalistic and analytical conceptions of law and for a new "sociological jurisprudence". In *France* Saleilles and Gény were advocates of a similar conception of law.[6] Many other countries could be mentioned. Most often it was jurists working in the field of civil law who engaged in the general fight against formalism; however, the most extensive penetration and the greatest practical results, especially in the field of legal policy, were found within criminal law by reason of the advance of the so-called positive criminological school.[7]

[4] In *Jherings Erbe,* ed. by Wieacker and Wollschläger, Göttingen 1970, the wide dissemination of Jhering's ideas is evidenced by, *inter alia,* the many translations of his most outstanding works.

[5] In Denmark and Norway this school was usually pronounced to be a return to the kind of "legal realism" that A. S. Ørsted had introduced at the beginning of the 19th century. Cf. *supra,* section 2.

[6] Thus Gény introduced the "libre recherche scientifique" to guide the judge in his discretionary decisions.

[7] Here, too, the leading figure was a German, Franz von Liszt, who was greatly influenced by Jhering. Cf. *Pioneers in Criminology,* ed. by H. Mannheim, London 1960.

If, as often before, an attempt is made to explain this evolution for each country individually, it will be quite natural to emphasize certain concrete, national factors as decisive. Thus, the completion of the *Bürgerliches Gesetzbuch* has often been mentioned as a factor calling for a turn of German legal science towards an interest in the problems of the judge who had to use the enactments formulated in this book. The *Code civil,* the French work of civil law, was now almost 100 years old, and this fact is often referred to as a reason for the need of a change in French legal theory. In the United States the decisive factors are often stated to be the passivity of the legislative power with regard to important social problems and a certain tendency towards reactionary interpretation of the Constitution. However, an explanation is missing which points at the simultaneous evolution in a great number of countries and which can be generalized to concern all of them.

On the basis of a theory of science that sees the historical evolution of sciences as a story of an increasingly better and more correct cognition of a definite field of inquiry,[8] the development now referred to would have to be regarded as a step forward in the recognition of the true nature of law and legal method. In my opinion such an explanation is completely mistaken. It is impossible to formulate a general point of view on the basis of which it can be evaluated whether law "according to its nature" is a *coherent system of norms* or an *appropriate tool* for the promotion of specific interests. The question which of these aspects ought to be used is ultimately a *political* one. Thus the debate between supporters and opponents of the new schools tends to resemble other political debates where real arguments, personal attacks, and gross distortions of the arguments of the opponent are connected and together come to influence the final result.

According to Kuhn, however, such political debates occur within nearly all sciences, and they determine the decisive paradigmatic changes within the natural sciences as well as other disciplines. Kuhn considers that the precondition for the starting of such very comprehensive debates is the appearance of discontent with the previous paradigm.[9] More and more situations are found on which the established science cannot take up a meaningful position. Within the exact sciences laboratory research will often show results which cannot be fitted into the existing theories. Within a branch of knowledge like legal science, however, the counterpart must be more practical problems, since the confrontation of the legal theories with

[8] Such an optimistic theory of evolution is of course based on an observation of the evolution of the natural sciences since Newton.

[9] Cf. Kuhn, *op. cit.*

reality must naturally take place in the society where the law is functioning.[1]

The main problem connected with the formalistic legal theory can be found in its inability to cope with changes in the already established legal system or in its social context. These changes can be legislative amendments resulting in a break with the preexisting systematics and methods or social developments that make a purely logical interpretation of the law in force absurd in its practical consequences. It is the ambition of the new schools to include in jurisprudence this *perspective of change,* which had been almost completely ignored for a long period. Furthermore, it is their object not only to do this in a theoretically coherent way but also to enable the lawyer to use the points of view put forward in the countless concrete situations where legal decisions have to be made.

The debate on which paradigm is to be the predominant one is thus *not only* a matter of demagogy and the marketing of new ideas, but here too, as in other sciences, it is also a prerequisite for success that some short and pithy phrases that can serve as a rallying call shall be found. In this context the titles of the main contributions of von Jhering in the debate—"Der Zweck im Recht" and "Der Kampf ums Recht"—undoubtedly had an immensely powerful impact in the given historical situation, and his successors in Germany and other countries have also had a flair for summing up their views in short, concise slogans. This applies, e.g., to Heck, Ehrlich, Fuchs and especially to Roscoe Pound, whose articles have titles like "The Causes of Popular Dissatisfaction with the Administration of Justice", "Law in Books and Law in Action", and "Mechanical Jurisprudence".[2]

But why is the conception of law as a goal-orientated phenomenon, determined by interest, advancing just now? Ever since the legal philosophy of antiquity in Greece and the Roman Empire this conception and other conceptions of the nature of law have been counteracting each other. An explanation of this must be found in *external* factors, which have conditioned a change in the lawyer's and the legal scholar's way of perceiving law and legal problems. The essential feature in the surroundings of law which is common to all the countries where the new conception of law has penetrated is the rapid process of change associated with the breakthrough of industrialism. In England this breakthrough took place about 1800, just at the time when Jeremy Bentham launched a conception of law according to which law had to be contemplated in the light of its actual

[1] This will probably apply to most of the social sciences, especially the ones dealing with macrophenomena.

