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Fragments of Legal Cognition

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FOREWORD

This paper is a contribution to the international debate on the character of law and jurisprudential methods.

In accordance with a pragmatic view of science "law" is understood pluralistically, as a relational concept which refers jurisprudence to the use of various methods, depending upon the character of the questions science wishes answered.

Jurisprudence is unable to formulate relevant questions without a philosophical starting point which, in turn, must be based on an ideology with a background in a given anthropology: the understanding of the relationship between human nature and culture.

Legal dogmatics is that branch of jurisprudence which advises juridical practice in answering topical legal questions on the basis of a systematic description and interpretation of legal rules with regard to the relationship of the law to a social culture. This means that general and particular legal ideas and principles are necessarily part of a teleological and pragmatical legal usage. Jurisprudence is a cultural science, which is why its methods are always determined by the cultural situation in society.

This produces a dilemma which is well known as "the hermeneutic circle": The whole cannot be grasped without a knowledge of individual phenomena, and individual phenomena cannot be understood without a knowledge of the character of the whole.

The author uses this model as a framework for his own scientific contribution through forty years in that he attempts hereafter to give a cohesive explanation of the character of his earlier work in legal dogmatics and legal theory.

On the one hand science is irretrievably bound to the existing "horizon of understanding" (Vorverständnis), on the other it must attempt to transcend this barrier without being quite certain as to what it does.

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Introduction

Life is lived forwards, but understood backwards, said Søren Kierkegaard in his critique of Hegel's philosophy.

When an action has been carried out and its consequences exhausted it is possible, in principle, to explain what has happened, even though this may be complicated. Hegel's thesis was that when something has happened, it has happened of necessity. For Kierkegaard the challenge lay in the circumstances of the existential action and in the choice of possibilities for the action, as this choice implies a responsibility for consequences.

Like Kant, Kierkegaard assumed freedom of action as a logical condition for responsibility which, for its part, implies duties and norms without which human society cannot continue to exist.

In the same way as children learn to speak without the slightest knowledge of grammar, syntax or semantics, people learn other activities, including jurisprudence or legal dogmatics, without fully understanding how they do so. Jurisprudence is such an old science with roots in the even older rhetorics that it has developed its own methods which can be learnt and used like any craft. This was the the way in which, during my student days and in practice, I learned to solve legal conflicts, although at that time I was already chafing at the bit because I had difficulty in learning things I was unable to understand. During my professional development in the fifties this need for understanding was helped partly by Alf Ross' and Knud Illum's legal-philosophical works and partly by the method-conscious Swedish jurisprudence.

But it was only in the sixties in my search for the roots of the development and methods of private law that I came closer to an understanding of the connection between legal dogmatics and legal philosophy. During the sixties logical positivism had been criticised, and its acceptance of the possibility of an objective description of reality had been replaced by a "hermeneutical" philosophy of language which saw the impossibility of the position of logical positivism in that language and reality belong to logically discrete categories.

Franz From had already in his dissertation: *Om oplevelse af andres adfærd* (1953) (Concerning the Experience of Others' Behaviour) made evident that a description of human behaviour is impossible without interpretation, and that

this interpretation is impossible without a knowledge of human motives. The "intentional" element became the basis for phenomenological philosophy and psychology and thereby for the recognition of the nature of language as action and not as the passive reflection of reality in consciousness.

In 1956 Joseph Esser had published his book: *Grundsatz und Norm* in which he had shown, on a comparative legal basis, that countries at the same level of development are confronted with problems of a similar character. These are solved in the same way with the help of legal rules and legal institutions which differ in structure due to differences in tradtion. Legal principles are the common ground in different legal systems with a common culture. Later Esser developed his theory with the aid of the hermeneutical insight into the connection between the methods employed by science and reflections on preexistent reality: *Vorverständnis und Methodenwahl* (1970).

Theodor Viehweg's: *Topik und Jurisprudenz* (1953) and Perelman's new rhetorics had revived interest in Aristotle's rhetorics and Vico's doctrine of the probable in contrast with the certain in humanistic perception. Frantz Wieacker in his: *Privatrechtsgeschichte der Neuzeit* (1952) had emphasised the character of jurisprudence as a cultural science, something which Gustav Radbruch had already done at the beginning of the century.

But it was not until I discovered Felix Cohen and American pragmatism, that my understanding of the connection between the "Zeitgeist" and jurisprudential method was sharpened. Cohen was the first to take into account the consequences that the theory of relativity had for the dissolution of science into different relationships using different methods. The study of the history of science confirmed the connection between the ordinary scientific world view and the methods of jurisprudence.

This was the same insight which both Wittgenstein and Habermas had arrived at by different routes with their emphasis on respectively, "Form of Life" and "Lebenswelt" as a prerequisite of every perception and all science. The English "common sense" philosophy as expressed by Hart and Honoré in: *Causation in the Law* (1959) took as its point of departure the actual conditions of life in an attempt to decide the question of cause on the basis of the "ordinary use of language".

At the same time it was this attempt to solve a complicated problem with a simple and primitive tool that helped me a step on the way to an understanding of the methodical flaw in legal dogmatics. Hidden behind this apparent "realism" was the "rationalism" which had characterised jurisprudence since its renaissance in the 11th century.

Thomas Aquinas' revival of Aristotle's conceptual realism helped to canonize the scientific rationalism of jurisprudence throughout the Middle Ages, the rationalistic theory of natural law and on to the German "Begriffsjurisprudenz". Aristotle assumed that reason was inherent in human nature and thereby a rule and standard for human actions, and it applies to every genus that its first principle is also a rule and standard for that genus. In this way the principle of reason becomes decisive in the solving of all legal questions. Where private law is concerned, based as it is on the rational will of the parties involved, it will be the interpretation of this, rather than practical considerations which will be crucial in determining the extent of the legal obligation. Consensus and dissent, and thereby an examination of the actor's "assumptions" or the, by him, "foreseeable consequences" will be decisive.

This rationalistic theory of science in legal dogmatics lived on well into the 20th century, in spite of a formal declaration of allegiance to a realistic philosophy. Behind the labels, "the public good", "practical considerations", "common sense" and so on, were hidden the "legal principles" or "legal grounds" which were to rationalise or justify the whole of private law or parts of it.

For a realistic theory of law which takes as its starting point the dual character of man as a natural and rational being, it is clear that reason alone cannot be a criterion for society or for the solution of legal conflicts arising within society.

This was the mistake made by the fathers of democracy in the past and Jürgen Habermas in the present when they presupposed that the rules of a democratic society are established on the basis of a reasoned debate among educated people. It was apparent already for Ihering and Marx that the laws of society are the front lines of warring interests and that voting is done with the feet as well as the head.

It is this realisation which makes it just as obvious that the considerations which motivate a given legal institution do not necessarily influence the more precise shaping of its details. Although the law of contracts, for example, is justified by private autonomy it is not a matter of course that the will of the parties alone shall guide the organization and development of the law of contracts. Although preventive considerations may be the basis of the law of reaction it is far from given that the ideas of the actors should be decisive in the question of the extent of responsibility.

A comparative view in its widest application, both historically as well as geographically, will also reveal that "reason" is at all times and in all places dependent upon the cultural situation. On the other hand it also demonstrates that certain values and certain structures in the consciousness are constants. Man

has always known the difference between adversity and injustice. Thucydides noted long ago that people will tolerate great adversity without complaining but that the smallest injustice will enrage them.

The concept of justice has a content which alternates with the culture, but that is not enough to - like Alf Ross - discard the concept as empty. The necessary social organization of humanity requires a minimum of trust and reciprocity and a previous calculability which presupposes that similar cases will be treated similarly according to a common rule. Arbitrariness has always been the antithesis of morality and the law.

A comparative analysis also makes it obvious that societies at the same level of culture will be confronted with the same problems, which they will deal with according to the same principles. It is this comparative view which leads to an insight into the relative nature of perception and science. The theory of relativity has taught us that perception is dependent upon the questions we ask and the questions we are capable of asking. Science asks the questions we are interested in asking and receives the answers which the chosen methods are capable of giving.

Jurisprudence has always been instructed by science and is also beginning to adjust itself to the relational way of looking at things inherent in the theory of relativity: That the truth has many faces and that the individual aspects of reality must be considered on the basis of their own premises and their own methods, but afterwards, and according to ability, should be synthetized in order to make life understandable and meaningful.

On the other hand, this overall viewpoint must always remain unstable and the object of continuous adjustment in step with the developments in society and human perception. Life is first understood after the event and when it has been understood, it has already become something different.

I.

Scientific Strategy

A. Fragments of a Theory

A genius is a person who says the right things at the right time.

It is not enough to say the right things if they are said at the wrong time. This is why the Italian philosopher Giambatista Vico (1668-1744) was ignored by his contemporaries. At the beginning of the 18th century he criticised Descartes' *modern* deductive rationalism on a dialectical-humanistic basis, and has only recently been "discovered" by present-day neo-romantic rebels.[1]

It is also possible to say the right things in the wrong language. The Danish jurist A.S. Ørsted was thus unable to influence the international debate on legal theory during the last century even though he was more "realistic" than his German colleague F.C. v. Savigny. Although taking "Lebensverhältnisse", as his point of departure, v. Savigny's "Rechtsverhältnisse" has its source in "the nature of things" as expressed in the Corpus Juris. Ørsted's point of departure, on the other hand, was the practical conditions of life as they were reflected in legal practice, which is why he began the publication of a collection of Law Reports.[2]

It is a general problem that the Scandinavian languages are not mastered by many foreigners, but it is also a more serious problem that the English-speaking populations only read German to a limited extent. This is the reason why Anglo-Saxon legal theoreticians have often initiated debates on theories which have already been formulated long ago in Continental legal science, but the opposite may also occur. Sometimes this is a case of an inadequate orientation in scientific theory. The linguistic and historical problem is part of a larger scientific-political dilemma which consists in groups and societies which, for personal and strategic reasons, monopolize the theoretical debate by sometimes consciously provocative modes of expression.

In the following I will be particularly concerned with four examples. I am thinking of the following: Thomas Kuhns, who launched the "theory of

paradigm",[3] Ronald Dworkin's theory of "legal principles" as a part of the legal system,[4] McCormick-Weinberger's "institutional theory of law"[5] and G. Teubner's theory of "reflexive law".[6]

All four theories have been succesful *partly* because they have met a need at a certain time and *partly* have been discussed in a predominant scientific milieu.

All four theories are a reaction to the crisis of positivism in the sixties and each in its own way implies an attempt to comply with and overhaul a number of the defects of positivism. Characteristic for them, however, is that they fail to perceive the systematic connection between these defects and do not see their common cause, which is why they only relate to part of the problem.

In my view the principal flaw in a positivistic scientific and legal theory is that it presupposes the possibility of an objective description and thereby presupposes either that reality has a linguistic structure, or that language is an integral part of reality: "that the real is rational and the rational real" (Hegel). Today it has become apparent that this cannot be correct, as reality and language belong to discrete logical categories and because, on the other hand, language is not simply a conventional means of passive identification but an innate ability to deal actively and selectively with reality.

It would therefore appear obvious that perception must be relative and decided by the "cognitive interest" dominant at every time and in every scientific milieu. Einstein's theory of relativity made this clear to science in general and Heidegger's general scientific hermeneutics made it equally clear to the human sciences that perception is conditioned by a certain "pre-understanding" and "intentionality".

Aristotle had already drawn attention to the fact that language and reality are two different entities. This is why he discriminated between *analytika priori* and *analytika posteriori*. The former contained rules for making binding conclusions within a system of language, either in the form of an apodictic syllogism, where there are two certain premises, or in the form of a dialectical syllogism, where there is one premise and a conclusion. Finally, rhetorics deals with conclusions from premises which are not certain but probable. Inductive and deductive conclusions are possible as long as we simply have the first premises which are the point of departure for the concluding system. These premises are not fixed with the help of logic (demonstration) but with the help of a special ability which Aristotle called *nous*, i.e. intuition.

