

Legal concepts – a transdisciplinary mirror of society

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1. Introduction

Let me start with the “raw material” – the objects – on which concepts are based. Earlier Wüster stated that:

Alles, worauf sich so das Denken eines Menschen richtet oder richten kann, heißt im philosophischen Sprachgebrauch "Gegenstand". Auch Sachverhalte sind Gegenstände in diesem Sinne (Wüster (1959/60) 2000: 22).

ISO 1087 (2000) defines the object only very briefly:

Object: anything perceivable or conceivable.

Note:

Objects may be material (e.g. an engine, a sheet of paper, a diamond), immaterial (e.g. conversion ratio, a project plan) or imagined (e.g. a unicorn).

A more extended division of objects may be presented in the following way:

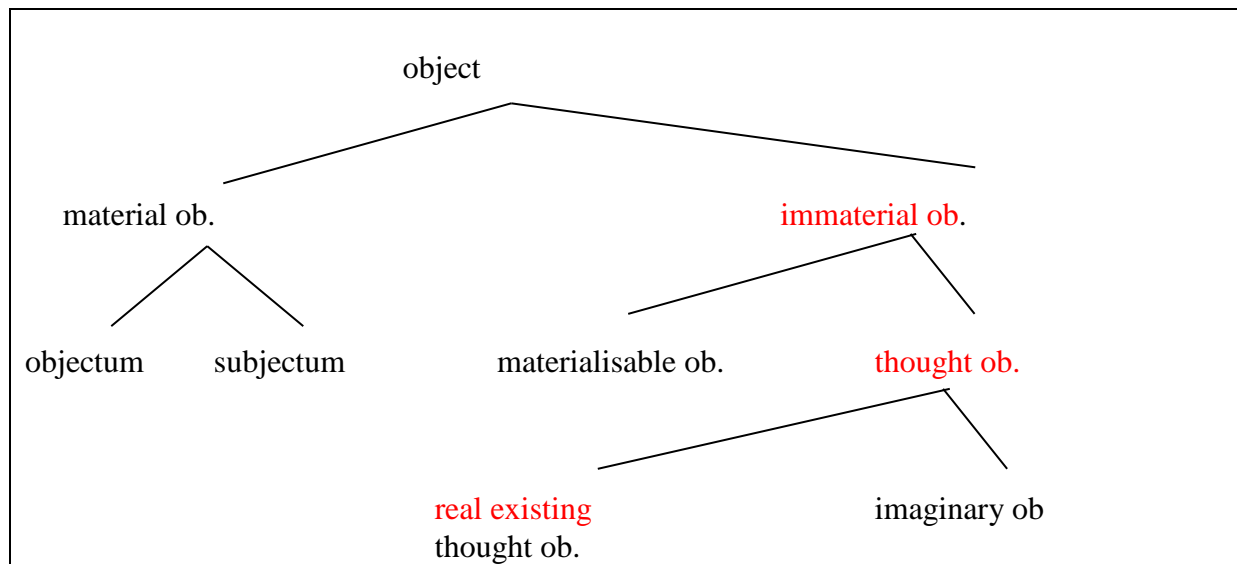


Fig. 1

The three types of objects marked with red are of special importance for our subject, because they refer to the type of concepts which are not based on physical or imaginary objects. I defined them as follows:

Immaterial object: object without physical form whose existence and relation to space and time is given through the imagining subject.

Thought object: immaterial object which only has mental existence and is therefore related to the imagining subject whereby the space-time-relation is realised.

Real existing, thought object: thought object which has a mental, but real existence, for instance the legal transfer of an estate.

Now, I postulate that legal concepts proper are based on immaterial – especially thought - objects. The carrier is necessarily a human being. The thinking process is by nature individual, which already hints at a concept formation other than abstraction only.

As we are concerned with concepts, I shall quote the standardised definitions of “concept” and the changes which have taken place in the last few decades.

