AN ESSAY ON THE SYSTEMATICS OF LEGAL CONCEPTS

A STUDY OF LEGAL CONCEPT FORMATION

BY

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I

In view of the exceedingly important role the use of concepts of various kinds plays in law it is undoubtedly a trifle surprising that within jurisprudence the question of the functions of legal concept formation in general has been subjected to so little analysis.

From one point of view law is a technology of rules and concepts and this technology makes use of concepts with very different functions and of varying logical status.

Concepts of and about law have no given meaning that is fixed for all time. They are concepts that have a function in legal argumentation—either by reason of their inclusion in the formulation of legal problems or their solutions, or because they provide the very framework for legal argumentation. In law, concepts and argumentation coalesce to form one unit.

The idea that legal concepts ought to be analysed on the basis of their legal function has been fundamental to many studies of singular concepts of this kind. Hohfeld's classic work on concepts of rights was in fact entitled *Fundamental Legal Conceptions as Applied in Judicial Reasoning*. In Sweden during the 1920s Undén opposed the ontological dogmatism of the Uppsala School by asserting that legal concepts are "functional concepts", not "concepts of substance", and Hedenius in his influential work *Om rätt och moral* (1941) launched a philosophically more articulate criticism of this dogmatism. This book also contributed to conceptual analytical questions being posed in a more fruitful way towards the mid-1940s—instead of asking about some legal concept, *b*, "What does *b* refer to in reality?", legal scholars formulated the question as follows, "How does *b* function in legal thinking?" This latter question constitutes the unspoken starting point for the fruitful discussion about the concept of right that took place in Scandinavia during the 1940s and 1950s (Ekelöf, Ross, Strahl, Wedberg *et al*).

The present author proposes to undertake a rough classification of the various functions a legal concept can have. Strictly speaking, therefore, it is not the concepts as such that are classified, but their functions, since it could well be that one and the same concept has a number of different functions. An analysis of how different legal concepts function will at the same time become a study of the formation of legal concepts, and the study of the formation of such concepts is one of the main tasks of jurisprudence.

No attempt will be made here to demarcate exactly the multitude of legal

concepts to which our classification applies. It is virtually impossible to apply such a demarcation because practically any concept whatsoever can be a legal concept if it is expressed in a law or in some other legal material ("man", "woman", "nuts", "per cent", and so on). But drawing such a line is not necessary at all as far as this study is concerned—let us simply say that legal concepts are concepts of the kind that are usually to be found in standard glossaries for law students . It is obvious that in this connection various legal concepts may be more or less interesting from a legal point of view.

Concepts are not the same as terms. A term is a word or a sequence of words, whereas a concept is a meaning-content (or thought-content) which can be expressed by means of one or more terms (the meaning or significance of the terms). Nor is the concept identical with any mental act in which it is conceived. Thus, the different terms "bord" and "table" express the same concept 'table'. The first term is Swedish, the second English, but the concept both express is an international one. Terms are linguistic phenomena, while concepts are semantic, non-linguistic ones.

The distinction between terms and concepts was clearly formulated already by the Stoics and thereafter it often appears in philosophical literature, though it is by no means undisputed. One difficulty which faces the person who wishes to maintain the distinction and considers it a fruitful one is determining the ontological status of the semantic entities, that is to say, what kind of phenomena they really are. On this point there is no generally accepted theory.

In this essay the word "law" refers to a normative thought- or meaning-content which can be structured in the form of legal rules and systems of such rules (legal systems).

II

We distinguish between the following two main functions of legal concepts: *the law-stating function* and *the juridical-operative function*.

Concepts with a law-stating function (in what follows *L-concepts*) are concepts that are used for stating the material legal content.

Concepts with a juridical-operative function (*J-concepts*) are concepts that are used for the juridical handling of the legal content.

There is nothing to prevent a given concept from having both these functions (*JL-concepts*)

In what follows L-concepts will be dealt with under section 3, J-concepts under section 4, and JL-concepts under section 5 below. By way of conclusion section 6 will present some general points of view concerning legal concept formation and how jurisprudence concerns itself with this.

III

Within the L-concept category four different distinctions are made designed to illustrate various functions of such concepts. A distinction is made between

(1) genuine and non-genuine L-concepts
(2) official and dogmatic L-concepts
(3) L-concepts forming parts of rules and those which systematize rules
(4) L-concepts that are dependent on legal systems and those that are not.

1. An L-concept has a genuine or non-genuine function depending on whether it appears in genuine or non-genuine legal statements in the sense indicated by Hedenius (*Om rätt och moral*).

Let us explain Hedenius' distinction—nowadays internationally accepted—with the help of an example. The legal statement

(*r*) Anyone who travels by car in Sweden must drive on the right-hand side of the road

can be understood in two different ways. If *r* appears in an official statute it is natural to understand *r* as a normative statement, a decree, which the legislator has issued with the intention of directing a certain kind of human behaviour. Understood in this way *r* is lacking in truth value, in other words, it is neither true nor false. Statements with this function are *genuine legal statements*. But suppose, for example, that I am in England and am asked by an Englishman who is about to undertake a motoring holiday in Sweden what the rules of the road are there, and that in reply I utter the (somewhat magisterial) statement *r*. When I make this reply it is not my intention—at least not in the first place—to steer the questioner's behaviour; my intention is merely to inform him of the content of valid Swedish law in this respect. And when *r* has this function then it is *a non-genuine legal statement*, and as such has truth value, that is to say, it is either true or false (true if spoken on, for example, July 1st 1984, but false if spoken on July 1st 1964). It is to be noted that *r* has the same linguistic formulation irrespective of whether it is used in the genuine way or the non-genuine way, and that genuine and non-genuine legal statements are often formulated alike. But the non-genuine legal statement always contains, logically speaking, an explicit or understood clause "according to valid law in *S* at *t*", where *S* is some society and *t* is a point of time. Thus, in its non-genuine function *r* is equivalent to the statement

(*r/ng*) Anyone who travels by car in Sweden must drive on the right-hand side of the road according to valid Swedish law

as long as this law is what is intended.

Thus, we say that concepts that are found in genuine legal statements are genuine L-concepts and that concepts that are found in non-genuine legal statements are non-genuine L-concepts. Consequently, the concepts "delivery agreement", "commercial purchase" and "delay" have a genuine function when they are to be found in the Sale of Goods Act, but a non-genuine function when they appear in a purely law-reproducing way in a textbook on the law relating to sale of goods.

However, Wedberg claims that it is "highly probable" that a term which appears in a genuine legal statement (Wedberg himself uses the term "internal sentence" synonymously with this) does not have the same meaning as the same term when this appears in a sociological discussion.[1]

If by this Wedberg means that a term can have one meaning when it appears in a genuine legal statement and another meaning when it appears in a non-genuine legal statement—which is probable—he has, without giving any reason, stated something that in actual fact destroys the distinction between genuine and non-genuine legal statements. But it may be that what Wedberg means is that sociological assertions concerning for example ownership (it is in connection with an analysis of the concept of ownership that the statement mentioned is made) are not *juridical* non-genuine legal statements (even though he calls also such statements "sociological").[2]

As far as the present author understands, a term that appears in a genuine legal statement *must* in fact have exactly the same meaning there as the one it has when it appears in a corresponding non-genuine legal statement. A non-genuine legal statement is after all not an independent phenomenon but is always one that corresponds to a certain genuine legal statement. And certain demands as to adequacy must be made on such a correspondence relation, primarily to the effect that the factual content of what the non-genuine legal statement claims is valid law is identical with the factual content of the genuine legal statement—otherwise of course the non-genuine legal statement is not a correct rendering of the genuine one. But such identity does not exist if a term has one meaning in the genuine legal statement and another meaning in the non-genuine one.

[1] A. Wedberg, "Some Problems in the Logical Analysis of Legal Science", *Theoria* 1951, pp. 262 f.

[2] Wedberg, *op.cit.*, p. 260.

2. Moreover, we can distinguish between official and dogmatic L-concepts. We find official L-concepts in statutes, *travaux préparatoires*, judgments and official texts. Examples of these are: "judicial separation", "right by marriage to joint property", "power of attorney", "rent", "intent", "forged document", "grounds" and a thousand more.

Dogmatic L-concepts are to be found in legal-dogmatic works. Examples of these are: "causality", "adequate causality", "right *in rem*", and so on.

Dogmatic L-concepts can, but need not, have equivalents among the official L-concepts. Legal dogmatists can quite well create their own concepts when they consider that the official battery of concepts is insufficient and, as we know, this happens now and then. Such concepts can later be incorporated in the law. Historically speaking there are also a number of concepts which, as products of academic law, are to be found in the law or are implicitly contained within it.

