THE GENERAL DOCTRINES IN PUBLIC LAW

BY

KAARLO TUORI

In this paper two types of elements are subsumed under the general doctrines of a field of law: its basic concepts (its conceptual system) and its general legal principles.[1] The distinction between these two elements can tentatively be described as follows: a conceptual system attempts to distill the basic structure of the field of law, while the general legal principles establish its central, morally-shaded normative contents. The general doctrines are often approached from the point of view of juridical decision-making, from the perspective of the authority applying the law or of the scholar of legal dogmatics. This is not the only approach possible. Even so, it may clarify matters if the distinction between the elements of general doctrines are illustrated also from this perspective: with the aid of the conceptual system one locates the juridical problem in question while the general principles set out the path for its solution in the so-called hard cases.[2]

At least within the history of learning approach the present author believes that it is fruitful to distinguish between general doctrines on the *a priori—a posteriori* dimension, even though (as will subsequently be shown) no sharp dividing line can be drawn between the two. Positive law is the watershed. General doctrines are classified as *a posteriori* when they have been developed in order to systematize a given set of positive law, when their content is based on positive law. Such systematization has at times been described as inductive.[3] General doctrines are classified as *a priori* when their purpose is to explicate the necessary preconditions and, at the same time, the limits of positive law. The first theme in the following (section 1) will be to use this distinction in an

[1] In this connection there will not be a more detailed analysis of the concept of general doctrines. However, mention will be made of the fact that, for example, Juha Pöyhönen in his study entitled *Juridisista teorioista* (On Juridical Theories), Helsinki 1981, has dissected the elements of juridical theories as follows: (1) the norm statements dealing with the set of norms that is the focus of the theory; (2) the factual underpinnings; (3) the value underpinnings; (4) the underpinning legal principles; and (5) the basic principles of the systematization directed at the set of norms that is the focus of the theory. A general picture of Pöyhönen's ideas is given in Juha Pöyhönen, "On the Role of Theories in Legal Dogmatics", *Rechtstheorie, Beiheft* 2, Berlin 1981, pp. 127–36.

[2] The characterization presented here presumably represents the self-understanding of legal dogmatics after the period of conceptual legal dogmatics. As will become apparent in the following, also legal concepts were used in conceptual legal dogmatics in the deduction of new legal norms in cases of lacunae.

[3] In particular in criticism of conceptual legal dogmatics the problems related to so-called legal induction have often been emphasized; however, these fall outside of the scope of this analysis. In Finnish legal writing these problems have been considered, e.g., by Kaarle Makkonen, *Zur Problematik der juridischen Entscheidung*, Turku 1965, pp. 195–206, and Aulis Aarnio, *Mitä lainoppi on?* (What is Legal Dogmatics?), Helsinki 1978, pp. 238–48.

analysis of the general doctrines deriving from the period of conceptual legal dogmatics in public law.

A distinctive feature of research in legal dogmatics over the past few years both in Finland and elsewhere has been a resurgence of interest in the theory of jurisprudence. There has been a lively debate also on the general doctrines of public law. This discussion has covered both elements in the general doctrines, the conceptual system and the general legal principles.

It has been argued that the traditional conceptual system especially of administrative law is going through a crisis, and an attempt will be made here to focus the discussion of this crisis by using the distinction between *a priori* and *a posteriori* elements. Some light will also be shed on the background to the discussion (section 2). In this, the arguments rest on the interpretations which have been made of a bifurcation of legal orders; the present author believes that the discussion of a crisis can be understood to a considerable extent by referring to the relationship between the traditional concepts developed from a legal state (*Rechtsstaat*) perspective and the legal evolution typical of a social state (*Sozialstaat*).

Also the position the general legal principles have had in the dogmatics of public law can be approached with the aid of the notions of the bifurcation of the legal order. The problematics of general legal principles can ultimately be reduced to the relationship between law and morals. These problematics form the last theme (section 3).

Of the theoretical traditions which have developed within the various legal cultures, this paper will focus primarily on the doctrines with a Germanic influence. This limitation can be justified by noting that Finnish research in public law is greatly indebted specifically to German prototypes.

I. THE A PRIORI AND A POSTERIORI ELEMENTS OF CONCEPTUAL LEGAL DOGMATICS

Aulis Aarnio has analysed in several connections the breakthrough of the analytical school in Finnish private law, as well as the criticism that this school has directed against the earlier paradigm of conceptual legal dogmatics.[4]

[4] The analytical school, which has been influenced by, among others, Hans Kelsen and Alf Ross, rose to a dominant position in the Finnish study of private law during the 1950s and the 1960s. The analytical school also had an influence on the study of public law; however, one cannot say that there was the same breakthrough in public law as there was in private law. On the influence of the analytical school in public law, see Matti Nieminen, "Den senare analytiska rättsteorin och den förvaltningsrättsliga forskningen i Finland" (Later Analytical Legal Theory and the Study of Administrative Law in Finland), *FJFT* 1976, pp. 266–79. As to Aarnio's interpretations of the differences between conceptual legal dogmatics and the analytical school, see Aulis Aarnio, *Philosophical Perspectives in Jurisprudence*, Helsinki 1983, pp. 20 ff. and pp. 122 ff.

According to Aarnio, the contribution of the analytical school is to be found above all in the new conceptual systematization of legal norms which, in turn, made it possible to formulate legal problems in a new and more refined manner. The breakthrough thus affected primarily the conceptual system, and not the other element of the general doctrine, the general legal principles.

In addition, the analytical school criticized the deductive use of concepts that is typical of conceptual legal dogmatics. The position of conceptual legal dogmatics is that legal concepts can be utilized to derive new legal norms, which in turn point to the solution to legal problems when there is a lacuna in the law.[5] In the opinion of the reformers, concepts cannot be used to produce solutions to problems, no matter how refined and nuanced these concepts are. Concepts can only point to and open questions; they do not contain the answers to these questions. Concepts as tools in juridical deduction on the one hand and in opening and specifying questions on the other; this is how we can characterize the tasks which conceptual legal dogmatics and the analytical school, respectively, assign to legal concepts from the point of view of legal decision-making.

But what, then, is the basis and approach in concept formation? According to Aarnio, a juridical conceptual system is always oriented towards the systematization of positive legal norms. Individual norms are systematized within general concepts, which can in turn be organized in the form of a hierarchical set. Aarnio writes that "every attempt at systematization is based on the legal order in force".[6]

Thus, it would appear that concept and system formation in both conceptual legal dogmatics and the analytical school is *a posteriori* from the point of view of positive law. When this position is adopted, the concept formation of these two school can be distinguished only on the conceptual realist—conceptual conventionalist axis.[7] The representatives of conceptual legal dogmatics are conceptual realists: according to them, legal norms and institutions were linked to one another in a certain necessary way that jurisprudential concept formation tried to establish. The analysts, in turn, are conceptual conventionalists: legal concepts are creatively developed by the researcher for systematization pur-

[5] The deductive method that is typical of conceptual legal dogmatics is also clearly evident in Paul Laband's methodological manifesto. *Infra*, p. 145.

[6] Aulis Aarnio, *Mitä lainoppi on?* (footnote 3, *supra*), p. 79.