In 1990, ISO 1087 defined concept as

A unit of thought constituted through abstraction on the basis of properties common to a set of objects.

Note:

Concepts are not bound to particular languages.

They are, however, influenced by the social or cultural background. (ISO 1087, 1990)

Ten years later (2000) the definition in the same standard was changed to the following wording:

Concept: Unit of knowledge created by a unique combination of characteristics.

Note:

Concepts are not necessarily bound to particular languages. They are, however, often influenced by the social or cultural background which often leads to different categorizations. (ISO 1087, 2000)

None of these definitions are knowledge-rich; only few characteristics are mentioned. Therefore, I have proposed the following definition:

Concept: Unit of knowledge constituted by all characteristics (chunks of knowledge) intersubjectively recognised and agreed upon by a professional community at a certain point of time; it has a life cycle determined by cognition dynamics. (Picht 2009: 11)

It might be wise to change the last sentence slightly, reading now: “it has a life cycle determined by cognitive and societal dynamics”.

In this presentation, I shall put forward and elaborate on the following seven theses:

- Legal terminologies are inter- and transdisciplinary
- Legal concepts in a narrow sense are predominantly prescriptive
- The life cycle of a legal concept is determined by societal changes, not necessarily by scientific cognition and research
- Most legal concepts are constructions
- Legal concepts may be influenced and even determined by religious dogmata and/or ideologies

- Legal concepts are open for interpretation in legal practice and theory
- Conceptual changes may be gliding or sudden.

2. The inter- and transdisciplinarity of legal terminologies

Any society, be it a so called primitive tribe or a highly developed modern community, is ruled by written and/or unwritten practices, rites and laws which determine the relations between the individual members of the society on the one hand, the relations between the different societal institutions and the relation between the individual members and the institutions on the other. In its ideal form one may talk of a regulated way of acting based on common values recognised as valid at a certain point of time.

The legal domain as a social and societal magnitude may be divided into two large conceptual areas:

- Concepts belonging to the field of knowledge concerned with jurisprudence, its applications, documents, etc. Here we find predominantly rules and prescriptions and their practical manifestations.
- Concepts and objects upon which legal prescriptions are to be applied. These concepts may be based on any of the object types indicated in fig 1.

For instance, a certain scientific work, a real estate, concepts and objects belonging to trade, transport and traffic, etc. belong to the second group. In reality, concepts and objects of all thinkable domains can obtain 'legal' relevance, whereby their legal aspects are the dominant properties in the case of objects or the central characteristics, when referring to concepts, for example, a computer, a slave or a basket of eggs considered as commodities, my horse as a matter of insurance.

In addition, the same concept or object may be legally relevant in different areas of jurisprudence; for instance, my house as real estate can appear in a contract of sale, it may be the object of succession; it can be an object of insurance of different kinds or even the place of a crime. A heart is not only a biological device, in the case of transplantation it also becomes a legal object. A doctoral thesis is, apart from being a scientific research work, merchandise in the form of a book or electronic device, part of a library, the carrier of an owner's copyright, an object of plagiarism, etc.

An important difference between the two groups of concepts is due to the fact that in jurisprudence – the first group – we find predominantly concepts whereas the second group is often dominated by objects. In other words, when applying jurisprudence on real life, i.e. all realms of a community and their manifestations, we move from the level of concepts based on ideas and beliefs to the level of objects – individual cases. The application of jurisprudence takes place at an ontic level which permits and requires – at least to a certain extent – interpretation and adaption of jurisprudential concepts to individual cases taking into account circumstances and peculiarities of a given case. On this subject, also see the doctoral thesis of Simonnæs (2003).

The border line between the two groups of concepts is by far clear cut, nevertheless, it can be stated that the domain of law, by necessity and by nature, must be inter- and transdisciplinary as its *raison d'être*. Inter- and transdisciplinarity should be understood in the way as it was used in the doctoral thesis of Våge (2012).