These first premises are, then, fixed by a decision which can consist in the introduction of an assumed reality, which Aristotle called a definition, and which thereafter can be made the point of departure for logical conclusions. The definition has its basis in the ability to make generalisations or concepts and, in

the actual instance, can be decided on the basis of an analogy as to whether the assumed attributes can be ascribed to the phenomenon.[7]

Through the years science has attempted to dissolve this antagonism between language and reality in various ways. Rationalism by keeping to language and thereby to the "certain" and empirism by keeping to reality and thereby to the "true". Kant attempted to reconcile these opposites by limiting science to sense impressions but assumed certain common concepts as structural elements in the human apparatus of cognition. For theoretical cognition it is particularly the causal relationship and for practical cognition freedom of action which must be assumed.

Kant did not regard "ideal reality" as an object for science but as cognizable simply through intuition. Science deals with sense impressions as these can be verified through the function of the cognitive apparatus. During the period of idealism which followed Kant's warning was ignored and 18th century rationalism continued quite unchanged, with language regarded as the primary basis for science on the assumption that reality was structured linguistically.[8]

When the new critical cognition came in around the turn of the century the assumption of the linguistic character of reality was rejected and various philosophical schools drew different consequences from this new direction. One of the most important was a return to Hume's and Kant's schism between cognition and evaluation and between empirism and generalisation (language). American pragmatism chose to give up the requirement of objective truth and link the "process of verification" to expediency (the effect of an action" and make consensus between scientists a criterion for the correctness of a method. The English moral philosopher, G.E. Moore, once again introduced intuition as a basis for cognition (common sense) and an objective theory of values and therefore also rejected a cognisable connection between "is" and "ought".

The Swedish moral philosopher, Axel Hägerström, came to the opposite conclusion, that evaluation is subjective and went on to found "Scandinavian value nihilism", reaching the same result as the logical positivism of the Vienna school which assumed that evaluational statements have no "semantic reference" i.e. no reality phenomena which correspond to the content of the statement. According to this theory science is only able to concern itself with "verifiable" postulates which must therefore either be analytical (concerned with logical connections) or, if they are synthetic (concerned with conditions outside language), have an objectively measurable outward correspondance. Therefore metaphysical and evalutaional statements are unscientific.

Intuition had been rehabilitated by the French philosopher Henry Bergson whose "intuitionism" had great significance for German phenomenological

philosophy represented by E. Husserl who, similarly to English "common sense" philosophy, attempted to overcome the schism between reality and cognition after the fall of idealism by starting from a "Wesenschau". This must be free from the taint of earlier views (ideas) and assume an immediate conscious impression through an intuition in competition with the cognitive apparatus. Intuition is not simply a passive ability for registration but an action, so that human goals control cognition, which is therefore "intentional". Husserl was influenced by his teacher, Frantz Brentano, who, like Bergson, had taken psychology, which had been separated from logic, as his starting point. The intentionality which was connected with this was also important in Schopenhauer's theory of volition, which in Ihering's theory of interest removed itself from the logical method of "Begriffsjurisprudenz" by stressing the importance of motive for human actions:[9] "Eine Handlung ohne Motiv ist wie ein Wirkung ohne Ursache" he said, adding as an illustration that in the same way it is impossible to make a machine work by reading it a lecture on the laws of motion, it can only be made to run by supplying it with power. Brentano was also the originator of "the objective theory of value" which claims that intuition can realise values immediately and give them priorities in a system of values, similarly to Scheler and Hartmann and, after the war, in Helmuth Coing's and Alois Troller's phenomenological theory of natural law.[10]

The similarity between phenomenolgy and existentialism as developed by Heidegger lies in the rejection of idealistic "preconceived" ideas, as "nature" is "preexistent" which is why every cognition must be dependent upon a "Vorverständnis".[11] Similarly to Gestalt psychology, this "hermeneutical" theory of cognition claims that individual elements can only be understood as a unified structure (cognitive structure) as a unity can only be "understood" as a system of individual elements (the hermeneutical circle). As a "prerequisite" for moral philosophy the fact that humans are living beings which can only exist as individuals in a society must also be accepted. This is why K.E. Løgstrup[12], for example, thinks that it is possible to deduce from this the "sovereign expressions of life" e.g. the truth requirement of a necessary, social trust relationship immediately and *a priori*.

Ludwig Wittgenstein realised the linguistic-philosophical dilemma in logical empirism, namely the assumption of the "objective" character of language (because the procedure of verification prerequires that reality correspond to a verbal assertion) at the same time as the logical reality structure of idealism was rejected.[13] He had learned from phenomenology that thought and thereby philosophy were actions, that it is impossible to perceive without describing and that the indescribable did not "exist". Wittgenstein later succeeded G.E. Moore

at Cambridge and the philosophy of language has since occupied an important place in English analytical philosophy. Through an analysis of language Wittgenstein's directions have been followed and in this way an attempt has been made to create as clear a perception as possible. Continental hermeneutics and English analytics have together attempted to extract information concerning mankind's needs and experience from language, on the common assumption that language has retained traces of these after having being used as a medium of communication throughout the history of mankind.

In the fifties and sixties the continental topical theory of law and new rhetorics also emphasised the connection between language and perception. But through a revival of Aristotle's dialectical logic and Vico's theory of the probable an attempt was made to justify a legal and moral philosophy with reference to consensus in an imaginary "auditorium", and in this way a pragmatical or relative truth criterion was chosen.[14]

The critical and neo-Marxian legal theory rejected both the positivist and rhetorical-hermeneutical theory of science and pointed out that the truth criteria employed by these schools were respectively conservative and historical. The given in the present and in history is only capable of taking into account the state of things as they are and cannot reveal anything about the state of things as they are not – yet.[15] Instead of positivism's "how?" and hermeneutics' "why?", the critical theory, or "negativism" poses the question, "why not?" On the basis of Jürgen Habermas' critical rationalism the claim is made that the human process of liberation is furthered through a reasoned dialogue. Like all the great thinkers of natural law, Aristotle, Thomas, Grotius, Rousseau and Kant, Habermas claims both that man is a social being and that he is led by reason. On the other hand Habermas, in accordance with the axioms of phenomenology and hermeneutics, is aware that cognition is controlled by interest and ought, like Marx and Ihering, to have seen that this is also true of practical cognition which can not, therefore, be due to a "reasoned" debate between educated people. Ihering thought that the struggle for justice was a prerequisite of the struggle for power, as he believed in the controlling effect of law. Karl Marx assumed that only a revolution could alter the distribution of power in society as law is "reflexive", i.e. that as a part of culture it belongs to the "superstructure", which simply mirrors the material "basis". The ultimate consequence of this "reflexive" understanding of law was also taken by Pashukanis who was, however, liquidated by Stalin and the Soviet government which, paradoxically, is based on Austrian Hans Kelsen's definition of law as identical with the state and its apparatus of power.

B. A Relationistic Theory. Language and Reality.

These introductory remarks on the difference in logical status between language and reality and the principle epistemological relativity resulting from this, are necessary as a background for an explanation of my own treatment of jurisprudential epistemology and the resultant connection between norm and reality.

In my search for the historical sources of jurisprudence I had arrived, by the mid-sixties, at a relative or relationistic point of view.[16] Jurisprudence, which is one of the oldest sciences, has, through the 800 years which have passed since the study of the Corpus Juris at Bologna was combined with the employment of Aristotle's philosophy, pursued various goals and has therefore employed different methods (*methodos*: the way by which [the goal is reached]) and goal and method have also been decided by contemporary world views and science. The first glossators used the authoratitive geometrical and dialectical methods of scholasticism with pro et contra arguments (mos italicus). Later, in the Renaissance, with its static-mechanical world view, jurisprudence was characterised by the methods of physics and arguments of causality. Finally, with the idealism of the 19th century, jurisprudence became dynamic and chose historical- evolutional arguments from biology (mos germanicus). My thesis was then, that the jurisprudence of the 20th century, under the influence of the theory of relativity, would choose pluralistic and relational arguments (pluralis juris).

On the way it appeared clear according to legal-historical, legal-anthropological and comparative-legal studies that an understanding of law develops from pre-political societies where the understanding of law is "reflexive" in that custom is the source of law. Ethic and moral come from the corresponding Greek and Latin words for custom and practice. In primitive cultures, including the European culture of the Middle Ages, justice is something which is "found", not something which is created. It was not until the Renaissance with its mechanical understanding of reality that the law came to be regarded instrumentally as a humanly created technical means of regulating society. But legal rules today are also "reflexive" in that they ascertain status and are subsidiary compared to social "institutions" such as marriage, the church, contracts, the state and so on. In the moral and linguistic-philosophical debate the division between "raw facts" and "institutional facts" was introduced because it was claimed that it was possible to conclude something normative

from "institutional facts". The flaw here, though, was the same as in "Begriffjurisprudenz" when the fact was overlooked that it is impossible to extract more from concepts and institutions than one has already put into them.

It was also evident that hermeneutic language philosophy led to a broadening of the concept of law, as this cannot be limited to the concept of rules. Every rule must be *interpreted* in order to be understood and thereby used on hypothetical or concrete facts, and these facts must be *described* so that they can be associated with the norm, like premises in a syllogism which lead to a conclusion. The judicial decision becomes a *resolution* which is dependent upon evaluations: the interpretation of the rule, the choice and linguistic qualification of facts and their concretisation in relation to the abstract concepts of the norm in connection with putting these elements in order of priority with regard to the goal of the norm and the effect of the decision.[17]

When interpreting judicial rules it is important to be aware that rules, like all other linguistic utterances, are intentional, as the use of language is an action which has a goal. Looked at in this way, all linguistic concepts are united with a goal which must be considered in connection with every linguistic qualification. A chair, for example, is for sitting on, a table for putting things on and so on. The goal of art, hereunder literature, is to effect an aesthetic experience and the intention of the artist is not decisive for the receiver who must decide for himself what the "meaning" of the work of art is. There is a difference in cases involving an authoratitive text, a religious or legal norm because here it is the "meaning" of the text which will be decisive for an interpretation. Where judicial rules are involved the norm sender's "meaning" will be of great importance as it must be assumed that the goal of the judicial rule is to have an effect on social reality. The interpretation of the linguistic utterance must compete with teleological and pragmatical considerations which can be supported by, among other things, the preliminary material of the law.[18]

Many of these goals and values are implicit in the structure and function of the judicial system and cannot be understood without taking the politico-cultural system and its historical background into account. Thus it is clear that the Western European communities governed by law are based on the development of an individualistic conception of mankind and society which builds upon the idea of individual rights and "the rule of law". Those in power must respect the law themselves and it may not therefore be censored on political, ideological or religious grounds as is, for example, the case in totalitarian states both of communist, fascist, and Muslim persuasion. Law and order and the formal principle of justice, i.e. that similar cases be treated similarly, are principles which therefore influence every interpretation and use of legal rules. The same

applies to the ordinary principles of the constitution: the publication of laws and the prohibition against retrospective laws, principles of legal procedures: among them the public administration of justice and *audiatur et altera pars*, the principles of criminal law, for example *nulla poena sine lege* and the principle that one is innocent until the prosecution has proved the opposite, the administrative law principle of analogy as well as the tax law principle of statutory authority. Private autonomy, which allows private individuals to agree on anything which is not illegal and proprietary rights are assumptions of civil law. The unifying principle in the axiom that the individual is the bearer of "rights" which are judged through "judicial" and not through "administrative" procedures.

As an example of the fact that general principles of law are elements of the legal system in the sense: basis for the interpretation and use of rules, I have used the following case: A chimney-sweep appears in the probate court and pleads that his claim be recognised as a privileged claim, pointing out that the law of bankruptcy does not declare against it. For a legal interpretation this is clearly erroneous reasoning as the purpose of the law is to place creditors on an equal footing, for which reason we can conclude that the chimney-sweep must argue for a privileged position. Another example is the interpretation of a prohibition against taking dogs on public buses. Does this, for example, also include tigers? Here, logical conclusions are not sufficient, but analogical evaluations of the similarity between the purpose of the prescribed situation and the actual are so considerable that it is possible to assume a common, general principle which will cover both situations.