[7] A second difference that, however, is not of interest here is connected with the concept of positive law. For conceptual legal dogmatics, especially for its early representatives, the concept of positive law was much wider than for the representatives of the analytical school. For example, for Puchta positive law was not merely—or even primarily—statutory law: also the legal convictions of the people and so-called scientific or jurist's law were sources of law. In time, to be sure, also the positivism of conceptual legal dogmatics became more and more clearly the positivism of the written law; this development was hastened by the codification of legislation, which culminated in private law in the BGB.

poses. The present author would like to comment on this interpretation: it is submitted that the system of conceptual legal dogmatics in both private and public law also contains elements that are to be characterized as *a priori* from the point of view of positive law; the work of the pioneers in conceptual legal dogmatics was directed specifically at the *a priori* side of the conceptual system.

It is true that the methodological manifestos of the representatives of conceptual legal dogmatics often emphasize the *a posteriori*—inductive nature of concept formation in legal dogmatics. In the field of public law, for example, we may cite Paul Laband's famous description of his method in the foreword to the second edition of his main work: "The scientific task of the dogmatics of a field of positive law is ... the construction of legal institutions, the reduction of individual legal rules to more general concepts and, on the other hand, the deriving of the conclusions arising from these. Aside from knowing and mastering the legal rules in force, this is a pure intellectual thought process. There is no other tool than logic in carrying out this task ...".[8] Also Robert F. Hermanson characterized juridical concept formation in the same way in his article presenting the new methodology in German state law (*Staatsrecht*), published in 1878–1879.[9]

In support of the *a priori* thesis in private law one might refer to the historical fact that the system of conceptual legal dogmatics often connected with the name of C.F. Puchta had been created much earlier than the codification of German private law in the BGB. However, this does not appear essential; for the early representatives of conceptual legal dogmatics, positive law was not fully discharged in legislation.[10] It is more important to note another feature which, in addition to realism, is typical of the view that conceptual legal dogmatics has of the nature of legal concepts; also Aarnio has paid attention to this feature.[11]

Conceptual legal dogmatics emphasized the national basis of law, in particular in drawing the borderline with rational natural law. However, according to the representatives of conceptual legal dogmatics, law contains not only an element that is nationally specific and changing, but also an element that is unchanging and generally valid. This latter element was focused specifically on the general legal concepts that formed the tip of the conceptual pyramid. It

[8] Paul Laband, *Das Staatsrecht des Deutschen Reiches*, vol. 1, 2nd ed. Freiburg 1888, p. XI.

[9] Robert Hermanson, "Om juridisk konstruktion i statsrätten" (On Juristic Construction in State Law"), *FJFT* 1878–1879, pp. 1–32 and 457–516. This article has an important position in the history of the theory of Finnish public law; it introduced the methodology of conceptual legal dogmatics into Finland.

[10] On Puchta's views of the so-called sources of origin (*Enstehungsquelle*) of law, see C.F. Puchta, *Cursus der Institutionen*, vol. 1, Leipzig 1850, pp. 18 ff. In the Finnish research, Puchta's views on law and legal science have been excellently presented by Niilo Jääskinen, *Historiallisen koulun oikeustiedekäsitys* (The Historical School's Conception of Legal Science), Helsinki 1983.

[11] Aulis Aarnio, *op.cit.*, p. 241.

was also these most general legal concepts that formed the *a priori* elements in conceptual legal dogmatics.

In Puchta's system, the concept of liberty constitutes such an *a priori* point of departure. For Puchta, man was not only part of nature, but also an intellectual being, a person typified by an ability to be free and, as part of this, by a free will. It is this ability to be free that makes man a subject of law, and because of this, liberty is also the basic legal concept.[12] In the Finnish research, the *a priori* nature of Puchta's system in respect of positive law has been emphasized by Juha Tolonen in an article published in 1973.[13] According to Tolonen, this system not only attempted to conceptualize (systematize) positive law, it also tried to reduce what is, in a sense, the necessary *a priori* framework of positive private law. For Tolonen, the system based on the concepts of liberty and the freedom of will is "a comprehensive view of what is necessary in juridical phenomena and at the same time it is basically an answer to the question of why it is necessary".[14]

Let us return to Laband's methodological manifesto quoted above. Laband was very much a dogmatician of positive law. In his main work, the German Constitution of 1871 is the focus of his conceptualization and systematization. In the above citation Laband speaks specifically of the "task of the dogmatics of a field of positive law". However, the basis of the system of conceptual legal dogmatics also in public law was developed more or less independently of positive law, in a way that was *a priori* in respect of positive law. This basis was laid by Carl Friedrich von Gerber in his work on the foundations of state law, published in 1865.[15]

Gerber's goals in the theory formation of state law corresponded to Puchta's system ideal. Gerber sought an independent and integrated conceptual system for state law where all of the parts would be derived from one overriding idea. As was the case with the system of private law, this overriding idea was free will. However, the difference when compared with private law was that this free will in state law was borne by the State as a legal subject, as a juristic person. In regard to private law, there was also a difference in the focus of the free will, forming the basis for the system: the free will of the State was directed at persons; there was a characteristic element of domination. For example, the

[12] C.F. Puchta, *op.cit.*, pp. 3 ff.

[13] Juha Tolonen, "Om begreppet rättshandling inom det traditionella rättssystemets ram" (On the Concept of the "Juristic Act" within the Framework of the Traditional Legal System), *FJFT* 1973, pp. 340–64.

[14] Tolonen, *op.cit.*, p. 348.

[15] Carl Friedrich von Gerber, *Grundzüge eines Systems des Deutschen Staatsrechts*, Leipzig 1865. The present author has previously analysed Gerber's system in Kaarlo Tuori, *Valtionhallinon sivuelinorganisaatiosta* (On the Organization of Supplementary Bodies in State Administration), vol. 1, Vammala 1983, pp. 12–19.

doctrine of State organs, which the expression and concretization of the will of the State required, was developed from the basic idea of the system, the free will that belongs to the State as a juristic person.

As was the case with Puchta's system, Gerber's theory of state law rested on what the present author would term an *a priori* foundation. It was not the result of induction on the basis of positive law in the sense referred to in the above citation from Laband. Gerber outlined the answer to the question of how one should see the State in a legal sense in order for legal regulation of the State to be possible in general. When interpreted in this way, the doctrine of the juristic personality of the State is not a description of positive public law regulation, but instead the explication of the preconditions of such regulation.

If this interpretation is correct, Gerber was in fact quite close to the point of departure of the neo-Kantian theory of state law, although references to the Kantian theory of knowledge are absent from Gerber's work. It was not until Georg Jellinek that the (neo-)Kantian approach was explicitly outlined.