A term that expresses an official L-concept need not, either, have the same meaning it has when it expresses a dogmatic L-concept. (Professor Agell has pointed out to the present author that it cannot, for example, be ruled out that the official concept of negligence differs from the dogmatic one, and concerning the concept of possession Undén points out, "The word 'possession' does not itself appear in statutory language as a definite term describing what in the doctrine is referred to as possession".) That such divergences can arise between a concept that appears in the law and one that appears in legal dogmatic writings—even though both are clothed in the same terminology—comes as no surprise when the concepts in question are used by two different categories of persons—the legislator and the legal dogmatist—who are occupied with the same material, though from different starting points. In another connection the present author has characterized the statements of legal dogmatism (theoretically and in different respects) as *better versions* of official law, and the dogmatic L-concepts constitute components of such statements. Such a "better version" is characterized, *inter alia*, by the fact that—to borrow Arne Naess' excellent term—it possesses a greater depth of intended meaning than the official version.[3]

3. When one states law—whether this takes place in the genuine or non-genuine way—one makes use of two different kinds of concepts: rule constituents and systematizing L-concepts. The former are concepts that are included in individual legal rules, either as components in the description of legal facts (prerequisite) or in the formulation of legal consequences. Systematizing L-concepts are included in the systematics of legal rules as regards their

[3] Cf. Å. Frändberg, *Om analog användning av rättsnormer*, Stockholm 1973, pp. 35 ff.

content and the systematics is also an element in the stating of law, whether it is a question of a systematics in the law itself or one constructed by legal dogmatics. Systematizing L-concepts are expressed by the names of different types of agreement and other legal institutions ("purchase", "gift", "marriage", "larceny") but also by terms in the more fundamental systematics ("the law of third-party conflicts—the law of contracts and torts", "public law—private law").

As we know, the systematizing L-concepts do not have only, or even primarily, a purely intellectual function (comprehensibility)—their function is very much a normative, problem-solving one. Their prime function is that they are used in order to diagnose and qualify problems. Within the conceptualistic school of jurisprudence (*Begriffsjurisprudenz*) a strict "conceptual" qualification was sometimes taken to absurd lengths, but concepts with this function would in practice appear to be unavoidable in all law.

Where the systematizing L-concepts are concerned the difference between official and dogmatic concepts often appears very strongly indeed. The classical systematization of the law of property in legal dogmatics (the division into the law of third-party conflicts and the law of contracts and torts, and so on) is, e.g., not reflected in any more effective way in Swedish legislation in this field of law, whose classification is constructed according to more "down to earth" criteria.

Systematizing L-concepts are used quite often in legislation as rule constituents for the purpose of abbreviation. One simple example is provided by ch. 21 of the Swedish Penal Code, which bears the heading: "Crimes committed by members of the armed forces". This term expresses a systematizing L-concept (specifying the set of crimes which can be committed by members of the armed forces). In para. 2 of ch. 27:1 of the same Code, which deals with suspended sentences, the phrase "crimes committed by members of the armed forces" is a rule constituent that refers to the above-mentioned set.

4. Finally, L-concepts may be dependent on or independent of a given legal system.

An L-concept that is dependent on a system is an L-concept that is wholly dependent, with regard to its meaning, on the content of a given legal system at a given point of time (for example, the law in force in Sweden on Jan. 1st 1985). In this way the concepts of rights—for example, the concept of ownership—was determined in the analysis discussed by those taking part in the Scandinavian discussion about rights.

As we know, what this analysis amounts to is that, say, the meaning of the concept of "ownership" is completely determined by the description of legal facts and legal consequences which in a given legal system at a given point of

time decide how ownership arises and ceases, as well as the legal effects of ownership. From this it follows that the Swedish ownership concept differs somewhat in meaning from the Norwegian one, and also that it is changed as soon as the legal rules are changed with respect to the above-named descriptions. This, however, is not the case where the concept of ownership is independent of a system.

Objections have been raised by Hedenius to the method itself of defining system-dependent concepts in this way.[4] Hedenius argues that if someone makes a legal mistake, for example, by saying, "X has the right to recover without payment an object taken from him as the owner and now purchased in good faith by someone else", with reference to Swedish law, then according to the above analysis it follows that the person making this statement is uttering not an empirically false statement but a logically contradictory one, because it conflicts with the definition itself of the Swedish concept of ownership. And Hedenius is of the opinion that this consequence is not reasonable.

As the present author sees it this objection overshoots the mark. The "definition" in question in the above analysis means merely that statements in which the term "ownership" or its derivatives appear are *abbreviations* of a kind for a number of legal rules ("the rules of ownership") within a legal system. But such rules can of course differ from one legal system to another and in that case the abbreviations of them will also differ. So, when in this analysis the statement is made that, for example, "ownership" has different meanings in Sweden and Norway *all that is being said* is that these two countries have different rules relating to ownership.

Contrary to what Hedenius appears to think system-dependent concepts of this kind are of very great importance in law. When making statements on, say, Swedish law in some area one is usually not interested in assigning any meaning to the concepts being studied other than precisely the meaning that is implied by Swedish legal rules.

As an alternative to the above-mentioned way of defining L-concepts as system-dependent "abbreviations" or "intervening concepts" Hedenius suggests his own definition of the concept of ownership. This definition is based on a logical method different from that mentioned above, namely what is called an ideal-type definition. The method in question is as follows:

An ideal type indicates something in its most extreme, or ideal, form, for example, the ideal type of democracy, equality before the law or ownership. The ideal type is defined as an extreme form in one or more *dimensions*, that is to say, the respects in which something is for example democracy, equality before the law or ownership. Hedenius' system-independent definition of

[4] I. Hedenius, "Analysen av äganderättsbegreppet", in *Filosofi och rättsvetenskap*, ed. B. Belfrage and L. Stille, Lund 1975.

ownership uses two dimensions: protection of possession and freedom of disposal. The greater the degree of protection of possession and freedom of disposal a person enjoys in relation to a thing the greater the degree of ownership he has to it and maximum ownership constitutes the definition of the ideal type. As we know, the degree of protection of possession and freedom of disposal can of course vary with respect to property of various kinds within a legal system as well as with respect to different legal systems, and this state of affairs is reflected by the ideal-type definition in that *real types* can be placed in the various dimensions. A legal system that affords a high degree of protection of possession will therefore have its real type situated nearer to the ideal type in the protection of possession dimension than a legal system which affords a lower degree of protection. Thus, the ideal-type definition does justice to what are called differences of degree and allows comparisons to be made between different phenomena possessing the defined quality. In view of what has been said it is hardly necessary to point out that an ideal type is not the same as an ideal in the normative sense. (Concerning this method of definition, see Hedenius' essay (mentioned above) together with the references mentioned therein.)

The ideal-type construction is very rewarding indeed when one wishes to present system-independent concepts. In the context of comparative enquiries such concepts can be of great value: one constructs an ideal-type concept and then with its help compares two or more different legal systems by establishing the position of their real types in the dimensions of the ideal type. Ideal-type thinking can be valuable also in international legislative work of the kind that aims to harmonize different national legal systems with each other or to work out international rules in some particular sphere (for example, an international sale of goods act). Such thinking can enable one to compare different legal systems more accurately in the respects that are relevant and thereby form a clearer idea of the legislative proposals that might perhaps be accepted by the countries involved.

However, system-independent concepts are useful in contexts other than the international one. Within the legal systems of individual countries the same term is quite often used in more or less different senses in different areas of the law, for example, "gift" in private law and tax law. In Sture Bergström's study of concepts used in both private and tax law in Sweden (*Skatter och civilrätt*, 1978) there are certain approaches in the direction of ideal-type thinking, though these are not explicitly developed. Such an analysis can show that the concept of "gift" in tax law is not quite as "strong" as it is in private law—or, in other words, that in certain dimensions of the ideal-type concept of "gift" the real types of the former concept are situated further from the ideal type than those of the latter concept.

The ideal-type concept is, moreover, very useful indeed when it is a question of analysing the class of concepts that will be dealt with under section 4 below.

IV

The J-concepts will now be discussed. As was mentioned under section 2 above, these are concepts that are used in the juridical handling of the legal content, and they differ from the L-concepts in the following respects:

(1) With the exception of the group of such concepts as may be termed "juridical-ideological concepts" and which are dealt with below, J-concepts have a more pronounced professional-juridical, or technical, function.

(2) They are usually interdisciplinary in character—they are important in all, or, at least, in many of the specialist juridical disciplines—and for this reason are of special interest from the point of view of jurisprudence.

(3) They often take the form of fundamental juridical concepts, that is, other concepts are defined with their help, and for this reason, too, they are of special interest as regards jurisprudence.

(4) In contrast to the central L-concepts a good many fundamental J-concepts have not yet been assigned any really definite meaning that has been embraced with any greater degree of consensus within legal science. There is in addition the fact that the array of fundamental juridical concepts we use today is far too unvaried and limited to constitute a satisfactory intellectual basis, or framework, for juridical thinking. There is in this field a need for creative construction work on a large scale. And while the development of concepts as regards the L-concepts is a task for the specialist juridical disciplines (though the analysis of the method itself for this concept formation is a jurisprudential task), the development of concepts where J-concepts are concerned is in the first place something that jurisprudence must tackle.

