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Concepts in Law

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Introduction

Concepts play a central role in the law, because all forms of law are formulated with the help of terms that express – in the eyes of many at least – concepts. Concepts are also important in the study of law's nature in philosophy of law and legal theory. After some decades of neglect, concepts are nowadays rediscovered by general philosophy, epistemology, cognitive science, psychology, artificial intelligence, informatics and – this is at least one of our aims in editing this volume – also philosophy of law and legal theory.

This crucial role of concepts in the law and their recent rediscovery by several disciplines were the reasons to organise a special workshop on concepts in the law during the conference of the International Society of Philosophy of Law and Social Philosophy (IVR) 2007 in Cracow. A selection of the papers presented at this workshop is collected in this volume. The topics of the selected papers provide an illuminating overview of the different ways in which concepts are involved in the law and the philosophical and theoretical analysis of the law.

The first paper in this volume, *An Essay on Legal Concept Formation*, by Åke Frändberg is introductory and methodological by nature. It consists essentially of a number of distinctions between the many functions concepts play in the law. The basic difference pointed out by Frändberg is between the juridical-operative function and the law-stating function of concepts. To state it overly simple, concepts in the juridical-operative function are used to deal with the law while concepts in the law-stating function are the concepts used in legal norms. One of the editors of this collection experienced the practical relevance of this basic distinction when he wanted to present an analysis of legal transactions in general, while part of his audience expected an exposition of the rules that specify when a legal transaction is valid. In the terminology of Frändberg, he wanted to analyse legal transactions in their juridical-operative function, while the audience expected a discussion of legal transactions in their law-stating function. Apart from this basic distinction, Frändberg makes a number of other relevant distinctions that are very helpful to avoid confusions about the roles of concepts in the law.

Also the second paper in this volume, *About Concepts in Law*, by Dietmar von der Pfordten is introductory by nature. Von der Pfordten starts by attacking 'normativism', that is the today widely accepted view in legal theory that norms (rules, principles) play the primary role in the law, and not, for instance, concepts or

institutions. Von der Pfordten first discusses the nature of concepts and of conceptual analysis in general. Second he investigates the way in which concepts are related in a conceptual scheme. He then returns to the law and answers the question how these general findings can be applied to legal conceptualisation. Especially interesting in this discussion is a fourfold division between the levels of abstraction of concepts, and its relevance for the issue to what extent general concepts are malleable by the law. Von der Pfordten argues that in particular those concepts which are one level more or one level less abstract than the concepts that function on the level of perception are most malleable by the law. By way of conclusion, he returns to the question whether normativism is correct. Von der Pfordten argues that normativism neglects the central and independent role of concepts in legal reasoning. He therefore rejects the view of Alf Ross, who held in his famous paper *Tû-Tû* that the meanings of intermediate legal concepts, such as 'owner' could be reduced to the norms that specify when they are applicable and the norms that specify the consequences of their applicability.

Alf Ross' Tû-Tû paper also plays an important role in the contributions of Giovanni Sartor and Jaap Hage. Giovanni Sartor starts the third paper in this volume, *Understanding and Applying Legal Concepts: An Inquiry on Inferential Meaning*, with the observation that Ross' analysis of the meaning of intermediate legal concepts was in one important respect correct: the meanings of these concepts can indeed be specified in terms of the roles they play in legal argument chains, on the basis of the rules that specify when they are applicable and the consequences of their applicability. From this observation he draws the conclusion that at least for these concepts there is no demarcation between on the one hand their meanings and on the other hand the positive law that specifies their roles in the legal system.

But then a problem arises. Does understanding an intermediate legal concept imply that one endorses the corresponding contents of the law? Suppose that a legal system uses the concept of a patriarchal marriage. The meaning of this concept is given by the following rules:

> *IF* a couple goes through a marriage ceremony, *THEN* the two spouses are in the relation of patriarchal marriage,

and

> *IF* two spouses are in the relation of patriarchal marriage, *THEN* the husband has power over his wife.

Does one's knowledge of the meaning of term *patriarchal marriage* commit one to the view that whenever a couple has gone through a marriage ceremony, the husband has power over his wife? This is not a position that Sartor wants to adopt. To avoid it, he devotes the second part of his paper to an analysis of inferential meaning that does not commit a person who knows the inferential meaning of a concept to endorsement of the rules that define this meaning. To this purpose he makes use of a technique developed by Ramsey to replace intermediate concepts by an existentially quantified variable and a technique developed by Carnap to distinguish between the possession (understanding) of a concept and its endorsement.

