PLURALIS JURIS

TOWARDS A RELATIVISTIC THEORY OF LAW

By
Stig Jørgensen

Contents

4

Preface

In the mid-sixties I read an article »Field Theory and Judicial Logic« (published in The Yale Law Journal (59) 1950, pp. 238-72) by the American legal philosopher Felix Cohen, who died much too young. The article took as its starting point Einstein's relativity theory and transferred to legal philosophy the insight of this theory that cognition depended on perspective and instrument:

> »Rather does the field concept, which recognizes the limited and relative validity of many apparently conflicting views in the practical struggles of the law court and market place, point to the possibility that many conflicting schools of jurisprudence may all be true and valid differing and limited perspectives and regions.«

At that time my primary interest as an ordinary dogmatic lawyer in contract and tort was the article's analysis of causation. According to the author's basic view causation is conceived as a tool, which in the given situation is used to explain and justify the imposition of a moral or legal responsibility from a number of intuitively conceived elements of value. I had already become interested in the comparative perspectives of law in general, and of contract and tort law in particular.

I had followed the ways of vertical comparison through legal history and legal anthropology and the ways of horizontal comparison in comparative law and sociology of law. During that very period I realized that comparative legal research in general had to be functional or factual, as a direct comparison between legal rules and institutions from time to time and from place to place would inevitably come up against difficulties owing to differences in the various manifestations of the material and immaterial culture.

Now I embarked on some general reflections on the character of law and legal science and found in Felix Cohen's relationism and relativism of culture and values a confirmation of and an inspiration for my further thinking. The idea that truth has many faces, and that in the given situation it depends on the spectator's interests and methods could easily be combined with the *analytic* and *hermeneutic* metascience, which was evolving during a struggle with the prevailing logical positivism based on the assumption of the objective character of truth and description.

In my first work on legal philosophy: Ret og samfund (1970), which was translated into German: Recht und Gesellschaft (1971), and into English: Law and Society (1971), I endeavoured – in accordance with this cultural and

relativistic conception of law – to summarize my reflections on legal philosophy in four chapters dealing with the legal concept, the function of law, the judicial decision and the legal ideas. In the first chapter I outlined – in continuation of Felix Cohen's ideas – a pluralistic conception of law based on the assumption that law can be conceived at the same time as norm and reality, as a functional guiding device, as a reflection of the conditions of life, as a system of rules or as religious, moral or political commands, as actual conduct or as predictions about judges' conduct, dependent on the perspective of the consideration and interest. Thus, the method of legal science must in each given relation adjust itself to the purpose, be that for example as dogmatic-exegetic or as descriptive method.

This paper is an attempt to take stock of my excursions within legal philosophy since then. My basic ideas have not changed, even though in the meantime I have read much and written quite a lot; I have, I suppose, become more well-informed, but not much wiser. This paper is therefore an attempt to arrange the original frail tune of one wind player for a whole small chamber orchestra.

Only a few ideas are new, most of them are borrowed from others. At most an idea borrowed from one person may be combined with ideas picked up elsewhere. This is what is called development. Anyway, one does not get new ideas, when one is past youth. The only thing one can do later on is to arrange and improve one's more or less original ideas by means of the sum of experience and knowledge gathered without much merit since then.

Stig Jørgensen

Stig Jørgensen:
PLURALIS JURIS

I. The Paths of Science

A. Myth

Seven blind sages were given the task of defining an elephant.[1]

One found that the elephant was a wall, another that it was a pillar. The third called it a snake, the fourth a spear, while number five and six felt certain it was a whip and a big leaf respectively. The seventh was convinced of its being a thunderstorm.

This anecdote is an attempt to express the unspeakable, just like parables and myths. When speaking to people who are seeing and »know the mysteries«, St. Matthew says (13.11), you need no parables, but when speaking to those who »seeing see not«, you must use proverbs and parables to utter the secret things (13.35).

Just as the little boy in the fairy tale by Hans Andersen reveals the delusion of the conventional view of the Emperor's new clothes, so the anecdote perforates the balloons of routine thinking, beautifully shaped to be sure, but still inflated.

B. Science

This does not mean that science, or *true* science, should always be critical and kill balloons. On the contrary. The main task of science must be *to* collect and work up new knowledge, *to* analyse and systematize this material, and *to* make the results of such research available for use according to our purpose.[2]

On the other hand, science can no more than any other human activity extricate itself from its purpose, but with the process of cognition the purpose or the purposes will often change into part purposes or maybe into means. Until this metamorphosis has taken place, the hermeneutic circle will prevent any other interpretation than the one generally accepted. Just like special knowledge is necessary to obtain a general insight and vice versa, the established knowledge will become a self-sustaining mechanism. You might compare it to the trick of v. Münchhausen, who pulled both himself and his horse out of the swamp with a grasp at his wig.

A »theory« cannot be true as such, but it can be of use as a description of

certain phenomena. At least the theory cannot be true, unless truth is defined as the fact that the theory is not at variance with reality. One cannot exclude the possibility that reality may be described just as truly in another way. One of the classic examples is the description of light as either waves or particles. Both are equally »true« according to the purpose of the description to be made and the methods used to verify the theory.

This *pluralistic* or *relativist* view of science lies behind the anecdote, which illustrates the dependence of science upon its purposes and possibilities. Because of such dependence scientific descriptions and methods must be in accordance with the varying purposes of science, and the theory, therefore, that fails when confronted with a special problem, cannot claim to be »true«, i.e. to contain a sufficiently comprehensive description. On the other hand the critic needs no other reasons for his criticism than the fact that the theory is unable to cover a single isolated case.

History knows examples enough that science in general, or special sciences, have been forced to change their course and take another direction than forward.[3] That is why the history of ideas or civilization is as popular with some as it is heretical with others. Critical and macro-oriented scientists are all for it, while steady and micro-oriented researchers are against it. The distaste for the comparative perspective laid upon the sciences by the history of ideas is understandable considering the amount of dilettantism and sciolism displayed the latest 20 years under the name of science criticism, especially by the so-called Marxists. Nevertheless the comparative view is an important corrective to any kind of dogmatism.[4]

The science of any period in history, of course, is part of the culture of that period and must be understood as such.[5] The oldest science was partly determined by a religious purpose. Thus the first astronomers had the task of identifying exactly the very important holidays, and the first observations of the heavenly bodies were made in order to get, among other things, a reliable calendar. Naturally the endeavours had a worldly practical purpose too in connection with the demand for administration of the growing societies. Sciences like physics and mathematics arose out of these early efforts.

The Greek science was preoccupied with finding eternity in the changeable world on the basis of the idea, that everything had a purpose (the essence of things). Thus science becomes teleological, for instance the social science which is founded on the idea, that a reasonable insight in the essence of man, the source of the »natural law«, must lead to the correct acting.

The mediaeval social science, which was to a great extent identical with the moral philosophy of the church, very easily took over this teleological view of science and replaced the essence (nature) of man with the will of God, so that the natural law coincided with the church law. The transmission of Aristotle's writings from the Arabs to the European culture in the 12th century marked the beginning of a scientific renaissance. This was especially the case within the

moral and legal sciences, as at the same time a copy of the classical Roman law, the Digesta, was found. However, mathematics and logic are still important patterns of the other sciences in their efforts to establish a noncontradictory and coherent system of doctrines. This is done in the form of *questiones* answered by means of *argumenta pro et contra* taken from The Holy Bible, Aristotle and the Digesta.

The scientific perspective (paradigm), however, was altered with the world picture, which shifted from the idea of the earth as the central body of the universe, common to the Bible and the Greeks, to the idea of the sun as the center of a planet system. It was Copernicus who proved mathematically that the earth was able to revolve round the sun, but it was Galilei who was sentenced for heresy by the church, when he wanted to draw the physical consequences of this fact at the beginning of the 17th century.

The church, however, was not able to stop the rational science in the long run. The great discoveries led to an increasing overseas trade, which demanded accurate navigation instruments and other physical and mechanical inventions. According to Galilei's functional conception of science the speculations regarding the essence of things were replaced by quantitative measurements and research regarding cause and effect, and this method was also adopted by other sciences. By and by the rationalist natural law developed a doctrine of an eternal and unchangeable system of rights and duties and set up a moral and legal science of universal validity besides the imperfect positive law.

In the late 18th century the speculative cosmology had its deathblow. The philosophers, especially Hume and Kant, denied the possibility of gaining an insight in the eternally good and right things by means of speculation, and the 19th century science was characterized, on the whole, by the industrialization and the evolutionism. Already the pantheism of the romantic age and the beginning nationalism with its doctrine of the organism were in favour of such a philosophy of growth, which was also soon supported by the sciences of electricity, chemistry and biology with their process orientation. The cultural sciences were dominated by historicism. The legal science developed a new formalism and a legal positivism in setting up a closed system of rules of law on the basis of a limited set of principles derived from the conditions of national human life. All over Europe the earlier half of the 19th century was dominated by the bourgeois-capitalist revolution and by Napoleon's wars, but the increasing urbanization made it difficult to maintain the idea of a common »national will«. It becomes clear that political and legal acts are governed by purposes and interests. The legal rules are the results of the political power struggle.[6]

We are now approaching the contemporary dissolution of the world picture and the unity of science. The relativity theory states that there exists no unambiguous and clear cosmology, but that the description of the phenomena depends on the measuring instruments and so on purpose and interests. The legal science develops a number of so-called realistic and analytical theories,

which have one characteristic in common: each of them underlines a specific aspect of the function of law.

C. Legal Science

This short raid through the history of science illustrates the dependence of science upon the horizon of understanding and the cognition interest of its time. A reflection on the various purposes or functions of law makes it equally clear that it will not be possible to maintain a monistic conception of law. Like *Kuhn*[7] one might speak of various paradigms being the methodical traits generally accepted by the pursuers of the specific sciences at a given time and in doing so indicate the *method* to be used according to the purposes of its time. One might also choose not to choose a specific paradigm for the legal science. In order to avoid the fallacies invariably accompanying any dogmatics that magnifies one out of more scientific aims into *the* aim and so to speak takes the object of science – in this case of legal science, i.e. the law – to be monistic one might try to adopt a pluralistic point of view on legal science.[8]

II. The Functions of Law

A. External (Political) Functions

The point of the above analysis is that law and legal science are phenomena of the *history of culture,* which makes it natural to look upon legal science as part of the comprehensive scientific universe being at the service of the interests in power at the time in question.

The law has always had different *functions,* some of which are original, while others have been added, as society grew more and more complex.[9]

It is necessary to look upon law from a functional point of view to avoid the risk of explaining away important functions from the legal science. A *comparative method* in the widest sense, i.e. *vertical* as well as *horizontal,* historical as well as international or intersystematic, must necessarily be functional. It does not make sense to compare institutions at different times or places which do not have the same function, just as it would be meaningless to separate different institutions which have the same function, totally or in part. For cultures which are closely related in time or contents there will be no great difficulties, but the difficulties will increase according to the distance in these respects.[10]

As regards the legal science it is an obvious absurdity to define law in general in relation to the modern political institutions and afterwards to maintain that past and present »primitive« *societies* with none of these institutions have or have had no legal rules either. For example it has been a common practice in connection with the neo-positivist theory of science from the twenties till to-day to identify law and state, which has led to the result that many ethonologists dealing with pre-State societies have found themselves obliged to deny the existence of law in such societies. Likewise Karl Marx and the Marxists have prophesied the non-existence of law in the future communist society where the State will wither away.

1. Peace and Order

Whenever people have formed a society there has been a need for means to secure peace with the world outside and order at home. In the latter respect it is important to develop mechanisms partly to prevent conflicts and partly to settle them, if they arise after all. The history of law tells us about the family feuds of earlier times being replaced by things and courts where conflicts are settled by means of generally accepted rules. Such rules, in all probability, have developed by and by through the settlement of various types of conflicts by mediation or arbitration. At least this is a well-known theory of the develop-

ment of law in the western cultures, corresponding to the modern theories of sociology of law and group sociology.[11]

The function as settler of conflicts, however, is not the only function of law, and not the most important one either, although it must be presumed that the actual legal rules have developed from this function. The most important need of a human society is not the settlement but the *prevention* of conflicts, and this task is given the first rank among the functions of law and may be called its *political* function in the widest sense. To the jurists this aspect of law may sometimes fade out of sight, since they are professionally educated to settle conflicts, and most of their work consists in so doing. But of course there must be a close functional connection between settlement of conflicts and the function of planning, since the functions of administration and legal policy must be closely connected with the command of conflict settling and legal technique. He who wants to avoid conflicts must master their technique. He who has to make plans for amendments of the existing law must thoroughly know its actual contents.[12]

2. Settlement of Conflicts

According to the above, then, there is only a difference in degree between the *administrative-legal policy* and the *conflict settling* functions of law. The traditional legal education and legal science have been oriented very much towards conflict settling and the dogmatic-exegetic method, but nevertheless this education has been a necessary – or at least a usually demanded – basis for a carreer in State service.