[2] Published from 1906 to 1910.

utility value, and it was precisely in England that there was lacking at that time the great interest in a goal-orientated legal science which was characteristic of so many other countries.[3] The process of industrialization in itself caused many changes in social and economic conditions, and in such a situation a reasonable application of the law implies that consideration must be paid to these changes. Legal practice cannot keep on waiting for the legislative power to take up a position on the continually changing technological and economic conditions; it must evaluate these new situations in such a way that cases which from a practical point of view seem to be identical are identically treated by the law and so that the goals formulated by the politicians are not obstructed in legal practice by formal arguments.

However, there is another very essential factor combining the leading conceptions of this period. It is not only by their view of law as an expression of specific interests that these conceptions can be characterized. They have this view in common with, above all, Karl Marx and his followers. The decisive difference between the supporters of Marxism and the supporters of von Jhering's sort of legal theory is the view of *the role of the state* in general and in the concrete societies of this period in particular.[4] In his works Jhering himself postulated a tripartite division of legal functions according to the attention to individual, social and political interests, and this division was often applied later on by the supporters of the new schools around 1900.[5] Von Jhering and his successors held it to be the responsibility of the state, *inter alia* through legislation, to ensure that these three groups of interests were considered in a suitable combination. They also believed that on the whole these interests were effectively served by positive legislation and by those in power. This basic attitude lay behind the opinion that it was possible in legal practice to arrive, through a reasonable interpretation of law according to its purposes, at solutions which could be accepted by those in power and which at the same time took into account all the individual and social interests which merited consideration. The conception of the role of the judge as the "junior partner" of the legislator was a distinctive expression of this attitude. Such a political attitude and such a conception of the legal profession were certainly provocative compared with the traditional political and legal thinking which assigned to the legal profession, including the judges, a more passive

[3] Here as elsewhere England is a rather special case. Cf. *Retsvidenskaben som samfundsvidenskab*, chs. 7 and 16.

[4] Cf. H. Schelsky, "Das Jhering Modell des sozialen Wandels durch Recht", *Zur Effektivität des Rechts*, ed. by Rehbinder and Schelsky, Düsseldorf 1972.

[5] Cf. Julius Stone, *Human Law and Human Justice*, London 1966.

role in the social and political process. On the other hand, these attitudes followed a line of thought very general in this period, to the effect that the state should play a far more active role in society than before. In Europe as well as in the United States there was a growing tendency to consider active intervention by the state necessary to avoid a situation where the free struggle for power resulted in the dominance of the few over the many or to avert a seizure of power by an oppressed working class.

In my opinion the leading position achieved by goal-orientated legal thinking in this period cannot be explained without taking into account this political aspect. However, this does not mean that the political factors provide the whole explanation. On the contrary, the specific form of the theory and its international progress must be explained mainly on the basis of the internal factors mentioned above. On the other hand, the fact that legal science had rather early and very distinctly formulated a concept of law with such contents and with such political functions in its turn influenced the subsequent social and political development.

4. THE REALISTIC SCHOOLS FROM 1920 TO 1940

The period I am now going to deal with differs from the two previous periods in that it is not characterized by an international consensus on a single paradigm—whether new or already established—indicating how legal science should be organized and developed. An explanation of this fact will be sought in the following pages. We shall also examine the way in which the external and internal factors acted—sometimes in combination and sometimes in opposition to one another—in a period of major political and economic crises.

Another decisive difference compared with the periods discussed above is that *Germany* had lost its leading position in the international debate. It is true that in Germany, after World War I, many of the ideas put forward by "die Interessenjurisprudenz" and "die Freirechtsschule" regained a certain practical influence, since the violent economic and social upheavals—*inter alia* the prevailing economic bankruptcy—simply required an open and goal-orientated interpretation of existing rules and existing contracts. Here it was possible to build upon the methodological conquests of the past. There was, however, only a limited development of these theories, which were now considered a natural part of the legal world of ideas. It was clear that the next step to be taken was to embark on the requisite legal-sociological examination of the functions of law in society, i.e. an

empirical research using the methods and theories of the social sciences.[6] Such research, however, was commenced only to a very small extent, probably in part because of the harsh economic realities of the time, which by no means favoured the increase of means for research needed in order to realize the programmatic statements made at the beginning of the century. Somewhat later, the discussion took a new course, veering away from the interest in social reality and the question of the position of law in that context towards a more metaphysical, non-rational orientation. Upon the seizure of power by the Nazis a new conception of law was evolved. This, while certainly stressing the role of law in the evolution of society, was rooted in a view of human beings and society which the Nazis probably neither could nor intended to ventilate in an open discussion or through a confrontation with social reality.

The schools of legal theory which are likely to seem to posterity the most remarkable ones in this period are the two forms of *realism* that arose in the 1920s in the United States and Scandinavia, respectively.