For Jellinek, the main question in state law theory was not the legal nature of the State or the State as a legal phenomenon, but rather how one should conceive of the State juridically ("Wie ist der Staat juristisch zu denken?").[16] This question was very much an epistemological one: the problem was how the synthetisizing approach should understand the juristic nature of the State in order for the juristic assessment of State phenomena to be possible in general—no matter whether the assessment was being made by a scholar or, for example, the legislator. From Jellinek, in turn, it was just a step to Kelsen's pure theory of law with its Kantian underpinnings, a theory that was developed specifically—as perhaps should be noted here—on the basis of the problems of state law theory.[17]

If some liberties are taken in summarizing the history of theory and in overlooking the special features of the different countries, the rational theory of natural law can be considered the stage preceding conceptual legal dogmatics in the development of the general doctrines. The essential difference between these two stages is often simplified by saying that conceptual legal dogmatics

[16] Georg Jellinek, *System der subjektiven öffentlichen Rechte*, Tübingen 1905, p. 21. The most thorough presentation by Jellinek of his points of departure in theory and methodology is to be found in his main work, *Allgemeine Staatslehre*, 1st ed. Berlin 1900. The present author has previously made a more detailed analysis also of Jellinek's views; see Kaarlo Tuori, *op.cit.*, pp. 24–34.

[17] The development of the pure theory of law began with Hans Kelsen, *Hauptprobleme der Staatsrechtslehre entwickelt aus der Lehre vom Rechtssatze*, Tübingen 1911. In his foreword to this work, Kelsen emphasized his debt of gratitude to Jellinek in the following words: "Almost every page of this book is a demonstration of the immense influence that he has had on the development of the theory of the State. Also where I have come to conclusions different from those he has taught, I have done this primarily by following the roads he has opened and on which he has walked as the unsurpassable master." See Hans Kelsen, *op.cit.*, p. XIII.

departed from the theory of natural law in taking positive law as its given starting point. An analysis of the *a priori* aspects of conceptual legal dogmatics shows that this view is, at the very least, one-sided. Just as did the theories of natural law, conceptual legal dogmatics—both in private and in public law—also contained aspects that are *a priori* in respect of positive law. The distinction was instead in what elements of the general doctrines these traditions in general were interested in their theory formation. The rational theory of natural law formulated *a priori* legal principles into the yardstick and the goal of positive law. Conceptual legal dogmatics, in turn, tried to explicate the *a priori* conceptual system presupposed by positive law.

The bypassing of legal principles with *a priori* contents was connected with the tendency of conceptual legal dogmatics to make law and the legal conceptual system an entity independent of, *inter alia*, morals. The distinction that, for example, Puchta made between law and morals followed the Kantian distinction between morality and legality. The law set out the outer limits to the freedom of choice, while morals concerned an internal choice based on the sense of obligation; the only connection between law and morals was that the law gave individual persons the possibility of making moral choices.[18]

The legal principles formulated by the rational natural law theory, in its turn, anchored the contents of law firmly in morals; in fact, these principles can also be understood as moral principles. Thus, where conceptual legal dogmatics separated law from morals, the theory of natural law brought them together. But—once more—in regard to the *a priori* elements even in conceptual legal dogmatics, this separation from morals did not lead to the system discharging itself into positive law. This is true even if we follow Puchta in holding that positive law exceeds the limits of written law.

In addition to their *a priori* elements, the general doctrines deriving from the golden period of conceptual legal dogmatics undoubtedly contain elements that, from the point of view of positive law, can be termed *a posteriori*. Taking another example from Laband, the doctrine of the dual concept of law associated with Laband's name, and the allocation of norm giving authority between the legislative and the executive that was defined on the basis of this doctrine, were developed on the basis of positive law rules of competence.[19] Similarly,

[18] C.F. Puchta, *op.cit.*, p. 7.

[19] In his conception, Laband distinguished between the formal and the substantive concept of law. According to Laband, all decisions made and promulgated in accordance with the legislative process ordained by the Constitution are formal laws, regardless of their content. Substantive laws have two characteristics: they should be ratified for observance (which distinguishes them from customary law) and they should contain legal rules (*Rechtssatz*). A characteristic feature of legal rules, in turn, is that they regulate the relationship between various subjects of will. The substantive concept of law established the field of the norm-giving power of the legislature: substantive laws must be given through formal laws or on the basis of a formal law. See Paul Laband, *op.cit.*, pp. 1 ff. and pp. 61 ff.

the general doctrines in administration law formulated in Germany at the end of the 1800s can be termed *a posteriori* doctrines systematizing positive administrative law; the major credit for the development of these doctrines belongs to Otto Mayer.[20]

In order to find the key to Gerber's opinion of the distinction between *a priori* and *a posteriori* elements, we might turn to the line that he has drawn between state law and administrative law. Only those questions that directly deal with state power, with the will of the State, belong to the field of state law. First, what can a State want, where are the limits of the power of the State? Secondly, through what organs does the State express its will? And thirdly, in what forms does the State express its will? State law pays attention to administration only in asking through what organs and in what forms the State can express its will. On the other hand, the content of administrative activity, what the administrative organs can and should do, is no longer part of the domain of state law, but of administrative law.[21] State law as a field of inquiry is not reduced merely to its theoretical part, but it is obvious that it is the theory of state law, its general doctrines that form the *a priori* framework of Gerber's system. On the other hand, it seems that Gerber, too, would hold that the general doctrines of administrative law have an *a posteriori* nature; they seek to systematize positive, constantly changing law.

It would be tempting to analyse more closely the *a priori* and *a posteriori* elements of the general doctrines deriving from the period when conceptual legal dogmatics was in the ascendant. Here, however, only some indicative questions will be presented. In an analysis of these elements, could we utilize an approach that divides legal phenomenon into levels following different rates of change—legal form (*Rechtsform*), legal ideology (*Rechtsideologie*) and law form (*Gesetzform*)?[22] Is it true that the *a priori* framework of the system in conceptual legal dogmatics seeks something of the permanent foundation of modern law, the legal form, while with reference to their *a posteriori* elements the general doctrines focus on regulations on the law form level?

If the answer to these questions is in the affirmative, if we adopt, in accordance with what is suggested here, the orientation of general doctrines to

[20] Otto Mayer's major work was *Deutsches Verwaltungsrecht*, vol. 1, Leipzig 1895, and vol. 2, Leipzig 1896.

[21] Carl Friedrich von Gerber, *op.cit.*, pp. 3 ff. and pp. 232 ff.

[22] These terms are used in the following sense: "legal form" to refer to the permanent basic structure of a historical type of law, "legal ideology" to refer to the collective and value-laden legal notions, and "law form" to refer to regulations by positive law. See Kaarlo Tuori, *op.cit.*, pp. 74–77. The present author's proposal regarding levels of law has been developed on the basis of Marxist social theory; the main source of inspiration has been Sakari Hänninen's work, *Aika, paikka, politiikka* (Time, Place, Politics), Helsinki 1981. However, it would seem that a separation of legal phenomena into levels with different rates of change along the lines presented here does not necessarily require the acceptance of Marxist theory.

the different levels of modern law, it is at the same time possible to specify the *a priori* qualifier used here. Thus, *a priori* would be *a priori* only within an historical legal type that we might call modern law. Furthermore, this specification would appear to correspond to at least Gerber's assumption. This can be seen in that Gerber emphasized that the conceptual system he outlined is valid only in modern society, not in a society where feudal relationships still prevail.[23] This is, however, not the place to embark on an assessment of whether or not Gerber's theory of state law is valid even when its focus is limited in this way, whether or not it actually catches something essential of the permanent basic structure of modern law.[24]

In addition to a possible separation of the areas of focus of the general doctrines, the mutual relationship of, and interaction between, the *a priori* and *a posteriori* elements of these general doctrines would call for a more exact analysis. One could tentatively argue that the *a posteriori* elements are based not only on positive law but, in a sense, also on *a priori* concepts. Thus, for example, the conception of substantive law contained in Laband's dual concept of law rests on the notion of law in conceptual legal dogmatics that is interpreted here to be *a priori*.[25] And as Laband defined the norms regulating the internal relationships within State organization (the administration) as lying outside the concept of substantive law, the theoretical point of support was the doctrine of the State as one undivided juristic person. In the general doctrines of administrative law, the interactive relationship could be studied, for example, by analysing to what extent the concept of administrative act (*Verwaltungsakt*) is based also on state law, on the *a priori* elements of its general doctrines. Even in legal dogmatics, one can scarcely consider the *a posteriori* concept formation a fully independent phase or form of research; research in legal dogmatics is always based also on what is referred to here as *a priori* presuppositions.