3. Ethical Governing

When aspiring to play the role of *ethics* or *legal policy* or of social science, including the use of prescriptive or descriptive methods, the legal science has lost its influence on the jurists and consequently its being of interest to them.[13]

During the 18th century the rationalist natural law was of great importance to the political ideas and the criticism of the law in the common educated public. But it did not meet the jurists' need for a dogmatic-exegetic working-up of the positively valid law. The systematic writings of the natural law theorists were used as subsidiary sources of law by the courts and dogmatists to fill in the legal rules at hand, which were often inadequate and casuistic. The natural law writers, however, had their greatest importance as inspirators of the European codifications of the Enlightenment.

4. Public Utility

When Jeremy Bentham rejected the eternal ethics which was the metaphysical basis of the natural law and replaced it by a legal policy program founded on the empiristic concept of *public utility*, the distance to the traditional jurist's function became too long. This was also what happened in Germany in the late 19th century, when the so-called sociological *Freirechtsschule* carried the protest of Rudolf von Jhering against the academic formalism of the *Begriffsjurisprudenz* to extremes judging according to situations without any rules at all. The attempt of Fredrik Stang too to make legal science a sort of comparative *science of culture* suffered an unkind fate, as the jurists of posterity neglected the institute founded for the new science. Also the later extreme attempts to reduce law into phenomena of reality and legal science into *sociology* which have been made by representatives of the so-called American and Scandinavian realism have failed. So was the case with Jerome Frank's behaviouristic theory of judges, according to which the legal material was only one of more motivating factors contributing to the legal decision, and with the prediction theory of Oliver Wendell Holmes (Sen), according to which the role of lawyers was that of a prophet trying to predict the reactions of the judges.[14] In Scandinavia Vilhelm Lundstedt made an attempt to reduce legal science into a social science with public utility as its highest measure,[15] and Karl Olivecrona and Alf Ross wanted to see law as imaginary conceptions[16] or »judge's ideology«[17] and legal science as a description of the calculated reflex effects of the legal proceedings. These attempts were also generally rejected. It is true that Alf Ross would not accept the extreme behaviouristic method according to which law is only one out of several »stimuli« provoking the judge's »response«. Ross rightly held the legal obligation to be an important element of the process of decision, but since the obligation originated in a »common judge's ideology«, which was solely expressed in the grounds of the judgment, the »source-of-law ideology« must be part of the »judge's ideology« into which an insight can be obtained in the same way as in law in general. For this reason Ross accepted a »descriptive« source-of-law theory in principle.[18] Characteristically both Olivecrona and Ross made use of traditional legal methods in their dogmatic works, methods which were founded on the existence of a set of valid sources of law ahead of and beyond the judge's consciousness.

5. Social Criticism

The extreme schools of *legal criticism* or *legal sociology* of to-day, especially in Germany, have had no better luck. This is true of Marxist and neo-natural law as well as of existentialist schools taking the legal rules to be of the same kind as other social, political and cultural norms of functions. Whereas the Marxist and critical theories start from principles outside and inside the political system in

order to bring about changes in the existing legal conditions,[19] the extreme system theory, developed by Niklas Luhmann in continuation of Talcot Parson's political science, looks upon law as a part system within a network of competing political, economic, cultural and social systems which are legitimated (and changed) through their (unhindered) function.[20]

It is indisputable, then, that law has a double *political* function as peace-keeper abroad and maintainer of order at home and also as a means to preserve the social *status relations* and to develop and distribute the ressources of the country. All this is part of the *macro-function* of law, i.e. its functions when considered from a general social and political angle. Thus both a *Marxist* and a *»system oriented«* legal theory are macro-theories, since for instance the former emphasizes the »oppressive« character of law, identifying it with the commands of those in power supported by state coercion, and the latter stresses its »emancipating« function, identifying it with the service function of the »market mechanism«. These two macro-theoretic views insert law as phenomenon and system in a politological frame presenting two different concepts of democracy – a socialist one and a liberalist one.

B. Internal Functions (Justice)

However, law has also a micro-function, i.e. a function connected with an *»internal«* consideration as the point of departure of individual evaluations and dispositions. *Considerations of justice* in the widest sense play an important role in this area.[21] Formal and material expectations as to the consequences of one's own dispositions in relation to the reactions of the society and the surroundings lead to a certain degree of predictability which can be obtained in principle under any material system, provided that it is *formally* governed by rules and not discretionarily.

1. Formal Justice

Opposite to individual commands general rules prescribe a certain treatment of certain situations each time such situations occur. This on the one hand will permit general calculations and, on the other hand, it will create an expectation that *equal cases will be treated equally*. The words of many languages for »law« and »right« mean just what is »laid down« and »straight« contrary to what is arbitrary and crooked. This expresses the human need for predictability as to one's own possibilities and the need for being sure that others are subject to the same restrictions as oneself.

»Justice« in this sense is of special importance to the weak, because, as expressed by Aristotle: »The strong take for themselves«, or by Thukydid: »Most people will submit to hunger, poverty, oppression and many other suf-

ferings without complaint; but if they are treated unjustly, i.e. against the rules, they will become rebellious and ungovernable.«[22]

In this sense the *concept of equality* is socially valuable and related to the *rule of law*. In the former respect the concept of formal justice is status-oriented, emphasizing that the individual citizens are equal in relation to certain facts, while in the latter respect it is process-oriented, securing the individual a fair chance of estimating his legal expectations.[23]

Since »equal cases« are to be settled »equally« it is worth notice that it is necessarily a *comparative*, i.e. *analogical*, not a deductive, i.e. *logical*, operation to decide whether two cases are equal or, in other words, to *qualify* linguistically a phenomenon in relation to an abstract intension.[24] Even the Sophists of classical Athens were aware that the greatest difficulty in applying rules was of a linguistic nature, and both Plato and Aristotle, therefore, framed a special *concept of equity* as a modifying element at the application of abstract rules to concrete cases.[25]

The fact that such modification has been necessary indicates in principle that the use of *e.d.p.-technique* in judicial matters must be *limited*. Only in such areas where quantitative operations settle the cases, as for instance taxation or registration of motor-cars, these modern techniques can be utilized as decision systems.[26] At the same time the limits of the use of e.d.p. and other cybernetic governing systems as models or analogies of the concept of law have been indicated. No more than it is possible to reduce the concept of law into a sociologically conceived system with feed-back mechanisms will it be possible to reduce it into a psychologically conceived means of governing the mental processes which result in legal decisions and actions.

The modern synthetic construction of rules has contributed to veil the fact that the application of law involves an estimate. The former casuistic form was apparently simpler but in return implied a general application of analogy and fiction in order to lead to a satisfactory result, especially in view of the important changes in the conditions of life which must have taken place during the long intervals of years between the codifications of such case law.

The ideals which governed the great *codifications* of the 18th and 19th centuries were exhaustiveness and clearness.[27] The very ideal of liberalism was that every citizen should feel secure, when acting according to clear rules laid down to stipulate and delimit his freedom of action in consideration of others' equal right of freedom. Ever since it has been a common delusion of non-jurists that legal decisions result from a logical-automatic application of law, since according to the principle of separation of power (cf. the Danish Constitution, § 3) the law is made by the parliament and applied by the courts, which have therefore no »political« function. At the end of last century, in fact, the *Begriffsjurisprudenz* attempted to frame such a theory and application of law, and the criticism of this theory has never permeated the common conception of law.

2. Material Justice

Although the rules were made extremely abstract and were constructed in accordance with a firm system of concepts it proved necessary, for that very reason, to *supplement* them with terms of valuation like »reasonable«, »justifiable«, »common honesty« etc. By and by the so-called »general clauses« were introduced as correctives to the legal rules, for instance Bürgerliches Gesetzbuch (BGB) § 242 (»Treu und Glauben«) and the Danish Contracts Act § 36 (»urimelig« [unreasonable]).[28] In addition to this an increasing number of emergency powers acts are passed nowadays, meaning acts authorizing the secretary of state to control a certain area of public administration.[29]

3. Obligation

Thus law contains *internal elements* of »obligation« and »justice«, not only psychologically speaking as a feeling of being *obligated* but as a *logical category*. An obligation may be considered existing, whether or not the citizen or judge in question feel it, and even if the rule is unknown to them, or the interpretation is uncertain in a given situation.[30] The description of law as a mental system of government, then, cannot be called exhaustive.

III. The Existence of Law

A. The Validity of Law

1. Efficiency

To be considered as existing a legal rule must have been validly created within the given political system.[31]

Of course it is very important whether a legal rule is acknowledged and followed, i.e. whether it is *in force,* and of course it must be admitted that a legal rule may be cancelled through *desuetudo,* i.e. not being applied, for instance because of an oversight. The application alone, however, is not enough to define the existence of law. Often a rule may not have been made topical yet, such as is the case with emergency laws as for instance the Danish act of war risk insurance.[32]

2. Power and Law

The conception of »being in force«, however, also depends on who is intended to be the *addressee* of the legal rules. If, like Ross, one considers the legal authorities the addressee, since, in the last analysis, they are the persons who have to apply the *sanction system* of the State in case of offences, the conception of »being in force« must, of course, be rather hypothetical, dealing with the *probability* of an application of sanctions if an offence is submitted to the court for decision.[33] It may be difficult to separate such calculations of probability from the assessment of the »existence« of the rule on the part of the calculating jurist himself. Moreover there are certain rules which are not sanctioned. For instance it is doubtful, whether legal sanctions can be applied against laws passed by a *Folketing* which has not taken office on the first Tuesday of October. The rule in question belongs to a kind of regulations which cause no legal sanctions, but it would be rather odd to conclude from this that such rules are not legal rules.[34]

This is also true of the rules of *international law,* which are sanctioned only to a limited extent and not by the organized power system of the individuel State. Instead of excluding international law from the concept of law the idea that law and state are identical must be given up. In the same way it would be impossible to speak of law in *pre-State societies.* Such terminology would be both unnatural and inconvenient.[35]

Just as unnatural, at least in our time, is it to consider the common legal rules

addressed to the citizens as *reflective effects of the legal procedure*. Although it is true that many legal rules are addressed to courts and other public authorities, it is evident that most of the common legal rules address themselves direct to the citizens in general or to larger or smaller groups of citizens. It would seem unnatural for me to look upon the rules of income tax as something not directed towards my personal wages account.

I would not think it natural either to consider the existence of these rules as dependent on my *acceptance of an obligation*. Even if I do my best to evade my so-called duty to pay tax, the rule exists all the same and with it the duty. It does not suffice to acknowledge that the acceptance of the legal system as a whole implies the acceptance of the individual tax rule too. Conclusions of this kind would be identical with the assertion of the idealists of last century, that the criminal had in fact asked for his own death sentence, since he had known the rule of punishment at the time when he committed his crime. It is not allowed to pretend an acceptance which has not been given in each individual case.