These two schools were characterized by an extremely complicated love–hate attitude towards their predecessors, i.e. the schools influenced by Jhering in the countries in question. In *Scandinavia* the legal theory of Denmark and Norway was in this period under the influence of Sweden which, at the beginning of the century, had been affected only very slightly by the ideas of Jhering. About 1920 the Swede Vilhelm Lundstedt, the first great figure within Scandinavian legal realism, launched a violent frontal attack not on the constructivist school, to which he had previously belonged, but on the supporters of Jhering's conception of law represented, above all, by the Norwegian Fredrik Stang.[7] Lundstedt and the later supporters of this realism agreed with their predecessors that law ought to be studied as an actual empirical phenomenon. They criticized their predecessors, however, for not having followed with sufficient consistency an empirical, scientific course, and consequently considered their writings to be of the same scientific calibre as the papers of the scholastics on the sex of angels and similar subjects. Instead, they demanded a merciless exposure of all the myths extant concerning the actual basis of law. Lundstedt and his followers ended at any rate the first part of the period by proclaiming

[6] A kind of research which the German Arthur Nussbaum described as "Rechtstatsachenforschung".

[7] The history of "Scandinavian Realism" is described in Stig Strömholm & H. H. Vogel, *Le Réalisme scandinave dans la philosophie du droit,* Paris 1975, and Jes Bjarup, *Skandinavischer Realismus,* Munich 1978. Cf. Alf Ross, *On Law and Justice,* London 1958. The first leading figures of this school were Swedish scholars—besides Vilhelm Lundstedt the philosopher Axel Hägerström and the jurist Karl Olivercrona. Later on the Dane Alf Ross became a central figure.

law to be nothing but a chimera and propositions about it to be non-scientific statements with purely magical functions. The arguments of early Scandinavian Realism were usually very difficult to grasp, and in view of its presentation and its aims it was scarcely calculated to promote practically useful knowledge of and empirical research on the functions of law.[8]

American Realism emerged as a movement aiming at a precise scientific exploration of the factual aspect of law by applying the methods of social science. Although it was not named until 1930, it originated in the early 1920s.[9] No doubt, it was not so generally critical of previous legal theory—that associated with Roscoe Pound—as Lundstedt had been of Stang and others. Nevertheless, a conflict arose with Pound and his supporters, who, when accused of not having a sufficiently scientific legal attitude, countered by denying that the investigations of the new realists were of any practical value for lawyers who had to use law in practice.[1]

When one considers the programme of the new realists for future legal science it becomes obvious that their demands for a break with previous paradigms are not based on the same types of reflections as had resulted in the appearance of the new schools some decades earlier. Now the discussion is focused mainly on general philosophical and scientific principles, and the necessity of this debate, especially within legal science, is seldom very clearly demonstrated. Furthermore, the main arguments are put forward primarily only as a critique of earlier schools. This unconstructive sort of criticism makes it very difficult to see how it is possible at all to carry on "realistic" legal research while fulfilling the practical functions traditionally performed by legal writing. Thus few attempts have been made to situate the problems caused by the previously prevailing paradigm in the society in which the legal profession acts and the law functions. The first phases of the realistic movements both in Scandinavia and the United States are characterized by a distinctly *individualistic and psychological* approach, which tends to treat a broader sociological perspective with suspicion; such points of view were regarded as some sort of metaphysical speculation. Besides, the importance of the *irrational* factors for human

[8] This is the most conspicuous difference between Scandinavian Realism and American Realism. Scandinavian Realism, which is based on the so-called Uppsala Philosophy, concentrates primarily on the epistemological bases, whereas American Realism arises from a scientific milieu dominated by empirically working social scientists, at first primarily psychologists. If it is at all possible to characterize American Realism by one common formula, I find that it has most features in common with the German "Freirechtsschule" as regards the way of thinking, the kind of people attached to it, and the concrete research programme. Cf. *Retsvidenskaben som samfundsvidenskab*, ch. 13.

[9] Cf. William Twining, *Karl Llewellyn and the Realist Movement*, London 1973, part I.

[1] Cf. David Wigdor, *Roscoe Pound, Philosopher of Law*, Westport Conn. 1974, pp. 233 ff.

behaviour, including the behaviour of judges, was strongly emphasized. Consequently, a basis for the change-over from the new form of scientific conception of law to a practical legal science aimed at the legal profession and at showing its members how to perform their tasks in the most rational way was not found either by starting out from a general conception of society or on the basis of a psychological theory. Typical of the early realistic attitude is Jerome Frank's recommendation that judges should undergo psychoanalytical treatment as the best way of acquiring a better capacity for their work.[2]

From an international and comparative point of view the situation in this period is, as mentioned before, that Germany no longer holds the leading position within the debate on legal theory. Thus for a time a firm centre for the debate is lacking. It is true that these years see the beginnings of a development which means that in due course the United States will, in the field of legal theory, too, assume the role of a leading power which will attract scholars from other countries and from which they will return eager to propagate the ideas received there. However, this development does not come to full flower until after the end of World War II.[3]

Furthermore, there is no international leader whose efforts can be generally accepted as paradigmatic for the future course. This position, which was previously occupied by Savigny and Jhering, is difficult to fill, probably partly because no country has as yet emerged to take over the leading position in the debate on legal theory and partly because the new schools are primarily justified by general scientific demands and not by concrete requirements related to legal science.