3. Legal concepts in a narrow sense are predominantly prescriptive

Proceeding on the assumption that the legal domain has the function to regulate the relations between the members of a community, we can infer that the concepts which constitute the essence of the legal domain represent the ideal, the expected behaviour and conduct of the members of a community. Legal concepts in this sense form the norm of the community and as such they are necessarily prescriptive, although the prescription may become apparent in different degrees.

However, in order to accept and to put through any kind of prescription, in a democracy certain conditions have to be fulfilled, for instance

- A norm has a life cycle; it is a dynamic magnitude
- A norm is negotiable
- A norm has to be accepted at least by a majority of the community members
- An infraction of a norm entails a sanction
- The separation of powers aims at a rightful prescription
- Etc.

In non-democratically ruled communities, some of these conditions are different, for instance,

- The acceptance of a majority of the community is not central or even necessary
- A norm is not freely negotiable
- The separation of powers does not exist
- The infraction of a given norm by certain groups of the society may be accepted, for example, torture
- Etc.

These two cases mentioned are only the extreme opposite points of a scale; in between many nuances can be observed which alter the degree of possible intervention by members of the community and the intensity of prescription. The two extreme opposite points may be called “negotiated prescription” and “dictatorial prescription”, respectively. Nevertheless, in all cases the very nature of the concept of prescription remains the same.

Legal concepts can be perceived as a hierarchy in the sense that superordinated moral and ethical norms determine the nature of the subordinated concepts, for instance, “freedom of expression” can be the superordinate concept of a system of subordinate concepts including ethical rules for the media, limitations with regard to political incorrectness, injuries, sanctions, etc. Ideally, a contradiction between the superordinate concept and the subordinate concepts may not exist, because the prescriptive aspect in a hierarchical system is inherited by all subordinated concepts.

In addition, by nature, prescription implies a temporal aspect. Regardless the type of prescription, none of the types can be eternal; eternity in this respect would mean everlasting societal stagnation. Reality, however, witnesses “prescription dynamics” according to societal evolution and changes.

4. The life cycle of a legal concept is determined by societal changes, not necessarily by scientific cognition and research

It is not so simple to determine the life cycle of a concept. When does the life cycle start and when does it finish?

When does a concept come into being and when does it cease to be used? In addition, one has to distinguish between life cycle and “eternal” existence of a concept (Picht 2008: 287ff).

Thus, life cycle is related to the time a concept is considered correct and as such in active use. For instance, the concept “atom” as an indivisible particle of the material world is no longer considered correct and therefore no longer in active use. Its life cycle has finished.

“Eternal” existence of a concept means that a concept can be “born” or “created”, but it cannot die. Humanity would be without conscience of its development and history, if concepts – as units of knowledge – should irrevocably disappear. However, a concept can be forgotten, but then we have to talk about a lacunae in our present knowledge about former stages of knowledge caused by a variety of possible circumstances, e.g. when any form of concept representation is lost or no longer understandable. Nevertheless, at least the theoretical chance of concept recovery by research exists (Picht 2010: 24).

Especially in the natural sciences and their applications one may delimit the life cycle of a concept to the concepts of “verification” and “falsification”, “need for a technical solution” and “end of its application”; thus, cognition seems to be the dominant parameter.

In the legal domain – and by extension in many other social domains – we may have the often vague cognition of certain states or conditions as a starting point for a concept formation process. In order to make these states and conditions manageable, we try to make them more tangible. In this process concepts are constructed starting often with individual ideas, passing through a process of discussion and reaching a state of consensus. Take for instance the concept of “ombudsmand”. In the beginning there is a vague feeling of the need of having “something” which defends the rights of the ordinary citizen against the administration. A clarification – formation of a concept and its term – is required. The following model may illustrate the clarification process (Laurén/Myking and Picht 1997: 105, here translated version).