II. ON THE CRISIS OF THE GENERAL DOCTRINES IN ADMINISTRATIVE LAW

The current discussion on the general doctrines in public law—especially on the conceptual system of administrative law—is coloured at least in the areas

[23] Gerber's sensitivity to the historical limits of his analysis is clearly apparent in von Oertzen's study analysing the whole of Gerber's works, including his work on private law. See Peter von Oertzen, *Die soziale Funktion des staatsrechtlichen Positivismus*, Frankfurt am Main 1974, esp. pp. 170 ff. An obscuring of the historical validity of theory can be considered a typical feature of later German development in state law, which was based on Gerber's theory and extended through Laband and Jellinek to Kelsen.

[24] Elsewhere, the present author has leaned towards an affirmative answer to this question; see Kaarlo Tuori, *op.cit.*, pp. 35–70.

[25] *Supra*, footnote 19.

influenced by the Germanic legal tradition by the belief that the traditional set of concepts is in a crisis. However, the crisis assertions and reform demands have been directed above all at the elements of the conceptual system that can be termed *a posteriori*. As a matter of fact, it can be claimed that in the recent discussion there has been very little interest in the *a priori* elements of the system that has been handed down from the time when conceptual legal dogmatics was in the ascendancy, or at least these elements have not been regarded as problematic. The reason for this may be the following. The need to explicate the *a priori* conceptual points of departure of positive law was the greatest during the breakthrough period when modern state law was being formed; since then, there has no longer been any reason to problematize what have been regarded as self-evident starting points that even today can perhaps be held to be valid at least up to a certain limit.

The main idea in the crisis theses has been that concepts developed from a legal state point of view cannot deal with the new phenomena in the administrative law of a social (welfare) state. The traditional set of concepts is based on an opposition between the citizen and the State (the administration); theory formation is guided by the problems of the legality of administration and the legal protection of the individual. Such an approach stresses the executive function of administration in relation to the legal norms regulating it. At the same time, it focuses attention on the administrative activity that intervenes to restrict the legal position of the citizen (in the German terminology, *Eingriffsverwaltung*). The central concept in the general doctrines of administrative law developed from the legal state point of view is the "administrative act" (*Verwaltungsakt*). According to the standard definition, an administrative decision is a unilateral and concrete administrative measure that directly affects the legal position of an individual subject.

According to the critics, the orientation in this set of concepts easily leaves the active and goal-oriented influence that administration has on societal processes and relationships outside of the scope of legal dogmatics. The same danger applies also, for example, to the internal relationships of the administrative organization and to the stages of the administrative process that precede the administrative decision (the giving of an administrative act).

In the development of administrative law in a social state, the active and goal-oriented activity of administration, activity that goes beyond the mere executive function, has been emphasized in particular in the field of the so-called public services (*Leistungsverwaltung*); for example the planning systems that have been adopted in administration and that at least in Finland have typically concerned the welfare state functions, clearly reflect the changes that have taken place in the role of administration. The increasing complexity of administrative decision-making has emphasized the importance of the stages

in the administrative process that precede the final decision. The significance of the internal relationships of the administrative organization has, in turn, grown along with the expansion and specialization of the administrative machinery. Thus, it has been argued that the traditional set of concepts that is limited to the legal state point of view applies only to a constantly shrinking portion of the activity and organization of administration.[26]

The backwardness of the general doctrines has been considered to be a burden also for the development of legislation. For example, Niklas Luhmann holds that the main drawback with the traditional conceptual system is that it is tied one-sidedly to the perspective of the application of law; this, of course, is linked to the emphasis on the legal protection of the individual that is characteristic of the legal state approach. A set of concepts with a legal policy orientation has not been developed to support legislative work. The purpose of such concepts would be to make it possible to assess different solutions to problems on the basis of experience, to compare the experience derived from different fields of law; briefly, to assist the process of learning required by legal evolution.

It is in particular the legislative development in public law that is characterized by *ad hoc* regulations that attempt to correct defects and deficiencies on a case-by-case basis. Legislation is not guided by a set of concepts with a legal policy orientation, concepts that would make comprehensive control of legislative work possible. In Luhmann's opinion the main bottleneck in legal evolution is at present the backwardness of the dogmatic conceptual system; the conceptual system does not meet the demands of the positiveness that is typical of modern law. Instead, it is a barrier to the utilization of the potential created by the positiveness of law, to the raising of the system rationality of law.[27]

The demands for reform of the conceptual system of administrative law, however, have remained on the level of criticism of the traditional concepts. To the best of the present author's knowledge there have not been any successful attempts to meet the challenge by creating an established set of concepts for the dogmatic-systemic ordering of the administrative law of the social state. Could it be that this is because of some special features in public law legislation

[26] A representative although somewhat dated overview of the German discussion is available in *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer*, vol. 30, Berlin 1972. This publication contains the papers and discussion from the 1971 meeting of the association for German researchers in state law. The theme was the dogmatics of administrative law and the modern tasks of administration. Olli Mäenpää's intervention, "Kaksi hallinto-oikeutta: merikoskelainen hallinto-oikeus ja hyvinvointivaltio" (Two Forms of Administrative Law: Administrative Law à la Merikoski and the Welfare State), *Hallinnon tutkimus* 1/1983, pp. 1–20, should be mentioned as a Finnish contribution.

[27] Niklas Luhmann, *Ausdifferenzierung des Rechts*, Frankfurt am Main 1981, pp. 30 f. See also Niklas Luhmann, *Rechtssoziologie*, Reinbek bei Hamburg 1972, pp. 325–33.

that make it difficult to systematize it conceptually with the tools of legal dogmatics?

The reasons for the unsatisfactory dogmatic systematization of administrative law have been sought, e.g., in the multitude of enactments in administrative law as well as in the heterogeneity of the subjects with which they deal. Reference has also been made to the rapid pace of change in administrative law and the degree to which the enactments are tied to specific situations. Furthermore, it has been noted that the contents of administrative law, more than any other field of law, are dependent on political and expediency points of view. It is also in part due to these substantive features of administrative law that proposals for conceptual reform have often been coupled with a demand for a consideration of the results of empirical social sciences, for example of organization research or the policy analysis current in administrative science; the call has been for bringing even legal dogmatics closer to the social sciences.[28]

Interpretations of the evolution of modern law have often argued that there is what amounts to a bifurcation in the legal order, a differentiation of the legal order into two essentially different sectors. It is submitted that the discussion on the bifurcation of law helps us to shed light also on the background to the present conceptual difficulties in administrative law.