The assumption that certain rules of private law are expressions of "general principles of law" is the basis for analogical conclusions in many cases where considerations of the interests of a third party or social considerations are not in opposition to an analogy and for a "reverse conclusion". It is clear, however, that the choice between an analogy and a reverse conclusion is not concerned with a conclusion but with a decision.

These linguistic-philosophical reflections lead to epistemological consequences. Language is a tool which is adapted to man's particular consciousness which makes it possible to represent reality with the help of symbols and thereby transfer the contents of consciousness from one individual to another. Unlike the signalling systems of other animals human language is able to generalise and thereby also to form an experience of identity and to discriminate between subject and object. The tool concept is connected with identity, i.e. that the individual remains the same from time to time and place to place so that an "aid", which is situationally fixed, is replaced by a "tool" which

can be kept and used in similar circumstances in the future. Human consciousness is able to create the generalisation that some cases are similar although they may not be identical. The concepts of time and of identity are also necessary requisite for the creation of concepts in general and the general concept is the tool consciousness creates as a cognitive structure which can be put in wherever similar situation occur. "Similar" must in this sense mean that the "cognitive structure" comprises a set of elements which appear in a certain number and a certain pattern which *limits* these situations from eternal reality in relation to certain criteria, i.e. the conditions for choice.

The ability to use language, which is connected with a certain region in the left half of the brain, is an ability which is latent in every child and which can be developed and perfected like any other human ability such as the ability to walk upright and to use the hands as tools. The ability is developed through practice, although it is not learned by adults who speak "correctly". This is why the conclusion has been drawn that human consciousness is not an "empty vessel" but a disposition for the logical structuring of the contents of consciousness in relation to an innate "in depth grammatical" genotype, which assumes various phenotypic expressions in different nations and cultures.

One thing does however appear to be general for the development of language and consciousness, namely that its sequence runs from a casuistic to a generalising state. This is true, not only of the individual, but also of historical cultural development. the sequence of which runs from a casuistical, objective and collective stage to a generalising, subjective and individualising stage. The development of writing and particularly the analytical alphabet furthers this development of culture which ends in an urbanised and technological understanding of the world and society.[19]

The general concept corresponds to the definition which Aristotle developed and which limits and identifies similar situations in relation to their surroundings. It is exactly on the basis of the precise limitation and identification that general concepts can be used as elements in apodictical and dialectical syllogisms which allow us to arrive at deductive and inductive conclusions within systems of concepts. As mentioned analogical conclusions can be used where the situation is not included in the definition but is so similar to it that it can be considered as covered by a more comprehensive genus which is capable of including the analogue situation.

It is also, as mentioned, a problem which Aristotle had already seen that reality is not linguistically structured, which is why it must be *qualified* in the form of language before it can fit into the linguistic-logical system. Another related problem is that many words and concepts are *type concepts*, i.e. that they

represent reality not exactly, through a certain number of precisely structured conceptual elements, but through the *intensity* of elements.[20] A well-known example is the concept "forest" which is characterized with the conceptual elements "trees", but not precisely how many per unit of area in relation to the concept "park", "grove" and so on. The German interest theory of law similarly developed the concepts "Begriffskern" and "Begriffshof" to indicate the possibilites for a "teleological" interpretation of legal rules.

Most of the "concepts" of language have this open and ambiguous character which is a condition making possible the limitation of language to a reasonable number of words which are capable of expressing an, in principle, unlimited number of meanings. On the other hand, it is obvious that any linguistic treatment of reality is made up of a concretizing "weighing" of the individual situation whereby a not objective, yet not subjective, description of reality occurs. It is precisely because the purpose of language as a tool is to transfer a meaning content from individual to individual that it is necessary that communication normally be successful which is why it must certainly be *intersubjective*.

Behind the sender's and the receiver's use of language there must be a common "ideology", i.e. a common system of ideas and values which can, so to speak, filter concepts through the same network of asumptions which cause them to have the same "meaning". This is why it is possible for the same person in some "auditoriums" to be a freedom fighter and in others to be a terrorist. But also forms of cultur and life can involve differences and similarities in the experience of language. Seamen often use nautical expressions whilst farmers use agrarian and the businessman mercantile expressions. Primitive peoples do not easily understand modern institutions which contain assumptions on individualism and democracy. This is why historical accounts must be written on the basis of past levels of experience. The Lilliputian's search of Gulliver and their report on the effects found in his pockets are instructive insofar as the account illustrated the fact that it is impossible to describe pistols and bullets without a knowledge of firearms, and pipes and matches without a knowledge of tobacco smoking.

That which characterises human consciousness in contrast with modern computer technology is that it can think "horizontally" and not merely "vertically". It is capable of using analogies and not just logic, i.e. that it can operate with *similarity* and not just with *identity*. Human consciousness can therefore operate with greater or smaller similarities and still connect concepts with meaning, whilst the computer must be given a precise command in order to work. This way of working is the background for and indicates the mechanism in the ac-

quisition of new experience which must be done by attributing the experience to one of the known concepts and thereby extending its meaning. The mechanism is also, from another angle, the reason that a generalisational legislational technique is preferable to a casuistic one. The casuistic technique demands that every interpretation be carried out with the help of a fiction or analogy technique whereby a given situation is said to simulate another. For example, in Danish Law (from 1683) there is a rule which punishes for theft anyone who sleeps with a woman who possesses the keys to the pantry of the house. With the help of a generalisational legislational technique it is possible to subsume a plurality of cases under the same concept and, at the same time, make it possible to take into account future, as yet unknown situations on the basis of teleological and pragmatical values indicated either in the text or in the preliminary material of the law.

II.

Law and Society. Pluralis Juris

A. Law and Society

On the basis of the above-mentioned premises and the general philosophy of science and language grounded upon this I wrote: *Ret og Samfund* (1970), which in 1971 was translated into German as: *Recht und Gesellschaft* and into English as: *Law and Society*.[21] This book was followed by *Pluralis Juris* (1982).

I had already presented a cohesive theory of law and jurisprudence in *Law and Society*. Law is seen as a cultural phenomenon which must be understood as a systematic part of an at all times existing society. A comparative analysis is first and foremost an analysis of functions as, vertically, it investigates which functions norm systems have had in the history of culture and, horizontally, which legal rules and legal institutions are used in different legal systems for the achievement of identical functions, and what interplay there is besides between the legal system and other social systems. Legal history, legal sociology and comparative legal science are brought into the analysis to achieve as comprehensive a body of material as possible to avoid defining important areas of law and legal science out of existence.

I became aware early on that most general legal theories hypostasized one of several aspects of the historical and social functions of law and that the chosen definition also had to be regarded as chosen on ideological considerations in the broadest sense, i.e. on the basis of the desire to legitimise a certain type of society or a certain policy. In the same way legal science must be understood on the basis of a reductionistic inclination to indentify law with certain political interests. Instead of such a *monistic* point of view, I chose a *pluralistic* method to secure as broad an understanding of law as possible.[22]

Already at the beginning of the previous century, Johann Gottlieb Fichte wrote that man chooses a philosophy according to his needs. Although the

romantic basis for this statement has been abandoned - we no longer believe that the individual creates his surroundings through his intellectual faculties - there is still that genuine core in romantic idealism that the individual cannot confront his surroundings without being aware that he is separated from them and can only deal with them intellectually with his ideological and interest-determined premises. There is a direct connection between Fichte's romanticism and modern pragmatism and hermeneutic.

The scientific concept which I plead for in *Law and Society* is also pragmatical in that as a criterion I refer to the greatest possible methodical consensus between the actual practicioners of legal science. This view was a consequence of that relativity which emerged on the basis of the different methodical traits in science and legal science throughout the history of jurisprudence. This was also connected with a realisation of the different manifestations of legal science. *Legal dogmatics* which is concerned with questions of the type: What is existing Danish law? is a normative and practical interpretative and systematic science related to the ethical, theological and humanistic sciences and it serves the legal professions by suggesting solutions to hypothetical conflicts. It is, however, a social science insofar as its object is the legal norms of society. *Judicial sociology* is an empirical and theoretical science which is concerned with the relationship between judicial rules and actual social conditions. Judicial sociology is related to administrative and political legal science which analyses the rle of judicial rules as a tool which can prevent conflict, regulate and alter society. *Legal history* and *comparative legal science* are also non-dogmatic sciences in so far as they do not answer actual judicial questions but, on the contrary, compare empirically the connection between structure and function and thereby serve to forward a more comprehensive understanding of the judicial concept.

Law cannot therefore without further notice be identified with modern Danish or European law. From a historical viewpoint law is not a conscious instrument of regulation which is produced by princes or states for that purpose. In primitive societies there is no central authority which has the power to carry out its purposes, for hundreds of years law was thought of as a status constituting instrument which reflected and did not create social institutions and values. It was therefore paradoxical that Kelsen's identification of law and state was accepted by anthropologists who were then able to assert that primitive societies had no legal rules. Even more paradoxical was that Marxist systems in Eastern Europe accepted Kelsen's definition of law although Marxism, in principle, should lead to a "reflexive" understanding of the law as it can be found in Pashukanis.

It is understandable that things have developed as they have, simply because reality does not correspond to ideology. It is also possible to understand why the concept of "reflexive law" has been rediscovered to justify a "post-capitalistic" and "post-socialistic" social system based on "autonomous units". It is apparent in the east and the west that the bureaucratic "welfare state" partly hinders efficiency and partly detracts from law and order. There is, however, no need to discover a new concept to describe this situation and, so to speak, pour old wine into old bottles and merely attach a new label.

B. Pluralis Juris [23]

1. Prognosis

Law can be considered from different points of view and on the basis of different agent's interests too. D.W. Holmes drew attention to the fact that American realism, which considered the law as prophetic of future concrete judicial decisions, was "the bad man's law". It is only those who are interested in finding out how far they can go who are interested in knowing the probability of the public power apparatus being turned against them. American realism reflects, however, also the fact that the judge is a dignitary in the Anglo-American legal tradition, so that it is natural to seek the criterion for the law's existence in the actions of the judge.

2. Command - rule

H. Hart's judicial theory[24] differs in this from the Anglo- American tradition and removes itself also from Kelsen's continental theory of power. The command theory of absolutism thought out by Thomas Hobbes was taken over by the theory of volition in the 19th century, which was then taken over by John Austin whose theory is rejected by Hart and replaced by a "rule theory". According to a rule theory law is not comprised on individual commands but abstract norms which oblige citizens but also the authorities to respect the law (the rule of law) and its basic meaning corresponds to the requirement of formal justice that similar cases be treated similarly. Hart emphasizes the "democratic" element in his theory by subscribing to a positivistic theory of law

which does not allow a censorship of law on the basis of morals or natural law. He speaks of "immoral" but not "invalid" law if it has been arrived at in accordance with the "rule of recognition", i.e. social rules for the production of "valid law". Hart's legal theory has been attacked from various sides but most attacks have not so much been based on flaws in the theory as on its limited perspective. Fuller's criticism[25] misses the mark in so far as "inner morality", according to his own statement, are "effect conditions" and not validity conditions. Hart's "minimum content of law" is close to Fuller's eight activities conditions and Hart is correct in finding them represented in all known judicial cultures.[26] Ronald Dworkin's criticism[27] disputes the validity of Hart's supposition that the judicial system is not exhaustive and that certain unregulated situations leave the judicial decision to the judge's opinion, due as mentioned to the limitation of the content of the theory. Hart does not include judicial decisions in his analysis which is why the problem of the application of law does not affect his conception of law.