The uniting slogan for the new schools, i.e. the fight for a realistic conception of law, is also not particularly suitable as a distinct indication of a new message different from that of the schools from about 1900. The emerging conception of "realism" is primarily of a general epistemological character and is only to a small extent based on a new conception of the functions of the legal profession and the law.[4]

What has been said above has focused on the initial phases of the new realistic schools, and some circumstances have been pointed out which meant, on the one hand, that no new international paradigm was evolved and, on the other, that it was difficult to grasp the new points of view fully in the different countries. In the long run, however, there was an evolution

[2] Jerome Frank, *Law and the Modern Mind*, New York 1930.

[3] In the 1930s the tide was going in the opposite direction as some outstanding German legal scientists emigrated to the USA for political reasons, and this meant a valuable contribution to American legal science, both in the short and the long run.

[4] Cf. *supra*, section 2.

towards a form of jurisprudence connecting a contemporary conception of science with a more specific legal form of realism. This involved an orientation partly towards legal questions of method and partly towards a wider social perspective in which law is to be studied. In the United States this evolution was greatly influenced by the efforts of Karl Llewellyn. He had a very great influence both through his elaboration of new educational material which demonstrated in practice the possibilities of incorporating new social-science perspectives in the traditional textbooks used in legal education and through his concrete examination of the factual side of law, as well as through more general reflections on the functions of law and the legal profession in society; to some extent, these reflections were based on ethnographical field work.[5] In so doing, however, Llewellyn and American Realism, generally, came closer to earlier legal thinking, especially as worked out by Pound. In Scandinavia, we can also find a softening of the harsh realism and a trend towards a combination of realistic and more traditional views on concrete legal disciplines. The Dane Alf Ross played a leading role in this connection.[6] This evolution began during the thirties and continued during the 1940s.

Thus the new realistic schools were markedly a manifestation of a new orientation based on changes in the *general conception of science*. There was no urgent need for *a new sort of legal thinking* which could not be met by the earlier schools, either within legal science itself or within the legal profession. Nor were there factors in the surrounding society during the initial phase of the schools calling for changes; and even had this been the case, these schools would hardly have been in a position to respond because of their very puristic scientific demands on legal science. In a number of societies, however, a distinctive turn in the situation took place about 1930, first as a reaction to the emergence of *the world economic crisis* and later on as a response to the social consequences of that international phenomenon and the resulting political reactions. Urgent necessity now caused the state to assume a much greater responsibility for the solution of the problems of society than it had previously considered it necessary and possible to do. This change found its political expression in different ways in different countries: in Scandinavia by Social Democratic parties coming into office, in the United States by Roosevelt's election to the presidency, in Britain by the formation of the National Government, and in Germany, in a special

[5] Cf. Twining, *op. cit.*

[6] In this connection special mention may be made of Ross's textbooks of international law and constitutional law, the first editions of which appeared in 1940 and 1948 respectively. In a corresponding way Karl Olivecrona has applied his general views to the field of legal procedure.

way, by Hitler's seizure of power. All these political changes mark the beginning of a policy in which the state, in particular by taking measures in the field of legislative policy, intervenes in many fields where previously free enterprise or informal norms had been the regulating factors.

This new situation was bound to have a great impact on the character of the law studied by legal writers and used as a basis for the practical work of lawyers. However, such was the novelty of the situation that it was extremely difficult for the established legal science to take up a position. The social basis for the legal schools of the previous period had also been a situation where law was changing rapidly, but this change had been proceeding for a long time and was therefore not unforeseen. Furthermore, it was possible at that time to react in a way more consistent with the aims of traditional legal science, since that science could still be carried on as a science *directed towards the judge* and other individuals solving legal problems. Now a situation had arisen where *general legal rules* were subject to rapid change, and the role of the judge in this scene became less important, except perhaps in the case of the justices of the American Supreme Court. Here, the previously proposed inclusion of social considerations into the legal judgment became of decisive importance in the political process.[7] Finally, this situation differed from earlier situations as the main stress was now laid on the development of rules pertaining to public law, whereas previously legal science had most frequently been renewed through the study of civil-law problems.[8]

The result of all this was that it became difficult to define clearly the new tasks of legal science called for by the changed situation. It was not that legal writers did not concern themselves with the question, but rather that they did so on the basis of widely differing views, which could not be collected into a common theory or into any accepted programme for a new sort of legal writing.[9] As far as Scandinavia was concerned, the Dane Frederik Vinding Kruse and the Swede Vilhelm Lundstedt can be mentioned as two prominent legal scholars both of whom, from almost diametrically opposed conceptions of science and political affiliations, laid down ideas for a new orientation of legislative policy. Lundstedt emphasized that

[7] Support for the claim that the judges should play an active part in the political process can be found in the works of L. D. Brandeis and Benjamin Cardozo, both of whom were inspired by the views of Roscoe Pound.

[8] This means that the field of administrative law is achieving a more prominent place within legal science as a whole.