In a way the most radical position in the discussion is represented by those who on the whole deny that the administrative law set of norms has a specific legal nature. This view may be illustrated with two examples which are representative at least in the sense that the starting points in social theory of those voicing these positions, Eugen Paschukanis and F.A. Hayek, are far removed from one another.[29]

According to Paschukanis, the juristic content of administrative law is limited merely to securing the rights of the citizens on the one hand and the administrative hierarchy on the other. Otherwise, in his opinion, administrative law is merely a mixed rag-bag of technical rules and political recipes.[30]

Paschukanis' position is based on the distinction that he draws between legal norms and technical rules. According to Paschukanis, the legal nature of regulation requires that the regulated relationship contains an opposition of

[28] Such demands were presented, for example, in the papers presented by Otto Bachof and Winfried Brohm at the meeting of German researchers in state law mentioned above. See *supra*, footnote 26.

[29] In respect of Paschukanis, the present author has used as the source a German translation of his main work, Eugen Paschukanis, *Allgemeine Rechtslehre und Marxismus*, Frankfurt am Main 1969 (1929). This is also available in an English translation, Evgeny B. Pashukanis, *Law and Marxism: A General Theory*, London 1978. Hayek's main ideas in respect of legal science, in turn, are contained in F.A. Hayek, *Law, Legislation, and Liberty*, London and Henley 1982; this originally appeared as three separate volumes.

[30] Eugen Paschukanis, *op.cit.*, footnote 11, pp. 81 f.

interests. If there is no such opposition, if instead the parties in the relationship share a common goal, then the rule is not a legal but a technical one. Paschukanis uses as an example the regulation of rail traffic. For example, the norms that deal with the traffic operator's liability are legal; the rules that are merely designed to ensure the smoothness of traffic are technical.[31]

For Paschukanis, the original domain of law, of the legal form, is in private law. Paschukanis derives the legal form both logically and genetically from relationships of commodity exchange. It is precisely in commodity exchange that one can find the opposition of interests that he deems the criterion of legal form. In the field of regulation of public law the legal form is, in a way, borrowed from private law, to the extent that the regulation can in general be considered legal on the basis of the interest criterion.

For Paschukanis, the point of departure in social theory lay in Marxism. F.A. Hayek can, in turn, be termed an extreme liberal. Lying in the background of Hayek's dichotomy of norms is a division of social orders into two, into spontaneous self-generating orders, on the one hand, and into organizations, orders that are deliberately created for a certain purpose, on the other.[32] A model example of what Hayek considers a spontaneous order is the market economy system. In fact, Hayek does not even examine any other spontaneous orders; Hayek's liberalism is very much economic liberalism.

Hayek terms the norms that guide spontaneous orders "rules of just conduct". The norms that regulate organization orders, in turn, are "rules of organization". Originally, only the norms that belonged to the first group were called law. Rules of organization were integrated into the same concept only after the political development that began with the absolute monarchy stage led to the concentration of the power to give both types of rules to the same body, the legislature.

Hayek himself would prefer to use the term "law" to refer only to the rules of just conduct. He argues that the expansion of the concept to include rules of organization has led, for example, to a hollowing of the contents of the principle of the rule of law, to its transformation into what is merely a demand for legalism.[33]

The essential difference between the rules of just conduct and the rules of organization lies in their different goal orientation. The rules of just conduct are not directed at any concrete and specific goals. They only make it possible for individuals to seek within their limits goals that they themselves have set; they can follow plans that they themselves have created. If it is possible in general to use the concept of goals in connection with such rules, then we could

[31] Paschukanis, *op.cit.*, pp. 55 f.
[32] F.A. Hayek, *op.cit.*, vol. 1, pp. 36 ff.
[33] Hayek, *op.cit.*, vol. 1, pp. 72 ff.

say that their only goal is to help the activity in spontaneous order by ensuring the general framework of this order. The demands for abstractness, generality and permanence, which are also characteristic of the rules of just conduct, are tied to this independence from concrete goals.[34]

The rules of organization, in turn, are oriented towards concrete and deliberately established specific goals. It is not enough for them to create free spheres of action for individuals within which they would be allowed to decide on their own goals. These rules determine tasks for the individuals to fulfil, tasks that depend not only on organizational goals but also the position of each individual within the organizational order. Since the rules of organization are tied to concrete and specific goals, they cannot fulfil the criteria of abstractness, generality and permanence that characterize the rules of just conduct.

Hayek's dichotomy of rules follows in general the borderline between private law and public law; in this, also criminal law is included in private law, in accordance with the Anglo-American approach. The norms of private law are typically rules of just conduct; public law, in turn, is primarily composed of rules of organization. According to Hayek, the development over the past hundred years has led to an increase especially in the public law rules of organization. As a full-blooded (economic) liberal Hayek is worried over the danger that the system of rules of just conduct will gradually change into a system of rules of organization.[35]

Public law regulation is often justified by referring to social goals, to demands for social justice. However, for Hayek the concept of social justice is an empty one. According to him, the qualifier "justice" can only be attached to the behaviour of an individual and not to the state of society. Hayek argues that the expansion in the public law rules of organization in the name of social justice is leading to a totalitarian planning and command society that destroys the freedom of the individual.[36]

In a way, both Paschukanis and Hayek argue that law is withering away. However, while for Paschukanis the replacement of law by technical rules oriented towards common goals is an ideal state of society, for Hayek such a development is more a horror story in social development. However, these value-laden differences of interpretation are not of interest to us in this connection. It is more important to note that both theoreticians, and on the basis of similar arguments, conclude by dividing the rules that we commonly call law into two essentially different groups, of which only one is law in the proper sense of the term.

Both Paschukanis och Hayek use a substantive, content-oriented concept of

[34] Hayek, *op.cit.*, vol. 1, pp. 98 ff.
[35] Hayek, *op.cit.*, vol. 1, pp. 131 ff.
[36] Hayek, *op.cit.*, vol. 2, pp. 62 ff.

law. If the legal order is defined by formal criteria like the source of the norm, the thesis of the bifurcation does not lead to such radical conclusions, to the shutting off of most norms in administrative law outside of what is called law. A few examples of more "moderate" versions of this thesis will be given.

Already in Max Weber's distinction of legal regulations into those following formal and those following substantive rationality one can see the kernel of the notion of an opposition between two different types of regulation characteristic of the present legal order. However, as Weber's analysis was written at the dawn of the development towards the social state, it was more a harbinger of what was to come than a description of the situation prevailing at the time.[37]

In comparison, Jürgen Habermas' distinction is specifically intended to serve in the analysis of the social state and the problems it has caused. His differentiation of legal norms into law as an institution (*Recht als Institution*) and law as a medium (*Recht als Medium*) has close associations with the moral connections of law. We shall return to this in greater detail later on, when dealing with the general legal principles.[38] Also Ronald Dworkin's principle, policy distinction, which can also be connected to the discussion on the bifurcation of law, is concerned with the relationship between law and morals. For Dworkin, policy is a standard which establishes certain economic, political or social goals for decision-making. Principles, in turn, are standards which are grounded on moral considerations and not on the need to secure or promote a political, economic or social state.[39] In Habermas' distinction, law as an institution is primarily based on what Dworkin refers to as principles, while when policy considerations are emphasized we are dealing with law as a medium.