3. Morality and Law

Of course it is an important prerequisite to the individual's acceptance of the rules that they harmonize with his own conception of law or morality or at least with generally accepted conceptions, but this demand cannot be decisive to the question of the existence of the law. In a pluralistic society, for one thing, the norms of morality are not identical. The parliament is and must be the authority to decide the »moral« contents of the law. In fact that is the very task of the parliament. Even in a totalitarian society, for instance the Nazi or communist societies, it would be rather unpractical to make ethical demands on the contents of the law as a condition of its validity. If the political authorities keep within the framework of the constitution, the rules will be formally valid and therefore actually existing. It will not be possible to talk of »immoral« law, unless for instance the rules are at variance with the Human Rights. Lon Fuller has advanced a series of demands to be made on the ethical contents of law, including prohibition of ex post facto laws.[36]

B. Natural Law as a Social Theory

Although the mere agreement with certain moral principles, then, does not establish a criterion for the existence of validity of the law, it is obvious that the function of law as a *means of social binding* (and as a tool of governing) must presuppose that certain fundamental ethical principles are respected and sanctioned. Herbert Hart speaks about the ethical »minimum content« of the law and states that no legal system known to history has been without rules for the

protection of personal and material integrity and of the general reliability.[37] According to Hart a society cannot survive without such rules. If a rule has been made in agreement with the »rules of recognition« of the society in question, it must be considered as valid positive law, even if at variance with the moral minimum. One might also say that there exists a *natural law* but only as a *social theory,* i.e. a hypothesis regarding the demands which a given society must make on its legal system.[38] In the first place we have no chance to study man in his state of nature, since even the most primitive contemporary human beings have established a *culture* which has already changed this nature, because, unlike the animals, we both create our culture and are created by it. Secondly the changes of culture cause new natural needs, so that the content of the natural law must change with the development of culture.

Even *Aristotle* was aware that the *system of government* must depend on the *culture* of the society in question. Although he regarded democracy as it was practised in the Athenian *polis* in the fourth century B.C. as the superior system of government, he would not exclude the possibility that monarchy and oligarchy or even tyranny might be the most suitable government forms in certain critical situations.[39] By the way Aristotle, like Plato, subscribed to a *material* conception of man and society. Both found that their experiences during the Peloponnesian war had shown some rather negative consequences of the radical Sophist view of democracy, according to which the social and legal system should be totally decided by the majority.

Aristotle regarded man as a social being *(zoon politikon),*[40] and he found that the social needs and human reason made certain natural demands on the organization of society. This line of thought was carried on during the cultural renaissance of the 13th century by Thomas Aquinas, who, contrary to the older church doctrine, acknowledged a human legislative power delimited by *general principles.* Later on in the 17th century Hugo Grotius revived this material natural law doctrine. Like Aristotle he looked upon man as a social being governed by social needs and by reason. Whereas Grotius and his successors considered the rules of natural law, which are based on human freedom and a social contract derived from this freedom, as being eternal and unchangeable, Thomas Aquinas had emphasized that only the principles in general were eternal, while the contents would change according to the human will.

In the 18th century *David Hume,* the empiric philosopher, rejected any idea of a common human natural law, seeing that perception and valuation are activities of individuals not of mankind. Just like the principle of causation cannot be proved through cognition, general values are inconceivable, because the surrounding world has no other values than those laid into it by each individual himself.

Immanuel Kant overcame the dilemmas experienced by Hume presupposing a special structure of the human apparatus of cognition, which creates our thoughts in time, space and causality in accordance with general concepts. He

also presupposed the concept of *freedom* as the point of departure for the evaluation of human actions, since freedom must be a prerequisite to responsibility. Conversely he rejected the existence of a *material* ethic and natural law. The idea of freedom and of the social contract must lead to the universal rule that one's freedom is limited by others' equal right to freedom, and that the demands made on others can be made on oneself too (the principle of universality). While Kant, like Thomas Aquinas, recognized some general natural law principles or formal concepts the content of which was changing according to the positive political will at the time in question, Hegel and his pupils, among others Karl Marx, found a material basis of a natural law in human reason and the reality reflected by this reason on the one hand and the material forms of production on the other hand. Marx held that the material development would necessarily lead to the abolition of private property in the means of production and hence to a communist society of free and equal citizens without legal restrictions, since to him the legal rules were a means of oppression intending to protect private property.[41]

More recent phenomenological (intuitionist) theories have established value hierarchies, which in themselves demand specific forms of legal organization. The weakness of such systems is the lack of possibilities of verifying these values, which can only be seized when obvious, just like the religious natural law systems of catholic or protestant observance. This weakness also encumbers the natural law theories based on the Human Rights, if they cannot lean on a positively valid constitutional foundation.[42]

However, as mentioned, it is meaningful and justifiable to advance natural law hypotheses in the form of social theories which must be verified through a political process repairing defects and changing conditions according to the political needs felt.[43] In this connection one may adopt the theory that democracy is a better means than any authoritarian governing system (when there is no revolution or war in the country and no heavy industry being built up) to communicate the necessary information to secure that the needs of the citizens can enter into the political decision process, and that the resources of the country, through the market mechanism, are developed in the most effective way. In other words, the legal rules are assumed to be an important element of this information and governing system, since they provide the framework of both individual and social decision processes. If these information and decision processes are not allowed to take place without disturbances the *social solidarity* or acceptance will suffer the kind of break which we call revolution (or »fundamental change«) and which changes the »rule of recognition«, the »social contract«, the »constitution« hitherto forming the basis of the validity of the law.[44]

IV. Hypostasis

The above analysis of the present and former functions of law and of the philosophical theories of law derived from these functions makes it reasonable to regard the various theories as *hypostatizations,* meaning that one single function, certainly an essential one, is made the *criterion of the concept of law.* In other words, the concept of law is *defined* in relation to conceptual elements expressing such aspects of the function of law that are (at present) of outstanding importance both practically and scientifically.[45]

A. From Reflection to Governing

In *primitive societies* without any politically or otherwise centralized government the law, or most of it, is regarded as pre-existing norms of divine or cosmological origin.[46] In such societies the ritual or religious functions and the function as »law-speaker« will often be conferred on the same person. This was the case, for instance, with the Roman augurs and priests, who took auguries and advanced prophecies and consequently controlled the calendar, in which the »true court days« were determined. The Nordic law-speakers at the time of the provincial laws and previously in the 12th and 13th centuries held a similar mixed status. In pre-classic Greece too the cosmological-ritual function was no doubt closely connected with the creation of law. The legend about the three Moerae, the Fates, who spin, measure and cut man's thread of life according to the principle of »every man his due« is a reflection of the moral-legal idea of justice. The idea of a connection between fate and justice is also found in the Nordic myth of the Norns and the belief in fortune as mixed of fate and merit. The Roman doctrine of justice as »*suum cuique*« has come down from Greece with the Stoic philosophy.

The oldest Greek conceptions of law were taken from the Babylonian cosmology, according to which the human relations were reflections of the movements and mutual positions of the heavenly bodies. Thus the governing powers were impersonal or divine, and the legal and moral conceptions therefore of a *fatalistic* character. The interest in the changing seasons (and hence in the calendar) was also due to the prevailing *agrarian* culture and economy, and the seasons were often identified with important ideas of law and justice (the so-called »double symmetry«: law and chance, power and peace).

Greek religion, contrary to that of the Jews, never became monotheistic, so the concepts of morality and justice stayed fatalistic and not particularly connected with merit and punishment, but in principle the conception of man was

collective, considering that the family was the bearer of rights and duties, crime and punishment, just like it was the case in the pre-state Nordic society. The meaning of being »good« was primarily being »good at something«,[47] seeing that the abstract idea of goodness was not formed until the establishment of the Athenian city-state. On the whole the development of the city-states in the Eastern Mediterranean countries, Palestine, Greece and Italy, about 400 B.C. with their division of labour and dissolution of the close family relations encouraged *individualism,* i.e. the idea that moral and legal principles are founded on the will and responsibility of the individual. The contract is a manifestation of such belief in the power of the individual will to create rights and duties. To the Sophists the social contract was the ideological basis of a democratic constitution as the natural result of the secularization, after which the power of legislation became exclusively human and unlimited. As we have seen this unlimited legislative power was criticized by Plato and Aristotle during the dissolution of the city-state in the 4th century B.C., because they found that an unprincipled democracy based on direct voting might lead to unethical and dangerous consequences.

After that the city-state was played out. Attempts were then made first by the Hellenistic Empire and later by the Roman one to combine consideration for the State with an individualistic doctrine of law handed down from the classical Greek and Roman republics and supported first by the Stoic individualistic conception of morality and law and later by the corresponding Christian ideas. After the fall of the Roman Empire in the 5th century A.D. the church took over the temporal power of the Emperor in Western Europe and with it the legislative power.[48] Throughout the Middle Ages until the 13th century it was generally held, that law was primarily the customary law and that only the church had the authority to change it. This view had its origin in the breakdown of the advanced urban money economy and the return to the static agrarian economy with feudalism as its organizing principle. The writing down of the Nordic provincial laws in the 12th century was formally no legislative activity but a codification of already existing customary law, although it is generally admitted that the church, almost having a monopoly of the art of writing, insinuated some legal changes into the supposed mere copy.[49]

As mentioned it was not until the period of economic growth in the 13th century that the temporal princes gained enough strength to compete with the church for the legislative power. But the urbanization and the division of labour, which was the necessary basis for a revival of the individualistic conception of morality and law, did not take place until the 16th century. This must be stated irrespective of the fact that the church had formally maintained the ideas of individualism thoughout the Middle Ages.

In the early 16th century *Hugo Grotius,*[50] the Dutchman, completed the mediaeval material philosophy of morality handed down from Thomas Aquinas and at the same time laid the foundation of the rationalist natural law,

i.e. the belief in *eternal and unchangeable principles of law* cognizable to reason just like empirical phenomena. Grotius believed in the good social nature of man and in reason as a safe guide in the creation of social and individual contracts to secure the power of the State and the rights of the individuals. Almost at the same time *Thomas Hobbes,* the Englishman, framed a theory of the social contract, but in diametrical opposition to Grotius he based it on the idea of man's fundamental weakness, which must lead to the entrustment of the legislative power to an absolute ruler who is given the task of securing law and order. The difference between these two related theories is due not only to different political experiences but also to a fundamentally different philosophy. Grotius, as mentioned, built his theory on the catholic moral philosophy, including the belief in a divinely inspired social nature in man and in an eternal »natural law« (lex aeterna), whereas Hobbes departed from a quite illusionless conception of mankind as weak and egoistic individuals, who would fight each other without mercy for their own profit if prevented by no forces of order. In the state of nature, he thought, men are like wolves eating one another, and in their own interest they must agree on a social contract handing over their natural sovereignty to a prince (Leviathan), who is able to keep the mutual peace. Hobbes started from the human sensation and regarded the object of experience, including man himself, as material phenomena subject to mechanical laws, and his philosophy therefore might be called instrumental individualism. The natural law became individual »natural rights«.

Grotius' rationalist natural law with its belief in eternal and unchangeable legal principles was developed and systematized by Pufendorf, Thomasius and Wolff and greatly influenced European law and culture during the period of the Enlightenment. The individualistic ideas of Hobbes were carried on by *David Hume,* who rejected totally the idea of a natural law, since only individuals are able to think and feel and so arrive at any cognition, and later by *Jeremy Bentham,* who regarded legal policy to be the main task of law (instrumental law) and advanced the utilitarian legal and moral philosophy.

This theory of cognition was radicalized by *Immanuel Kant,*[51] who placed an insurmountable barrier between cognition and evaluation, so that both the social contract and the fundamental moral principles became purely formal constructions, which had to be completed through the positive morality and law at the time present. Throughout the following century law, like culture, became a historical phenomenon developing on a national foundation.

At the same time, however, Kant had radicalized the concept of freedom underlying the individualistic natural law and the social contract, the same concept that in Locke, Montesquieu and Rousseau led to the assumption that certain »human rights« are eternal and inalienable, and which stands out against the political democracy.

As maintained by *von Savigny* the citizens must be free to settle their own private conflicts. Whereas the State has got nothing to do with civil law, it

positively lays down its own rules by means of its commands. This social model has been called the »nightwatcher State«. In Germany this ideology led to the legal positivism and the *Begriffsjurisprudenz,* schools founded by professors of a nation with a non-central government. France was a centralistic State with a strong parliament, and here the words of the law were of a decisive importance, so that the main task of the legal science was to interpret the laws. In England the judges were the central figures of a traditional common law system, and law was considered a naturally growing customary law nursed by the careful legal gardeners. In Denmark *A. S. Ørsted* became the exponent of a legal conception which was instrumental and realistic as well, and the development of which was essentially decided by the correlation between theory and practice.[52]

It was not until late in the century, however, that the idea of law as a political-instrumental phenomenon penetrated, after *Rudolf v. Jhering* had made it generally accepted that the legal rules are chiefly produced by the parliaments as the result of a struggle for the interests of different social groups. Since then it has been the common opinion in eastern and western countries, that law is a tool of the political process and a product of it as well.[53]

B. From Utility to Justice

During recent years the question has arisen, whether law can be sufficiently described by referring to its *political-functional* aspect, or whether it is right to leave out the aspect of *reflection,* i.e. law as a *mirror* of life. This question has been discussed by moral and legal philosophers. Is it possible to reduce moral philosophy to a value hierarchy with one single value at the top, or is it necessary to depart from a pluralistic value basis? In other words: Is *social utility* or *justice* the final aim of the legal system, or are they competing? The problem might also be expressed in a third way: Has justice been reduced to a *distributive* activity, or does it still contain a *commutative* aspect?