In the fourth paper in this collection, *The Meaning of Legal Status Words*, Jaap Hage also takes the analysis of Alf Ross as his starting point, but focuses on Ross' claim that words like 'owner' do not have a proper meaning, because their sole role is to function as intermediaries in legal argument chains. First Hage argues that words like 'owner' do, opposite to what Ross argued, denote entities. To be sure, these entities do not exist in physical reality, but next to the physical reality there is a social reality in which entities can exist because their existence follows from the application of rules. Words such as 'owner' denote a legal status which exists in the rule-based (institutionalised) part of social reality. There are rules which specify when such a status comes into being or ends, and what the consequences of its presence are.

The next question is whether these rules specify the meanings of legal status words. Here Hage takes a fundamentally different position than Sartor. According to Hage, the rules that govern the use of legal status words do *not* specify their meanings. The meaning of a word like 'owner' is that it stands for owners, nothing more. Are the rules irrelevant for the meanings of legal status words, then? No, their importance lies in the fact that one should know about these rules to know what the legal status for which they stand involves. Without knowing the rules that govern ownership, one does not know what ownership is. And if one does not know what ownership is, one does not know what the word 'owner' means either. But from this it does not follow that the rules governing the use of legal status words specify their meanings.

One legal concept that is mostly used in a juridical-operative function is the concept of a power or competence. (Hart, however, has created the impression that it is commonly used in a law-stating function, by writing about 'power conferring rules'). In the fifth paper in this collection, *Explicating the Concept of Legal Competence*, Torben Spaak offers an extensive analysis of this concept and of what the exercise of a competence is. He connects competence conceptually with changes in legal positions that are brought about by acts which then count as exercises of competence:

> A person, p, has the competence in regard to a legal position, *LP*, if, and only if, there is a competence-exercising-act, a, such that it depends for its legal effect on having been performed with an (actual or imputed) intent to bring about the relevant legal effect, and a situation, S, such that if p in S performs a, and thus goes about it in the right way, p will, through a, change *LP*.

Apart from this analysis, Spaak discusses a number of subdivisions between types of competence, the most common being that between autonomous and heteronomous competence.

When concepts are used in their law-stating function, they become the object of legal manipulation. By broadening or narrowing a concept's scope of application, the contents of the law can be changed. This well-known phenomenon is at the focus of the contributions by Lorenz Kähler and Ralf Poscher, be it that they approach it with different purposes in mind. Kähler raises in his contribution *Do Normative Reasons Completely Determine the Formation of Legal Concepts?* the questions

whether the normative character of the law completely explains which concepts are used and which meanings they have, or whether there are other aspects which determine their content. That there is such an influence is, at first glance, obvious. But it is less obvious what exactly it consists in. If legal concepts have an objective 'deep structure', as Dworkin argues, they might not be open to an unlimited manipulation according to one's moral or ideological agenda. Kähler argues that there are several independent ways in which normative considerations can influence the choice and definition of legal concepts but that there are also constraints on this influence. These constraints date back to the functions legal concepts must fulfil. Legal concepts must be used in various contexts and express different states of affairs, the evaluation of which might differ.

In the seventh paper in this volume, *The Hand of Midas. When Concepts Turn Legal, or Deflating the Hart-Dworkin Debate*, Ralf Poscher also takes the malleability of legal concepts as his starting point, but uses it as a stepping point for understanding the relation between law and morality. As soon as a concept is used in stating the law, the precise scope of application of this concept has become a legal matter. This is what Poscher calls 'The Midas Quality of the Law'. Just as everything that was touched by the legendary King Midas turned into gold, everything that is touched by the law becomes legal. This also holds for concepts with a moral import. When these concepts are used in a law stating function, they receive a specifically legal content. In the words of Poscher: 'The law and morality only share common concepts but not common conceptions.' Based on this observation, Poscher argues that the Hart-Dworkin debate is based on a wrong presupposition, namely that the use of common concepts implies that moral conceptions of these concepts would be legally relevant as such and not only as one source amongst others out of which the specifically legal conceptions are developed.