In the Nordic discussion Lars D. Eriksson has earlier analysed the legal order in terms of regulations following the logic of exchange value, and those following the logic of use value. In his most recent analysis he speaks of the

[37] According to Weber, formal rational law is one of the special features of Western social development that made the breakthrough of the capitalist market economy possible. The law that is characteristic of modern capitalist society is formal in its closed nature and its self-sufficiency. The premises for legal decisions are to be found in law itself; the law does not refer to sets of norms lying outside of its scope, such as morals or religion, nor to political or utilitarian arguments of benefit. The law establishes for private economic actors the external rules of the game that fulfil the criteria of clarity and predictability and that make it possible for these actors to behave in a strategic rational manner. Substantive rationality, in turn, injects into legal decision-making standards and sets of norms that lie outside of law as well as political and utilitarian arguments. Weber was concerned over the materialization process of law: there was a danger that the formal-rational nature of law that was demanded by the market economy would break down. See Max Weber, *Wirtschaft und Gesellschaft*, Tübingen 1980 (1922), esp. pp. 387 ff. Weber's sociology of law is presented, e.g., by Alan Hunt, *The Sociological Movement in Law*, London and Basingstoke 1978, pp. 93–133.

[38] *Infra*, pp. 160 ff.

[39] Ronald Dworkin, *Taking Rights Seriously*, London 1978, pp. 22 f. For a comprehensive presentation of Dworkin's theory of law, see also his recently published work, *Law's Empire*, London 1986. The distinction between principle and policy is critical also in this work.

conflicting elements of a legal order based on the ideology of private autonomy on the one hand and the ideology of social justice on the other.[40] Also in the background of Håkan Hydén's classification of norms we can see the view that there is a bifurcation in law. The types of rules that he calls assessment and goals—means norms represent a new type of goal-oriented regulation that has accompanied the development of the social state.[41]

The bifurcation theses have somewhat different points of departure and criteria. One distinguishing factor is related to the significance attached to moral considerations. Thus, Habermas and Dworkin base their differentiations of the legal order on the varying connection that legal norms have with morals and a morals-based legitimacy. For Habermas, for example, regulations that are independent of the morals basis become more common in the social state stage of development. For Weber, Eriksson or Hydén, in turn, a characteristic feature of the oldest layer in the modern legal order, norms that adhere to the Weberian formal rationality, is its separation from the moral order. In this, they are in fact very near the notion of conceptual legal dogmatics.

The differences in interpretation can be explained at least in part by considering the sector of law that is being analysed in each case. These latter scholars who have emphasized independence from morals presumably have been keeping in mind primarily the liberal framework of regulation of economic activity, the market. The difference in respect of, for example, Habermas, becomes smaller when we remember that also in Habermas' scheme economic activity is part of the System that has grown independent of morally-laden relationships.

However, to return to the main theme, in outlining the background to the present conceptual difficulties in administrative law it is important to emphasize the common elements rather than the differing elements in the various interpretations. It would appear that Paschukanis and Hayek, as well as those presenting a "moderate" interpretation, are agreed on one feature that is characteristic of the layers that do not belong to "proper" law or represent the new development in the legal order: the fact that they are bound to specific goals.

According to both Paschukanis and Hayek, "proper" law regulates the behaviour of independent subjects towards one another: Paschukanis estab-

[40] Lars D. Eriksson, "Utkast till en marxistisk jurisprudens" (Draft for Marxist Jurisprudence), *Retfærd* 11/1979, pp. 40–54, *Marxistisk teori och rättsvetenskap* (Marxist Theory and Legal Science), Helsinki 1981, pp. 108–10, "Till teorin om den reflexiva rätten" (On the Theory of Reflexive Law), *Samfunn, Rett, Rettferdighed, Festskrift till Torstein Eckhoffs 70-årsdag*, Otta 1986, pp. 281–92.

[41] Hydén has categorized legal norms as constitutive, procedural and action norms. In this last category, he has distinguished between obligation norms, (interest) assessment norms and goal-means norms. Håkan Hydén, *Ram eller lag?* (Framework or Law), Stat-kommunberedningen Ds C 1984:12, Stockholm 1984.

lishes an opposition of interests as the presupposition of the legal form; Hayek, in turn, speaks of the definition by law of the area within which individuals are free to act. In this, both theoreticians are very close to the notion of law adopted by conceptual legal dogmatics, a notion that also Laband used in the definition of substantive law in his dual concept of law: law (in the substantive sense) regulates the relationships between different subjects of will.[42]

In one way, however, goal-bound regulation terminates the independence of the subjects: a goal that has been established outside of the subjects brings them together to carry out the same orientation of will, to promote the same interests.

It is presumably now possible to formulate an answer to the question concerning the reasons that have led to what is called the crisis in the traditional concepts of administrative law, to their inability to systematize conceptually the administrative law of a social state. The set of concepts created from the legal state point of view was specifically based on the independence of subjects (of citizens and the administration or the state as a juristic person) and on at least a potential opposition of interests, that is, on the feature that Paschukanis and Hayek have established as the precondition for the legal nature of regulation. The administrative law of the social state, however, does not attempt so much to delineate the area within which citizens and administration may act freely. Instead, it seeks goals that, in the way described here, end the mutual independence of the subjects of the relationships being regulated, no matter whether these subjects are merely the authorities or also private individuals. The legal state conceptual system is not able to systematize legislation that is goal-bound or, to use Dworkin's terminology, policy-oriented.

In connection with goal-bound regulation it is perhaps possible to speak (with parallels to Paschukanis' thesis of the withering away of law) of the loss or at least decrease of the autonomy of the legal order; a corresponding interpretation is contained in Habermas' notion of law as a medium that is entangled with the mechanisms that coordinate the actions in the subsystems of public administration and the economy, power and money. To use a Weberian definition, it is a question of goal-rational regulation where the goals are determined either instrumentally by objective social laws or strategically, as a result of compromises between interest groups.[43] Especially law drafting

[42] *Supra*, footnote 19.

[43] Elsewhere, the present author has made a distinction between three ideal procedural forms in decision-making in the State organization. According to the discursive method, an attempt is made to come to a decision and the consensus it requires through open and rational argumentation and debate, discourse. Also the public at large outside of the decision-making forum is supposed to participate in the discourse. The strategic method, in turn, is based on an attempt to reach a

and legislative work following the instrumental model become fused in a tendentious manner with social planning that utilizes the empirical social sciences. In this we can also see the background to the demands that also legal dogmatics should be brought closer to the (empirical) social sciences or that jurisprudential concepts should have a legal policy orientation (Luhmann).

The definition of law may be considered a semantic question; in the opinion of a proper conceptual conventionalist, it is undoubtedly a matter of agreement whether we define law substantively, on the basis of its contents, or formally, with reference to the source of norms. In the opinion of the present author, one of the merits of Hayek's analysis is that he shows the one-sidedness of such an interpretation, for example in his analysis of the rule of law principle.