Recently the idea of justice has been analysed especially by *John Rawls,*[54] who has rejected the reduction of law to social utility, because, as he sees it, regard for the freedom of the individual must compete with regard for the interests of society. Human actions cannot be reduced to pragmatic functions. Man needs no other justification of his action than his own will: I will because I will! Rawls considers it an important task of moral philosophy to establish criteria for the *distribution* of social resources. Departing from an adapted social contract theory he attempts to combine the doctrine of equality with regard for efficiency. The details I will pass over for the moment, because they have been widely criticized, and with a good deal of justice. Rawls' point of departure is a social liberal conception of man or a political ideology, according to which efficiency and freedom should not be ranked against one another but must compete for priority.

24

This social liberal theory of Rawls has been contradicted by *Robert Nozick*,[55] who subscribes to a »libertarian« ideology and maintains, that in a developed society only the market mechanism is able to secure personal freedom and efficiency at a time. Nozick returns to the natural law point of departure, i.e. man's freedom to dispose of his body and powers, which leads him back to *Adam Smith's* classical liberalism with its assumption that the individuals' striving towards their own benefit would tend towards being of benefit to society. Recent research has demonstrated, that Smith's economic theory was connected with a legal and moral philosophy which agreed with the rationalist natural law doctrine, that man was a reasonable being and a social being as well (zoon politikon), and that this fact would necessarily lead to the result that the benefit of the individual was also the benefit of society.[56] This assumption, although not empirically obvious, is important to understand Smith's thesis. Since the middle of last century, therefore, political theorists and practicians have taken the consequence of the breakdown of idealism, which means that they do not, like the classical theorists of the 18th century, look upon democracy as a reasonable debate between well-informed persons, but rather as a struggle between different interests. The »correct« political action, then, is not the result of a rational process of cognition but of a struggle between wills and interests.[57]

Most recently *Ronald Dworkin*[58] has tried to find a compromise between Rawls and Nozick. He starts from the market mechanism, which he thinks able to meet the demands for freedom and efficiency at the same time. To a certain extent it also meets the demand for equality, at any rate all citizens must be equal before its abstract norm of distribution as opposed to norms founded on status or privileges. As it favours an effective communication too, it gives everybody a chance of being heard. Some theorists have gone so far as to state, that a pluralistic economy with its liberty of choice must be a prerequisite to a democratic social organization.

However, experience as well as theoretical considerations suggest an adjustment of the market mechanism. In the first place it should secure long-term social interests by including the external production costs paid by society, such as education, communication etc., in its commodity prices just like the internal costs. In the second place the citizens should be secured equal possibilities to utilize the objective norm of distribution of the market mechanism, which implies a redistribution of resources by means of changed policies regarding education, subsidies, taxation etc.[59]

C. Reflection and Culture

According to the above the rules of a society cannot be a unilateral *governing system* based on social consideration. It must still contain important elements

reflecting certain *customs and cultural values,* which may partly be *conditions of the existence of the society,* such as protection of property and person, marriage, bringing up of children etc., partly represent a lump sum *of ideas of justice.* These thoughts are on the same lines as the assumption that man is both an individual and a social being with equal needs for freedom and security. The question which of these needs must be preferred to the other cannot be answered in a general formula but must be left to emerge from the political process.

1. Justice

In our western countries the *civil law* is rooted in *private autonomy,* the manifestation of which is the *contract,* the ideal expression of the common will of the parties. In practice the will factor is subject to certain restrictions because of the necessary regard for general expectations, for the utilizing of certain strategic advantages in making the contract, and for public control of the contents of it according to general social policies. These restrictions are similar to those which nowadays entangles private property, especially real property, in relation to the public planning. Many kinds of contracts, leases and companies are subject to an extensive public control, and large parts of business life in general are regulated by *standard contracts.* Mass production demands mass sale, and therefore contract conditions must be standardized. At the same time standard contracts harmonize the opposing organized interests, just as does the model acts, when the standard contract is an »agreed document«, i.e. when it has been agreed on through negotiations between the organizations of opposite interests as for instance the superior agreement of the labour market and the nationally and internationally accepted business conditions and shipping conventions.[60]

Even though the law of property, like the matrimonial law, is subject to an increasing public control through planning, taxation and direct influence on the management of private undertakings, the western societies still build upon private property and disposal together with free choice of consumption.

It makes sense, therefore, to maintain that law has still a reflective function, and that *justice* cannot be reduced to being *distributive,* as the civil law is in principle founded on the institution of contract, which implies reciprocity and equivalence, that is *commutative* justice. One might try to reduce the function of law to the aspect of control and distribution by calling private autonomy a kind of political ideology or control, and it would not be quite wrong, but it would veil some important aspects of the function of law and also the possibility of a dualistic concept of man. At least one cannot by presupposing a monistic concept of man avoid the political and scientific discussion, which must precede the reduction of the concept of law and justice to a function of the social utility.

Neither has the recent debate of *criminal policy* been in favour of a one-sided consideration for society (general prevention), for the treatment of criminals (special prevention) or of society itself (Marxist theory). It is accepted by criminologists that, out of consideration for individual justice, it is necessary to maintain as far as possible that responsibility corresponds with liberty, and that the reaction must, on the other hand, be reasonably proportional to the offence. From the earliest times the reciprocity implied by the law of contract and the criminal law has been the foundation, not only formally but also materially, of the idea of justice in the form of equality.[61] It was not until more recent times, when culture was urbanized, that justice was supplemented with a distributive function and it was left to society to decide the individuals' deserts.[62]

2. Custom

The *reflective* function of law is also that of being the framework of the traditional culture, manifesting itself through *customary law*. As mentioned above the customary law is the only kind of law in primitive and static societies, often, but not always, combined with religious conceptions. This situation has coloured the concept of law in Western Europe, especially in the Scandinavian countries, all through the Middle Ages. Even nowadays the *Islamic* countries are dominated by this combination of tradition, customary law and orthodox religion. In some of the countries, especially Iran, a revolutionary religious renaissance can be observed as a reaction against the infiltrating technology and liberalism of western civilization. The *Jewish* culture too implies a religious legal system surrounded by ritualized customs.

On the one hand, of course, *culture* and *religion* rest on tradition and custom and, on the other hand, have developed from local practice in a natural way. It is easy to understand, therefore, that the romantic movement and its predecessors, Goethe and Herder, could compare the social organization with the biological organism, in the first place in opposition to the mechanical conception of society and culture of the rationalists. The corresponding conception of law is most clearly advanced by von Savigny, the German, who emphasized that customary law, like culture on the whole, had grown up in the people independently of the State and should therefore be preferred to the radical French codification policy.

Politically and ideologically von Savigny's purpose was partly to further *the movement towards German unity* after the Napoleonic wars, partly to justify a liberal policy corresponding to Kant's moral and social philosophy. In Denmark, where the political situation was otherwise, A. S. Ørsted recommended a combination of tradition and reform, customary law and legislation. Whereas to von Savigny the material from which the customary law sprang up was the Roman sources of law, to Ørsted it was practical life itself. Consequently von Savigny and his successors at the universities did not immediately influence the

legal practice or the legislation to any degree worth mentioning, while Ørsted, who remained a legal practician, became an important intermediary of the interplay between theory and practice and had an influence as a legislator.[63]

In the long run, however, von Savigny did influence the German legislation. The BGB is to a certain extent a further development of the Pandects with the advantages and disadvantages connected with the high level of abstraction and the omission of the practical commercial law. The liberal social ideology has been preserved until the present day by the BGB, in which the principles of liberty and will are still maintained. This has caused great difficulties in post-war Germany, where the need for combining the application of the rules of the BGB with the »social state«-foundation of the constitution has been urgent. In the Third Reich, however, there were no great difficulties in applying the BGB, since the *Treu und Glauben* of the general clause could easily be interpreted as *»gesundes Volksempfinden«*.[64] In theory (Wiethölter) as well as practice it has been attempted to interpret the fundamental principles of the constitution into the positive legislation by means of a »critical« or »neo-natural law« method, but in the course of time a great deal of up-to-date special legislation has been introduced, and most recently a comprehensive analysis has appeared making a forthright proposal for a general law reform.[65]

In the *Anglo-Saxon debate* a similar discussion about the status of the cultural and social development as a corrective to the positive law has taken place, though in another form. *Herbert Hart*[66] has adhered to his positive law view but has had to realize, that in case of important changes in society the legal system will be incomplete in principle if not supplemented with new legislation. *Ronald Dworkin,* his successor, has maintained that the legal system is exhaustive in principle, and that the gaps which may appear, especially in difficult cases, can be filled in with support from general moral and legal principles, which are regarded as belonging to the legal system, at least if they are supported by the American Constitution. (Dworkin is an American citizen).[67] It is worth mentioning that both Wiethölter and Dworkin are subject to constitutions made to keep federal states together, for which reason they contain a large number of general principles meant to guide the autonomous constituent states. Because of their »political« constitutions, therefore, it is a common feature of American and German law that a number of social conflicts of a political and ideological nature are transformed into legal conflicts, which are then submitted to the federal tribunal for decision. In monistic states like England and Denmark, naturally, a sharper distinction is made between law and politics, and the »political« conflicts are left to the parliament, leaving the courts to settle conflicts on a neutral basis.[68]

28

3. General Principles of Law

In continuation of a general theory of understanding, emphasizing that any interpretation must depend on the conditions of life and culture in the society in question, the so-called »hermeneutic« philosophy of law, including the English analytical philosophy (Wittgenstein),[69] considers history and culture as its »horizon of understanding«, inasmuch as these phenomena are kept in language so to speak.[70]

It is obvious, therefore, that the culture, religion and ideology handed down to us must become the hidden but necessary foundation of our legal institutions. The Greek/Jewish individualism together with the democratic human rights and the constitutional State-ideology are important prerequisites to the understanding and interpretation of the legal rules of the western world.[71] As stated about the radical critical theory of law of certain federal states it may be questionable, to what extent political-ideological ideas and principles can be, or ought to be, considered as parts of the legal system in force, and to what extent such principles ought to be considered as meta-legal or legal policy maxims inapplicable outside their direct sphere of application. In legal practice, for instance, it is generally held that constitutional principles cannot be applied right away to civil law conflicts. Only a general principle of equality has passed from constitutional law to civil law and administrative practice in many countries.[72]

It is self-evident that *general principles of law* must be the basis of legal argumentation, and, moreover, to a legal theorist departing from legal practice it is obvious that such general principles of law exist and have developed by and by in legal theory and practice, concurrently with the social and cultural development on the whole, but varying within the legal areas.[73]

The *criminal law* is governed by three basic principles: The principle of guilt, the principle of no punishment without offence, and the principle that the burden of proof lies with the Prosecution. The *law of procedure* is governed by the principle of public administration of justice and the principle of either party to a case being present at the hearing and informed of any step in the action. In *civil law* the principle of private autonomy is important, and in *public law* the principles of sovereignty and of equality besides the principle of efficiency and lawful administration must be emphasized. An analysis of Danish legal usage,[74] however, shows that a series of specific models of argumentation are involved in the procedures of each legal area. These models have a double purpose: to fill in gaps and imperfections in the legal material and to adapt it to new situations caused by changes in the social or moral conditions. The general clauses of the legislation also contribute to an adaption by degrees of the social morality and the professional ethic. During recent years the legislators of several countries have introduced new general clauses to enable the courts to set aside unreasonable contract conditions (Danish Contracts Act § 36). Such an

estimate cannot be made, of course, without considering at the same time the aims of the regulation (teleological aspect) and the practical (pragmatic) effects of a concrete decision.