The classification set out below has come about as a result of the author's attempts in the course of his work to establish a kind of frame of reference in the form of an outline map of the research field of jurisprudence (although he does not of course wish to maintain that juridical concept formation is the sole object of study of this subject; cf. section 6 below).

Within the class of J-concepts two main groups are distinguished: *technical-juridical concepts* and *juridical-ideological concepts*. The former are concerned with the purely intellectual handling of the law and do not comprise any value other than that of intellectual stringency. The latter, on the other hand, contain as their most important ingredient a valuating attitude to the juridical handling of the law.

1. A usual, though not very successful way of using the term "juridical-technical term" is that, as regards a term, *t*, which has one meaning, *b*, in everyday

language and a somewhat different meaning, b', in law, one says that t is a juridical-technical term simply because it has this special juridical meaning. Thus one says that "loan" is a juridical-technical term because its meaning in Swedish law is "loan of property", while its everyday meaning is "loan of property or advance" (e.g., money loan). But this use of the expression "juridical-technical term" is, strictly speaking, misleading: a term is hardly more "technical" than another just because a special meaning which deviates from the meaning in everyday language has been assigned to the former but not to the latter ("loan" would therefore not be a technical term if its juridical meaning were to coincide with its meaning in everyday language). And the opinion that a word appearing in the law is transformed into a "juridical-technical" term as soon as the Supreme Court assigns it a slightly special meaning does not, in the view of the present author, make the matter very much clearer.

As regards the above-named J-concepts with a purely intellectual content it would be more justified to use the term "juridical-technical concepts". However, to avoid departing too abruptly from normal legal usage the term will not be used in this way; the term "technical-juridical concept" will be used instead.

Let us suppose that a system of *technical-juridical concepts* in this sense is to be constructed from scratch. One reasonable way of proceeding would surely be to form some idea initially of the need for technical-juridical concepts. Here, it appears that at least the following four types of such concepts are essential:

1. We need a set of concepts that would help us to structure the law (the normative content, "the legal subject matter") in a logical and functional respect.

2. We need a set of concepts that would help us to indicate the phenomena to which the law is applicable and also to separate from each other the areas of application for different legal systems—if one so desires, concepts that indicate the "dimensions" of the law.

3. We need a set of concepts that would help us to speak clearly and articulately about the relations between the law and the social reality in which "the law operates" and which it is designed to influence.

4. We need a set of concepts that would help us to describe in a precise manner the professional-juridical utilization of the law as well as the methods for this (including those actually employed as well as those merely proposed).

We now imagine that for each of these needs there is a corresponding family of J-concepts the members of which will meet the need in question, so that:

(1) for 1. there is a corresponding set of *morphological J-concepts*
(2) for 2. there is a corresponding set of *dimensional J-concepts*
(3) for 3. there is a corresponding set of *praxeological J-concepts*
(4) for 4. there is a corresponding set of *methodological J-concepts*.

Each scientific theory is constructed within a conceptual framework that is more or less developed (cf. section 6 below), and this also applies to the construction of theories in legal science. So, the above-named families of concepts form the conceptual framework for what could be called morphological, dimensional, praxeological and methodological theories, respectively.

In what follows something will be said about each of these families of concepts, though particular attention will be paid to the morphological J-concepts. The remaining J-concepts will be dealt with in less detail.

A. There is an important branch of jurisprudence that could be termed *legal morphology* (the accidence, or "grammar", of the law). This is concerned only with the purely formal or structural analysis of the legal subject-matter: the construction, or form, of individual legal rules and systems of rules. The concepts used in this respect are *morphological J-concepts*. Concepts such as "prerequisite", "legal fact", "legal consequence", "primary" and "secondary legal rule", "right" and the concept of "legal rule" itself belong to this category.

"Morphology" is a term that is used in a number of disciplines—for example, zoology and linguistics—simply to denote the study of purely structural and technical-functional characteristics of phenomena. But whereas the objects studied in zoological morphology are physical entities (wings, gills, and so on) the objects studied in legal morphology are abstract entities, products of culture and thought processes. This is why logical analysis occupies a central position in legal morphology and is inseparably linked with a technical-functional analysis.

A number of important results have been attained in the field of legal morphology. Here are three well-known examples:

Early this century the American scholar W.N. Hohfeld published the analysis of the concepts of right (jural relations) which has now become a classic and which constitutes one of the most elegant results of jurisprudence. Here the rigid distinction between "right" and "duty" is broken down into a classification, based on logical criteria, of different legal relations in which persons can find themselves in relation to others (right, power, immunity, and so on). Hohfeld's theory has since been further refined and most credit for this is due to the Swedish scholars S. Kanger and L. Lindahl.[5] Here we find one of the all too few examples in jurisprudence of a theory being developed where undoubted progress has been made within a theory tradition. Here also we find an example of how fruitful theories can be developed through interaction between jurists and logically inclined philosophers. With the help of this concept

[5] S. and H. Kanger, "Rights and Parliamentarism", *Theoria*, XXXII, 1966, and L. Lindahl, *Position and Change*, Dordrecht 1977.

formation complicated legal positions—for example, the position in which a persons finds himself in relation to others when he has "ownership" to something, and which position consists of a great number of "rights" and "duties" in the usual sense—can be reproduced and compared with other legal positions within the framework of a unified and logically stringent typology.[6]

The second example of legal morphological theory formation is Kelsen-Merkl's similarly classic *Stufenbau* theory. Here it is a question of uncovering the fundamental formal structure ("the skeleton") of more developed systems of legal rules of the type represented by national legal systems. In this connection the rules are arranged hierarchically in a certain way and between rules belonging to different layers in this hierarchy there are fixed relations of a legal-genetic kind. It is these relations which bind the mass of rules together to form a unified legal system separated from other legal systems. As we know, the thing that finally determines that a mass of rules constitutes such a unified legal system that is separate from other legal systems, is that these rules can be genetically derived from what is known as the basic norm of the system. The doctrine of the basic norm is far from crystal clear in Kelsen's works and it has, moreover, been presented somewhat differently in different works. It has also been subjected to considerable criticism. On the other hand, it seems to the present author that the *Stufenbau* theory describes something that is essential to the construction of national legal systems. It would therefore be a worthwhile jurisprudential task to try to reformulate the theory so that its essential intention is safeguarded, even if that part of the theory which deals with the basic norm is excluded.[7]

The third—and in its simplicity perhaps the most important—example of established legal morphological concept formation is the distinction—well known to all jurists—between "legal fact" and "legal consequence". This means that every legal rule, either singly or in conjunction with other legal rules, may be reconstructed according to the model "if ..., then shall (may, must not) ...", where the antecedent indicates certain legal facts and the consequent indicates certain legal consequences. The application of "legal fact—legal consequence" as a basic concept has made it possible also to define other important concepts. Thus, the distinction in question forms the basis for the previously mentioned system-dependent method of defining terms relating to rights (rights that either are disjunctions of legal facts or conjunctions of legal consequences) that was developed in the debate about rights in the Nordic countries during the 1940s and 1950s.

[6] An application of S. Kanger's theory of what are called atomic types of rights is to be found in H. Kanger's political science dissertion *Human Rights in the U.N. Declaration*, Uppsala 1984.

[7] The present author has made an attempt along these lines in *Om analog användning av rättsnormer* (see footnote 3 above), pp. 49 ff.

By taking as a starting point the key concept of "legal rule" it is possible within legal morphology to differentiate between two different levels—one micro-morphological and one macro-morphological.

At the former level it is the component parts of individual legal rules that are studied and here we meet concepts such as "prerequisite", "legal fact", "legal consequence", the various concepts for rights and duties (legal positions), the various normative modalities "shall", "may", "must not", "ought to" (expressing obligation, permission, prohibition), and so on. Through this, legal morphology clearly comes into very close contact with what is known as deontic logic. The aim of micro-morphological analysis, one could say, is to lay bare the structure of legal rules of various kinds. In the process an attempt can be made to restore rules of a certain type to a standard form for rules of this type,[8] but the task may also be to penetrate the detailed structure of individual examples of legal rules, for example, in connection with an analysis of some line of reasoning in which these rules play a part.

At the macro-morphological level the items studied are the legal rules as units, which are incorporated in systems of legal rules, legal systems. Macro-morphology differentiates and examines legal rules of different kinds and various types of relations than can prevail between legal rules in a legal system. In actual fact it is the existence of such relations that makes it at all possible for a mass of rules to be apprehended as a system. The aim of macro-morphology is ultimately to arrive at a theory concerning the construction or structure of legal systems that is essentially comprehensive, and this task is as urgent as it is difficult.

Although certain macro-morphological approaches can be discerned in a number of older writers (for example, Austin) it is however only recently that the system aspect has been consciously and energetically given any real attention. A pioneer work in this respect is the above-named *Stufenbau* theory worked out by Kelsen and Merkl.