[9] The view that legal science actually reacts more strongly to this situation than was indicated by me in *Retsvidenskaben som samfundsvidenskab* has been expressed by Stig Jørgensen in his review of the book in *Rechtstheorie* 1978, pp. 373–81.

considerations of public utility should be the decisive bases of legal evaluation,[1] whereas Vinding Kruse tried to revive a sort of legal thinking whose object was to formulate the legal rules which correspond to prevailing social conditions according to the nature of things—a programme strongly inspired by the pioneer of Danish legal science, the early 19th-century lawyer A. S. Ørsted.[2]

In the *United States* several attempts were made aiming at a fundamental change of legal science from an interpretative branch of science towards a science creating rules and thus contributing to legislative policy. In this connection it is natural to mention *Felix Cohen*'s "science of values", *Beutel*'s "experimental jurisprudence", and *Lasswell's* and *MacDougal's* comprehensive "policyscience". All these writers were more or less indebted to American Realism, the influence of which, however, is most pronounced in the practical work which was done by many of its supporters during the first Roosevelt administration and which aimed at the carrying out of "the New Deal".[3]

In *Germany,* after the seizure of power by the Nazis, the necessary legal changes were accomplished mainly through an unlimited politically defined reinterpretation of the existing legal system. Accordingly legal science had to play the role of legitimating the new interpretations as legally correct and of finding suitable arguments to this end.[4] In all probability this political perversion of a free purpose-orientated style of interpretation resulted, especially in Scandinavia, in a reaction which assigned to legal science the sole task of giving a correct and objective description of the existing law, and which held that evaluation of the law and recommendations of new legal rules were not the business of legal scholars.[5] For that matter, such a conception is most consistent with the general conception of science held by the realists. However, in this connection mention must be made of Alf Ross, who later on accepted the need for a scientifically founded legislative policy and assigned to it a place as an applied legal-sociological discipline within the larger realm of legal science in general.[6]

[1] Cf. Wilhelm Lundstedt "Beaktande av samhällsnyttan inom juridiken", *Sv.J.T.* 1933, pp. 121 ff.
[2] Cf. F. Vinding Kruse, *Retslæren I,* Copenhagen 1943.
[3] Cf. *Retsvidenskaben som samfundsvidenskab,* ch. 13, and T. Eckhoff, *op. cit.* pp. 298 ff.
[4] Cf. Bernd Rüthers, *Die unbegrenzte Auslegung,* Tübingen 1970.
[5] Cf. Strömholm & Vogel, *op. cit.*
[6] Cf. *On Law and Justice,* London 1958.

5. THE 1960s AND AFTER

We have now reached the present era, but it is still premature to try to determine what characterization is most appropriate for the theoretical debate of legal science in the last decade. It is also too early to express an opinion as to whether this debate will result in the adoption of a new paradigm for legal science or perhaps in the adoption of several different paradigms according to the kind of legal problems concerned. In any case, an animated debate on the future of legal science has been going on in Scandinavia, in Germany, in the United States, and other countries, and now also in England. In part this debate is taking place across the frontiers. Many countries have had common themes for these discussions, which have also gradually produced concrete scientific results in many fields.

The first general movement to appear within legal theory in this period concerns the understanding of *legal thinking* and the *special character* of legal argumentation. Here, there has been a search for such common patterns and criteria of rationality as are in fact accepted and followed but cannot be defined in accordance with a conception of science based on natural science. In the countries where realistic schools have held sway, the new conception of the special character of legal thinking has meant a rupture with the realism previously prevailing; it is mainly based on the linguistic analytical philosophy which was developed at Oxford and Cambridge and later on spread in particular to Scandinavia and the United States.[7] In Germany the same endeavours are connected with older scientific traditions, primarily with hermeneutics and the Aristotelian theories of topics and rhetorics.[8]

The second tendency, appearing a little later, has been an increasing interest in the study of the *actual functions of law* in society. This interest is shared with American Realism, but the new trend has expressed itself in more active and systematic attempts to connect these studies with general theories of society. In this context mention should be made of the so-called structural functionalism associated with the name of Parsons. At a later stage, influence is exerted by, on the one hand, the Marxist theory of society and, on the other, various kinds of systems theories, including especially the legal variant of the German Niklas Luhmann.[9] This tendency is also to a large extent an international phenomenon, and in many countries it has manifested itself in the creation of new research institu-

[7] *The Concept of Law* by H. L. A. Hart, Oxford 1961, has had an influence on this development that can hardly be overestimated.

[8] Cf. Stig Jørgensen, *Law and Society*, Aarhus 1970, ch. 4.

[9] Cf. Niklas Luhmann, *Rechtssoziologie I & II*, Reinbek bei Hamburg 1972.

tions and a great number of publications which together have contributed considerably to a better understanding of the social aspects of law.[1]

The third tendency is the interest in *problems of legislative policy.* Gradually, it has become generally accepted that legal science must deal with legislative problems as well as concerning itself with the problems of interpreting and systematizing given rules. There are widely different opinions as to how this should be done and as to the proper conception of the relations between traditional legal writing and legislative policy, on the one hand, and between such policy and legal sociology, on the other. In the modern *Scandinavian debate* this topic has been one of the most important ones in recent years, and many opinions have been put forward, characterized by differing general conceptions of science and differing attitudes towards the relationship of law and legal science to politics and political science. As mentioned before, Alf Ross has defined legislative policy as a sort of applied legal sociology, and it has been maintained that this branch of policy can in all essentials be carried out on the basis of the same views as characterize "ordinary" legal science.[2] It has also been stated that activities in the area of legal policy could adequately take the form of action-research where the relation between political and scientific activities is regarded as being both positive and fruitful in a scientific sense. Finally, I have myself maintained that a form of legal science concentrating upon legislative policy could make up a new main paradigm for that science side by side with the traditional "dogmatic" one and that it should be based on historical, sociological, and philosophical studies.[3]