V. Model and Analogy

A. Topology

Immediately above we have accentuated the special features of legal theory which are connected with the choice of court procedure, as our starting point for the understanding of law. If we choose the concept of law or the *legal system* as our model and the conceptual analysis as the method of our activity, the *formal* aspects of the concept of law and its relation to other social norms will stand out, whereas if we depart from the *legal decision,* we must necessarily direct our attention to the application of law, especially to the methods of adapting an abstract, but purposeful, norm to a concrete case.

1. The Concept of Law

In the former model situation we are brought to stress the general and formal aspects of the *concept of law,* and in the latter we are forced to realize the pragmatic and discretionary nature of the application of law. It is easy to understand that the legal theorists, who consider the legal system as a formal means of governing society, must come to identify law with the State and its maintenance through political powers. Such legal theories are founded on the *analogy of command,* and consequently the individualizing and evaluating elements of the application of law fade out of sight. This is true, whether they refer to the will of the State or the ruler[75] like the German and English theories of the 18th and 19th centuries, or they eliminate the will factor in different ways like the *Reine Rechtslehre* of Kelsen, who identifies law with the State,[76] the rule theory of Hart,[77] or the »free-standing imperatives« of Olivecrona.[78]

2. The Legal Decision

To the German »Freirechtsschule« at the end of last century,[79] the »American realism« in the 1930s,[80] the existentialist legal theories[81] and other theories, which regard the *judge's function* and individual legal decisions as analogies of the concept of law, the discretionary element will quite eclipse the normative contents of law. The same is true of the »naturalistic theories« from Jhering[82] and Pound[83] to Hägerström,[84] who all look upon the legal decision as being the result of a psychological motivation process based on interests, just like the behaviourists, and who want to reduce legal science to natural or social science. Alf Ross'[85] legal theory contains both elements considering law both as commands supported by State coercion and as judge's ideology manifesting itself in

grounds of judgments, which in turn form the basis of the legal scientists' probability calculations of valid law, i.e. what will be made the basis of future decisions. Ross does not make it clear, however, that this is a question of two different aspects of law.

As explained above law has been described by means of different models and analogies.[86] The models have always been dependent on the general cultural and scientific world picture at the time in question. In *static* societies the concept of law is mainly *reflective,* and law is understood as ever existing customary law of mythical or religious origin. In *dynamic* societies law is conceived according to its *function* as a tool of the political power to govern and change society. In the former case law is conceived as natural law and the legislative power as belonging to the gods or the church like in the Middle Ages. In the latter case law is conceived as positive law derived either from the citizens' will through a social contract, as for instance the Sophist Athens and the rationalist natural law, or from the rulers' will, as for instance in Europe after the Renaissance. In the 17th and 18th centuries the social contract was made the foundation of democratic as well as autocratic forms of government, and the natural law, although considered as eternal laws, was still looked upon as reflections of a superior mechanical world order cognizable by reason. Only after Kant in the 19th century did the absolute legal positivism penetrate with its separation of religion and morality from the law. The former were submitted to the court of conscience, and the latter, being the work of man, was placed at the service of the society and State will and later the social utility or the social interests.

B. Legal Theory

1. Realistic Theories

a. Political Theories

Law, then, may be conceived as an expression either of the world order, the laws of nature, the morality of human reason, the will of the ruler or the State, the social utility or of the competing social interests.

In *our time* law has been subject to an analysis of functions and has in turn been considered on the basis of different *analogies.*

Realistic theories, regarding law as an *empirical phenomenon,* have concentrated upon its *political* function, and some of them have identified law with the *commands* of the ruler or the State backed by *coercion.* So was for instance the opinion of Hegel and John Austin, and it is still the prevailing conception of law in the so-called socialist countries of Eastern Europe. In these countries

also the pedagogical and moral functions of law are paid much attention.[87] Others, like *Hans Kelsen*,[88] identify law with the State which they regard as a legal and nothing but a legal organization. Also *Hägerström*[89] takes law as an expression of the State organization but rejects the idea of including will or coercion in the concept of law. It is not quite clear how to motivate such a behaviouristic or naturalistic concept of law, nor what logical status should be given the »free-standing imperative«, so called by Olivecrona.[90]

Thus Hägerström lays more stress on the function of law as a virtual political-psychological means of governing. This understanding is especially emphasized by *Vilhelm Lundstedt*,[91] who mentions the social utility as a realistic interpretation of the purpose of law as opposed to the idealistic concept of justice. Already in the late 18th century *Bentham* had formulated this utilitarian principle of law, which was accepted by *Rudolf von Jhering* in the middle of the 19th century and further developed in the German *Freirechtsschule* and *Interessenjurisprudenz* as well as in the beginning American realism. According to these schools law was to be looked upon as a result of the political struggle for interests.[92] Already in the early 19th century, however, *A. S. Ørsted*,[93] the Dane, had framed a »realistic« legal theory based on the idea that law was serving the interests of the community of citizens. This theory has been the foundation of Danish-Norwegian legal science ever since and has manifested itself in an organized cooperation between theory and practice.

While according to Jhering's social-liberal theory law was a parliamentary means of governing and changing society in agreement with the interests of the majority, *Karl Marx*,[94] his contemporary, framed a theory of struggle or con-flict according to which the legal rules had no governing functions. The legal rules were nothing but a *reflection* of the material social conditions and in turn only one out of more middle class tools for the oppression of the working class, brute force being the most important one. When private property in the means of production was abolished, man would change with the emancipation, so that neither legal rules nor power would be needed to make him do the right, social things. During a transition period after the revolution, however, it would be necessary for the proletariat to establish a socialist State and to oppress the middle class through legal rules and State power.

Thus Marx' legal theory is a peculiar compound of reflection and governing theories, maybe because it was chiefly a sociological theory. Marx' anthropol-ogy is greatly influenced by the romantic doctrine of man as a good social being who is ruined by his surroundings, a doctrine which in turn is rooted in the natural law tradition, dating back to Aristotle's »zoon politikon« and Socrates. By the way, it was generally accepted in the Middle Ages that law and custom were reflections of order and justice. Marx' reflection theory, however, is a dynamic development theory, which reflects changes in the social conditions and which is in a sense related to romanticism and von Savigny's doctrine of the

development of »the spirit of the people«, which was carried on by Hegel in his theory of the dialectic of reason.

b. Cultural Theories

Marx' theory is also related to the common cultural theories which regard law as a *cultural phenomenon*[95] just like religion, morality and other norm systems that are subject to the same changes as the rest of the material and immaterial culture. This conception of law is of a systematic character, since it places law as a part system within a general cultural system.

These cultural system theories are related to the *sociological theories* choosing their analogies from different sociological points of view.

c. Sociological Theories

1° System Theory

Several modern *system theories* consider law on the analogy of the cybernetic control and feedback systems. Some of them, as for instance those of Sundberg and Eckhoff,[96] lay stress on the functions of governing and control and look upon the feedback mechanism as a means of information about disturbances in the governing mechanism, while others, especially *Niklas Luhmann,*[97] consider law from a model of market economy as a rolling system, constantly corrected and legitimated through its own administration.

2° Jurists' Behaviour

Other sociological theories take their analogies from a specific legal sociology angle regarding law as the *behaviour of jurists.*

Law may be seen as the result of the *parliamentary behaviour,* which is done in *France* where the parliament occupies a leading position in the jurists' hierarchy. In *England* and partly in the *USA* law may be regarded as *judges' behaviour,* because among the English legal profession the judge holds the highest rank. *Oliver Wendell Holmes* sees law from the lawyer's point of view, i.e. as expectations or calculations as to the chances of winning a case. In *Germany* and to some extent in the *Nordic countries* the *professor of law* has been prominent, and his scientifically arranged ideas of the contents of law has often been regarded as the correct interpretation of the popular view of law, as found for instance in such mutually remote personalities as *von Savigny* and *Knud Illum.*[98]

d. Psychological Theories

1° Behaviourism

Here we are moving in the direction of the *psychological* theories which consider law on the analogy of psychic regularities and expectations.

The *behaviouristic* psychology, which looks upon the psychological processes from outside as the result of an *input* producing an *output,* has greatly influ-

enced certain sides of the American realism of the 30s. This school had as its model the *legal decision* which was understood as a psychological process of motivation in which the legal material was a factor equal to other factors, such as the judge's political conviction, state of health, sex, race, mood and even digestion (Jerome Frank's digestion theory). Also later on law has been considered on this analogy in the USA,[99] and in Scandinavia, as mentioned, *Axel Hägerström's* line of thought bordered on behaviourism.

2° Psychology of Cognition

Later on by analogy with the *social psychology* (expectations) and the *cognitive psychology* the theorists have attempted to make out the feelings of right and duty animating both the legal subjects and the legal officials. The social psychology has offered the model of the analogous conception of law as a system of *expectations,* which are fulfilled if law exists, while the cognitive psychology has been the model of *Alf Ross'* complicated theory of »valid law« being a combination of social facts (judicial behaviour, court decisions) and psychological facts (feeling of being legally obliged). In principle law is the »judge's ideology« prevailing in a certain country, but an insight in this ideology can be obtained only by reading grounds of judgments. The legal rule is valid, if the probability of its being applied exceeds a certain limit. Law, then, is conceptually connected with the judge's function and in the last analysis it is an expression of the will of the State backed by coercion. But at the same time it is the interpretation scheme from which the judge's behaviour may be predicted.

On the whole, *Knud Illum*[100] states, this possibility of predicting the judge's behaviour is just due to the lawyer's insight in the interpretation scheme, which is not only judge's ideology, then, but also *lawyer's ideology.* In his opinion a professor of law is just as qualified as a lawyer, if not better, to interpret the popular conception of law which is the last warrant of legal practice.

3° Social Psychology

Here the psychological theories approach the ethical. The popular conception of law may be understood as a social-psychological phenomenon, which is theoretically subjectable to empirical examination, as for instance Berl Kutchinsky's[101] study of the public sentiment of justice. But of course it may also be understood as a general resort to an alleged sentiment of justice by way of legitimation of one's own ideas of justice. To Illum, however, it is a question of legitimation in principle of the jurist as an intermediary of law.[102]

4° Governing of Mental Processes

Most recently *Gidon Gottlieb*[103] has compared law to the means governing the *mental* processes which govern in their turn the political and social processes. Once again law is regarded as a means of governing, although not, as according

to certain political and sociological theories, a direct social means of governing, but a psychological tool with direct effect on people's readiness to act and with no need for feedback or threats of display of force. This direct governing effect is what lies behind Hägerström's conception of law and also behind several of the Eastern European theories of law as a pedagogical aid. Hitler and other dictators have made use of such immediate propaganda, which, although bad to the people, had its good effects from the point of view of the rulers, in so far as the mental accept of the contents of a rule is very important to the keeping of it, its internalization.

2. Ethical Theories

Now we are able to go the whole length and turn to the *ethical* theories which prevailed in the religious and secular natural law theory until the criticism of Hume and Kant in the late 18th century. The *principles* of the idealistic legal theories, however, were in no small degree an extension of the maxims of natural law, and till the present day even the concepts of social utility or regard for real interests have often been used as a cloak for private assessments of justice.

Departing from the so-called *socio-biology* this analogy has during recent years been developed to represent an actual e.d.p. system design for the human brain. According to this theory the primary design concepts must be understood as the result of the biological development, while the secondary design concepts, i.e. social, ethical and legal norms within this framework, adjust the human behaviour to the physical and social surroundings when changed through the cultural development.[104]

Concurrently, however, ethical and religious legal theories have kept their strength in the catholic countries of Southern Europe and South America, where the *Thomistic natural law theory* is still alive, though often with changing contents, as for instance in the works of *A. Verdross*.[105] After World War II attempts have been made, especially in Germany, to establish a neo-natural law school in opposition to Nazism and its utilization of a positivist legal theory and on the basis of a phenomenological value theory. However, like the corresponding *existentialist* theories, which totally deny the existence of abstract norms, these attempts have remained unsuccessful, because like the confessional theories they require a special intuitive insight in the values which cannot be obtained by ritual cognition.[106]

In Germany and the USA the so-called *critical theory of law*[107] has questioned the contents of the positive legal rules and has moreover argued, that the constitutional and more extensive human rights must be included in the interpretation of the remaining rules of the legal system. In this respect the critical theory of law is related to the rationalist natural law including its claim for a right of resistance against unacceptable rules. »Civil disobedience« has

caused continual problems during the latest 10 or 15 years.[108] It is derived from the so-called hermeneutic theory of law, which maintains that any description, including the interpretation of the legal rules, must involve the total historical, social, ideological and cultural horizon of understanding.[109]

Other legal theorists too, such as *Lon Fuller*[110] and *Frede Castberg*[111] have opposed to the American and Scandinavian realism and have demanded that the legal rules of a given country should be founded on certain ethical maxims in order to be recognized as a valid legal system. Both claim the human rights respected. Fuller makes a further series of »reasonable« demands on a valid legal system, for instance that the rules must be unambiguous, be announced, not be ex post facto, not contain impossible commands, not be self-contradictory etc. Also the legal theory of *Ronald Dworkin*[112] contains elements of neo-natural law character, insisting that the legal system is exhaustive in principle and should, in extreme cases, be interpreted according to the general maxims of the democratic system. Like *John Rawls* and others he has combined the functional aspect of legal philosophy with a moral philosophy contemplation of society being founded on morality and justice.