There are certain resemblances between this theory and Hart's analysis of the structure of more advanced legal systems (in *The Concept of Law*, 1961). What characterizes such systems—in contrast to more primitive systems—is that in addition to rules of the kind that are solely designed to regulate the relations and behaviour of the citizens and which are to be found in all legal systems (what are known as primary rules), the former contain secondary rules of three different kinds that are designed to eliminate certain defects which are inherent in systems which consist only of primary rules. The defect that in such a system it is not possible to distinguish the rules that belong to it is eliminated by a rule of recognition, the drawback that it is difficult to undertake changes

[8] Cf. Frändberg, *op.cit.*, pp. 60 ff.

in the system—its static nature—is eliminated by rules of change and the system's lack of efficiency is remedied by means of rules of adjudication (rules relating to the forms for authoritative legal decision making).

From a somewhat different point of view, and about the same time, Ekelöf carried out a systematics of the legal rules in a legal system, and this, too, is of the kind that is here referred to as macro-morphological.[9] Here Ekelöf distinguishes between (primary and secondary) rules addressed to the public, rules addressed to the courts of law and rules addressed to the executive authorities. The rules addressed to the public are aimed at the citizens and impose duties on them (and also confer rights on them). The rules addressed to the courts of law and the rules addressed to the executive authorities, on the other hand, are addressed to official authorities. A primary rule addressed to the public indicates the particular obligation the citizens are under in some respect, while a corresponding secondary rule addressed to the public indicates what the citizens are bound to do if they break the primary rule addressed to them. Thus, the primary rule addressed to the public

(pr) One must not damage another person's property

corresponds to the secondary rule addressed to the public

(sr) If anyone damages another person's property he must make good the damage

and the secondary rule in its turn corresponds to the rule addressed to the courts of law

(cr) If someone damages another person's property and does not make good the damage and the person suffering the damage claims compensation, the judge shall direct the person causing the damage to pay compensation.

Finally, one or more rules addressed to the executive authorities correspond to cr, and these may roughly be summarized in the following formulation

(er) If a court of law has directed someone to pay compensation to another person and he fails to do so and ..., then [the executive authority] shall take [an executive action] in order to ....[10]

[9] See P.O. Ekelöf, "Förhållningsregler och domsregler", *Festskrift tillägnad Karl Olivecrona*, Stockholm 1964.

[10] Concerning the logical-functional relations between rules of this kind, see Frändberg, *Rättsregel och rättsval*, Stockholm 1984, pp. 51–54.

One category of legal rules which has been discussed is "the competence norm" (the competence rule) considered by Ross,[11] which confers on someone a certain legal competence (power, authority) and which can be contrasted with the "forholdsnorm" (the norm of conduct) applying directly to conduct. Since then T. Strömberg[12] has added a third category of legal rules to this distinction: the qualification rule. Rules of this type assign to persons, things, relations, and so on, a certain "legal quality", for example, the quality to be a guardian, a Provincial Governor or a limited company.[13]

In the legal theory of the 1970s the system aspect was given increasing prominence and two works which deserve special mention in this respect are Raz, *The Concept of a Legal System* (1970) and Eckhoff and Sundby, *Rettssystemer* (1976). However, any detailed discussion of these works would involve a digression far beyond the scope of this essay and so the present author wishes merely to point out in general terms their importance in macro-morphological analysis. (There is even less space for more than a reference to the leading work in this field—*Normative Systems* by Alchourrón and Bulygin (1971); this would require an essay all to itself.)

The aim of macro-morphology is to clarify the logical-functional construction of legal systems, in other words, the structure of legal systems. This means that macro-morphology rests on a postulate—and without the assumption of this postulate the activity in question would be meaningless—namely that there is such a structure built in the mass of rules. But if one assumes this it is also reasonable to assume that this structure is complicated, that is, that it consists of many *different relations between legal rules*. Between such relations there can in their turn be relations—let us speak of *relation systems for legal rules*. We say that such a proposed system of relations, S, is sufficiently strong relative to a legal system R if and only if the essential structure of R can be fully described with the help of S. And if the essential structure of each (well developed) legal system can be described in full with the help of S, we say that S is a universal, sufficiently strong system of relations for legal rules. The works of Raz as well as of Eckhoff and Sundby can be seen as first, more conscious steps in the direction of the drawing up of a universal, sufficiently strong system of relations for legal rules. In this connection the direction in which such steps should be taken is an important question. Raz[14] introduces a number of reflections in this respect which could be regarded as a kind of macro-morphological programme, and these are perhaps of even more interest than the rule relations themselves that he describes.

[11] A. Ross, *Om ret og retfærdighed*, Copenhagen 1953, pp. 45 ff.
[12] T. Strömberg, *Inledning till den allmänna rättsläran*, 8th ed. Lund 1981, pp. 80 ff.
[13] See also T. Strömberg, "Norms of Competence in Scandinavian Jurisprudence", 28 *Sc.St.L.*, p. 151 (1984).
[14] J. Raz, *The Concept of a Legal System*, Oxford 1970, pp. 140–47.

Raz draws up seven conditions for what he calls "individuation of legal rules", but what he means by this is not completely clear. His exposition concerning "the problem of individuation" invites two differing interpretations and it is possible that Raz himself swings between these: (i) the problem of what constitutes a *legal rule unit* (in contrast to a number of such units or to a fragment of a rule) and (ii) the problem of how different *types of rules* are to be demarcated from one another. Here, however, we take interpretation (ii) as the most interesting and the present author has formulated the conditions set out below according to this interpretation. The first three conditions—which he characterizes as "limiting requirements" since they exclude certain unsuitable ways of demarcating a type of rule—are as follows (the present author's formulation):

(1) Rules that are demarcated as belonging to a certain type of legal rules must not deviate too much from a commonsense view of what a legal rule is.

(2) A rule belonging to a certain type of rules must not repeat the content of another rule belonging to a different type of rules.

(3) The principles of individuation must not make certain rules redundant.

In addition, Raz lays down the following four "guiding requirements", which indicate different general goals for the individuation of legal rules (these, too, are in the present author's formulation):

(1) The principles of individuation shall be such that the structure of the legal rules is relatively uncomplicated and their meaning relatively easy to understand, and also such that the component parts of the rules are comparatively easy to locate in the source material.

(2) The legal rule units must be made relatively complete (self-contained) and constitute "natural units", in other words, they must not be too fragmentary.

(3) Each act-situation that is regulated by the system of rules must constitute the core of one (and only one) legal rule.

(4) The classification of legal rules must be such that important relations between rules belonging to different types of rules are clearly visible. (This condition can perhaps be interpreted so that a classification of legal rules in different types of rules should be based on what is referred to above as "relation systems for legal rules".)

When Eckhoff and Sundby analyse the construction of legal systems—which is in the main done by utilizing the general system theory which has been developed mainly since the Second World War—they use the term "legal system" in a wider sense than that of the present author. Their concept is more extensive in that they assign to the components of a system not only legal rules (legal norms) but also legal activities and in addition could consider including specifically juridical "beliefs" concerning social states of affairs as such compo-

nents. On the other hand, when the present author speaks of a macro-morphological analysis of legal systems what is meant by that are systems that consist exclusively of legal rules. In addition to morphological elements the theory of legal systems advanced by Eckhoff and Sundby therefore also includes elements that the present author refers to as praxeological, methodological and ideological in his concept formation. Only a few items of a morphological kind in their theory will be touched on here.

In this connection the following reservation ought to be made. The present author is of course not unaware that there is a good deal of difficulty involved in the construction of a legal morphology in that different writers have different views concerning the ontological status of the legal rules (the legal norms)—that is to say, concerning what kind of phenomena these are. This problem cannot be discussed here. One minimum condition that must be fulfilled in this respect is that a writer's ontology is reconcilable with his morphology. And there is no doubt that it is much easier to achieve such agreement if the concept of a legal rule is not overloaded, that is to say, if its connotation is not made needlessly complicated. It seems obvious therefore that when one is presenting an ontology for legal rules attention should be paid to the morphological aspect. It might, moreover, not be impossible to construct a morphology that is more or less independent of different ontological opinions concerning legal rules.

Here follows a short discussion of three kinds of morphological relations between legal rules (legal norms or fragments of norms) that are dealt with by Eckhoff and Sundby:

(1) *Linking connections*. This term refers to "the fact that two or more norms (or fragment of norms) are linkable in the respect that they, by being linked together in a fixed manner, together form a (more exhaustive) norm".[15] This includes the linking together of a statutory definition or qualification rule with a duty-rule so that a more precise duty-rule is obtained, the linking of rules concerning the generation and extinction of a right to rules concerning the "legal consequences of the right" with the help of linking words or intervening concepts in the way that Ekelöf, Wedberg and Ross have reconstructed the matter, as well as the combination of a (primary) norm of conduct with a (secondary) rule which provides for a sanction against a breach of the norm of conduct.[16]

(2) *Operative connections* (this term—like the term "genetic connections" mentioned in (3) below—has been taken from Raz by the authors, though they do not use it in exactly the same sense as he does). By this is meant "that

[15] T. Eckhoff and N.K. Sundby, *Rettssystemer*, Oslo 1976, pp. 159 f.