Hart emphasises the "internal perspective" of law as necessary for the judge or civil servant who is to apply it, and therefore cannot stop at a theory of prognosis ("external perspective") which is enough for the lawyer or "the bad man". He who is to apply law must know what he is *obliged* to use as a basis for his decision. The judicial decision must be *justified* with arguments from "valid law" which will lead to the "judgement" and it is not sufficient, like American realism, to understand the judicial decision as a virtual *motivational relationship* which causally leads towards a psychological decision.[28]

Although Hart subscribes to analytical language philosophy with its recognition of the "open texture" of language, he still thinks that "common sense" can lead to a correct description of facts in such a way as not to, in principle, remove himself from the logical theory of language of logical empirism, which sees nothing problematical in the linguistic description of legal facts. By rejecting the objectivity of description and recognising "intersubjectivity" and consensus in different hermeneutic "auditoriums" - including the juridical - it appears clear that both the application of law as well as legal dogmatics must take into account the description of, respectively, factual as well as hypothetical "legal cases" and thereby "qualify" reality in a linguistic system of concepts and "interpret" legal rules on the basis of their language content with regard to purpose and practical effect.

As mentioned, these observations mean that both the entire cultural situation as well as social and political reality, including the whole politico-legal system, like the legal principles, are comprised within the collected process of qualification. It is therefore incorrect for Hart to think that there are "holes" in

law which must be filled in according to the free opinion of the judge as stated in section 1 of the Swiss Statute Book. It is interesting to say with Joseph Raz that legal systems are formally exhaustive in so far as the judge will always come to a decision because he must. Nor is Dworkin accurate in discriminating between "rules" and "directive rules" and in viewing the latter as something separate from law. Either "principles" are a part of the argumentation material, which due to the tradition of juridical science is allowed "de sententia ferenda" (advice to the courts) and so belongs to the source material of law and thereby law, or it lies outside this material and arguments based on it become "de lege ferenda" (advice to the legislature).[29]

3. Rule - principle

It has always been known that legal rules must be interpreted, but it is only today that the principal problems of language philosophy, which mean that interpretation and application must be seen as a collected "process of concretisation", as Karl Engisch expressed it already in 1953,[30] have been recognised. It was this recognition which caused me, in the above-mentioned works, to regard "legal principles", "general lines" and "legal ideas" as necessary parts of the judicial system and the point of departure for legal argumentation.

It is therefore not particularly interesting or original to look at this theory as a kind of new natural law middle path between "Begriffsjurisprudenz" and "legal realism".[31] German phenomenological legal theory and the interest theory of law had the same purpose; the former referred to intuition, the latter to teleology as a tool for the recognition of the values behind the rules, which provide advice in the process of the concretisation of rules. Existentialism also regards judicial rules as an incomplete draft for solving problems that must be given their final answer in the individual legal decision, which will then constitute the rule.[32] Certain variants of the system theory, particularly N. Luhmann's and Werner Krawietz's, who regard law as a social constituent system which continuously adjusts to a complicated social reality, have the same decisionistic character under the pretence of exhaustiveness. This system theory is - like an existentialistic theory also - related to the market-orientated legal economy as it has been developed by R.H. Coase and R. Posner of the Chicago School.[33]

The inadequacy of such theories as legal theories can be revealed in a simplified model: There is a sign on each of two lawns. Sign no. 1 reads: "Keep off the grass, penalty for violation $1". Sign no. 2 reads: "Tread on the grass, price $1". From an economic point of view there will be no difference between

the two cases when the money is counted. From a juridical point of view it is clear that the purpose of the two signs is different.

It is clear according to this reasoning that a sociological, economical and existentialistic perspective of law is interesting and relevant, but not exhaustive and not illustrative of the practically significant perspective: It is dogmatics which is concerned with right and obligation. General judicial theories, which start from and hypostasize the "reflexive", "existentialistic" or "market economical" perspectives of law are an expression of an "anarchic" ideology which, like the neo-Marxist ideology of the sixties and seventies, imagine a society made up of "autonomous" groups or individuals.

4. New criticism

The "new critical theories or new theories of natural law" also imagine a social development where minority groups, who lack the opportunity of influencing legislation through parliamentary systems, can, by using the courts as a tool, reform society by transferring a constitution's "promises of future legislation" from constitutional law and introducing arguments from this to support demands in connection with administrativ law and civil law. Such a procedure is favoured in a federal system like that of the USA where the lack of a common judicial system allows the federal courts a considerable "political" influence in testing the constitutionality of "legislation". That the system has been used in this way is in no doubt when we look back on the endorsement of Roosevelt's "New Deal legislation" and Eisenhower's "racial integration legislation". In recent years the situation has become more acute with the majority decision of The Supreme Court rejecting the death penalty and a new majority's "re-introduction" of the death penalty.[34]

This method has also been used with a certain success in the Federal Republic of West Germany for judicial renewal. In particular, reference has been made to the fact that a civil Statutes Book (BGB) which is based on the 19th century individualistic theory of volition, should be interpreted with regard to the new Federal Republic's "socio-political" constitution (Wiethölter). On the other hand the general clause in 242 BGB, which states that the law must be interpreted with regard to "Treu und Glauben" had currently adapted the law itself to the Nazi "Gesundes Volksempfinden".[35]

For a period the "judicial critical" movement succeeded in obtaining results in the courts which it could not get through the legislative procedure. Particularly in the USA and the Federal Republic, which as federal states have different

jurisdictions, the constitution could be used as a political element in the courts by constituting a kind of "new natural law", but realising their lack of a political mandate, the courts have recently begun to take a more restrictive stance.[36]

It has been realised that there are limits to the "political" function of the courts and that there is therefore also a difference in "legal arguments" (de sententia ferenda, i.e. advice to the court) and "political arguments" (de lege ferenda, i.e. advice to the legislature). Legal politics is a respectable and important legal science, but it cannot be hypostasized to "the legal science". In no case has Scandinavian realism, like Eastern European socialism's judicial theory, placed emphasis on the pedagogical and regulatory effect of law and on public utility as a basic value.[37]

For the working lawyer valid "right and duty" are the most important things, whether he solves conflicts as a judge, administrative civil servant, or negotiating lawyer (conciliator) or as conflict preventive as a constructor of contracts or rules in public administration or private organizations. It is characteristic that the theoreticians who represent a "new liberal" ideology, in opposition to the bureaucracy of the welfare state which is justified by reference to "public utility" or "distributive justice", use the market economy of the social contract to legitimise "commutative justice" and the rule of law as a value in competition with public utility. Contrary to Scandinavian realism which regarded right and obligation as "terminological aid concepts" right must be taken seriously in the new liberal theory.[38]

5. Pre-legal facts. Institutions

a. Institutional facts

There is a difference in principle between a "metalegal" ideology whereby right and obligation are legitimised and the acknowledgement by legal dogmatics of the existence of valid rules with their derivatives, rights and legal obligations. These can, as mentioned, only be derived from normative and not from factual conditions, unless the fact in question is an "institutional fact", a constituent assembly for example. Kelsen's "Grundnorm" is a logical condition for his judicial system, just as a system in general can only, as a system, refer to itself. Hart's "rule of recognition" is the empirical fact which each individual social system approves as a criterion for valid judicial production, whether, as in primitive society, it is custom or, as in England, political practice, or in other countries, a constitution which indicates a legislational procedure. It is clear that the es-

tablishment of this "institutional fact" cannot be justified normatively, but must be considered as one of the "pre-legal facts" which law in general must take its point of departure in.[39]

"Social contracts" of all kinds are hypothetical or fictional entities the purpose of which is to legitimize the judicial system by referring to something rational, namely human reason. On the other hand, it is obvious that "legal obligation" through agreement prerequires that the agreement be binding, and from antiquity it has been apparent that biological-anthropological facts are the factual side of the basis of judicial and social systems. Aristotle grounded law on the double reference to man's social nature (zoon politikon) and reason. The later Catholic and material theory of natural law from Thomas to Grotius took the same starting point in natural facts and man's reasoned will. Hobbes, on the contrary, founded a more pessimistic social theory which assumes man's asocial nature, but the later Anglo-Scottish empirism is based on the assumption that man's egotistical actions will, due to the intervention of the "invisible hand", lead to social gains. ("Private vice, public benefit", Mandeville, *The Beehive*)[40]

But it was, as mentioned, C.F. v. Savigny, who, on the basis of Kant's discrimination between "nature" and "obligation" started with the factually present "Lebensverhältnisse" by constructing the corresponding "Rechtsverhältnisse". The inspiration for this came, like that of his Danish contemporary, A.S. Ørsted, from Montesqieu's relative natural law which required "rapports nécessaire" between the nature-given conditions in a concrete society and the judicial rules corresponding to them. "The nature of things" played an important role both for Savigny and Ørsted as a source of judicial rules, but while Savigny, as mentioned, found them in the legal manifestations of the "national genius" (Volksgeist): the sources of Roman law, Ørsted found his inspiration in practical "real considerations". The "nature of things" and "case-logical structures" are, in the later theory, often-used figures in the argumentation for certain preferred problem solutions. It is clear that such arguments, like references to justice and conceptions of justice etc. have no more value that other evaluational statements and must therefore be supported by clarifying arguments, either with reference to the implied values and purposes, or to the authority of the evaluator. Reality is not structured "reasonably" which is the reason that "case-logical structures" is meaningless.

Nor can the "nature of things" in itself establish any "necessary connection" between facts and obligation even though it actually can have a normative power psychologically (Jellinek).[41]

b. Nature - culture

It was the ambition of phenomenology, with the help of a so-called "Wesenschau", to be capable intuitively of expressing itself ontologically on man's being and on the normative conclusions which could be drawn from this. Kant would go no further than to deduce, on the principle of freedom and responsibility, a right to freedom only limited by the equal right of others to freedom and the principle that man is the goal of society and not a means. But now things were taken further and deductions were made on whole value and judicial systems on the basis of "institutional facts".[42]

It is a correct observation that judicial rules must be based on man's *biological nature* and *cultural organization* but intuition is an uncontrollable tool for "feeling" the way to the demands of nature. The biological and anthropological sciences are more reliable in spite of the fact that it is difficult to decide what, in present-day social life, is "nature" and what "culture". One thing is however, certain, man is only a social being of necessity as a certain division of labour and organization is needed for the continuance of the species. This is due to the fact that its infants are helpless for several years due, first and foremost, to the size of the brain which makes man capable of creating culture and adapt himself to it due to a correspondant poverty of instinct. These "family institutions" are therefore necessary just as "religious institutions" are necessary if it is correct that the palaeontological criterion for deciding if a being was a human is the evidence of burial rites which imply religious ideas. On the other hand it is probable that the intitution of "ownership" and "right of inheritance" are culturally decided as the original hunting and gathering cultures were not interested in ownership and familiy succession which first become of interest in connection with the advent of agriculture.[43]

In general it is not easy to speak with certainty on what natural needs are, and even less on which rules and institutions are necessary to meet them. It is certain, however, that man is not "an island entire in itself" which can be statistically handled like natural phenomena and logical entities. Humankind reacts to natural and legal challenges and thereby becomes a participant in the legal game which limits the possibilities of legal regulation. It is also clear that there are limits to which social and cultural conditions man can adjust to without mental or social wounds in the form of insanity and criminality. But an "ontological" view of man's "nature" is dangerous as it leads to intolerance. A political process, however, can be adapted to nature and culture, especially if a system can be found which will at one and the same time make allowances for the

communication of human preferences and their long-term arrangement in order of priority.[44]

Scientifically, it is impossible to prove which form of social organization is "natural" for man, only that a form of social organization is necessary. There is a good deal of evidence which points to a development from a collective, status orientated understanding of man and society with a natural economy to an individualistic and contract-based understanding in urbanised social conditions with a division of labour and a money economy. The condition of reciprocity is the material element which connects the objective and the subjective technique for distributing wealth. *Quid pro quo* is the balancing thought which unites the religious sacrifice for the propitiating of supernatural forces with commutative justice, which, according to Aristotle, is the most ancient form of justice based on proportionality, the law of contract's: service for payment and the law of sanction's: an eye for an eye. The objective and material form is gradually dissolved into a subjective and formal understanding which regards the establishing and interpreting of private declarations of intention as both the social and private contract's justification and legal effect (See section IV below).[45]