However, the theme in this paper does not require that we take a position for example on the substantive characteristics that Paschukanis and Hayek have given to "proper" law and that are, as noted above, quite close to those adopted by conceptual legal dogmatics as well as by Laband in his definition of substantive law. The purpose has merely been to illustrate, through the conceptions of the bifurcation of law, the background to the current discussion on the conceptual system of public law, especially administrative law. Hopefully the essence of the matter has become clear: The complex of norms that we normally, with reference to their sources, call the legal order contains two types of regulation that differ from one another in one important respect. On the one hand, it is a question of the determination of the tangential areas of activity of different subjects. On the other, it is a question of combining the activities of these subjects through externally defined goals. The traditional set of legal concepts has been outlined from the point of view of norms of the first type. The central reason for the present difficulties of the conceptual system, in turn, is the increase in norms of the latter type.

The scope of this explanation may perhaps be expanded to private law. Also here, the current problems in the general doctrines are due at least in part to the influx of goal-bound regulation into the traditional preserve of private law. To a wide extent, it is specifically this that is involved when we speak of an obscuring of the borderline between private and public law.

Without taking up a position on the definition of law, the present author would like to make one more comment on the study of legal dogmatics and in particular on the general doctrines of public law. Even if we were not to go so far as to exclude goal-bound norms from the concept of law, the tasks of the

compromise among interests. The instrumentalist method rests on the goals and means approach. In this last method, the goals are not based as much on group interests as on objectively construed social laws. See Kaarlo Tuori, "Oikeusnormien asettamismenettelyt ja oikeuden kriisitendenssit" (The Procedures for Establishing Legal Norms and the Crisis Tendencies in Law), *Politiikka* 1985, pp. 189–203.

study of legal dogmatics can still be seen to be more limited in connection with such norms than is the case in the analysis of norms that fit in the legal state mould. It may be possible that there is no sense in trying to use the tools of legal dogmatics to pin down the entire gamut of legislation in the social state; it may be that this legislation simply will not submit in full to legal dogmatic systematization. Could it be that legal dogmatics is indelibly bound to concepts that assume the separateness of the subjects? Could it be that legal dogmatics as an independent discipline cannot contribute anything to the administrative law of a social state other than its legal state perspective?

That the answer to these questions is an affirmative one is also indicated by the fact that attempts to create an established set of concepts that could deal with the new phenomena of the administrative law of the social state have not succeeded, despite the continuous demands that have been voiced for such concepts. It is true that this fact in itself does not show the theoretical impossibility of reforming the conceptual system. However, in the view of the present author it does add further weight to the doubts reflected in the questions on the relevance of independent legal dogmatics.[44]

III. THE GENERAL LEGAL PRINCIPLES IN PUBLIC LAW

In the foregoing, the main emphasis has been on the conceptual systematic side of the general doctrines of public law. We shall now move on to the second element of the general doctrines, the general legal principles, interest in which has been revived during the past few years also in the dogmatics of public law.

One theme in the international discussion on legal principles was introduced by Dworkin's distinction between rules and principles; more recently, for example, Robert Alexy has viewed the borderline between rules and principles somewhat differently than Dworkin did.[45] However, the refined details of this discussion will not be taken up here, nor will a position on whether or not legal principles actually are part of the legal order be adopted. Also in this connection a feature that combines rather than distinguishes the different contributions to the discussion will be observed.

Both Dworkin and Alexy emphasize the connection between legal principles

[44] The discussion on what is known as reflexive law may perhaps be considered a demonstration of an attempt to find a new and independent rationality basis for law and at the same time for legal science. This rationality basis would replace the goal-orientation that is typical of the social state stage of development. Although emphasis has been laid in the discussion on the distinction between regulation regarded as reflexive on the one hand and the formal law stage based on private autonomy on the other, at times this distinction appears to be a very fine one indeed. Günther Teubner, "Substantive and Reflexive Elements in Modern Law", *Law and Society Review*, vol. 17, 1983, pp. 239 ff., remains the most important contribution to this discussion.

[45] Ronald Dworkin, *op.cit.*, pp. 22–28; Robert Alexy, *Theorie der Grundrechte*, Baden-Baden 1985, pp. 71–103.

and morals. As already noted, in relation to morals it is specifically the legal principles that turn the legal order into an open system; they mediate the relationships between law and morals. In its emphasis on the interaction between law and morals, the present discussion signifies in a sense a return to the stage in the development of general doctrines that preceded conceptual legal dogmatics; it will be recalled that conceptual legal dogmatics attempted to cut off the ties that, according to the theories of rational natural law, existed between law and morals. It is perhaps not a coincidence that the discussion on the legal principles opened at about the same time as interest was revived once again in political philosophy in the theories of rational natural law.[46]

As is the case with general doctrines in general, also legal principles have been analysed primarily from the point of view of juridical decision-making; for example Dworkin and Alexy have adopted this point of view. However, it is also possible to approach legal principles from another direction, that of the legitimacy of law. In so doing, we shall find ourselves dealing with the questions with which, for example, Habermas has been concerned. In the proposal regarding levels in law given earlier,[47] we find ourselves faced with the frontier between legal ideology and the law form; the connection between these two lies to a large extent precisely in morally-coloured legal principles.

The interest in legal principles has traditionally been stronger in private law (in which, following Hayek, criminal law is included) than in public law. In order to explain this, it is useful once again to return to the discussion of the bifurcation of law. Now, those interpretations that keep an eye on the morals-bound nature of law are in a key position.

In the background of Habermas' analysis of law we find the notion that modern society is divided into two fields of action, the so-called life-world (*Lebenswelt*) and the System differentiated from it. The life-world represents the day-to-day reality of the members of society; its social relationships are morally charged. The System, which has grown independently of the life-world, is in turn composed of two subsystems, public administration (the State) and economy.[48]

When law regulates the life-world relationships, it is a question of law as an institution. In that case, also the demand for legitimacy that is based directly on morals is directed at it. The legal norms that regulate the System (that is, the subsystems of administration and economy), in turn, represent law as a medium. Contrary to what is the case with law as an institution, these norms

[46] Rawls' and Nozick's contributions are perhaps the most debated ones. See John Rawls, *A Theory of Justice*, Cambridge Mass. 1971; Robert Nozick, *Anarchy, State and Utopia*, New York 1974.

[47] *Supra*, p. 155.

[48] Jürgen Habermas, *Theorie des kommunikativen Handelns*, vol. II, Frankfurt am Main 1981, pp. 229 ff. and pp. 470 ff.

are not subject to the immediate legitimacy claim that must be met with in the life-world.[49]

The peripheral position of the general legal principles in the general doctrines of public law can easily be explained on the basis of the analysis presented by Habermas. In public law (and especially administrative law) regulations law is generally used as a medium. Such regulations thus remain outside the scope of the direct morals-bound legitimacy claims.

Even so, the general legal principles have an important position for example in the German discussion in the dogmatics of one field of public law, that of constitutional law.[50] Habermas offers us an explanation also for this.