3. Analytical Theories

The last of the major groups of legal philosophy schools is the group of *hermeneutic* and *analytical* schools,[113] which have all concentrated upon *language* and its character of *acts carrying meaning*. They are based on the assumption that the valuations and experiences of mankind are kept and expressed by language as a means of social communication, since language is not only an individual gift, but a biologically governed disposition rooted in the human nature and organized according to general rules in a common structure, which enables people to »understand« each other, i.e. to communicate a »meaning« from one individual to another.

a. Positivism

The original *logical positivism*,[114] which was developed by the so-called *Wiener-Kreis* in the 1920s, was built upon the idea that it is possible to make an »objective« description of an empirical phenomenon, which is so to speak the reference or the basis of verification of the scientific statements. In order to keep free of religious, political and ideological conditions science can express statements only about such positive facts which can be verified or falsified through comparison with reality.

Metaphysical statements about things beyond the scope of our experience and valuations that express the sentiments of the valuating person instead of apparent qualities of the things cannot be subject to scientific treatment, but only to religious belief or intuition. It is characteristic of the logical positivism that it is not absolutely empirical, since for instance mathematics and other

logical systems based on deductive principles of conclusion are accepted as scientific, just like actually existing norms and *norm systems,* including legal norms and legal systems, can be subject to scientific research.

In this respect the Scandinavian realism differs from the logical positivism, since the former, as the name implies, recognizes only the phenomena of the outer world as objects of science. Therefore such things as norms and legal rules cannot in themselves be objects of science, since science can only deal with psychological and sociological facts. The object of legal science is *»den gældende ret«*[116] (Ross), i.e. either legal ideas, judge's ideology (Ross), imaginary ideas (Olivecrona) or legal facts (Eckhoff), and the legal decision consists of certain legal facts, which, related to the legal idea, will causally lead to the legal consequence (Ekelöf), and in »reality« the rights are terminological auxiliary concepts (Ross)[117] or reflex effects of the court procedure (Lundstedt).

The *English* analytical philosophy of law, especially in *Herbert Hart's* version,[118] deals with language in conceptual analyses. Hart's principal work, characteristically, has the title of »The Concept of Law«, but in the end it is a kind of descriptive sociology (cf. Preface), as Hart maintains the positivist foundation of the concept of law and rejects to regard any kind of natural law control of the contents as a *criterion* of the law. On the other hand he is constantly preoccupied with placing law in relation to morality, but he prefers to speak of »immoral law« instead of building the moral validity into the contents of law. To Hart the legal rules are valid if they have been made in accordance with the rules of recognition of the given society. Such rules of recognition, of course, are empirical facts. In primitive (pre-State) societies custom is the dominating source of law, while in developed (State) societies it is the legislation, since the constitutions contain technical directives for the making of legal rules. Just like the criterion of validity of the formal making of law is a sociological-comparative fact, Hart admits too, after having made a comprehensive comparative analysis, that law must have a minimum content of morality, if society is to function. This minimum, however, is not a condition of validity, as it is to Lon Fuller and other neo-natural law writers, but an empirically observed *condition of activity.*

Hart not only wants to delimit law from politics and morality, he is especially engaged in analysing the structure of law. As opposed to Austin he points out that law is certainly normative, but is not a mere command. Contrary to a concrete command or threat it is of a *general* rule nature, which logically means that it creates »obligations«, whereas a command creates »duties«. Law, then, presents itself in the form of a permanent general rule which creates an obligation to act equally in equal cases. The obligation is a logical category, quite different from the actual custom and the actual feeling of being obligated with which the realistic theories of law operate. A valid obligation exists, even though no corresponding actual feeling or behaviour is experienced. By the way, Hart's rule analysis leads to the assumption of two fundamentally sepa-

rate rule categories which cannot be reduced to one. Primary rules address themselves to the legal authorities and comprise rules of competence: rules of recognition, rules of adjudication and rules of change. Secondary rules address themselves to the citizens and contain the proper norms of behaviour.

Hans Kelsen's reine Rechtslehre,[119] which has been developed in continuation of the metascience of the logical positivism, also distinguishes between law and morality and between law and politics. On the other hand Kelsen regards law and State as a unity, because, he says, law does not exist without the power of the State, and the State is nothing but a system of rules. Accordingly law means commands backed by the coercion apparatus of the State, but as, following Kant, he keeps up the fundamental distinction between »sein« and »sollen«, he emphasizes at the same time, that law as a norm or a norm system cannot be derived from empirical facts. The legal norms belong to the »sollen« category and so cannot be given empirical grounds but can only be legitimated by a superior norm, which depends in the last resort on a basic norm. Contrary to Hart's rule of recognition this basic norm is no empirical fact, but, after Kant, originally a condition of cognition which was later changed into a fiction. It is doubtful, whether the character of the basic norm was quite clear to Kelsen: was it a truism as a redundant foundation of a logical system, or was it a legitimation of the legal system?

It is probably Kelsen's main concern, as it is Hart's, to bring to light the structure and the political or superlegal – formal – validity of the *legal system,* but first of all he wants to create the basis of an efficient decision system to serve the political government of the State without involving religion, morality and ideology. Certainly Kelsen did not regard these value systems as being inferior, but he thought that their influence should be felt in the *political process,* the very result of which is the law which is in turn identical with the State. Legal science, therefore, should only describe and systematize the positive, validly created legal norms, while sociology, psychology and political science should deal with the empirical and evaluative basis of law.

Kelsen thought it possible, in accordance with the strategy of the logical positivism, to set forth the legal system in an objective and close form from which logical *conclusions* in the form of legal decisions could be drawn. Contrary to this, departing from the further development of the linguistic philosophy of the later Wittgenstein and Ryle, Hart found it clear that language is of no such objective nature. The linguistic concepts are »open« and »intentional«, and a legal decision therefore cannot be objective but must necessarily be an alogical process ascribing a legal content to the given facts. However, Hart has later dissociated himself from the early work in which he dealt with this decision theory.[120]

Alf Ross' legal theory is more complicated. On the one hand he subscribes to the metascience of the logical positivism, on the other hand he follows the Scandinavian realists in maintaining an empiricist theory of cognition. On the

one hand he complies with the theory of Hans Kelsen that law is identical with the State and its power apparatus, on the other hand he maintains that legal science must deal with the valid law as an empirical fact in the form of judge's ideology. But he agrees with both the logical positivism and the Scandinavian realism that »metaphysics« and evaluations are of a scientific nature. Legal science is a theory of the »positive« law, whereas »natural law« and »justice« have no »semantic reference«.

The American realism had taught Ross to focus the courts and to look upon law as part of the function of the courts. To be sure, he rejected the purely behaviouristic variant as framed by Jerome Frank, and assumed that the function of law was understandable only on the basis of an interpretation scheme which was identical with the ideology of the judge's *feeling obliged*. On this basis, Ross states, it is possible to *predict* future legal decisions, and in his theory the probability of this prediction is the criterion or the basis of verification of the scientific statements regarding valid law. So Ross' model resembles Holmes' »lawyer's model«. One can obtain an insight in this judge's ideology by reading grounds of judgments, which will give a hint of what the judge has felt himself obliged by. As a manifestation of a common superindividual ideology it is an example of the »metaphysics« which Ross otherwise rejected, because it is in principle unverifiable and, as a matter of fact, does not exist, which is abundantly illustrated by the number of dissenting judgments. Besides Ross concludes from his own metascience that there cannot be established any certainty that the judgment as a decision is *motivated* by the grounds which are stated as its *legitimation*. So it seems to be theoretically impossible to gain any positive knowledge of valid law.

Thus, even though Ross rejected a behaviouristic motivation description closer to the Scandinavian realism and maintained the obligation as part of the motivation process, to him this obligation was not, as Kelsen and Hart professed, a logical category derived from a formal consideration of validity but a »feeling« which could be verified empirically by studying the judge's own authoritative statements about it in the grounds of his judgments. The source of law-theory, therefore, must be descriptive, since it had to explain the judges' own statements about their feelings of being obliged. *Knud Illum* has called the entire verification apparatus »needless circumlocution«, because the judge's ideology is nothing special as compared to the jurist's ideology which enables every jurist to understand the legal rules and on the basis thereof to predict legal decisions, and thus to make statements regarding valid law. The doctrine of the sources of law, then, is not purely descriptive either, and the legal science might criticize the grounds of the judgments for being at variance with the legal sources.[121]

Lastly Ross has also been influenced by the English linguistic philosophy and its assumption that philosophical problems are exclusively linguistic problems. This is of special importance to his analysis of the concept of right, which is left

totally emptied of its contents as a terminological intermediary between the positive legal rules on the one hand and the legal process on the other hand.[122] It also manifests itself in the distinction between norms of competence and norms of behaviour, of which the latter are, in the last analysis, reduced to norms of competence, because they comprise the application of the monopolist coercion apparatus of the State too.[123] Thus Ross, like the Scandinavian realism, concludes by regarding the *material* law as reflections of the legal process while maintaining Kelsen's doctrine that the coercion apparatus of the State is the ultimate basis of law. It may seem a little confusing, therefore, that the courts are made the *realistic* intermediate link. Notwithstanding this »realistic« verification apparatus Ross' legal theory may reasonably be included under the analytical legal philosophy.

b. Hermeneutic Theories
1° Linguistic Qualification
Like the English analytical philosophy the German so-called *hermeneutic*[124] philosophy is especially interested in language and first of all in the *meaning* of the concepts, but the German school does not want to reduce cognition to the linguistic world to such a degree as did the English. Whereas a cognition theory built strictly on linguistic analysis will attempt to harmonize with an existing linguistic system and its application concepts (the *coherence theory*), the hermeneutic philosophy will not reject the verification postulate of the logical positivism (the *correspondence theory*), i.e. the scientific cognition consists in comparing linguistic contents (the statement) with real phenomena. The thesis is that the deflection of the measuring apparatus (the verification mechanism) is identical with the contents of the statement, and it is presupposed that *objective* criteria for the description of such measuring results are at hand.

The difference between subscribing to the coherence theory and the correspondence theory will be obvious already when trying to verify the simple statement: It rains! The former theory will lead to an examination of the linguistic usage, the latter to an inquiry into reality. The answers will be different: In the first case one studies the words of the statement and in the affirmative the answer is: It is said to rain! In the second case one holds one's hand out of the window and finds: It rains! That is to say, if it does!

It is a matter of course that answers of the second type will be wanted in most cases, and that it is very important, therefore, to cognition and science alike, that *reality can be described in such a way that the verification process is rendered possible.* Even Aristotle knew that in principle this process can never be certain. Only purely logical observations within the linguistic and conceptual system can lead to certain results (analytika priori), whereas empirical research necessarily implies the uncertainty connected with the linguistic and conceptual incorporation into the system (analytika posteriori). The logical positivists thought that the problem could be solved through a clarification of

41

the scientific language, but the hermeneutic philosophy has maintained *the fundamental arbitrariness of the linguistic description* and the *intentionality*, i.e. the purpose orientation, of all our concepts, which are *tools* of our thoughts and actions.

The hermeneutic philosophy and legal theory is thereby oriented towards *reality* and *values* alike and has in the first place directed its attention to the *understanding* of the legal norm, generally formulated in language, and of the description of reality.