The fourth and last general tendency which should be mentioned is the appearance of a number of *new legal disciplines* centred around new fields of law; in this connection private law has finally lost its position as the guide of legal science as a whole as regards methodology and systematics. However, there is still considerable disagreement about the proper course to pursue today concerning the systematization of legal material: whether to continue basing systematics on familiar principles, or whether to search for

[1] In Scandinavia, Norway has taken a leading part in this development with Vilhelm Aubert as the most influential scholar. He and other Norwegian legal sociologists studied in the United States just after World War II, and later on a larger number of legal sociologists from other European countries developed legal sociological research, to some extent influenced by American sociology. During the last ten years, however, European legal sociology has developed in its own way, and the contact with general social theories, including Marxism, has become more distinct.

[2] Cf. Preben Stuer Lauridsen, *Studier i retspolitisk argumentation,* Copenhagen 1974.

[3] In *Retsvidenskaben som samfundsvidenskab,* ch. 19. In Germany this debate has been carried on, above all, in the new periodical, *Rechtstheorie.* See also Peter Noll, "Von der Rechtssprechungswissenschaft zur Gesetzgebungswissenschaft", *Rechtstheorie als Grundlagenwissenschaft der Rechtswissenschaft,* ed. by Albert, Luhmann, Maihofer & Weinberger, Düsseldorf 1972, pp. 524 ff.

new groupings based on more functional criteria. This debate is going on both within the field of public law and that of civil law and also—to an even greater extent—across the line dividing these two disciplines.[4]

In these four respects, as in many others, the same development is to be found in many different countries, and consequently I shall try to suggest some types of factors which might serve to explain this development.

First of all, the period concerned has been characterized by very comprehensive and broad theoretical and political discussions within the theory of science and within the individual social sciences. In these discussions the previously dominating conception of science—that associated with logical positivism—connected with the above-mentioned forms of realism has generally been attacked. On the basis of theoretical and practical considerations there have also been advocated new types of scientific investigations, requiring either the adoption of a more general view of society and/or the initiation of a more practically relevant sort of research. At first, as mentioned above, legal science was particularly interested in contacts with the evolution taking place within analytical philosophy in order to use philosophical analyses for a better understanding of the special character of legal thinking and its special form of rationality. More recently, inspiration has to a greater extent been sought in the other social sciences in order to gain a better understanding not only of legal thinking but also of the total function of law in society. This development from a discussion of legal-theoretical problems on a purely analytical basis towards a discussion where scholars try not only to understand existing legal science but also to point out new directions for legal research has taken place in many countries. However, it can perhaps be most easily demonstrated in Germany, which now as before is playing a leading role in the debate on general principles, while, as in earlier periods, to some extent leaving the concrete problems and the empirical investigation to legal scholars in other countries.[5]

While the general debate within philosophy and social sciences as to which paradigm should be adopted as the central one has clearly been of importance for the basic discussion on legal science, it is equally evident

[4] This debate also has an ideological component. However, this is more pronounced in the Soviet debate on these questions. Cf. Norbert Reich, *Sozialismus und Zivilrecht,* Frankfurt/M 1972.

[5] Nowadays a number of different centres for the evolution of new forms of legal thinking can be found. Thus Britain has introduced the new analytical legal philosophy, the United States has introduced empirical legal-sociological research, and Germany has led the general debate. At the same time, however, these schools have to a still greater extent spread to other countries, so that each individual country has a varied selection of schools and tendencies, which are often elaborated very independently. This state of affairs is especially pronounced in the Nordic countries.

that this science itself has felt a need for the adoption of new views. This need concerns, on the one hand, a better understanding of the *special character of legal writing* and, on the other, a better understanding of the relationship between legal problems and other, more general problems and of how legal science can attempt to get beyond the previously fixed limits between itself and other sciences in order to perform its tasks in relation both to the legal profession and to other groups of users. It may seem self-contradictory to mention these two motives, which seem to point in opposite directions, as reasons for a new orientation, but the self-contradiction is only apparent. For one thing, the motives represent two stages of the same development; next, it is quite natural that a contact with other sciences calls for an explanation of what are the essential elements peculiar to legal and jurisprudential thinking. In my opinion these elements are traceable to the traditional legal task of solving individual conflicts on the basis of general rules and of using a specific sort of reasoning, which aims at treating like situations alike. On the other hand, the need for a new orientation is primarily due to the rapid changes in modern society and in modern legal systems, calling as they do for a more general view of the functions of law, for a systematization of law along new lines, and for an effort to deal, to a far greater extent than earlier, with problems of legislative policy within the whole field of legal science.