[16] Cf. Frändberg, *Rättsregel och rättsval* (see footnote 10 above), ch. 2, concerning specification, i.e. combining of fragmentary rules to form what are called molecular legal rules.

successive stages in a course of events are regulated in such a manner that the norm (or norms) which is (are) used in one stage determine(s) which norm (or norms) is (are) used in the next stage".[17]

Here it should be noted that each norm relation that is an operative relation is also a linking relation. So what is involved here is not a classification into mutually exclusive classes. In fact the authors classify the linking connections among what they call "the static structures of the legal system" while the operative connections belong to the "dynamic structures", and a system is dynamic if "actions, events or processes" are taking place within it.[18] Against the background of this distinction a more precise interpretation of the authors' train of thought could perhaps be formulated as follows: The static linking connections form the set N of the norm relations answering the needs of juridical work for which the machinery—the legal system—has, so to say, the latent capacity. An operative connection, on the other hand, is a subset OP of N consisting of norm relations that are in fact used in the solving of a certain legal task (which is a thought process and therefore belongs to the dynamics of the law).

Let us call such a thought process "a juridical operation". The authors hold that such an operation proceeds in certain steps taken in a certain order (or it can at any rate be rationally reconstructed in this way). Suppose, now, that a certain legal operation, o, consists of phases o_1, o_2 and o_3 and that o is undertaken in the order: $o_1 \rightarrow o_2 \rightarrow o_3$. Also, let R be the set of rules that are needed to carry out o. An interpretation of the authors' ideas concerning operative connections could then be this: In N there are one or more fixed norm relations, say, n_1, n_2 and n_3, such that these exist between the rules in R and such that they can be related in a one-to-one correspondence to o_1, o_2 and o_3 according to this diagram:

juridical operation:	o_1	o_2	o_3
	↕	↕	↕
step:	1	2	3
	↕	↕	↕
norm relation:	n_1	n_2	n_3

If such a one-to-one correspondence does exist we can say that there is an operative connection between all the rules, R, in the system that stand in one of the relations n_1, n_2 and n_3 to one another (so that if, for example, rule r_1 stands in relation n_1 to rule r_2 and r_3 in relation n_2 to r_4, then each and every one of r_1,

[17] Eckhoff and Sundby, *op.cit.*, p. 187.
[18] Eckhoff and Sundby, *op.cit.*, p. 24.

r_2, r_3 and r_4 stands in an operative connection to each and every one of the others).

(3) *Genetic connections*. A legal system usually regulates the activity that consists in producing, changing and discarding rules in the system. It is therefore important to analyse the relations between the rules that regulate these matters and the rules that are produced, changed or eliminated with their help. Eckhoff and Sundby say that there is a genetic connection between "an established norm and the norm(s) which has (have) given the competence to establish it".[19] If in this connection a rule, r_1, gives the authority m_1 power to issue a rule r_2 and if r_2 in its turn gives the authority m_2 power to issue rule r_3, then, say the authors, there is an immediate genetic connection between r_1 and r_2 and between r_2 and r_3, but an indirect connection between r_1 and r_3. (Genetic relations of this kind are of course not transitive, because from the fact that r_1 gives m_1 power to issue r_2 and r_2 gives m_2 power to issue r_3 it does not at all follow that m_1 necessarily has power to issue r_3.)

The authors assign the genetic connections to the dynamic category. However, one could choose to regard the genetic relations as both static linking connections and dynamic operative ones. The genetic relations can lie latent in the system as possible operations and then constitute genetic linking connections, but they can also be brought into play in an actual change in the system (for example, by m_1 and m_2 in the above example actually making use of their power to issue r_2 and r_3) and then they can be regarded as operative relations (genetic operative connections).

Knowledge of the fact that an understanding of the construction of legal systems and of the legal employment of their rules can be greatly increased by an analysis of different relations between rules also forms the basis of the present author's own theory about a number of so-called norm relations, which is to be found in *Om analog användning av rättsnormer*, ch. 3. The task undertaken there was to try to bring some sort of order to the notoriously disorderly family of concepts consisting of such concepts as "precization", "extensive interpretation", "analogy", "reduction", "obsolescence", "restrictive interpretation" and "*e contrario*".

Terms of this kind often tend to be thought of as methodological terms, which, to be precise, is a trifle inappropriate since they are not really names of methods but of *results* of interpretative procedures (irrespective of whether these have been undertaken according to some "method" or not). (In this respect only the terms "(argumentation by) analogy" and "(argumentation) *e contrario*" are ambiguous: they can express the result of a norm-constructing operation as well as being the names of methods of a certain kind, namely an

[19] Eckhoff and Sundby, *op.cit.*, p. 192.

argumentation where certain kinds of judgments concerning similarity between cases constitute a vital component.) The terms in question are instead more nearly morphological in character and express *various kinds of relations between legal rules*:

(i) r is a precization of r'
(ii) r is an extensive (restrictive) interpretation of r'
(iii) r is analogous with r'
(iv) r is in an *e contrario* relationship to r'
(v) r is a reduction of r'
(vi) r' makes r obsolete

Norm relations of this kind can, as noted, arise as the result of an application of the law (r is the result of certain operations with r'), but they can also exist between rules already present in the system. For example, a statutory rule, s' , can be analogous with another statutory rule, s.

The more detailed analysis of these relations consisted in (a) a precization of their meaning and (b) their systematization, that is to say, defining them within the framework of a common, unified *typology* which enabled their internal connections to emerge clearly. The latter task appeared to be desirable because the traditional presentations of these connections are unclear and open to criticism. It seemed to the present author that these uncertainties could be eliminated within this typology. The typology rests on the two following basic ideas (here they are indicated only roughly):

(1) To the prerequisite description of every legal rule, r, corresponds a set of cases such that these are covered by this description, and to its description of legal consequences corresponds a set of circumstances, which according to the normative modality in the description of legal consequences, shall, may or must not be the case. Certain set theoretical operations can be carried out on these two kinds of sets (they can, roughly speaking, be expanded or restricted). If we carry out a certain such operation on *r's* set of legal facts or set of legal consequences but retain the normative modality of the rule, we obtain a new rule, r^*, which has one of 16 possible relations to r. These 16 possible norm relations constitute *r's spectrum*. The relations belonging to *r's* spectrum are precization and analogy relations of different kinds.

(2) Within the framework of *r's* spectrum it is not, however, possible to indicate the difference between, on the one hand, precization and analogy relations and, on the other hand, reduction (including obsolescence) and *e contrario* relations. This difference is in fact connected with the normative modality of the rules. The last-mentioned relations are characterized not only by certain set theoretical relations between the sets of legal facts or the sets of

legal consequences of r and r^* but also by the fact that r's normative modality is exchanged in r^* for "the opposite (antithetical) modality" (a prohibition is exchanged for permission or obligation, or vice versa). If we now carry out such an exchange in each norm relation within r's spectrum we obtain 16 new norm relations, nos. 17 to 32, where no. 17 corresponds set theoretically to no. 1, no. 18 to no. 2, and so on. The norm relations 17 to 32 constitute *r's antithetic spectrum* and each and every one of them describes unambiguously either some form of reduction relation or some form of *e contrario* relation.

Consequently, this typology enables us to indicate exactly what the differences are between (i) precization (application) and reduction, (ii) extensive and restrictive interpretation and (iii) argumentation by analogy and argumentation *e contrario*.

r's spectrum also indicates a kind of scale: precization—extension—analogy, where the extension is a marginal case between precization and analogy (one does not really know if one is applying r or is using r analogously). *r's* antithetic spectrum similarly indicates a scale: reduction—restriction—*e contrario*, where the restriction is a marginal case between reduction and *e contrario* (one does not really know if one is reducing r or using r *e contrario*). Obsolescence is the extreme case of reduction: the total reduction of *r's* set of legal facts.

Suppose that we have a statutory rule

(s) If two ships collide each captain must supply the other with the name of his vessel and its home port.

Suppose also that it is not clear whether small vessels are to be regarded as ships within the meaning of this law. In a case where a small motor boat collides with a sailing boat one judge will base his decision on the rule

(r_1) If two small boats collide each captain must supply the other with the name of his boat and its home port

while another judge will base his decision on the rule

(r_2) If two small boats collide each captain may refrain from supplying the other with the name of his boat and its home port.

It will be noted that r_1 and r_2 have identical sets of legal facts and consequences (collision between small boats and the supplying of the name of each boat and its home port). What separates the two rules is that their normative modalities are in an antithetical relationship to one another ("must" and "may refrain from").

If it had been the case that small boats were ships in the meaning of the law then r_1 would be in a precization relation to s (all small boats are ships but not all ships are small boats), while r_2 would be in a reduction relation to s. If, on the other hand, the situation was that small boats were not ships in the meaning of the law then r_1 would be in an analogy relation to s, while r_2 would be in an *e contrario* relation to s. In the example chosen it was not clear whether small boats count as ships, and so r_1 is in an extension relation to s, while r_2 is in a restriction relation to s.