With the advent of a more comprehensive social authority public utility and *distributive justice* make their appearance as a supplement to the commutative.[46] Whilst today there has been a tendency to regard distributive justice and the regulatory function of the law as the most important, it is, in fact, commutative justice and the reflexive, state-orientated understanding of law which, regarded historically has been primary. This does not mean that the "primitive communist" society was the original one, although the *hierarchical* element in society was extended with the development of the agrarian family society. "Hierarchy" refers to the divine or holy order and is based precisely on a religious theory that something and somebody is raised above the ordinary. There is no reason therefore to believe in the Marxist conception of the withering away of law in a communistic society which is based on autonomous, decentral groups. All modern, technological societies require organization and administration which must become more and more comprehensive with an international distribution of production and markets. The national state was a fitting framework for the dawn of technology with its need for capital and a limited market. Imperialism was an attempt to meet the need for raw materials and markets in connection with a growing industry within this romantic framework. Two world wars were the result. Postwar international market organizations are the adequate answer to this development, which in turn means a weakening of the regulatory possibilites of the national state, as tax laws and

social policies must be adjusted to the ability to compete internationally. This is the reason that at present we are experiencing a crisis in the distributive possibilities of the "welfare state" as the bureaucracy is inadequately equipped and unwilling to take care of "public utility" for the benefit of its own interests. International competition therefore gradually forces national states, out of regard to efficiency, to introduce contract-like elements in its social organization, whereby individuals attempt to maximise their profits and minimise the cost of transactions.[47]

It appears to be correct that Kelsen's judicial theory based upon the identification of law and state will become of damning importance in future society. On the other hand it would be wrong to believe that a "neo-socialistic" reflexive law based on the idea of the "withering away of the state" will correspond to reality. Although the importance of the national state will decline in the future, an international organization and bureaucracy will most probably be necessaary for the time being. International prosperity and equalisation, which a life without "law" would demand, are still very much of the distant future.

From humankind's social forms it is, however, possible to formally conclude that the necessary conditions for an organized form of society are fulfilled. The minimum conditions must refer to communication and function. In order for communication to succeed a great degree of intersubjectivity and truth is neccessary and in order for the function to succeed a minimum of peace and order must be maintained. Hart's "minimum content", Fuller's "inner morality" correspond very well to basic characteristics of the known high cultural and primitive cultural social legal orders, as they also correspond to the moral of the "Ten Commandments" and K.E. Løgstrup's "sovereign expressions of life".

III.

Ontology - epistemology

On the basis of a pragmatical-hermeneutical concept of science, I have viewed the concept of "law" as a pluralistic relational concept, and legal science as an activity which uses different methods according to which perspective and which relationship is being treated.

A. Philosophical basis

Legal philosophy can take its starting point in various values and interests: analytical, sociological and ethical. The first mentioned, which is represented by Kelsen and Hart, for example, views law as "valid obligations" and seeks the criteria for the formal validity of law. A "realistic" legal theory manifests itself in different sociological and psychological variants, for example American and Scandinavian realism which look upon law as an actually "valid" ideology or behaviour. Ethical legal theories, on the other hand, seek the law's "material" (as regards content) validity criteria in moral principles (justice).

Legal science can concern itself with law's empirical or *dogmatic* perspective. The latter is its traditional, practical side which is an auxiliary science for the juridical administrative and judicial practice, as it systematically gives answers to questions on what "current law" is. The *humanistic* interpretative elements are important methodical features, but these must be supplemented with *social scientific* methodical features, teleological and pragmatical features, due to the fact that the purpose of law is to regulate social reality. *Empirical* methodical features are dominant in judicial sociology, judicial history, judicial politics and comparitive legal science, which are theoretical sciences, analysing the relationship between law and earlier, actual and future facts and rules.

The different legal-philosophical perspectives are expression of different interests both, ideological and scientific. *Analytical* theories, which view law as *commands* or "imperatives" with the power of the state as basis have clearly authoritative features. This is true of both 19th century German

"Begriffsjurisprudenz" as well as Kelsen's "pure judicial theory". Hart's "rule theory" emphasized the abstract and democratic and Kelsen's theory of state power, based on the logical-empirical theory of science, had as its goal the screening off of the concept of law from religious, ideological and political manipulation and the legitimization of the democratic system. This definition of law, however, became normative in communist states and has also been attacked for having legitimised the German "Führer state" because the law was reduced to a political tool for any state whatsoever. It is also understandable that "logical positivism" became the main enemy of "critical science" for the generation of '68.

The same authoritarian elements can be found in Scandinavian *realism*, particularly in its Swedish variant where law is defined as "detached imperatives" to remove the theory from the volitional element of the sender. The social-psychological "internalising concept" emphasises the connection with the element of pedagogical "guardianship" which is to be found in the social state and socialistic countries and which can also be glimpsed in the New Deal period of American judicial realism. The psychological basis for the theory is behaviourism and the ideal was the psychically "adapted" individual.

Nor is there a necessary connection between a social change and a "realistic" view of law which particularly J. Dahlberg-Larsen wished to find.[48] It is clear that great social changes can be achieved with law and coercion and an ideological dogmatism such as happened to an extreme degree in Stalin's day and in Nazi Germany, but can also occur under formally democratic forms of government as in Scandinavia and the USA in the thirties where "realistic" (technological) theories of law were much in evidence. The most decisive thing for the connection between ideology and legal science is the difference between the distribution of the "regulatory element" and "reflexive elements" which can be found in totalitarian and democratic societies alike.

This circumstance is also discernible in modern system theories. While the older, static conceptual juridic system theories had authoritarian elements[49] this fails to describe the politologically stamped sociological system theories which seem to regard law as a function of market economy in the same fashion as the judicial-economic theories of the Chicago school. Eastern European system theories are closer, in the nature of the case, to the traditional, regulated system theories, just as economic theories can have "state capitalistic" traits. System theories can also, however, be "critical" like Habermas' communication theory, the topical-rhetorical judicial theory and the existentialist "free legal" and "Marxist" theories. Teubner's "reflexive" judicial theory has been regarded by some as "conservative", and by others as "critical", depending upon what is

understood by conservative and liberating. The "conservative" element consists in the reference to elements of market economy in the system theory, the "liberating" in the critique of the "corporate state's" bureaucratic regulation through judicial rules.

The disagreement on the interpretation of system theories is connected in particular with differences in attitude to the criticism of bureaucracy. A new liberal model points to the "contract model" as a pattern for reform, whilst the "proximity democratic" model points to "autonomous groups" as social elements. The disagreement consists partly in a different order of priorities for freedom and equality, and particularly in a different understanding of the possibilities of allowance for considerations of efficiency and thereby the interests of the whole, and relative justice at the expense of equality.[50]

These theories hereby come close to theories of new natural law based on social contractual elements which accentuate the individual rule of law as competing with social utility. Ethical and idealistic judicial theories emphasise in general individual justice as a legal value, but at the same time the importance of the interests of the whole.

B. Scientific perspectives

On the basis of the philosophical point of departure and the basic values connected with this, a legal scientific model may be chosen. My point is the abovementioned pluralistic relationism which views legal science as a collection of answers to the questions asked on the basis of different cognitive interests. Legal dogmatics, which is the oldest legal science, concerns itself with giving practical advice to legal agents on "current law".

There are, however, many agents and therefore many perspectives: the *lawyer* is interested in the concrete case and thereby in an evaluation of of the court's or administration's probable evaluation in a concrete or hypothetical situation. The prognosis model of American realism, "the bad man's law" is a reasonable description of this situation. The sources of law and obligations are important but not decisive in the strategic motivation analysis. *The judge* and *dogmatic legal theory* are, however, interested in considering the "correct" solution to concrete and hypothetical legal problems. They are interested in what available authoritative sources there are of *judicial obligation*. The theory of prognosis is, in this connection, worthless, as is also Alf Ross' abstract theory based on the "common judge-ideologue" as long as the theory of judicial sources and legal argumentation are decisive for the interest. Whilst the judge *must* decide the

individual case because of the fact that the decision can serve as a guideline for the future, science *may* allow the question to remain open, but must, in return, place the individual problem in a systematic connection which is based on a general philosophy and scientific theory.

The administrative lawyer has to a certain extent a task in common with the judge, but he must also concern himself with *planning* whereby the *legal-political* elements will come to the forefront of consciousness. Over and above securing the political goal through the rule it is also important to *prevent* future conflicts, which is why legal-sociological and legal-economical methodical elements come to compete with the deference due to law and order and practicability.

Legal sociology, criminology, forensic psychology, legal anthropology and legal history use empirical-quantative methods in viewing law as a social and cultural constituent system in an interplay with moral, cultural conventional, political and social constituent systems. Law is, so to speak, somewhat subordinate to the actual object of study, but can also serve as an auxiliary science for dogmatic legal science. There is for example, both a historian's and a lawyer's legal history, and so on.

This relationally conditioned view of law and legal science raises the question as to what law "actually" is. In my opinion this is an interesting question, but not a scientific one. Kant believed that science should limit itself to the phenomena that the cognitive apparatus was capable of handling, whilst the question of the "being" or "idea" of things, i.e. ontology, should be left to intuition and poetry.[51] Nor, in my view, is it particularly fruitful to lose oneself in ontological speculation, especially not when this is concerned with such a soft reality as the human- social. It is difficult enough as it is to discover what is nature and what culture in the human world of values and thereby what "real" law is. Certain formal conclusions can, as mentioned, be drawn from the understanding of man's social nature, but these are few and general conclusions. But an organization and a regulation of these are necessary conclusions.

We can assume so much with Kant that freedom is a necessary condition for responsibility, which in itself is a necessary condition for moral and legal regulation. Responsibility without "obligation" is meaningless and therefore the characteristic element in the norm is an "obligation", which has to do with law when the obligation is arrived at in a certain way, dependent upon the degree of development in society and constitution. Today this will normally be a legislative procedure, but law can also be arrived at through custom and the private formation of a legal basis. In practice the criterion is whether the obligation can be required recognised by the public authorities, but it is important to remember that the possibility of sanction is not decisive and that in general and as far as

possible it is best to avoid formal definitions which may leave out important facets of law, international law, for example, or law in primitive societies and "basic norms". That which belongs systematically to law, including the assumptions and values of the system, is law, without regard to which definition we choose. On the other hand, the system can only theoretically justify itself; looked at historically these are, however, empirical phenomena.

"Law" is not identical with statute books or other empirical phenomena, in this connection psychology (ideas, expectations), and behaviour, just as a musical composition is not identical with the notes or the performance, or architecture with building. Law must, like all other patterns be regarded as *precepts* for behaviour or the mental processes which precede decision and behaviour.[52] Looked at in this way law is what it is, but it is naturally only reasonable to imagine "justice" as an expression of real law. That man has always had such ideas with a certain general structure is a good enough ground for a theory of natural law. Not a material theory but, on the one hand, a theory of formal justice: similiar cases should be treated similarly, and on the other hand, a social theory of man's nature and society which can only be proved or disproved through the political process.[53]

IV.

Theory of dogmatics

The theory of the relative or relationistic concept of law was developed with constant reference to the method of dogmatic legal science.

I became aware early on that the authors who represented a "realistic" legal science, supporting their rule of law by invoking "public utility" and "real considerations", were in fact still thinking in "idealistic" terms and only verbally subscribing to "realism". A closer analysis of the formation of their theories revealed that the reference to social considerations mainly consisted in a reference to general legal principles disguised as practical considerations. 19th century idealistic legal science sought a moral "judicial ground" (by contrast with the historical cause) for a legal institution and deduced thereafter the solution to concrete legal questions from this. As the "concept of freedom" in Kant's critical theory represented the basic value for private law, the principle that a promise is binding because the promisor by promising has declared his will to perform it, would become determinative not only for the whole of private law, but also decisive partly for the individual disciplines of private law and partly for the derivation of answers to concrete questions in private law.