Thus, I think the fact that the aims and methods of a new sort of legal research have been discussed in many countries is ultimately due to rapid changes in society itself, which have called both for a very comprehensive legal regulation and for very rapid continuous changes of the existing legislation. The question is then how to combine the traditional way of studying law—where the existing law is interpreted and systematized—with a kind of legal science dealing with legislative policy. The purpose here must be to focus on how to deal with social problems using, above all, legal means, and the efforts must be based on a general knowledge of the functions of law in society. This calls for cooperation with other social sciences in order to understand the interplay of law and other social forces.[6]

It appears obvious that this problem can no longer be solved by a legal science where the judge is regarded as the central figure in the legal system, not only for the purpose of solving individual conflicts in a correct manner but also for the job of developing a legal system which satisfies the

[6] The unintentional consequences of different kinds of political interventions have long been a central interest of the science of economics. It is, however, just as necessary that legal science should take up this problem, and it is also equally evident that an increased interest in the actual social consequences of the legal system is called for.

general needs of society.[7] Now, obviously the adaptation of law to new social surroundings must be brought about principally through general changes in legal rules and legal institutions, and a legal methodology orientated towards the judge will not be very useful in this respect. Through their individual decisions, however, judges and other officials of the state can, in their turn, contribute very much both to a realization and to an obstruction of the aims of new rules. This fact may again lead to a consideration of how a legal science orientated towards the individual solver of conflicts and a science of legislative policy orientated above all towards the holders of political power can and ought to be related to each other.

6. CONCLUSION

In the introduction to this paper I described the theoretical aim of studies of the actual evolution of science; some practical applications of such studies were also mentioned. It is therefore natural to conclude by asking what contribution this investigation has made to the understanding of the evolution of legal science in general, and what practical conclusions may be drawn from it, particularly with regard to policies for future research.

First, I want to stress the danger of drawing too far-reaching conclusions. Within the framework of this paper it has not, of course, been possible to substantiate in detail the descriptions and explanations given. It has been my intention, however, on the basis of a number of concrete studies already made of different periods in the evolution of legal science, to try to establish a more general frame, sketching out certain phases of this evolution which seem characteristic of the legal science of a great many countries. Then I have tried, using certain internal and external variables, to explain the general course of this evolution and also the characteristics of the specific schools mentioned.[8] To what extent this selection of four specific

[7] Cf. Jan Hellner, "Syften och uppgifter för rättsvetenskaplig forskning", *Festskrift til Alf Ross*, Copenhagen 1969, pp. 205 ff.

[8] In this paper the division into phases has primarily been performed by starting from the general evolution within legal science since 1850. Of course, a wider time perspective could also be applied, thus perhaps making the distinction between the period around 1900 and the following period less important. Or the evolution may be divided by external criteria, such as, e.g., the social evolution or, as the German Dieter von Stephanitz has done in his book *Exakte Wissenschaft und Recht*, Berlin 1970, starting with the evolution of the natural sciences. Cf. Stig Jørgensen, *U.f.R.* 1978, pp. 141–47.—In *Retsvidenskaben som samfundsvidenskab* I have based the division of periods on the relationship between legal science and the contemporary social sciences.

phases is reasonable will partly depend on whether it is possible to adapt it to new studies of the evolution of legal science without essential modifications. By including new results from the rapidly increasing body of writing on this subject, it will probably be possible to correct and clarify the views in many respects.

A decisive difficulty attending such studies is the distance, at times very considerable, between the manifestoes for legal research which are advanced and also accepted at a certain time and the concrete activities going on at the same time in the specific legal fields. Of course, the break with the legal science of the past is not really so clear-cut as it is made out to be. This seems to be due to the predominant individualizing method of legal interpretation orientated towards the judge, which in a way sets limits to a too radical renewal. Nevertheless, I think that many more concrete investigations have proved that legal writing has not remained unchanged by these debates but has absorbed the relevant features of the new theories, often by adding new methods of interpretation to the old ones.

In any case I consider it sufficiently proved that legal science has in fact undergone a number of changes, and that, notwithstanding the retention of essential features from the past, it cannot be maintained that legal science can be defined by the use of the same legal method which has been applied for thousands of years, as is sometimes claimed. I also consider it sufficiently proved that these changes cannot be explained only by one set of factors but that there will always be an interplay between different types of factors. The factors that have been especially pointed to on the theoretical level are the influence of the general theory of science at the time in question and of the existing social sciences. At the opposite end of the scale the social and economic evolution are the decisive factors. Between these two sets of factors one finds, on the one hand, the interests of the legal profession, and on the other, the political factor. All these factors seem to affect the jurisprudential universe, and through professional discussions on theoretical, practical and political levels they are crystallized into schools of legal theory and afterwards into concrete research. It is scarcely possible to point to any single factor as being mainly responsible for the emergence of a new school. On the contrary, I consider it sufficiently proved that any one of the factors mentioned here can be determinative in a concrete historical situation. However, when looking at the further evolution of the schools during a longer period, it becomes evident that all types of factors must be included.