This briefly described typology has finally proved fruitful in the analysis of competition and collision between legal rules. The competition relations lie within the spectrum of the rules, the collision relations within the antithetic spectrum of the rules (r_1 and r_2 in the above example collide with one another: if a captain chooses not to supply his vessel's name and its home port he is acting legally according to r_2 but illegally according to r_1).[20]

Thus much concerning different morphological theories or systems of concepts.

Within international jurisprudence there is an age-old idea that could be called "the dream of a universal morphology" and to which many have felt themselves drawn. It is hinted at in Hobbes ("my design being not to show what is law here, and there; but what is law; as Plato, Aristotle, Cicero and divers others have done, without taking upon them the profession of the study of the law")[21]—and from the context it appears that Hobbes was not, or at least not in the first place, referring to the content of the law itself. Bentham speaks of a "universal jurisprudence", which he describes as involving the examination of concepts ("To be susceptible of an universal application, all that a book of the expository kind can have to treat of, is the import of words: to be, strictly speaking, universal, it must confine itself to terminology.").[22] Austin speaks in the same spirit of a "general jurisprudence" that is "the science concerned with the exposition of the principles, notions, and distinctions which are common to systems of law".[23] Hohfeld's characterization of his eight basic concepts as "the lowest common denominators of the law" suggests a similar view, and there would seem to be no doubt at all that Kelsen's Pure Theory of Law was thought of as having universal application. The Hungarian Felix Somló (*Juristische Grundlehre*, 1917) distinguishes between the content of the law and its form and makes corresponding distinctions between "Rechtsinhaltswissenschaften" (= mainly legal dogmatics) and "die Wissenschaft von

[20] See further concerning competition and collision, Frändberg, *Rättsregel och rättsval* (see footnote 10 above), ch. 3.

[21] Th. Hobbes, *Leviathan*, ch. 26.

[22] J. Bentham, *An Introduction to the Principles of Morals and Legislation*, ed. Burns and Hart, London 1970, pp. 294 f.

[23] J. Austin, *Lectures on Jurisprudence*, vol. III, London 1861–63, p. 351.

der Rechtsform" (= die Juristische Grundlehre), and between "Rechtsinhaltsbegriffe" and "juristische Grundbegriffe". Concerning the latter he says,[24] referring to Austin and Bierling, that they are "jene, deren sich jedermann zum Ausdruck einer Rechtsnorm notwendigerweise bedienen muss oder die er dabei notwendigerweise voraussetzt". The notion that there are certain necessarily common features in the law is also found in Raz: "Thus it will be argued ... that every legal system must regulate the existence and operations of some courts, and that every legal system necessarily stipulates sanctions. This subject is closely related to the problem whether there is some minimum content common to all legal systems. The minimum content and the minimum complexity of all legal systems ... determine the necessary internal relations existing in every legal system, that is the internal structure which is necessarily common to all legal systems."[25] Eckhoff and Sundby "aim at elucidating such features of legal systems which are not peculiar for the Norwegian one, but are to be found in many others".[26] Finally, Lindahl expresses himself more cautiously in the preface to his dissertation *Position and Change*, saying that his work "was prompted by the question of whether an investigation into law and legal systems could lead to the discovery of unrevealed fundamental patterns common to all such systems".

It could be argued that ideas of the kind cited above—and especially those which assume the existence of "necessary legal concepts"—rest on an assumption that is mistaken: namely that there really does exist a set of concepts, distinctions, principles and so on that are common to all, or to a large group of legal systems.

There is a lot to be said for this objection. There is nothing that says, for example, that concepts of the L-type are necessarily the same in a number of different legal systems, and this can also be said of legal principles. On the contrary—as is often pointedly noted in comparative legal writing—one must be on one's guard when it is a question of "translating" legal terms from one legal system to another.

But let us formulate the notion of universality a little more carefully. Let us restrict this to comprise only concepts of a technical-juridical kind, and especially those that are here referred to as "morphological". The matter will then appear in a different light.

In fact, legal morphological concepts can be apprehended as paradigmatic—in the sense that the word "paradigm" is traditionally given in grammar (and not in the science-theoretical sense à la Kuhn). One or more such paradigms form a matrix within whose framework appear all the inflected

[24] Felix Somló, *Juristische Grundlehre*, Leipzig 1917, p. 27.
[25] Raz, *The Concept of a Legal System* (see footnote 14 above) p. 141.
[26] Eckhoff and Sundby, *op.cit.*, p. 157.

forms of a word. By combining number (singular, plural ...), gender (masculine, feminine ...) and case (nominative, genitive ...) we can for instance construct a matrix for all the forms in which an article or a substantive can appear in a language. In principle there is nothing to prevent such a matrix being constructed for all languages within some family of languages, even though certain places of the matrix may be empty when it is applied to some specific language in that family. Analogously, it is possible to regard legal morphological concepts as paradigmatic—or typological—in this sense.

The dream of a universal legal morphology can be formulated as an urge to construct such a generally applicable legal scientific matrix. And one criterion of the value of a morphological concept will in fact be that it is as generally applicable as possible. It would seem clear enough that the morphological concepts mentioned in the above presentation are of this kind.

Finally, a few words about the practical usefulness of legal morphology. This, it is claimed, will be within both legislation and the administration of the law. Within legislation the morphological paradigms can provide a more secure base for the technical drafting of regulations and lead to greater understanding of their internal functional connections. Within the administration of the law micromorphology will be an aid in that it enables increased precization of the rule that is to constitute the premise for administering the law; and macromorphology can be a great help in the specification of the rule, that is, in the combination of the (fragmentary) regulations that must be combined with one another to enable the law to be applied in some specific case.

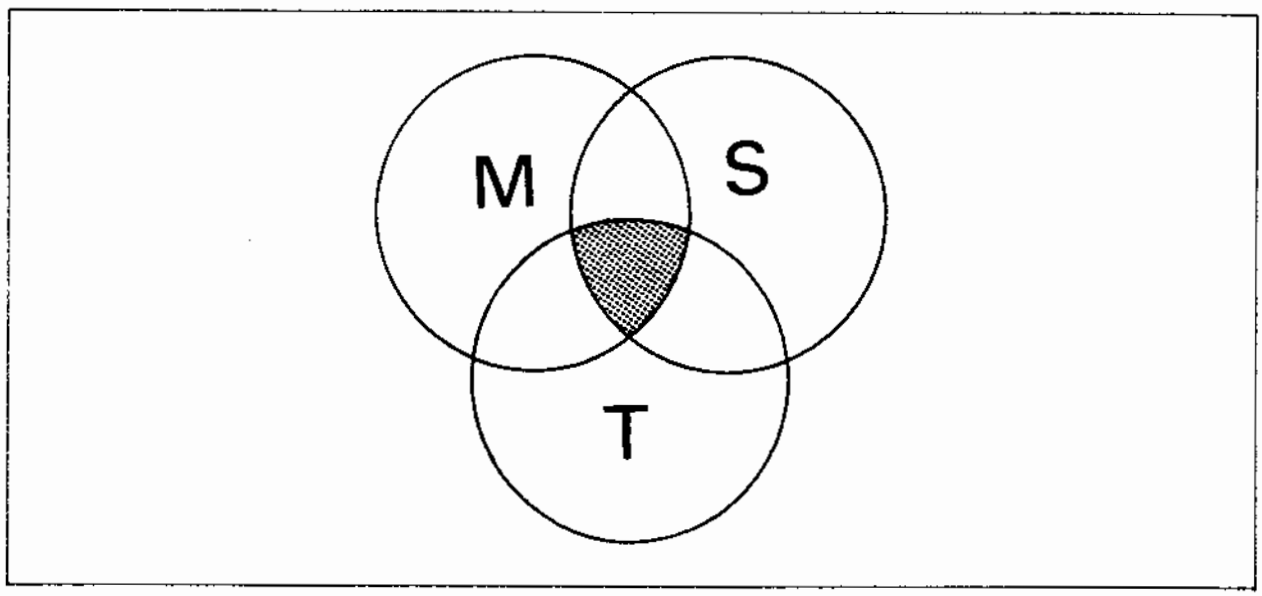
At this point we leave the family of morphological concepts and turn to a much shorter presentation of the remaining kinds of J-concepts.

B. Another important group of technical-juridical concepts are those that can be called *dimensional J-concepts*.

The morphological (structural) aspect of a legal rule is obviously merely one aspect among many others from which law can be considered. After all a legal rule also stands in many, and complicated, relations to a good deal that is external to it. As we know, one important characteristic of a legal rule in this connection is that in certain circumstances it shall be applied to some factual situation belonging to a certain set of such situations. Let us label such a set with the expression the *area of operation for a legal rule*. One important aspect of the legal rule is consequently the one that is concerned with the relation of the rule to its area of operation, and a little time will be devoted to this aspect. At a more general level it is possible to speak in a corresponding way of the area of operation for a whole legal system.