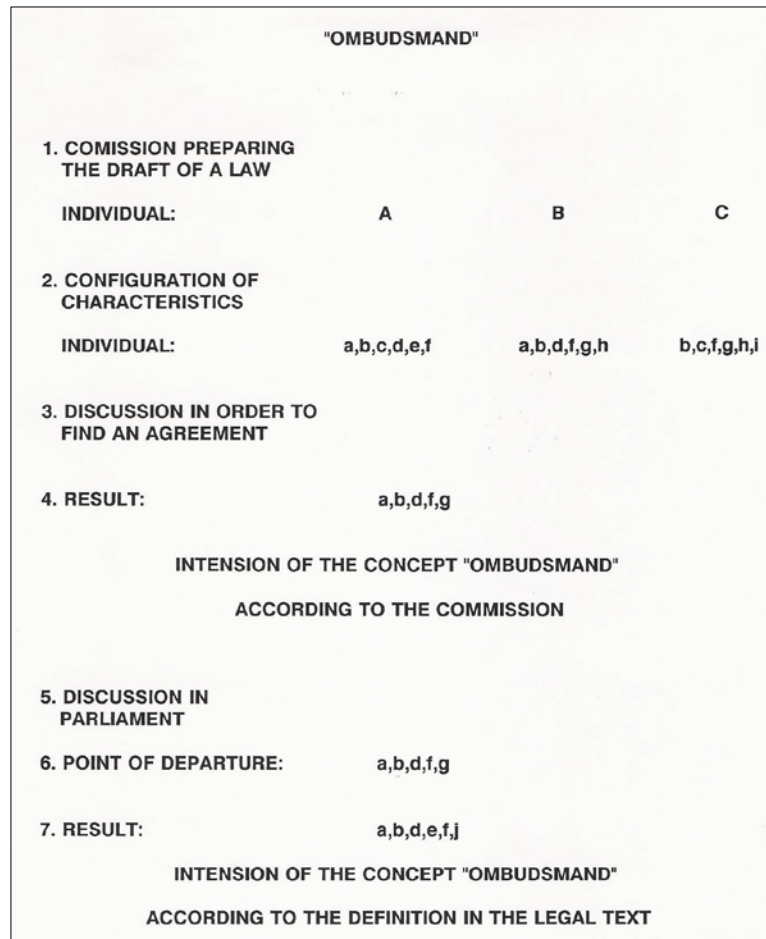


Fig. 2

Reaching a consensus about the intension of a concept fixed by an authoritative definition also means that the concept will have a certain degree of prescription, because it was created to facilitate and regulate social life. It is not unusual that the concept converts into a norm.

As these types of concepts are constructions related to society at a certain point of time, it is evident that the life cycle of these concepts will finish when a society's need for such entities and their concepts disappears.

5. Most legal concepts are constructions

Whereas most concepts based on physical or materialisable objects are formed by abstraction, for instance, mountain, desert, tree, etc, many legal concepts are based on ideas. Ideas are originally individual creations; they may be rather fuzzy in the beginning and more often than not they pass through a clarification process which either leads to a solidification by discussion forming a concept or are rejected or abandoned as not being in conformity with the opinion of the majority of a society.

Examples:

The creation of the European Union as a legal entity was originally based on individual ideas and passed later on through many stages on its way to the legal concept we know today.

The idea of abolishing the celibacy in the Roman Catholic Church was rejected – at least until now.

Legal concepts are in principle valid for the entire society, which requires not only the acceptance of a legal concept by a restricted professional group, but by broad consensus reached through negotiations carried out by the representatives of the society – at least in a democracy. In authoritarian regimes the procedure is usually simpler. Nevertheless, the very nature of concept formation by construction is basically the same, although a broad consensus is not necessarily required in the latter case.