Generally speaking, it may be said that the *internal scientific factors,* which have reference to the evolution within the scientific universe generally and the world of legal science in particular, determine the *form* of the treatment

of legal problems, whereas the *external social and economic factors* ultimately determine the *kind of* current problems which arise, also as far as legal science is concerned. The *legal profession* and the holders of *political power* are working between these two types of factors and act partly as direct users of the products of jurisprudence and partly as parties interested in the *ideological* and *guiding* functions of law and legal science in society. By producing legislation and judicial decisions they also act as producers of the material which legal science is working with and which again is of importance for its theories and methods.

As mentioned several times before, I think that there is still a need for detailed single studies of specific periods, of specific countries,[9] and of the evolution of specific legal disciplines within the field of legal science. I also think, however, that it is necessary to pause now and then in order to try to use such investigations for drawing up some general lines and giving some more general explanations, as I have tried to do here.

To put it more concretely, I think that such investigations may, in particular, contribute to a relativization of the ideas of what legal science really is, ideas which are based exclusively on the background of experience of the present time concerning the situation in a single country. Here, as well as within other sciences, such a broad historical background is a necessary prerequisite for being able to discuss the legal science of the future in a reasonably balanced way, as this discipline is seen as part of the historical evolution and as a phenomenon which has itself changed in this process.

Of course it is impossible to reach, on a purely objective foundation, definite conclusions on research policy, even if the most essential views maintained in this article are accepted. It is, however, possible to single out some points which it seems reasonable to make the subject of a debate today.

The first point concerns advantages and disadvantages of a situation where no single paradigm is absolutely dominating, but where many different opinions counteract each other and where research is developing in widely different directions. In such a situation much energy is used for very general programmatic discussions. Accordingly, a cumulative growth

[9] In Finland a research milieu has recently been created, based on the study of the evolution of Finnish legal science according to the suggestions made in this paper. Cf. Juha Pöyhönen, "Om forskning om rättsvetenskap", *F.J.F.T.* 1976, pp. 456ff., and Aulis Aarnio, *Legal Point of View. Six Essays on Legal Philosophy*, Helsinki 1978. This is also the case in Germany. Cf., e.g., Erik Volkmar Heyen, "Philosophische Perspektiven zur Geschichtsschreibung der Rechtsdogmatik", *A.R.S.P.* 1976, pp. 475ff., and Ekkehard Klausa, "Die eigentümliche Fachgemeinschaft der westdeutschen Rechtssoziologie", *A.R.S.P.* 1976, pp. 229ff.

of knowledge takes place more slowly than would have been the case if one single paradigm had been predominant and if "normal science", as Kuhn called it, was performed within its framework. This question can hardly be answered generally, as the decisive point must be whether the "normal science", which can be or previously has been dominating, can be regarded as relevant compared with the problems being dealt with by the science in question.[1]

In my opinion the situation of legal science today is such that it is neither desirable nor particularly probable that there should be one single paradigm to gather around in the immediate future. If one uses a very wide perspective of time in comparing the evolution of legal science with that of other sciences, I think that, in spite of all the above-mentioned changes of its orientation, one will find a focusing upon an interpretation and systematization of the existing law aiming at the *solution of individual conflicts* as the central area of legal science, even though this area has been understood and studied in very different ways through the ages. In my judgment it is neither desirable nor probable that this area of research should disappear or be very radically changed. Nevertheless, I think, as mentioned above in section 5, that the rapid social and economic evolution of the last few centuries, together with the development of the other social sciences, the evolution of the extent and character of legislation, and the appearance of new tasks for the legal profession, has made urgent the need for a legal research with a more direct aim towards legislative policy as a new central area within legal science besides its traditional tasks.

If this need is accepted, the question will arise what measures should be taken in order to initiate a system of research in this field. This is a question both of institutional frames and resources and of what theories, methods and values are to be regarded as relevant. I consider it essential that just as traditional "dogmatic" legal science ought to be assured a position enabling it to take up a critical stance on legal practice, so the research on legislative policy ought to be assured such independence of the state that it not only provides the state with expertise but is also permitted to evolve within its own framework and to take up a critical position on political decisions.[2] A protection of such independence will mean that alternative proposals may be made concerning the construction and implementation of new laws in various fields which proposals may then influence the political debate. It will also mean that long-term research

[1] Cf. Kuhn, *op. cit.*, esp. chs. 4 and 13.

[2] On these problems, see Aulis Aarnio, "Vad är rättspolitisk forskning?", *F.J.F.T.* 1975, pp. 122 ff. Cf. *Retsvidenskaben som samfundsvidenskab*, ch. 19.

projects may be started, in which some single legal field is subjected to thorough investigations from many different points of view. Such research projects are likely to result in a more qualified debate on matters of legislative policy. The research will necessarily be interdisciplinary and will have to include the theories and methods of the other social sciences. It will also to a very great extent profit from an extended international contact between scholars of different countries, both regarding basic research, *inter alia* of legal-sociological character, and more practical problems and their possible solution.

A look at the modern legal periodicals from both the East and the West reveals clearly that such a research is actually being established in a great many countries. To be able to fulfil its social functions in a satisfactory way, however, it must necessarily be supported and encouraged in different ways just as are other new fields of scientific research. I therefore think that a discussion on research policy, especially today, must be an important part of the theoretical debate still going on both within the various countries and across the frontiers on the special character and the potentialities of legal science.