The area of operation of a legal rule is not an unambiguous, linear phenom-

enon but is fixed in (at least) three dimensions: the material, the spatial and the temporal dimension. The material dimension of a rule, *r*, demarcates the factual situations to which *r* is applicable solely as regards its content (materially). The spatial dimension demarcates the factual situations to which *r* is applicable solely with regard to the geographical location of the factual situations. The temporal dimension demarcates the factual situations to which *r* is applicable solely with regard to when the factual situations took place. One could say that the material dimension determines the material sphere, *M*, of *r*, the spatial dimension the spatial sphere, *S*, of *r*, and the temporal dimension the temporal sphere, *T*, of *r*. *r's* area of operation, *O*, can thereafter be defined as the intersection of the sets *M*, *S* and *T*:



where *O* is the shaded area.

A set of concepts, all of which can be described as "dimensional", is linked with each of the three dimensions.

In *Rättsregel och rättsval* the present author has dealt at some length with the dimensional aspects of the law. In ch. 4 of the book there is an analysis of the area of operation of state legal systems. (It is to be noted in this connection that the area of operation of a legal system cannot be defined simply as the union of the areas of operation of all the rules contained in the system. Lack of space does not permit the author to explain why this is so, but the matter is connected, on the one hand, with the obligation to decide—the prohibition against *déni de justice*—and, on the other hand, with the fact that the phrase "legal system" is ambiguous in the temporal perspective.) There is also an examination of various problems touching on the relationship between different legal systems. In ch. 5 there is a presentation of a comparatively extensive family of transitional (intertemporal) legal concepts as well as a demonstration of their usefulness in the formulation of problems and solutions in this area.

Let r be a legal rule, F the set of cases to which r is applicable and f a specific case, any one at all, in F. A dimensional vocabulary can then be required to express, on the one hand, concepts that indicate sets of type F and, on the other hand, concepts that indicate various kinds of relations between r and f.

To be able to speak of the material dimension of legal rules we therefore need concepts for relations of the type "r is applicable to f", "f comes under r", "f is covered by the wording of r", and so on. Similarly, we need concepts for sets of the type "(the rule's) area of application", "area of meaning", "set of legal facts" and the like.

One characteristic feature of law (which is connected in part with the obligation to decide) is also that through the possibility of extensions and analogies a legal rule often exerts a kind of long-range effect which extends beyond what could reasonably be called its area of application—we can speak of the "area of influence" of legal rules. A notice in a park bearing the words "Dogs not allowed!" could have, in the eyes of a juridically minded park keeper, an area of influence that extends also to someone who brings along a cat, a fox or a monkey. There is somewhere a limit to the area of influence of a rule. After all, it would certainly be regarded as strange if the park keeper felt that the prohibition on the notice was relevant also to a man who brings along his wife.

The temporally dimensional vocabulary contains concepts such as "being in force", "retroactivity", "simulactivity", "infraactivity", "factum praeteritum", "factum pendens", "factum futurum", "retropendens", "infrapendens", and so on. The spatial dimension is described in terms of "area of jurisdiction", "connection" ("case f has connections with legal system R"), "connecting factor", etc.

C. The *praxeological J-concepts* all refer to the relationship between the law (legal system) and the social reality. Very little indeed has been done regarding concept formation in this important area. (A number of concepts belonging to this family are treated in ch. 1 of *Rättsregel och rättsval*, for example the concept of validity. In sections 2.3 and 4.4 of *Om analog användning av rättsnormer* there is also an explication of the concept of legal basis.)

Both in the administration of the law and the debate about legal policy it is sometimes necessary to speak of the observance and breach of legal rules. But what is meant by this? The praxeological concepts "to observe" and "to break a legal rule" are far from unambiguous. They are in fact logically dependent on the normative modalities of the legal rules and these modalities are of course of different kinds. A breach of an obligation is not the same as a breach of a prohibition and a genuine permission cannot be broken at all (it is always obeyed).

Important features of the argumentation concerning administration of law and legal policy are statements of the type

(a) *r* is expedient
(b) *r* is effective
(c) *r* has the legal basis *b*

which also describe relations between law and reality. Concepts such as "expedient" and "effective" predicated on legal rules, and also the concept of "legal basis", are praxeological concepts of a finalistic kind. (A legal basis can be understood as a causal relation with the following general structure: "if the legal consequence is realized when a legal fact is present, then a desirable (for the legislator) social condition is (probably) caused". Asserting a legal basis for a rule is finalistically justifying the rule.)

One notorious problem among the J-concepts is the concept of validity ("*r* is valid in society *S* at time *t*"). One reason for the great disunity within jurisprudence as to the meaning of this term is that it has not yet been decided whether it should denote a morphological (Kelsen), a methodological, a praxeological or even an ideological concept—or perhaps some mixed form of these. The present author regards it as natural to view the concept of validity as a praxeological concept and one reason for this is that, as Hedenius has pointed out, one seems to be saying something unreasonable if one says that a rule is valid even though it is not in fact applied by the authorities. That *r* is valid means, it seems, that *r* is on the whole observed by the authorities (= is applied). (And this is in no way a circular definition, as is commonly and mistakenly claimed.) By attaching the label "valid" to a legal rule (a normative meaning-content) one is indicating that the rule functions juridically in *S* at *t*.

D. The *methodological J-concepts* should preferably be divided into three different categories, methodological frame concepts, sources of law concepts and programme concepts.

(1) One matter which must of course be taken into account in the analysis of legal method is that the thinking that this method is to steer takes place during the performance of certain professional roles and in more or less institutionalized forms, which so to speak fix the frame for these thought processes. People work, for example, as judges, lawyers, legal dogmaticians or legislative draftsmen. The judge operates in the institutionalized forms of the administration of the law, and although the legal dogmatician or the lawyer is not active in these forms the forms in question do even so determine to some extent the frames within which these people work. To be able to analyse these frames we need a set of concepts that we can call *methodological frame concepts*. These describe the

activities within which the handling of legal rules takes place. Terms which express such concepts are, for example, "administration of the law" and "application of the law" when these terms are used as names for certain intellectual activities, as well as terms that name the different components of such activities, for example, "interpretation", "qualification", "evaluation of evidence", "choice of legal consequence (sanction)".[27]

(2) We also need a set of concepts that deal with the factual basis of the legal rules, that is to say, texts, utterances, usages etc. from which according to certain methods lawyers in general derive legal rules—what are called sources of law. We can call such concepts *sources of law concepts* and among them are concepts such as "statute", "act", "precedent", "case law", "custom", "practice", "*travaux préparatoires*"—and the concept of "source of law" itself.

(3) Finally we come to a category of concepts that are methodological in a more genuine sense.

The doctrine of juridical method, such as it is presented in textbooks on jurisprudence, may be seen as a collection of programmes indicating how lawyers in general—within the frame of their professional roles and the institutionalized forms of their activities—should proceed when they derive general legal rules from sources of law and individual legal norms from the general legal rules. A number of such programmes (one assumes) are in fact used in the administration of the law, others are merely proposals formulated within, for example, legal science (and which programme belongs to the one or the other kind is something we have no certain knowledge of, at least not in Sweden). The names of such programmes express *programme concepts* and some examples are "objective interpretation", "subjective interpretation", "historical interpretation", "teleological interpretation", "pragmatic interpretation" (Ross), "logical-grammatical interpretation", "systematic interpretation", "reasoning by example", "the open model" (Bolding), and so on. The debate about method that is always going on within law would gain much from a precization and systematization of the concepts in this family.

But the programmes for legislative drafting technique also belong to the doctrine of juridical method. While the work of the administration of the law has a great number of methodological programmes the reverse is the case where the drafting of legislation is concerned. This is due to the fact that it is only quite recently—mainly in German-speaking Europe—that legal science has started to develop a theory and methodology of legislation in a more comprehensive and organized way. We have long had to content ourselves with stereotyped distinctions of the "casuistic-synthetic (generalizing) law-drafting technique" kind and the like.

[27] Cf. Frändberg, *Om analog användning av rättsnormer*, section 2.4, and *Rättsregel och rättsval*, ch. 2.

All the J-concepts mentioned under 1 to 4 are of the technical-juridical kind—all of them are connected in one way or another with the technical handling of the law.

2. But alongside these there is also a class of very important legal concepts that we could call *juridical-ideological concepts* and which have as yet been paid surprisingly little attention. These include concepts such as "legal security (predictability)", "equality before the law", "legality", "legal protection" and "Law-State" ("*Rechtsstaat*")—all of which are fundamental to our legal culture.

It may appear strange to regard such concepts as "juridical-operative", that is, as concepts that are used for the legal handling of the content of the law. That this is the case here, however, is due to the following circumstance.