6. Legal concepts may be influenced and even determined by religious prescriptions and/or ideologies

It is a fact that ideologies and religions have influenced and even determined legislation and thereby enforced the creation of corresponding legal concepts. For instance, concepts from national socialist legislation such as “racial defilement” (*Rassenschande*), “kin liability” (*Sippenhaft*) and “enforced political conformity” (*politische Gleichschaltung*) or Russian communist legislation such as “common property” (*kollektives Eigentum*), “dictatorship of the proletariat” (*Diktatur des Proletariats*) or “dekulakisation” (*Entkulakisierung*) may illustrate the issue.

In the case of concepts based on religious prescriptions, we may distinguish two cases:

1. Legal concepts derived from a basic religious document containing superordinated moral prescriptions, e.g. the Ten Commandments of the Old Testament or the posterior dogma of a confession.

Examples:

The commandments 6 – 10 are a central part of the basis of civil and penal law in Christian countries.

In the dogma of the Roman Catholic Church “heretic” is defined as: a baptized Roman Catholic who wilfully and persistently rejects any article of faith.

Types of heretics (in the Middle Ages)

- a. the heretic impenitent and not relapsed (for the first time)
- b. the heretic impenitent and relapsed (for the first time was penitent now is impenitent)
- c. the heretic penitent and relapsed (for the first time was penitent now is penitent too, but relapsing was the capital offence)
- d. the heretic negative (who denied his crime)
- e. the heretic contumacious (who absconded)

The first four types were all delivered over to the secular arm. The state usually immediately punished heresy with the death sentence (Wikipedia a).

Islam prohibits conversion to any other religion. The legal sanction in many Islamic countries is according to Sharia capital punishment – although the corresponding sura of the Quran does not express it directly.

2. Legal concepts which at the same time are religious concepts given through Divine Revelation or implied by it:

Examples:

Sharia law is the moral code and religious law of Islam. Sharia is derived from two primary sources of Islamic law: the precepts set forth in the Quran, and the example set by the Islamic prophet Muhammad in the Sunnah. Islamic jurisprudence interprets and extends the application of sharia to questions not directly addressed in the primary sources by including secondary sources. (...)

Muslims believe sharia is God's law, but they differ as to exactly what it entails. Modernists, traditionalists and fundamentalists all hold different views of sharia, as do adherents to different schools of Islamic thought and scholarship. (...). Sharia deals with many topics addressed by secular law, including crime, politics and economics, as well as personal matters (Wikipedia b).

The Sacraments of the Roman Catholic Church are “efficacious signs of grace, instituted by Christ and entrusted to the Church, by which divine life is dispensed to us...” (Wikipedia c).

Thus, marriage as a sacrament is a religious concept and at the same time a secular legal concept, because in many countries marriage celebrated in church is also legally valid according to civil law. In countries where church and state are separated, epistemologically we may distinguish two different concepts of marriage; however, the common religious background as a society-regulating factor is still visible.

It is obvious that religiously based concepts may undergo degrees of modification according to social influence; however, their origin is still perceivable. Variations are also due to believers' attitudes, for example orthodox or liberal interpretations.

7. Legal concepts are open to interpretation in legal practice and theory

Interpretation of legal concepts can be considered at two levels:

- the theoretical level
- the practical level.

The first case refers to the theoretical discussion within the discipline of jurisprudence. Interpretations and discussions are related to fundamental questions and concepts which belong, for instance, to the domain of ethics and morals. However, ethical and moral values vary in time and space; for example, cannibals do not have moral scruples about eating human beings; the Inca sacrificed human beings in order to satisfy their gods, which may be seen as a moral obligation; in medieval times, physical torture and humiliation (for example putting people in the stocks) was not considered unethical.

The main task of the theoretical level consists in the interpretation of ethical and moral values translating and/or adapting them to legal maxims defined as guiding principles of law and jurisprudence. These maxims may be considered superordinate concepts.

Examples:

Universal Declaration of Human Rights of 1948 consists of 30 articles which have been elaborated in subsequent international treaties, regional human rights instruments, national constitutions and laws.