According to Habermas, the subsystems of administration or State and economy are not totally independent of the life-world, of its values and moral principles. Even the System must be anchored in a certain way in the life-world. The State or, more widely, the administration subsystem obtains the legitimacy basis it requires through its general principles of organization and activity. These principles, for example that of popular sovereignty and the fundamental rights, are precisely the general legal principles referred to in the dogmatics of constitutional law.[51]

The significance of the general legal principles specifically in the dogmatics of constitutional law is illustrated also by another tie that Habermas has pointed to between the norms of public law and the life-world. As part of the legal order as a whole, law even as a medium is subject to the requirement of morals-bound legitimacy, although, as it were, indirectly. Habermas does not accept Weber's theory of legal legitimacy characterizing modern law.[52] Even when law is used as a medium its legitimacy cannot be based solely on legality, on the legality of the procedure of norm-giving. In a way, Habermas moves the entire problem of the legitimacy of the legal order as a whole one step back from where Weber—and many after him—stopped. For Habermas, also the legal procedure for establishing norms requires its legitimacy.

According to Habermas, the legitimacy required by the norm-giving procedure is mediated by the principles that are expressed in the constitutional

[49] Habermas, *op.cit.*, vol. II, pp. 535 ff.

[50] The position of legal principles in German dogmatics of constitutional law is due, at least in part, to the institution of the Constitutional Court that has been adopted in the Federal Republic of Germany; the application even of the Constitution has been subjected to judicial control. The general legal principles, in turn, have become the focus of international discussion specifically from the point of view of judicial decision-making. Similarly, part of the reason for the absence of discussion on the Finnish constitutional principles may be that there is no separate constitutional court in Finland, and the assessment of whether or not laws are in conformity with the Constitution has, also, not been delegated to the general courts. Robert Alexy's study of civil rights, *op.cit.*, is a representative example of German constitutional law dogmatics utilizing the notion of legal principles.

[51] Jürgen Habermas, *op.cit.*, vol. II, pp. 229 ff. and pp. 522 ff.

[52] On Weber's legitimacy typology, see Max Weber, *op.cit.*, pp. 122–30.

norms of Western democracies dealing with the Parliament and its legislative process. These norms are based on the so-called discursive procedure, that is, a procedure characterized by free and rationally argumentative discussion. In this way, according to Habermas, they also correspond to the level of post-conventionalist moral consciousness that has been reached by modern society.[53] In this interpretation by Habermas we come face to face once again with a demonstration of the renaissance of the theories of rational natural law: the constitutional norms that in Western democracies regulate the Parliament and its legislative procedure are based on the principles in which the theories of rational natural law with a formal-procedural orientation crystallized their demands concerning the law-making process.

The current Finnish discussion, however, is not directed at the general principles in constitutional law so much as at those in administrative law. The background also to this discussion will be outlined.

The discussion on the general principles of administrative law has referred, *inter alia*, to the standards of decision-making that limit the discretion of the authorities even within the limits of the written provisions. In order to prevent abuse of discretion (*détournement de pouvoir*), emphasis has been laid on the obligation of the authorities to take into consideration in their decision-making, for example, such principles as equality, proportionality and objectivity.[54] Following the line of argument of those propounding the theses of a crisis in the conceptual system of administrative law, it is submitted that the legal development of the welfare state lies also in the background of the attention that has been focused on the general principles of administrative law.

The legal development of the social state has expanded administrative intervention not only in the economy but also in social relationships that Habermas includes in the life-world. In tandem with the new, active and goal-related role that administration has assumed, especially the provisions on the level of acts of Parliament have become looser and provide the authorities with more room for maneuver than was the case in the legal state regulations. This has led to new types of problems with legal safeguards in the relationships between the administration and citizens. The legal state conceptual system of administrative law does not offer answers to these problems; the search for answers has had to be directed towards the legal principles.

The renaissance of legal principles in the dogmatics of administrative law,

[53] Jürgen Habermas, *op.cit.*, vol. I, pp. 345 ff.

[54] The principles that limit free discretion were introduced into Finnish studies by V. Merikoski after the Second World War. He was influenced primarily by the French doctrine. These principles have later obtained a foothold also in the practice of administrative law. See V. Merikoski, *Vaapa harkinta hallinnossa* (Free Discretion in Administration), Vammala 1958. The most recent monograph on these principles, one which can already refer to legal practice, is Timo Konstari, *Harkintavallan väärinkäytöstä* (On the Abuse of Discretionary Power), Vammala 1979.

while generated by these problems in legal safeguards, can be considered a legal state reaction towards the social state development. Paradoxically enough, in this reaction one has had to turn to the element of the general doctrines, the legal principles, in which the administrative law dogmatics of the legal state (*Rechtsstaat*) was originally not interested.

With the general principles of administrative law—as is the case with legal principles in general—we are approaching moral norms or—to refer again to the theory of levels in law submitted earlier—the level of legal ideology. What is involved here is a question of principles that systematize the morally sensitive relationships between government and citizens. In the view of the present author, the increase in goal-bound regulation in the social state is a sign of the decrease in the autonomy of the legal order. A corresponding comment may, perhaps, be fitting in conclusion of an analysis also of the general legal principles. Here, however, it is a question of a decrease in autonomy in another direction, namely a decrease in the autonomy of law in relation to morals.

IV. ONE LAST COMMENT

In this presentation, ample use has been made of the analyses and interpretations made by other researchers. The present author hopes, therefore, that the reader will allow a concluding personal point of view. The attention that has been paid in the recent discussion to the general legal principles is regarded as a positive phenomenon. The existence of the problems thematicized in the discussion on the so-called judicial state (*Justizstaat*) is, however, accepted; at least in administrative law this discussion has clear connections with the emphasis on the significance of the general legal principles.[55] Even so, generally speaking the strengthening of the ties between law and morals is a promising development. The present author would only like to follow in the footsteps of Habermas and require of the notion of morals features of discursiveness, features that presuppose free and rationally argumentative moral discussion.

[55] It has been argued at times in the Finnish discussion that, by referring to general legal principles, the administrative courts have entered also into questions of expediency with political connotations, and have thus assumed an authority that belongs to political decision-makers, above all to the Government. Critical contributions to this discussion include Kai Kalima, "'Tuomiovaltaa käyttävät riippumattomat tuomioistuimet' (HM 2 §)" ("The Judicial Power Shall Be Exercised by Independent Tribunals", Art. 2 of the Constitution Act), *Oikeus* 1983, pp. 177–80, and Hannu Tapani Klami, "Mitä korkeimmalle hallinto-oikeudelle pitäisi oikeastaan tehdä" (What Should We Do with the Supreme Administrative Court?), *Kanava* 1983, pp. 541–44. The practice of the Supreme Administrative Court, in turn, is supported by Toivo Holopainen, "Näkökohtia korkeimman hallinto-oikeuden asemasta ja toimivallasta" (Some Observations on the Position and Authority of the Supreme Administrative Court), *Oikeus* 1984, pp. 55–60. The arguments of the critics are also presented in Hannu Tapani Klami, "Legality and Expediency", *Samfunn, Rett, Rettferdighed, Festskrift til Torstein Eckhoffs 70-årsdag*, Otta 1986, pp. 439–51.