The question whether legal concepts are defined by means of the rules that specify their roles in legal arguments presupposes that the concepts are used in their law-stating function. The final paper in this volume, written by Dennis Patterson, focuses on the other main function of legal concepts, that is their juridical-operative function. One feature of this function is to provide a perspective on the law as a whole. Is the law, for instance, depicted as a set of norms that guide action, or as a set of protected interests? That concepts used in their law-stating function influence the contents of the law is obvious. Less obvious, at least nowadays, is that the concept of law determines this content too. Dworkin deserves the honour of having placed this role of the concept, or – maybe better – the conceptions of law on the legal philosophical agenda again. Our conception of the law may influence our position on what the law is in particular cases. It is somewhat ironic to notice that this makes analysis of the concept of law – the kind of work that Hart undertook in his major study, and which was criticised by Dworkin – relevant for the contents of the law in particular cases.

There is a major difference, however, between the styles of analysis proposed by Hart and Dworkin, at least according to Dennis Patterson in the eighth contribution to this volume, *After Conceptual Analysis: The Rise of Practice Theory*. Where Hart would take the practice of the participants in the law as defining the concept of

law, for Dworkin this would merely be the starting point of a theoretical analysis. In contrast to Dworkin, Hart would hold a 'practice theory' of the law. Under a practice theory Patterson understands 'an account of the law that answers the question "What is the law in this jurisdiction with respect to x?" by looking at how participants in the practice decide the state of the law'.

This raises the question what a practice is, and Patterson devotes the second half of his contribution to the analysis of practice and practice theory. To this purpose he refers to a study by Rouse which offers an account of practice theory at the hand of six themes. According to Patterson, the goal of any practice theory of law is to make sense of the practice as an ongoing, iterative and common activity. The normativity of the law is in this connection the most important aspect of the law that has to be explained. Therefore a practice theory of the law must illuminate how participants can be said to perform in a common world, what makes the world of law common, and how disagreements between participants about the purportedly common world are framed and adjudicated.

Patterson's paper provides a good conclusion of this volume, because it illustrates that the role of concepts in the law is not confined to the operation of the law, as emphasised in the papers that focused on concepts in their law stating function, but that concepts also play a role in our very understanding of the law's nature. Whether the contributions in this volume cover the full range of roles that concepts play in the law is a matter that remains to be seen. That they give an attractive overview of at least a number of these roles and that they point out directions for further research is clear.

Contents

An Essay on Legal Concept Formation

Åke Frändberg

1 Introduction

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 analytical 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. Not that the idea that legal concepts ought to be analysed on the basis of their function is a completely new one. Hohfeld's classic work on concepts of rights, for instance, was in fact even entitled *Fundamental Legal Conceptions as Applied in Judicial Reasoning*[1] and in his work Hohfeld surely kept the promise of its title.

In this article I shall make a rough classification of the various functions legal concepts can have. So it is not the concepts as such that are classified, but their functions. And it may well be the case that one and the same term has more than one function. An analysis of how different legal concepts function will at the same time be a study of the formation of legal concepts.

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

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[1] W.N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* (New Haven 1923).

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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.

In this study I am concerned with concepts and conceptual matters, not with terms and terminology.

2 A Basic Distinction

I shall 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 (law-concepts, concepts of law; in what follows *L-concepts*) are concepts that are used for stating the material legal content.

Concepts with a juridical-operative function (juridical concepts, concepts about law; in what follows *J-concepts*) are concepts that are used for the juridical handling of the legal content.

It might well be the case that a given term is ambiguous, in the sense that it names both an L-concept and a J-concept (*JL-terms*).

What lawyers handle – the very object of the work of lawyers – is *law*, i.e. a normative meaning-content structured in the form of legal rules and systems of such rules (legal systems) and appearing to us in the shape of language. L-concepts are concepts of (in) law in this sense of the word 'law'. But like all other crafts, the craft of the lawyer also demands a professional, technical vocabulary, or language, of its own. J-concepts are members of that language. In what follows L-concepts will be dealt with in Section 3, J-concepts in Section 4 and concepts expressed by JL-terms in Section 5.

3 L-Concepts

3.1 Different Kinds of L-Concepts

Within the L-concept category, four different distinctions will be 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 (rule constituents) and those that systematise rules (systematising L-concepts);
4. L-concepts that are dependent on one particular legal system (system-dependent L-concepts) and those that are not (system-independent L-concepts).