"Begriffsjurisprudenz", as this idealistic legal science has been named was developed in opposition to the 18th century rationalistic theory of natural law, but took over in all important features the theory of natural law's legal-scientific methods. The scholastic method was characterised by its starting point in authoritative texts (the Bible, Corpus Juris, Aristotle and so on) which had absolute validity. Reason was the superior tool of perception as, since antiquity, it was the reigning view that there was no difference between theoretical and practical perception because as man's nature or being was based on reason this could objectively and immutably decide what was good and what was bad.[54]

David Hume's and Immanuel Kant's critique of perception made it clear, however, that "objective reason" is an illusion and that scientific theoretical perception must be limited to the "kingdom of the necessary", i.e. the outside world, which must be understood as ruled over by the theory of causation, whilst the moral-practical perception belonging to the "kingdom of freedom", i.e.

responsible human actions, can only be derived from moral or legal norms. This was the principle separation of "is" and "ought". When Kant had founded practical perception on the prerequisite of freedom of action, as the concept of responsibility would otherwise be meaningless, the moral and legal theory which followed took the "concept of freedom" as the point of departure for its construction of the system of private law, which in practice did not separate the methods of "Begriffsjurisprudenz" from the methods of natural law's legal science. In both cases the purpose was to seek the reasonable "legal ground" for every legal institution and thereafter derive the concrete legal questions as effects of the "legal ground" or "legal principles".[55]

In the middle of the last century a principle change in the methods of Danish (Nordic) legal science occurred, following Aagesen, Evaldsen and Goos, who from private law, in personal, family and inheritance law, which was still founded on the principle of personality and volition, segregated the law of property for extraordinary treatment with reference to the "social principle" and to "transference interests". Following this the "principle of objective interpretation" was developed as the decisive principle for ordering the legal rules of the law of property. Contrary to the principle of volition, which starts from a reference to the actor's will and thereby his interest in being bound, the principle of objective interpretation looks instead to the joint contracting party and the third party's conceptions and interests in solving concrete questions of law.[56]

Although the purpose of this was to return to Ørsted's "realistic" legal theory which, as mentioned, regarded the "nature of circumstances" as the most important tool for legal science, the methodical principle remained the same. It was merely the starting point for argumentation which was displaced from the agent to the surrounding ideas, and not the method. The task of deriving the individual solutions from the correct principle was established. It was only with the advent of Viggo Bentzon's realistic legal philosophy that Ørsted's ideas became reality as Bentzon recommended an "empirical" theory of legal sources, which he later revised in such a way that he attempted to unite the reference to opinion and rule by demanding that the judicial decision be made on the basis of concrete justice, but in a way that could be recociled with reference to serving as a model for future decisions. Later Alf Ross and Knud Illum further developed this theory.[57]

As early as the forties Alf Ross turned violently against Vilhelm Lundstedt's variant of "Scandinavian realism", in particular, which he attacked for exploiting "public utility" in the same way as he (Lundstedt) in his younger days, before becoming aware of Axel Hägerström's critique of idealism, had used the legal

principles of "Begriffsjurisprudenz". "Justice" had merely been renamed "public utility" whilst the result remained the same, namely that the dogmatist unconsciously came to his decisions on the basis of his own evaluations and then legitimised them by referring to a general "principle" or "consideration" which is so abstract that it is capable of legitimising any decision whatsoever.[58] Knud Illum similarly criticised Frederik Vinding Kruse's formal reference to "the demands of practical life" as a correspondingly disguised idealism scantily dressed in the cloak of realism.[59]

It was this double inspiration that I regard as decisive for my own scientific development in my work with subjects connected with the law of damages and the law of contracts. Back in my student days I had already, in an examination paper, taken a critical attitude towards the "theory of implied conditions"[60] in the law of contracts as it was expressed by Henry Ussing and it was hardly by chance that my first larger scientific experiment was a criticism in principle of the remoteness of damages in the law of damages.[61] The principal content in the criticism of these theories and other general theories, "the theory of wrongfulness" (Rechtswidrigkeit) and "the theory of negligence" was that also Henry Ussing's, in form, practically justified "law of obligation" was still anchored in the idealistic judicial thinking of the 19th century, and that the theories named were not only a dogmatic generalisation of individual rules and individual decisions, but on the contrary, legal principles, which the individual rules and concrete decisions were regarded as being "manifestations" of. This was most obvious when Ussing wanted to regard large parts of the legal provisions of the contracts act, both the rules of invalidity of the contracts act and the rules of breach of contract in the sale of goods act as manifestations of the law of implied conditions, and when he regarded the material "theory of wrongfulness" as norm-giving for several of the constituent questions of the law of damages.

The decisive content of my criticism of Ussing's use of these general principles was that it led to rationalistic and not realistic methods which he had formally used by the reference to "practical considerations". Particularly when a single "practical consideration" was referred to as "*the* practical consideration" for one branch of law, the method must become "monistic" and not "pluralistic", which it becomes when it is acknowledged that conflicting "practical considerations" can lead to different results in different "relationships". The "relationistic" theory of law which I later arrived at must thus be regarded as a further development of this early criticism of dogmatics.

The theory of illegality and adequacy with inspiration from the methods of German "Begriffsjurisprudenz" attempted to construct a theory of limitations

of the individual's freedom of action and, correspondingly, of the extent of the responsibility for violation of freedom of action. The theory of conditions was equally one inspired by Windscheid on the extent of the obligations in the law of contracts. On the basis of the general assumption that obligation is derived from the actor's will, it was necessary, in accordance with the method, to find a "justification" also of the individual rules of the law of contracts and the law of damages on the same principle. It followed thereafter that the actor's "assumptions" and the "foreseeablity" of the later development came to the foreground with the development of the special rules of the consequences of the contract and the tortious act.

As far as the theories of illegality and adequacy are concerned such a development is understandable, as these theories are primarily thought out by theoreticians of criminal law with the entire law of reaction: criminal law and the law of damages as their area. As far as the law of conditions is concerned it was less understandable as it was clear that the Nordic law of contracts had removed itself from the German theory of volition and had developed a theory of objective interpretation, the main emphasis of which was placed on the interpretation of those associated, which is why the agent's assumptions were an obvious condition for the extent of his obligation.

But a closer analysis and description of the law of torts outside of contractual relationships revealed[62] - contrary to criminal law - that there was an important consideration in connection with the interests of the injured party, as the law of torts had to decide whether the tort feasor or the injured party should bear the risk of loss. Here it is not only the interests of the tort feasor but also those of the injured party which must be taken into account. "Prevention" as the legal consideration that has come to be regarded as the basis of the law of reaction is called, must compete with the "reparation consideration". Preventive consideration can be analytically divided into general prevention and special prevention, and in another way expresses the fact that tort law contains an "obligation" to limmit damage to others' persons or things. General prevention in particular, the preventive and norm-creating effect, expresses this accord with the rule concept, whilst special prevention, the motivation of the concrete behaviour, has less importance, particularly after the spread of third-party insurance.

The basis of the law of reaction has, in general, changed during the course of legal history[63] from an objective and collective understanding to a subjective and individualistic understanding: thus also the special part, the law of torts - after having been divided in more recent times into a public criminal law and a private law of damages - has varied. Whilst, during the Middle Ages, the general

rule was that the tort feasor and his family bore the risk of loss on a objective basis, it was the general distribution of risk in the previous century merely to prescribe responsibility for negligence (culpa). Later, with the spread of technology and insurance, the risk was increasingly distributed on an objective basis.

In the liberal society of the 19th century the general rule was that one was only responsible if one had acted "wrongfully" (contrary to others' rights) and dangerously in such a way that one could have *foreseen*, and thereby avoided the injurious consequences of the action. The rule was, as mentioned, divided into a theory of wrongfulness and a theory of culpability. The theory of wrongfulness was based on considerations of the protection of rights, as only actions, which foreseeably transgressed the borderline of freedom of action with regard to the protectors of the amenities, could incur responsibility. On the other hand, negligence was a rule of responsibility for foreseeable and avertable injuries, whilst finally the condition of adequacy limited the responsibility for injuries resulting from foreseeable consequences.

I criticised partly this triple "foreseeability evaluation", and partly foreseeability itself as a criterion for the judgement of wrongfulness and negligence and as a criterion for the limitation of responsibility. Instead I stated that an actual "realistic" method would have to take its point of departure in the division into different relationships. The law of torts cannot be formulated as a choice between negligence and risk, as the rule of negligence in itself is an expression of a distribution of risk. In the same way the judgement of the constituent areas of the law of torts depends upon a legal-political evaluation of the various constituent questions.

It was already recognised that the rule of damages was only valid for injuries to persons or things, whereas "general property damage" should be compensated according to special conditions within the various areas which was often premeditated or criminal behaviour. In the same way it was only "economic" injury which should be compensated according to the general rule of damages, whilst "non-economic" injuries followed special rules. In general it was recognised that questions of: 1. Whose interests are protected by the rule of damages, 2. Which persons are able to demand damages, 3. Which advantages can be counterclaimed in the loss, must be decided according to an evaluation of the practical considerations in the individual relationships. I believed that the same should apply also to the remaining areas, so that the problem of adequacy would be divided into different relationships: 1. Injuries to things on the one hand and to persons on the other, 2. The initial injury on the one hand and consequential injuries on the other, 3. The reasonableness of costs paid and

assessment of loss. 4. The influence of the time factor and possibilities of evidence. 5. The injured party's intervention and the reasonableness of this. 6. Casual and responsible competing causal factors etc.

In general it was difficult to reconcile the decisions in the various relationships and combinations with any general formulation of "the rule of adequacy", which must therefore be regarded as a description of the "reasonable" order of priority for the parties' and society's interests which are part of the conflict. Just as adequacy was divided into its relationships and ended as a synthesis of these relationships, wrongfulness was reduced to a formal description of the conditions exclude a responsibility for damages: 1. Self-defence, jus necessitatis, 2. Agreement (as far as this is possible), 3. Omission (only in cases where there is an "obligation to act"). The terminology of foreseeability and prevention in the theory of negligence, and the balancing of interests in the theory of wrongfulness could be paraphrased as a general search for the source of law: the decisive test of responsibility must be whether a general norm of action was officially or according to custom, violated.[64]

The main point in my criticism of the theory of the law of torts was, then, that in spite of its realistic surface quality it was still bound to the idealistic method of the 19th century with the main emphasis on the parties' subjective conceptions and not on objective legal considerations. As mentioned, similar criticisms were applicable to the law of contracts, where Henry Ussing's theory of implied conditions was regarded as a general legal principle from which both the rules of the law of contracts and of the law of obligations were derived. This was even more odd in that it was precisely one of the great advances of the Nordic theory of private law that the law of property had been separated from the law of person and thereby freed from the principle of will and subjected to the principle of expectation, and thereby the considerations of the interests of trade.

The theory of implied conditions which Ussing subscribed to was, then, also an "objective" theory by contrast with Julius Lassen's "subjective" theory of implied conditions. It was not an individual test of the parties' "hypothetical will" which should decide the validity of the contract and the extent of obligation (tacit conditions as limitations of will) but on the contrary the "condition usually implied". The parties themselves had usually to assume the risk for individual assumptions, unless they had been made conditions for the obligation, or it was perceivable for the promise that an individual assumption was determining for his transaction. Even though such an individual assumption perceivable by the other contracting party were decisive for the transaction, it could only be considered of importance as a condition where there were particular grounds for imposing the "risk" upon the opposite party for their failure. It was clear to

Ussing that a contrary solution would make trade insecure, because any transaction incurring loss would otherwise be not binding, as the profit motive must perceivably be determinative for every businessman.