In law, technique and ideology are closely interwoven. The ideal of legal security, for example, has undoubtedly had a profound effect on the shaping of both legislative technique and what are known as the methods of interpreting the law. The name "juridical-ideological concepts" has been chosen simply because these concepts constitute the components of something that can be said to be the special ideology of *lawyers* in general in modern Law-States, and this ideology deals to a great degree with how legal technique is to be constructed. For this reason the technical as well as the ideological concepts have been assigned to the same category of J-concepts.

Terms of this kind are usually understood as expressing certain principles (for example "equality before the law") or as expressing concepts which are included in or stand in some other relation to such principles. And here it is a question of principles that are addressed to the legislator or the administrator of the law (but not to the ordinary citizen). The penal law principle of legality, for instance, can be formulated in two different editions, one (LJ) directed at the person administering the law (the judge) and the other (LL) at the legislator:[28]

(LJ) It is forbidden for a judge to qualify an act as a crime when the act in question does not come under a description of a crime in the law.

(LL) The legislator must draft the law so that the acts that the law says are criminal are precisely and comprehensively indicated (Jareborg: *nullum crimen sine lege certa*).

On the other hand it appears strange to understand the principle of legality as addressed in some respect to the citizens. The juridical-ideological principles are primarily not concerned with the citizens' social conditions but with the very handling of the law, and it is here that they differ from other so-called general legal principles such as, for example, the general fault liability rule.

[28] Cf. N. Jareborg, *Brotten*, vol. 1, 2nd ed. Stockholm 1984, p. 40.

Legal security, legal protection and so on are, as we know, something that societies can enjoy to a greater or less extent, and for this reason the juridical-ideological concepts are especially suitable for analysis with the help of the logical technique described in connection with the L-concepts, namely the ideal type technique. The concept of legal security, for instance, can be seen as a three-dimensional ideal-type concept where a society enjoys the greater the degree of legal security, the greater the degree (i) to which it has clear and unambiguous rules providing answers to questions of a legal kind, (ii) to which these answers are accessible to all and (iii) to which people can depend on the answers as far as their actions are concerned.

V

As was noted under section 2 above there is nothing to prevent a particular concept from being both an L-concept and a J-concept. Such concepts—JL-concepts—have a certain capacity for bringing about confusion in legal thinking and the reason for this will be touched on with the help of one or two examples.

The analogy concept is a J-concept that plays an important role in legal thinking. The analogy can be understood as a certain type of relation between legal rules, based on a particular kind of resemblance between them. Now, it may happen that the legislator is interested in regulating in some particular area the construction of rules by the courts by means of analogy. He may, for example, wish to counteract the creation of rules detrimental to the accused by means of analogy where penal law is concerned. If a prohibition on this point is issued in the law the analogy concept becomes thereby an element in a rule, that is, an L-concept.

But as soon as a concept becomes an L-concept it starts to have a life of its own to a greater or lesser degree. The courts may perhaps discover after a while that the analogy ban cannot be upheld to the letter. Thus a start will be made on redefining the analogy concept by explaining that certain analogies are not analogies at all but extensions that are not covered by the ban. Such redefinition can be explained by the legal basis on which the rule in question rests and completely justified with respect to the analogy concept as an L-concept.

On the other hand, it would lead to absurd consequences if this analogy concept were to be used in general discussions about analogies or in presentations of the concept in textbooks on jurisprudence, that is, if the analogy concept as a J-concept were to be identified with the analogy concept as an L-concept. The circumstances that influence the forming of the L-concept are

special to the area to which the rule in question refers and such circumstances are often of no interest at all when it is a matter of defining the concept in question as a J-concept. This must be defined on purely intellectual grounds and one must be on one's guard against (crypto)normative influences when defining the concept.

The retroactivity concept is another example of a JL-concept. Here it is also the case that interpretations in practice of a legislative ban on retroactivity can assign to the retroactivity concept (as an L-concept) a content that is quite impossible as the content of a general retroactivity concept of the J-type.

A certain vigilance is therefore justified when handling concepts with a dual function of the kind mentioned above.

VI

There is something that could be called "the general framework of legal thinking", or why not "the basic theory of legal thinking". This consists of concepts, methods, value judgments, "principles" and other more or less conscious and thought-out habits and patterns of thought that are on the whole common to the members of the legal profession in a given society at a given time. This basic theory of legal thinking is built up and modified by means of initiatives that can be undertaken anywhere within this profession—no particular legal science subject and no special category of lawyers has a monopoly of it. Of course this theory varies from place to place and from time to time—but certain basic features of it are surprisingly similar over time and in otherwise dissimilar societies at the same time.

Jurisprudence is in a quite special relationship to such a basic theory of law.

The basic theory is never encountered in an explicit and systematized form in everyday law; it is implicit in, for example, the thinking of the legal dogmatician, the judge and the lawyer concerning legal problems, and in their linguistic behaviour. Now and then it emerges, but only as glimpses, and what it contains over and above this we are not really sure of. If we were to try to compile the basic theory of legal thinking exclusively on the basis of such fragments it would undoubtedly appear vague, disharmonious, contradictory and impoverished. Let us call such a compilation "the basic theory of legal thinking in undeveloped form".

As the present author sees it, it is up to jurisprudence, on the basis of such an undeveloped theory, to construct "a basic theory of legal thinking in developed form". Certain demands must be made on such a developed theory and these demands also determine the method of development. The procedure in question can, with Carnap, be called *explication* (or rational reconstruction) and involves, roughly speaking, the following steps:

(1) bringing the undeveloped idea from "the unconscious", concealed area out into the open air; making the implicit explicit

(2) making the idea precise

(3) placing the idea in a consistent system with other ideas

(4) improving the idea with the intention of making it more effective for its legal purpose.

It may perhaps seem a strange idea that a scientific discipline would mainly carry out purely intellectualizing functions in this way. However, the strangeness disappears if, as is correct, one sees legal science in general as a whole in which the individual subjects are separated from one another primarily for practical reasons of a division of labour kind. Part of legal science must in this connection deal with the lawyers' own problems touching on general concept formation, systematics, value formation and methodology—and because it is occupied with problems that are common to lawyers this part could conveniently be called "general jurisprudence".

Consequently, jurisprudence does not aim only at a pure analysis of the assumptions on which legal thinking rests—it also participates in building up the basis of legal thinking. Jurisprudence is both meta-law and proto-law.

The Swedish philosopher A. Wedberg says: "A science must, like a tree, grow upwards as well as down into the ground: it must gain an ever wider view of facts, but it must at the same time strive to be clear about its own fundamental concepts ... But neither can be stifled for any period of time without the science itself suffering serious damage."[29]

This applies with great force to legal science. In this essay an attempt has been made to explicate that part of the undeveloped basic theory that touches on legal concept formation. The present author has in this respect consciously adopted the abstract approach in that the concepts examined have to some extent been taken out of their contexts. In reality of course the concepts do not function in isolation but as components in legal argumentation, and their meaning must always be determined according to their function in such argumentation.

However, and this must be emphasized, the question here has not been that of explicating individual concepts—this would necessarily involve a contextual method of approach—but rather of systematizing the contexts themselves. Some contexts state the law, others are morphological, others again are methodological and so on, and the author's view is that when an explication is being given of a specific, individual concept account should be taken of the family to which it belongs. So, the abstract method of proceeding in this essay

[29] A. Wedberg, *Den nya logiken*, Part II, Stockholm 1945, p. 3.

does not conflict at all with the idea of a contextual explication—on the contrary it should be seen as a step in that direction.

Moreover, there is the fact that the two activities of concept formation and theory formation are in practice indissolubly bound to one another. As the scientific theoretician Carl G. Hempel has pointed out "concept formation and theory formation in science ... (are) so closely interrelated as to constitute virtually two different aspects of the same procedure".[30] This is not least apparent in legal science. The construction of, say, a morphological or methodological theory within jurisprudence is therefore very much a concept-forming activity.

Between concept formation and law formation there is a similarly close connection that verges on coalescence. In Western law and also in Western science the central role of concept formation is connected with the fact that, viewed historically, these two activities rest on a common ideological base—the *rationalism* which gave European culture its distinctive character in such a radical way and which has its roots in the world of ideas of Ancient Greece and Rome.

An explication cannot be characterized as true or false. On the other hand it can be more or less *adequate* in relation to (i) how faithfully it preserves the fruitful elements in the corresponding undeveloped idea and (ii) how effectively it deals with the precization and systematization of that idea in relation to the function it has—or should have—in legal thinking. A prerequirement for assessing adequacy is therefore that this function is also explicated.

Ultimately the criteria of adequacy must be determined for each individual concept. The chief aim of the systematics of the functions of legal concept formation introduced here is to provide a general framework when such criteria are being established.

But, as is noted above, this essay has a further aim. The presentation in section 4 of the types of juridical-operative concepts can thus be seen as an attempt to achieve a certain systematic overview of the broad field that constitutes the research area of jurisprudence.

[30] C.G. Hempel, *Fundamentals of Concept Formation in Empirical Science*, Chicago 1952, pp. 1 f.