3.2 Genuine and Non-genuine L-Concepts

An L-concept has a genuine or a non-genuine function, depending on whether it appears in genuine or non-genuine (spurious) legal statements in the sense indicated by the Swedish philosopher Ingemar Hedenius. This distinction, though clothed in different terms such as, for instance, 'norm-expression' and 'norm-description', has become world-wide accepted in legal philosophy.[2] Let us explain Hedenius' distinction 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* lacks a truth value – 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 Swedish law in this respect. And when *r* has this function, it is *a non-genuine legal statement*, and as such has a truth value (true, if uttered on, for example, December 5th, 2007, but false if uttered on December 5th, 1957). It is to be noted that *r* in my example has the same linguistic formulation irrespective of whether it is used in the genuine or in the non-genuine way, and that genuine and non-genuine legal statements are often formulated alike. But the non-genuine 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* a point of time. Thus, in the 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 now [indexical] 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 found in non-genuine statements are non-genuine L-concepts. Consequently, the concepts 'delivery agreement'. 'commercial purchase' and 'delay' have a genuine function when they are 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, the philosopher Anders Wedberg argues that it is 'highly probable' that a term which appears in a genuine legal statement (Wedberg himself uses the term

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[2] I. Hedenius, *Om rätt och moral* ('On law and morals'; Stockholm 1941) 65f. See G.H. von Wright, *Norm and Action* (London 1963) 105.

'internal sentence' synonymously with this) does not have the same meaning as the same term when it appears in what Wedberg refers to as 'a sociological discussion'.[3]

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 perhaps Wedberg means 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')[4]

As far as I understand, 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 claims 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 an identity does not exist if a term has one meaning in the genuine legal statement and another meaning in the non-genuine one.

3.3 Official and Dogmatic L-Concepts

Official L-concepts we find in official texts – statutes, *travaux préparatoires*, judgments etc. Examples from among the many thousands of them are 'judicial separation', 'right by marriage to joint property', 'power of attorney', 'rent', 'intent', 'forged document' and 'litigant'.

Dogmatic L-concepts are found in legal-dogmatic works. Examples of these are: 'causality', 'proximate cause', '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.

Furthermore, a term that expresses an official L-concept need not have the same meaning that it has when it expresses a dogmatic L-concept. In Swedish law, for instance, the official words 'negligence' and 'possession' seem to differ somewhat in

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[3] A. Wedberg, 'Some Problems in the Logical Analysis of Legal Science' 17 *Theoria* (1951) 262–263.

[4] Wedberg, *Some Problems*, 260.

meaning from their dogmatic counterparts. 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. The statements of legal dogmatics can be characterised as from a theoretical point of view *better versions* of official law, and the dogmatic L-concepts are components of such statements. Dogmatic statements often exceed mere law-reproducing.

All official L-concepts are genuine. Dogmatic L-concepts might be either non-genuine or genuine (for instance when they occur in an argument *de lege ferenda*).

3.4 Rule Constituents and Systematising L-Concepts

When one states law – whether this takes place in the genuine or in the non-genuine way – one makes use of two different kinds of concepts: rule constituents and systematising L-concepts. The former are concepts that are included in individual legal rules, either as components in the description of operative facts (legal facts) in the prerequisites expressed in a rule, or in the formulation of the legal consequences in the rule. Systematising L-concepts are included in the systematics of the material content of legal rules. Moreover, the systematics is also an element in the stating of law, whether it is a question of a systematisation in the law itself or one constructed by legal dogmatics. Systematising L-concepts are, for example, expressed by the names of different legal institutions ('purchase', 'gift', 'marriage', 'larceny') but also by terms in the more fundamental legal classification ('the law of third-party conflicts' (Ger. '*Sachenrecht*') – 'the law of contracts' (Ger. '*Obligationenrecht*'); 'private law' – 'public law').

As we know, the systematising 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 to be used for diagnosing and qualifying problems of law.

With respect to systematising L-concepts the difference between official and dogmatic L-concepts often turns out to be very strong. The classical systematics 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, for instance, not reflected in a more effective way in Swedish legislation on this field of the law, whose classification is constructed according to more 'down to earth' criteria.

3.5 System-Dependent and System-Independent L-Concepts

An L-concept that is dependent on one particular legal 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