Ussing considered, moreover, the type condition and the "relevant" conditions as identical with the so-called "supplementary legal rules". These had to supplement every agreement of a certain type with rules as to what to do in the event of an unexpected and abnormal development of the contractual relation which, as a rule, would not have been taken into consideration. As mentioned, Ussing saw the whole law of breach of contract as "derived" from the theory of "assumption" which is the reason why both the rules of specific performance, compensation in contractual relations, as well as the rules of rescindment, and proportional reduction for deficiencies, must be understood and interpreted in accordance with the structure and conditions of the theory of adequacy notwithstanding that legislation and particularly the sale of goods act and the contracts act had considered the problems specifically.

In my view it was wrong to attempt to put an interpretation of a certain theory in positive legal provisions which were not merely later than the theory but which also in their motivations either reject or ignore the theory. On the contrary, the basis should be that the positive legislation had, in itself, decided the "question of relevance" and carried out that evaluation of interest at which the theory of assumption had aimed.[65] Added to this was the fact that Ussing's "theory of assumption" was inspired by Ernst Møller, who had constructed his theory before the Nordic sale of goods act and the contracts act were enacted.

In agreement with Knud Illum's criticism in particular, I had to regard the theory of implied conditions as a superfluous beating about the bush which, without grounds, would connect the legal effects of the parties' agreements to their own conceptions, instead of to the objective considerations of the legislation. Instead it would be preferable, in my view, to begin with general principles of legal interpretation and, firstly give the legislation of the law of contracts and torts, including the law of the sale of goods as the special law, priority over the general law of contracts in cases of conflict or doubts in interpretation. This would, for example, be valid for the meaning of fraud which can partly involve invalidity and partly give ground for annulment of the contract with the difference in the calculation of compensation that follows with it (negative contractual interest/positive interest for breach of contract). Secondly, a direct interpretation of the individual contract could be gone into and in this way a decision arrived at as to which interpretation was "most justified", and the necessary legal effects derived by supplementing with general legal rules.[66]

There is no need for a theory of implied conditions besides general legal interpretation and contractual interpretation. To a certain extent it militates against general legal interpretation, and belongs otherwise to an antiquated philosophy and method which attempts to derive legal effects from the conceptions of the parties instead of from objective legal considerations. Judicial practice, however, still uses the terminology without it being quite certain whether the word "assumption" is used in a psychological sense synonymous with conceptions, or in a technical sense, as the theory of implied conditions implies. The theory has also been rejected in more recent Norwegian and Swedish theories, although Jan Hellner[67] has invoked it as "authority" for the rules of invalidity which Danish legal practice and even Henry Ussing have arrived at by analogy with the contracts act without the use of the theory of implied conditions; among other things, the rule that the one party is liable for incorrect information which he advances in good faith and thereby gives rise to the joint contracting party's transaction. After the introduction of the contracts act, clause 36, which gives the authority to disregard "unreasonable" contractual conditions, there is no need whatsoever for the theory of implied conditions, particularly if it is acknowledged that the rule authorises not alone a setting aside of conditions but also a general contractual regulation.[68]

In a methodical sense such an attitude towards the theory of conditions answers to the relationistic method for which I have pleaded above. The fact that the law of contracts as an institution is based on the autonomy of the parties and assumes an individualistic and liberalistic view of man and society, cannot justify the assumption that legal effects in general can be derived from the will or conceptions of the parties. The legal effects must, where there is no opinion, be derived from objective legal considerations which vary from relationship to relationship.

Looked at from a functional point of view the contract is a subjective means, given developed social conditions, of arranging the necessary distribution of goods in other, but primitive conditions, is arranged through objective relations of status which secure the individual's share of the collective's production. Reciprocity is the material basis for the law of contracts and today objective facts and standard agreements have superceded the individual agreement as a "social type" for the framing of the rules of the law of contracts. Objective facts and the evaluation of a reasonable reciprocity have come more to the forefront, particularly in the so-called consumer or purchaser relationships where rules of law, the operation of which cannot be dispensed with by agreement between the parties, aim at a reasonable reciprocity in the interests of the consumer.[69]

In commercial relationships on the contrary, a new private legal basis has been provided through "agreed documents", i.e. standard documents, and "conventions" provided through negotiations between national and international organizations. In interpreting such a "private formation of a legal basis" it is, on the other hand, natural to use general objective methods of legal interpretation instead of a subjective interpretation of contract.[70]

V.

Pluralistic and relationistic legal science

The point of the above analysis has been that legal science without legal philosophy is not cohesive, that legal philosophy without ideology is without direction, and that ideology without regard to the pre-legal facts is impossible. In other words, if there is to be a meaning in legal science, it must be anchored in a method which will secure both consequence and consistency; there must be a connection between the attitude of legal theory to the various problems and the individual areas of law.

There is a necessary connection between contemporary science and its interest in and consequent need for the questions science will - and can - put, and thereby also for the methods which are used and the answers which are received.

Like every linguistic activity, science is a purposeful action which has its goal in certain interests. Every age has its philosophical problems which stem from the contemporary world picture and way of life and which are solved on the basis of suitable methods. These problems are defined by the reigning political ideology which in a systematic form contains the needs and requirements that man's biological nature demands from society under the reigning cultural conditions.

The object of science alters shape with the methods and "measuring equipment" it uses. The "nature" of law also changes in connection with the methods of legal science. Law can be viewed in succession as ancient divine custom, as rules based on agreements with the prince by the grace of God, as moral expressions of human reason, as a system of logical concepts derived from the idea of justice, as a tool for the control of the state and as a constituent system of a complicated social system. Central to legal science is at all times *"dogmatic"* or practical legal science, which at all times - notwithstanding a superior philsophy - guides administration and legal practice by making decisions on the question of what obligatory law is.

The sociological and system-theoretical models are, like Marxist theory, *macro-theories*, i.e. theories which look at law from the outside as ideology and

behaviour, by contrast to *micro-theories* which look at the law from within, as obligatory norms. The fact that system theories, which regard legal rules as subsidiary in relationship to other social, including ethical, norms of behaviour, have become more and more evident, is connected with a growing scepticism regarding the normative power of law in modern, pluralistic society, where powerful interest organizations united with a high level of information partly weaken social solidarity and partly make it possible for groups within the population to neutralise the effects of great administrative regulation. The alternative is to appeal to the individual's own interests, either through "privatization" or by creating "decentral" systems of government. The weakness of the first alternative is that equality is reduced and that of the second, that efficiency and the interests of the whole are weakened.

The jurisprudence of the Middle Ages with its dialectical-logical method had as its purpose the creation of a framework around a static or at least, slowly-developing, family society, as the status relationships which have been handed down were regulated by custom and authoritative sources of law, Corpus Juris and Corpus Canonici.

The mechanical-rationalistic theory of natural law of the Renaissance and the Age of Enlightenment reflected the absolutist state's use of law as a tool for controlling society without regard to traditional customs and for the furtherance of the state. The "Begriffsjurisprudenz" of the 19th century with its attempt at polishing an organic system of legal concepts was to serve as a tool for an expanding technology within the national state and private capitalism.

It was the same rationalism which guided science in the rationalism of the 18th century as in 19th century idealism. In both cases it was thought which was placed foremost and projected into reality that was assumed to be linguistically structured. Around the turn of the century this rationalism was rejected and replaced by various types of irrationalism and realism. In both cases it was acknowledged that the principle difficulty was to combine thought and reality and especially perception and evaluation.

American pragmatism in fact gave up an objective criterion for truth, as the quality of perception, both theoretic and practical, was guided by expediency, and that of science by consensus between scientists. As far as legal science was concerned this situation was utilised by sociological and pragmatical legal science with patterns from behaviourism's social psychological models of adaptation and prognosis. Continental "intuitionism" was first coined as a "sociological" theory of free law, later becoming a teleological interest theory of law.

The later Vienna school and Kelsen's "pure theory of law" attempted, with their complete separation of law and reality, to protect law against ideological and political control, but instead propagated "Begriffsjurisprudenz's" reduction of law to a tool for state control of society now also of civil law. Also "Scandinavian realism" saw law as a state tool for changing society and the internalisation of behavioural norms. Marxist regimes in the west and communist regimes in the east with totalitarian ideologies, also saw legal rules as the means for achieving rapid social changes with the main emphasis on both pedagogical and authoritarian methods, in that both propaganda and the threat of force were important elements.

The English analytical theory of law also accentuated the character of law as a tool for social control with its principles of positivism and objective concepts of duty, but at the same time revealed a less authoritarian attitude by emphasising the abstract rule character of law contrary to the continental and Scandinavian command theory.

The show-down with the theory of law as a technique of control characterised postwar theories of new natural law and system theoretical models. The new natural law theories have in various ways appealed to "extrajudicial" *principles* as a moral control of the content of law and thereby the organization of society. System theoretical models have particularly appealed to various *procedures* for securing certain values. Some of these procedures refer to "communication", "rhetorics" and "dialectics", trusting in the ability of human reason to control social developments (Habermas, Perelman), others place emphasis on the structure of the system in securing "fairness" (Rawls, Dworkin), and still others refer to "market economy" and others, impersonal mechanisms, following which, legal rules continuously adapt themselves to other social processes, (Luhmann, Teubner).

It thus seems clear that the different theories of law, both in the past and the present have an ideological-political basis. It also seems clear that the clash with 19th century idealism and rationalism took various shapes. New natural law theories express an idealistic epistemology in that they refer to the projection by consciousness of values into the social surroundings, whilst system theories, on the contrary, deny the normative character of the law. A theory of law, which sees the pre-legal - "natural" and "cultural" - facts as "institutional facts" and the values within these as necessary constituents of the language in which legal rules are expressed and in which reality must be described, do not have the same epistemological difficulties. A philosophy of law which takes its point of departure in historical, comparative and social facts becomes a "social theory" which constructs hypotheses which are confirmed or dismissed through the

political process. A theory of law which regards law on the basis of different points of view will be relationistic and not relativistic. Legal dogmatics must, by consequence of this, be realistic, but not in the form of "unprincipled realism".

Individual legal institutions must be regarded as part of a whole and the individual legal rules must be understood in connection with the goals which lie behind the entire legal and cultural system, and in solving concrete and hypothetical questions of law it is necessary in making decisions to interpret the rule and describe facts in such a way as to achieve the legal effects which are compatible with law and order and the purpose of the rule. Every rule is, like every linguistic expression, intentional and teleological; in legal decisions the task is to realise this purpose and through a choice between the possible alternative interpretations to achieve the "correct" legal effects (pragmatism).

An action cannot be purposeful without a purpose, just as little as "real consideration" can speak for a result without a knowledge of a goal. Arguments of this character are therefore just as empty as the reference of idealism to "justice" and are in reality erratic expressions of individual evaluations. A principle realism must therefore openly take a stance in connection with the supposed goal of the rule and to the choice between the legal effects which are possible on the basis of a linguistic interpretation.

Such a combination and systematic ordering of actual, ideological, philosophical and dogmatic elements is necessary for a legal science which is both cohesive and stresses reality: A pluralistic and relationistic legal science.

Conclusion

I began this paper by quoting Kierkegaard's dilemma that we must live our lives forwards whilst we can only understand and explain our actions afterwards.

In youth we are obliged to act, although we have not the experience of age and therefore do not always know what we are doing and why we do it. This is both necessary and valuable because otherwise we could make no progress.

I will end by repeating the words of Johann Gottlieb Fichte, who already at the beginning of the previous century, understood the relativity and goal-orientation of perception. "Was für eine Philosophie man wähle hängt davon ab, was man für ein Mensch ist, denn ein philosophisches System ist beseelt durch die Seele des Menschen, der es hat".