Whereas hermeneutics in general deals with the method of interpreting works of art and especially texts, literary as well as historical etc., the theological and the legal hermeneutics have the feature in common that the texts to be interpreted are *authoritative*. The legal variant moreover has to adapt these texts to *reality,* and so *the interpretation of acts is inseparable from the application of law.*

2° Evaluation

The description is *not objective* but on the other hand not subjective either. It is *intersubjective* to different degrees, varying according to the degree of community of interests of cognition and cultural backgrounds. To jurists there is no doubt that the insight in the legal system and its function and tradition establishes a high degree of consensus (auditorium) regarding the description and estimation of legally important facts in relation to a given legal system. The legal estimation of such facts is supported not only by linguistic rules and customs, indicating the point of departure of the estimation, but also by the information regarding the *aim* of the rules given by the text itself or the preparatory notes to it, when it is taken into consideration that the norms are prescriptive and the legal concepts are of an intentional character. Also *pragmatic* factors must be taken into account, so that among more possibilities such interpretations are chosen that lead to results which will not only consider the aim of the rule in question but also realize consequences harmonizing with others, as for instance regard for more general aims of legislation such as law and order, private autonomy and changes of social conditions in general (»real considerations«, »the nature of things«).

The legal tradition has developed various tools such as *analogy* and *conclusion e contrario,* which allow the question of whether or not the situations regulated by legislation and the situations to be judged at present *resemble* each other sufficiently to be answered apparently by formal observation but actually at discretion. What happens is in fact the same as when *legal usage* and *legal custom* are adduced as sources of law, the delicate question about these operations too being the *discretionary estimate* of situations, of *resemblances* and *differences,* i.e. an evaluation from certain principles and practical considerations.[125]

3° Reality

As the special task of legal hermeneutics has been to interpret and understand linguistic expressions and to realize these loaded (intentional) elements, it seems natural that this legal theory has been especially preoccupied with *legal decisions* and *dogmatic legal science*. The fact is that the legal scientists take decisions on hypothetical legal conflicts by the same methods and from the same *internal* understanding of the obligation implied by the legal rules as the executive legal authorities apply to real conflicts. Thus the judge and the dogmatic legal scientist use the same methods, only that the former *has to* make a decision, while the latter may content himself with pointing out alternative interpretations.

A fundamental feature common to both, therefore, will be the *decisionistic* character of the operations. The result will be no logical conclusion but a *decision*. Not until a given legal fact has been described in relation to possible sets of rules, will the final decision result from a logical subordination of a minor premise (the description of the case) to a major premise (the interpretation of the rule) as the conclusion of a syllogism. This operation, however, is only the end of a long process of evaluation, during which the clarification of the norm and the description of reality are related to each other, dialectically progressing towards the final syllogism, which presents itself as a kind of logical control of the entire operation.[126]

The close connection between the methods of the practical court life and the legal dogmatics was recognized even in the classical Roman society and has always formed part of the jurists' ideology. In fact, the success of legal science has always depended on its keeping these rules of the game. When trying to become an empirical social science it has lost the jurists' interest. In England dogmatics has mostly been a colourless registration of the legal practice, while the French and German traditions have concentrated on purely linguistic-exegetic interpretations of the acts and abstract conceptual operations respectively. Since the days of A. S. Ørsted Scandinavian legal science, especially the Danish and Norwegian branches, has had a traditional cooperation with the legal practice, and since the beginning of last century the decisions of the courts have been published in print and have been intensely utilized by the dogmatics. Nowadays such cooperation is generally accepted in western countries.

The hermeneutic legal philosophy has paid special attention to *legal decisions* and the *element of value* of the legal rules. It is said to be »problem-oriented«. In Germany a series of different legal theories: phenomenological, topical, hermeneutic, existentialist etc., have been comprised under the designation of *Werttheorie*[127] as a successor of the earlier Interessenjurisprudenz inspired by Jhering.

Within the framework of the existing rule material such solutions of legal problems must be chosen that correspond with the *general principles* of cultural, social and political nature underlying the legal system. Our western

democratic welfare societies are founded on a set of principles, for instance the human rights, which must at any time be made the basis of interpretation. On an inferior metalevel a series of fundamental legal principles are found, such as the private autonomy, the doctrines of *in dubio pro reo* and *audiatur et altera pars*, the priority principle, the equality principle etc., which lead the way further on in legal argumentation.[128]

The last-mentioned type of metalegal principles must presumably be regarded as part of the legal system in the sense that arguments based on such principles may be called arguments *de sententia ferenda*, meaning advice to the courts, whereas arguments of the former type must broadly be characterized as arguments *de lege ferenda*, meaning advice to the legislative power. However, it is difficult to delimit these types of principles from each other. In dynamic periods the limit will tend towards becoming fluid and in static periods towards becoming more well-defined. The dialectic between the demand for adjustment of the legal system to the social conditions on the one hand and the regard for law and order on the other will always exist in legal theory and practice. A fixed limit between the law-creating function of the courts and the authority of the legislative power cannot be indicated to hold good at any time and in any situation.[129]

VI. Pluralis Juris

After this survey of the different functions of law in the past and present and the legal theories built upon them it must be time to return to the introductory myth about the elephant. The sages defined the elephant differently, because they caught hold of different parts of it and mistook that part for the whole object.

The mistake of the elephant men, who were unable to see that they had seized only a fragment of a whole, is easy to understand, if we take for granted that they knew nothing in advance of the whole, which was an animal organism of a certain kind. It is an experience of the Gestalt psychology, and of the hermeneutic philosophy of language as well, that parts of reality are *perceived* and *understood* as parts of a whole. The hermeneutic and critical metascience developed from these schools has emphasized the *interest of cognition* as constituting such fragmentary, »one-dimensional« parts of a total perception. Finally the general *relativity theory* has taught us that perception both depends on and influences our measuring instruments. What has been called the hermeneutic circle is just an expression of the fact that one cannot »understand« the whole without knowledge of the single parts, which in their turn are understandable only as constituent parts of an organized whole.

If the sages had known in advance the concept of »animal« or »mammal«, they would presumably quite easily have perceived their fragments or »entries of cognition« as part aspects of a whole, as *cognitive structures*.[130]

The myth implies an understanding, and a criticism as well, of science or philosophy. Nowadays science should be expected to be familiar with this theory of cognition, which must render it suspicious of or downright immune to the tendency, found in primitive thinking, to *hypostatize* a single aspect of the functions of the whole to be the »essence« of things. The fundamental line of thought behind the above description and analysis of a number of different legal theories is just the realization that law has different functions, and that legal science must consequently have different departments.

The *political function* of law is best studied by the political and economic sciences, while its *social and psychological functions* should be studied by sociology and social psychology, and its *cultural function* by ethnology. The *history of law* and the *comparative legal science* compare the legal rules and their social functions in a vertical (historical) or horizontal (international) perspective. It is common to all these parts of legal science that they do not aim at describing and interpreting the valid or current law. Therefore their methods will in principle be »*descriptive*«, i.e. they *describe law as part of working political, social, psychological and cultural systems.*

Against this stands the *dogmatic* legal science, which being an aid of the legal practice, is the original and the practically important part of legal science. The task of this science is the interpretation of an authoritative rule material, the valid or current law. The dogmatic legal science describes law *systematically* and by means of a number of *authoritative sources* (sources of law) and a number of *methods of argumentation* coined throughout history, which are accepted as lawful by the jurists (legal method), and which *correspond with the method of argumentation applied in the legal practice*. Some of these methodical features refer to *normative* elements (justice, fairness, equity), others to *linguistic-logical* elements, and yet others to elements of reality (teleological and pragmatic considerations).

When legal philosophers have attempted to comprise these elements under a common concept of law, this has sometimes been done with reference only to the dogmatic legal science, and sometimes they have disengaged themselves from that too and treated the legal science as a social science. As mentioned, this latter variant has not often been lastingly successful, because it has been of no outstanding interest to the »customers«, i.e. the legal profession. For the same reason a strictly analytical theory (pure legal theory) has been of no great success either. The debate between legal science and legal philosophy will probably go on, until legal philosophy realizes and respects the fact that law has different aspects according to its different functions, and that legal science must therefore apply different methods.

The idea outlined by the author in Law and Society (1971), p. 28 f. was just that *the concept of law is a relative and pluralistic concept*.[131] Law is *not only* a system of norms, a prediction of the behaviour of judges or authorities, commands to the authorities and/or the public, a general legal ideology or a special judge's ideology, and actually followed norm of behaviour, sanctioned orders, a means of political government, protection or oppression, a »normative content of justice«, game rules, system rules or rules of conclusion, legal customs or usage, or cultural part patterns. Law is *all of it at a time,* and each of the individual conceptions are split off from the general concept of law. They represent a single or a few aspects of the function of law and therefore look upon law from a certain limited angle, so that other aspects are *defined away.*

In a linguistic form all the definitions will represent *analogies* or *models,* since a definition of a new concept (definiens) must necessarily be referred to a genus (definiendum), which is thereafter delimited with special conceptual elements in relation to other parts of definiendum. Any new cognition must choose a *resembling* linguistic qualification. By such discretionary qualification a new phenomenon is *referred* to an already known concept. The concept of law is a metaphorical mode of perception with the pertaining limitations in precision and complexity. Everyday concepts are open and indefinite. They are often *type concepts.* As opposed to the exactly defined concepts of the natural sciences, used in experimental and mathematical connections, the social

science concepts are often related to everyday language with its open and indefinite concepts, since these sciences, and especially the legal science, deal with the solution of everyday people's problems.

The content of the legal concept in a given situation will depend on *the kind of question* made, which in turn depends on *the specific role or function performed by the legal actor*. The consulting *lawyer* is most interested in the probability of a certain decision of a prospective lawsuit, whereas the *judge* is in no need of such an *external* definition but must look for an *internal* information of what rules he is *obliged* to apply. The dogmatic *legal science* wants to see law as a *system* of legal rules validly following from certain sources indicated by the principles of legal sources. Like the judges the legal science is interested in the internal aspect of law, not only in connection with the solution of actual problems, but in order to be able to present the individual rules or solutions as parts of a systematic, consistent whole. The *legal sociology* and the *social psychology* are interested in the current law, i.e. the rules of behaviour which are actually complied with or which are felt obliging. The cognition interest of the *politicians* is the governing effect or the oppressive character of the law. Especially in the latter respect the aspect of power and sanction must be considered important, while other democratic government models attach greater importance to the public acceptance of the legal system and the individual rules. The *history of law,* the ethnology and the international law for different reasons are uninterested in the aspect of sanction, but want to see law as part of the national and international patterns of culture. The church and *ideological movements* in the widest sense conceive law as the realization of a superior order: the course of nature, the nature of man, the will of God, reason or *justice* (natural law), and they are unable, therefore, to respect the *positive* law unconditionally, because to them its contents may be invalid, in which case they have a right and a duty to resist it (right of resistance, civil disobedience).

The *definition* chosen is of a programmatic or *ideological* nature, connected with the underlying general *conception of man and society*. A *command theory* corresponds with an authoritarian State concept and a *collective concept of man*. A *sociological-functional* theory of law may be the expression of a collective concept of man too, since the *social utility* and the distributive justice are regarded as the supreme values of society. A theory departing from the *individual rights* of man looks upon man as an *individual* and nothing else and assigns the minimum task to society of securing the individual's rights. A *pluralistic* legal philosophy, regarding man as *an individual and a social being as well,* recognizes that *social utility* and *individual justice* are *equal, competing values,* and that the individual justice cannot be reduced to form part of the distributive justice. A manifestation of this fact is the increasing tendency of the legal philosophy of the latest decade of being interested in the *reflective* and *individual-oriented* aspect of law at the expense of its *governing* and *distributive* functions and in turn the distributive justice, which have been the main interests of the previous half century.

This turn of the legal philosophy coincides with a similar turn of the *moral philosophy* and the *political and economic sciences*. These disciplines have discovered the weaknesses of the socialist systems as well as of the parliamentary majority rule systems as regards their ability to distribute the social values. The State socialist systems have been afflicted by a dramatic information crisis, and the social democratic systems have suffered from the inclination towards majority dictatorship and unpredictability, since no rational distribution of social values can be reached through majority decisions. This recognition has been called the crisis of democracy, inasmuch as the individual social groups are no longer willing to pay (sufficient) attention to society as a whole. As justice is increasingly identified with equality in a material sense, the individuals are less motivated to contribute to the production of values and more motivated, in the name of equalization, to demand a larger part of the public funds for themselves. There is also a tendency to refer to a controlled *market mechanism*[132] as a means of strengthening the individual's liberty by virtue of a free choice of consumption and also as a means of furthering equality, inasmuch as the market mechanism is an objective and impersonal distribution factor without fear or favour. In return the allocation of benefit is made in proportion to one's own contribution, quantitatively and qualitatively, and this will reduce the irrational and accidental character of a distribution by majority and will also increase the wealth to be distributed through corrections to the market mechanism.