Magna Carta of 1215 issued by King John of England forced onto him by a group of feudal barons. Several fundamental prescriptions of this basic document are still valid today.

The constitution of a country: Danmarks Riges Grundlov nr. 169 af 5. juni 1953.

The second case refers to the application of legal concepts in practice, where the norm is confronted with real cases. While legal concepts seen as norms came into being either by observing and identifying states and incidents with many common properties allowing an abstraction or by the construction of concepts may be considered the abstract or strictly prescriptive level, the level of practical application of legal concepts belongs to the ontic area. This means that the abstract prescriptive legal concepts require interpretation of and adaption to a certain case in order to fulfil not the wording but the spirit of the prescription. This transition from the abstract to the ontic level cannot be done automatically and without taking into consideration the human and societal circumstances of a given case or matter. However, the scope of discretion may vary; its limit is reached, when the fundamental spirit of a prescription is violated.

8. Conceptual changes may be gliding or sudden

Changes in society may be gliding; taking several years or even decades. Usually, the legal system shows a certain inertia, which makes it difficult to react immediately to changes of established values. Changes have to be recognised and observed over a longer period of time in order to exclude passing trends which may lead to legal uncertainty. However, to bridge the time until a justified change of prescriptive norms can take place, discretionary decisions open up for gliding changes adapted to value changes, without, however, changing the written norm. For instance, homosexuality between men was prohibited in Germany by § 175 StGB (1 January 1872), later, since about 1970 societal values in this respect were changing and in practice the paragraph was applied in only few cases; in 1994 the paragraph was finally abolished. We may talk about a gliding decriminalisation. On the contrary, other activities such as smoking in public buildings, the sale of tobacco and spirits to people younger than 18 years are today prohibited. However, it took several decades, before legal prescriptions became the norm. Another example is environmental legislation. It also passed through several stages starting with the fact that certain behaviour was considered not really desirable – the use of certain insecticides in agriculture – however largely used; later a mild regulation often based on recommendations was the usual practice and today we have rather strict norms and corresponding sanctions if the regulations are violated. A criminalisation has taken place.

The opposite of gliding changes are sudden changes. A political system may change caused by pressure of different kinds, e.g. a revolution based on ideological or religious ideas, social pressure of a community, implantation of a new political system after the defeat in a war, etc. Sudden system changes enforce – at least in some legal domains – immediate changes of legal norms; very often legal changes are preceded by a new constitution as the superordinate guideline for all subordinated and derived legislation. For instance, when Spain changed from the Franco regime to democracy, substantial changes occurred in nearly all legal

domains. Although not so few legal concepts were borrowed from other existing democratic legal systems, the new Spanish legal system had to be constructed on the premises of the new constitution and the societal values. The characteristic of “construction” – and consequently the “construction of legal concepts” – is more salient in the case of sudden changes than in the often hardly observable gliding changes, because they are more obvious for the citizen affected.

9. Conclusions

A distinction can be made between the concepts of the legal domain proper and the application of these concepts on nearly all other concepts and objects, because the latter can acquire legal status, which underlines the phenomenon of transdisciplinarity.

Legal concepts are constructions created, adapted and changed according to belief, attitudes and needs of a given society at a certain point of time. The life cycle of legal concepts is determined by the societal factors and a society’s will to change and acceptance of changes. Conceptual changes may be gliding or sudden; they are different from conceptual changes based on research and cognition in the natural sciences.

Legal concepts are open to interpretation and adaption to real cases – the ontic level – within certain limits which are determined by legal certainty.

Legal concepts can be based on concepts revealed by the founder of a religion. Dependent on the personal attitude towards a religion, one may consider these concepts as constructions made by human beings – this interpretation will not be acceptable for orthodox believers – or as concepts created by divine revelation.

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Wikipedia a

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Wikipedia b

<http://en.wikipedia.org/wiki/Sharia> (12.04.2012)

Wikipedia c

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