Although no-one today would subscribe to Fichte's subjective idealism, which leaves it to the individual to create his own universe by projecting his ideas out into an unstructured surrounding world, it is more reassuring than Hegel's objective idealism. According to this the individual is a passive tool for the march of reason through history and a little wheel in the huge machinery of the state.

Today this clash is being repeated. After the collapse of logical empiricism and thereby the belief in "objective" perception, the connection between perception and consciousness has again been accentuated. In order to avoid landing in "anarchistic" subjectivism, which makes any organized society impossible, various paths were explored for the establishment of an "intersubjective" understanding. Language, as our only tool for scientific perception, must contain such elements if it is to be used as a medium of communication. In this view language is a necessary tool for the organization of a, for humankind, necessary society.

The ability to use language and consciousness belong together and are the counterparts of an extreme lack of instinct which makes it possible for man to adapt to changes in social conditions which consciousness is capable of creating. On the one hand, language - and especially writing - is capable of retaining the past as a feeling of identity, but also as a feeling of "history", in that experience is a condition for recognition and understanding. The theory of new rhetorics with its various "auditoriums" faced backwards and was historical in its criterion

for consensus, and Heidegger spoke of "Vorverständnis" and "intentionality" as conditions for perception.

A knowledge of the past and our motives is decisive for the choice between possibilities, which is identical with "being" (existing). The choice is, according to Heidegger, not free, but limited to the factually fixed situation's possibilities. He who asks what the nature of things is, has already assumed that it is possible to talk scientifically on this subject. Such an ontological standpoint can easily lead to a superior attitude which can be extended to include totalitarian ideologies.

The "liberating" ideology emphasises the creative possibilities of language, either like Habermas, by stressing the "reasoned dialogue", or like pragmatism by also accepting human feelings and interests as the driving force in social processes.

A pluralistic philosophy is bound to a pluralistic ideology and sharpens the awareness of a pluralistic (relationistic) science in general, and legal science in particular.

Notes

1. Stig Jørgensen, Videnskab eller Scientisme, *Slet og Ret* (1974) p. 48 ff.
2. Stig Jørgensen, *Reason and Reality* (1986) p. 80 ff.
3. Thomas Kuhn, *The Structure of Scientific Revolution* (1967).
4. Ronald Dworkin, Is Law a System of Rules (in Robert Summers, *Essays in Legal Philosophy* (1968) p. 25) and latest: *Laws Empire* (1986).
5. Neil McCormick and Ota Weinberger, *An Institutional Theory of Law* (1986).
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7. Stig Jørgensen, *Hermeneutik og Fortolkning, Lovmål og Dom* (1975) p. 86 ff. *Rechtstheorie* (1978) p. 63.
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13. *Tractatus Legico-Philosophicus* (1922), *Philosophical Investigations* (1953).
14. Theodor Viehweg, *Topik und Jurisprudenz* (1953), Chaim Perelman, Justice et Raison (1963), see Stig Jørgensen, *Values in Law* (1978) p. 162 ff., *Vertrag und Recht* (1968) p. 94 ff.
15. Stig Jørgensen, Ideology and Science, *Values in Law* (1.c. note 13) p. 9 ff.
16. Stig Jørgensen, *Træk af Privatrettens Udvikling og Systematik*, Acta Jutlandia XXXVIII:1 (1966) (*Vertrag und Recht* (1.c. note 13) p. 49 ff.), *Ret og Samfund* (1970), *Recht und Gesellschaft* (1971), *Law and Scoiety* (1971).
17. Stig Jørgensen, Norm und Wirklichkeit, *Rechtstheorie* (1971) p. 1 ff. Typologie und Realismus, *Nachrichten der Akademie der Wissenschaften in Göttingen I. Philosophisch-Historische Klasse* (1971) Nr. 3.
18. Stig Jørgensen, *Hermeneutik und Auslegung* (1.c. note 7), *Reason and Reality* (1.c. note 2) p. 47 ff., *Die rechtliche Entscheidung und ihre Begründung als rhetorische Rechtstheorie*, ed. D. Ballweg und Th. Seibert (1982) p. 337 ff.
19. Stig Jørgensen, *Reason and Reality* (1.c. note 2) p. 65 ff., 129 ff.
20. Stig Jørgensen, *Typologie und Realismus* (1.c. note 16).

21. The book was partly a synthesis of views and ideas which appeared as a series of articles, some of which had also been published in English or German: 1) Kontrakten som Form, *Tidsskrift for Rettsvitenskap* 1965, p. 400 (Contract as Form, 10 *Scandinavian Studies in Law* 1966, p. 97, Der Vertrag als Form, *Vertrag und Recht* (1.c. note 13) p. 2) *Træk af privatrettens udvikling og systematik* (1966) Entwicklung und Methode des Privatrechts, *Vertrag und Recht* (1.c. note 13) p. 49 (1.c. note 14), 3) Træk af de retlige ideers historie, Ugeskrift for Retsvæsen 1967, p. 153, *Vertrag und Recht* (1.c. note 13) p. 111, 4) *Argumentation and Decision, Festskrift til Alf Ross* (1969) p. 143, Typologi og Realisme, Festskrift til C.J. Arnholm (1969) p. 143 ff., (Typologie und Realismus (1.c. note 16)), 5) Norm og virkelighed, *Tidsskrift for Rettsvitenskap* 1970, p. 484 (Norm und Wirklichkeit, (1.c. note 16)).

22. Felix Cohen, Field Theory and Judicial Logic, *Yale Law Journal* 1950, 238, Leon McBride, The Essential Role of Models and Analogies in the Philosophy of Law, *New York University Law Rev.* 1968, p. 53, Joseph Esser, *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts* (1956), Franz Wieacker, *Privatrechtsgeschichte der Neuzeit*, 2. Ausg. (1967), Hans Welzel, *Naturrecht und Materiale Gerichtigkeit* (1962).

23. *Pluralis Juris* (1982).

24. *The Concept of Law* (1961).

25. *The Morality of Law*, 2nd ed. (1969).

26. Stig Jørgensen, *Reason and Reality* (1.c. note 2) p. 65.

27. see note 4.

28. *Reason and Reality* (1.c. note 2) p. 47.

29. Stig Jørgensen, Natural Law Today, *Values in Law* (1.c. note 13) p. 135.

30. *Die Idee der Konkretisierung* (1953).

31. R. Dworkin, *Law's Empire* (1.c. note 4).

32. L. c. note 28.

33. R. H. Coase, The Problem of Social Cost, Journal of Law and Economics, 3, 1960, p. 1, R. Posner, *Economic Analysis of Law* (2nd. ed. 1977).

34. L. c. note 28.

35. Bernd Rüthers, *Die unbegrenzte Auslegung* (1968).

36. L.c. note 28.

37. Jacob Sundberg, Scandinavian Unrealism, *Rechtstheorie*, Beiheft 9, 1986 p. 305.

38. R. Dworkin, *Taking Rights seriously* (1977) and note 29.

39. Stig Jørgensen, Grundnorm und Paradoks, *Rechtstheorie*, Beiheft 5, 1984 p. 180.

40. Contract as a Social Form of Life, *Reason and Reality* (1.c. note 2) p. 129.

41. *Reason and Reality* (1.c. note 2) p. 80.

42. H.A. Dombois, *Recht und Institution* (1956). Bernd Rüthers, *Institutionelles Rechtsdenken im Wandel der Verfassungsepochen*, 2. Auflage 1970, Wir denken die Rechtsbegriffe um, *Weltanschauung als Auslegungsprinzip* (1987), *Entartete Rechtslehre und Kronjuristen im dritten Reich* (1988), p. 55. Mathias Kaufmann, *Recht ohne Regel? Die philosophischen Prinzipien in Carl Schmitts Staats- und Rechtslehre* (1988), p. 5 ff.

43. *Reason and Reality* (1.c. note 2) p. 65 and 129, Uwe Wesel, *Frühformen des Rechts in vorstaatlichen Gesellschaften* (1985).

44. *Reason and Reality* (1.c. note 2) p. 145 and 65.

45. *Reason and Reality* (1.c. note 2) p. 65 and 129, *Limits of Law* (in print), *Ethik und Gerechtigkeit* (1980).

46. *Values of Law* (1.c. note 13) p. 59.

47. *Limits of Law* (in print), *Reason and Reality* 1.c. note 2) p. 145.

48. *Retsvidenskaben som samfundsvidenskab* (1977).
Stig Jørgensen, *Rechtstheorie* 1978 p. 373.

49. *Vertrag und Recht* (1.c. note 13) p. 90 ff.

50. J. Dalberg-Larsen, Retsstaten, *Velfærdsstaten og hvad så?* (1984).

51. See *Bulletin of the Australian Society of Legal Philosophy*, vol. 8 (1983) p. 2 (Stig Jørgensen) p. 19 (Knud Haakonsen).

52. Gidon Gottlieb, *The Logic of Choice* (1968).

53. *Ret og Samfund* (1.c. note 20) p. 69, (*Recht und Gesellschaft* p. 68, *Law and Scoiety* p. 57).

54. This is moreover, a dogma which dates right back to Aristotle's physics (200 a22) that it is the principle for every genus which is the standard and rule for that genus; as reason is the principle for the human genus (man's being), it follows that reason is the rule and standard for human actions. This thesis was taken over by Thomas Aquinas (Summa Theologica, point question 90, Art. 1) and was accepted by later rationalistic and idealistic theory of law, see *Vertrag und Recht* (1.c. note 13) p. 141.

55. *Vertrag und Recht* (1.c. note 13) p. 56 ff.

56. *Vertrag und Recht* (1.c. note 13) p. 78 ff.

57. *Reason and Reality* (1.c. note 2) p. 87.

58. *Ret og Retfærdighed* (1953) § 74.

59. *Lov og Ret* (1945) Ch. 7.

60. Forudsætning og mangel, *Ugeskrift for Retsvæsen* 1963 B p. 147. (Fire obligationsretlige afhandlinger (1965) p. 39), Misligholdelse, Tidsskrift for Rettsvitenskap 1964, p. 449 (Fire obligationsretlige afhandlinger p. 111).

61. Kausalitetsproblemet, *Ugeskrift for Retsvæsen* 1953 B. 33, Spredte bemærkninger om adækvans, *Juristen* 1961, p. 195, Årsagsproblemer i forbindelse med personskade, *Nordisk Forsikringstidsskrift* 1960, p. 185. See: Umyndiges afbetalingskøb, *Ugeskrift for Retsvæsen* 1950 B. 102.

62. Skærpet erstatningsansvar, *Ugeskrift for Retsvæsen* 1961 B. p. 81 (*Scandinavian Studies in Law*, 1963: Towards strict liability), Ersatz und Versicherung, *Juristenzeitung* 1970, p. 193, The Decline and Fall of the Law of Torts, *American Journal of Comparative Law* 1970 p. 39.

63. Erstatningsrettens udvikling, *Rätthistoriska Studier* 1985, Bd. XI p. 84, Erstatning og udvikling, Svensk *Juristtidning* 1986 p. 477 (Scandinavian Studies in Law 1988).

64. It was this view of the law of torts which was behind the treatment in: *Erstatningsret* (1966), *Erstatning for personskade og tab af forsørger* (1957).

65. *Forudsætninger* (1894).

66. This view formed the basis of: Kontraktsret I-II (1971-72).

67. *Festskrift til Y. Ylöstalo*, (1987).

68. Lennart Lynge Andersen, Jørgen Nørgaard, Palle Bo Madsen, *Aftaler og mellemmænd* (1987) kap. 2 and 6.

69. Stig Jørgensen, Unreasonable Contract Conditions, *Journal of Business Law* 1975.324, and, Er der behov for en generalklausul i formueretten?, *Tidsskrift utg. av juridiska foreningen i Finland* 1977 p. 7.

70. Kontrakten som form, *Tidsskrift for Rettsvitenskap* 1965 p. 400 (Contract as Form, *Scandinaian Studies i Law* 1966), Vertrag als Form, *Vertrag und Recht* (1.c. note 13) p. 13.