These conclusive remarks are meant to clarify what I have said about the ideological and political character of the legal theory. To me it is beyond doubt that a pluralistic legal theory corresponds with a *democratic* theory of society, founded on a concept of man according to which man is both an individual and a social being, and as such is in need of both freedom and security.

Finally it must be emphasized that the *concept* of »law« belongs to a *normative category* as opposed to descriptive statements. But law has not necessarily got to be expressed in writing or in words at all. It may be in the nature of a legal custom, i.e. a regular social behaviour, which is or is regarded to be binding. At any rate law is not identical with the written expression, no more than the notes are identical with the musical work. Law is not identical with psychological or social phenomena either, such as conceptions or behaviour. It holds the same logical status, but not the same criteria, as other prescriptions and patterns of human activities as for instance architect's designs, doctor's prescriptions, recipes etc.

In order to avoid unwarranted identifications it is useful to abstain from analogies like »commands«, »directives«, »imperatives« and the like. Also because it may be practical to use an expression which applies both to the behaviour and the underlying mental processes, I should prefer the neutral »prescription«. This word corresponds with the adjective »prescriptive« as opposed to »descriptive«.

48

Law as a logical category is then: *prescriptions* in the nature of *rules*. To this must be added a series of *criteria* separating the legal rules from other rules and a series of functions which require a set of different modes of perception and description.

Notes

1. The example is taken from *Felix S. Cohen,* Field Theory and Judicial Logic, The Yale Law Journal 1950. 238 ff.
2. *Stig Jørgensen,* Ideology and Science, in: Values in Law (VL) (1978) p. 9 ff. »Method« means: the road by which ... (»methodos«).
3. *Stig Jørgensen,* Entwicklung und Methode des Privatrechts, in: Vertrag und Recht (VR) (1968) p. 49 ff., Law and Society (LS) (1971) Ch. 3, p. 60 ff. (Translation of Danish version: Ret og Samfund [1970]; German version: Recht und Gesellschaft [1971]), *Franz Wieacker,* Privatrechtsgeschichte der Neuzeit (2. ed. 1967).
4. *Stig Jørgensen,* Auszüge aus der Geschichte der rechtlichen Ideen in komparativer Beleuchtung, VR p. 111 ff.
5. *Dieter v. Stephanitz,* Exakte Wissenschaften und Recht (1970) (reviewed by Stig Jørgensen in: Centaurus, International Magazine of history of mathematics, science and technology, Vol. 15, 1970, No. 2 p. 177-80), *Stig Jørgensen,* Symmetry and Justice, VL p. 59 ff., same, 1.c. note 3, *J. Dalberg-Larsen,* Retsvidenskaben som samfundsvidenskab (with a summary in German) (1977) Ch. 2-4. Also see *Julian Jaynes,* The Origin of Consciousness in the Breakdown of the Bicameral Mind (1976), esp. Ch. 2 (p. 176: »hieroglyphs« means »writing of the gods«; p. 236 ff. about the importance of omens to meterology and astronomy) and Ch. 6, *Alfred Jeremias,* Das Alter der babylonischen Astronomie (1908), same, Handbuch der Altorientalischen Geisteskultur (2. Aufl., 1929), p. 244 ff., and *Olaf Pedersen,* Studium Generale (1979), Ch. 1, p. 13 ff.
6. Jherings Erbe, Göttinger Symposium zur 150. Wiederkehr des Geburtstages von Rudolf von Jhering, hrsg. v. Franz Wieacker und Christian Wollschläger (1970), inter alia: *Christian Helfer,* Jherings Gesellschaftsanalyse im Urteil der heutigen Sozialwissenschaften, p. 79 ff., and *Stig Jørgensen,* Die Bedeutung Jherings für die neuere skandinavische Rechtslehre, p. 116 ff.
7. The Structure of Scientific Revolutions (1967), see *J. Dalberg-Larsen,* 1.c. note 5, p. 35 f.
8. *Stig Jørgensen,* LS p. 4 f. and Ch. 1.
9. LS Ch. 2.
10. VR p. 111 ff., *Estathios K. Banakos,* Some Thoughts on the Method of Comparative Law, in: Archiv für Rechts- und Sozialphilosophie (ARSP) 1981, p. 289 ff., deals with related ideas.
11. LS Ch. 2, p. 341, VR p. 115 ff., 129 ff. and 133, *Stig Jørgensen,* Der Begriff des Eigentums in geschichtlicher und gegenwärtiger Bedeutung, Festschrift für Helmut Schelsky (1978) p. 251 ff.
12. *Preben Stuer Lauridsen,* Studier i retspolitisk argumentation (1974) (with a summary in English) p. 299 ff.
13. See to the following *J. Dalberg-Larsen,* 1.c. note 5, and review by Stig Jørgensen in: Rechtstheorie 1978, p. 373 ff.
14. To the »American realism« see *Robert Summers,* Pragmatic Instrumentalism in Twentieth Century American Legal Thought, Symposium on American Legal Theory, Cornell Law Review 1981, p. 861; also see ibid.

David Lyons, Neil McCormick (Gray), *Wilfrid E. Rumble, Martin P. Golding* (Felix Cohen), *William H. Wilcox* (Holmes: Bad Man's Point of View).

15. *V. Lundstedt,* Die Unwissenschaftlichkeit der Rechtswissenschaft I-II (1932-36); see *Jes Bjarup,* Skandinavischer Realismus (1978) p. 104 ff.
16. *Karl Olivecrona,* Law as Fact (2nd ed. 1971) p. 129 ff., 133 f., 185, 200, 215 f., 270 ff.; see *J. W. Harris,* Olivecrona on Law and Language. The Search for Legal Culture, Tidsskrift for Rettsvitenskap 1981. 643 ff., *Jes Bjarup,* l.c. note 15, p. 141 ff.
17. *Alf Ross,* On Law and Justice (2nd impr. 1974) p. 34 ff., 38 ff. (43), 70 ff.
18. *Alf Ross,* l.c. note 17, p. 104 ff.
19. *Wolf Paul,* Marxistische Rechtstheorie als Kritik des Rechts (1974), *same,* Kritische Rechtsdogmatik und Dogmatikkritik, in: Rechtstheorie, hrsg. von Arthur Kaufmann (1971), *R. Wiethölter,* Rechtswissenschaft (1968). See notes 29 and 58 below about the American version.
20. *Niklas Luhmann,* Legitimation durch Verfahren (1969).
21. LS p. 65 ff., VL p. 59 ff.
22. Quotation from *Hartvig Frisch,* Magt og Ret i Oldtiden (1944) p. 22 f.
23. LS p. 65 ff., VL p. 59 ff.
24. *Stig Jørgensen,* Typologie und Realismus, Nachrichten der Akademie der Wissenschaften in Göttingen, 1. Philologisch-Historische Klasse (1971.3), *same,* Norm und Wirklichkeit, Rechtstheorie 1971.1 ff., LS p. 8 ff., 96 ff., VL p. 168 f.
25. VL p. 71 ff., VR p. 111 ff., LS p. 68 f. The Roman jurists expressed this concept by the word *aequitas,* in English later *equity*; »summum ius summa iniuria«. The schism between *law* and *equity* was the basic theme of Shakespeare's drama »The Merchant of Venice«.
26. On the other hand the e.d.p. techniques are well suited for information retrieval, i.e. for collection of legal source material such as acts and regulations, judgments, literature etc.
27. *Franz Wieacker,* l.c. note 3, p. 249 ff., VR p. 67 ff. In recent legal theory, issuing from *Ronald Dworkin's* concept of an *exhaustive system of legal rules and principles* (note 67), there has been a vivid discussion whether the judges exert any *discretion,* (Taking Rights Seriously, l.c. note 58), see *Barry Hoffmaster,* Understanding Judicial Discretion, Law and Society 1982.21 ff. As appears from the text *discretion* is *inevitable* in applying law whether the legal system is exhaustive or not, and whether »principles« are part of the legal system or not.
28. *Stig Jørgensen,* Unreasonable Contract Conditions in Nordic Law, The Journal of Business Law 1975. 324 ff.
29. New York Law Review, Vol. 56, No. 2-3 (1981) contains a symposium regarding »Constitution, Adjudication and Democratic Theory« in continuation of *John Hart Ely,* Democracy and Distrust (1980) with contributions by *John J. Gibbons, Michael J. Perry, Henry P. Monoghan, John Hart Ely, Frank I. Michelman, Lawrence G. Sager, Terrence Sandalow, Ronald Dworkin, Thomas Nagel* on the right of the courts to examine the acts of the Congress. – In his article Judicial Law-Making in the Leviathan State, The Law Alumni Journal, The University of Chicago Law School 1976, II p. 12, *Roger C. Cramton* criticizes the tendency of the American federal courts to embark on political attitudes, when critical movements (civil rights movements) pleading the principles of the Constitution bring in complaints of »discriminating« or »oppressive« treatment before the

courts. The position of the courts as unpolitical authorities is weakened, if they go in for »purely« political decisions, and during recent years the courts have taken the consequence of this fact and have referred questions of the siting of nuclear power stations, security, sexism etc. to be decided by the legislation. A somewhat macabre consequence of this change of attitudes (which has taken place since 1973 when the Supreme Court got a »conservative« majority) is the re-acknowledgement of capital punishment, which had in an earlier decision been characterized as unconstitutional, *J. G. Murray,* Retribution, Justice and Therapy (1979) p. 223 ff. The German federal courts, too, have held such a political function, cf. note 19 above, whereas unitary states do not assign such tasks to the courts, *Ralph Dahrendorff,* A Confusion of Power, Politics and the Rule of Law, Modern Law Review 1977.1 ff.

30. *H. L. A. Hart,* Cambridge Law Journal 1959. 233, cf. *Alf Ross,* Yale Law Journal 1962. 1185 f.
31. See *Stig Jørgensen,* Grundnorm und Paradox, Rechtstheorie, in print (note 29).
32. Act No. 208 of May 21, 1969.
33. *Alf Ross,* l.c. note 17, p. 38 ff. (49).
34. *Alf Ross,* l.c. note 17, p. 50 ff. (»norms of competence«); Ross concludes himself that such rules are not legal rules, see to this LS p. 20 ff.
35. *Alf Ross,* l.c. note 17, p. 60 ff. Otherwise *H. L. A. Hart,* The Concept of Law (1961) Ch. 5 on »primary rules« and »secondary rules«, especially »rules of recognition« in different types of societies; also see LS p. 20 ff., 31 ff., *Stig Jørgensen,* Ethik und Gerechtigkeit, Veröffentlichung der Joachim Jungius-Gesellschaft der Wissenschaften, Hamburg, Nr. 41 (1980) p. 12 ff., and *B. Barkun,* Law without Sanctions (1968).
36. *Lon L. Fuller,* The Morality of Law (2nd ed. 1969) Ch. 3. Also see *Gustav Radbruch,* Gesetzliches Unrecht und übergesetzliches Recht (1946), *same,* Rechtsphilosophie (v. E. Wolff) (6. Aufl. 1963, p. 347 ff.) on law in the Third Reich, und *Karl Larenz,* Richtiges Recht, Grundzüge einer Rechtsethik (1979), *W. Fikentscher,* Methoden des Rechts in vergleichender Darstellung, IV (1977), *J. Finnis,* Natural Law (1979).
37. Social Solidarity and the Enforcement of Morality, 35 University of Chicago Law Review 1967.13.
38. LS p. 57, VL p. 144.
39. Politika, VI p. 1 ff.
40. To the following see *Stig Jørgensen,* Demokratie und Völkerbewegung, X. World Congress of Legal and Social Philosophy (TVR), Mexico 1981. Vol. III p. 83 ff., *same,* Ethik und Gerechtigkeit (l.c. note 35) p. 8 ff., VL p. 73 ff., 112 ff., 135 ff.
41. VL p. 18 ff.
42. VL p. 144 ff.
43. VL p. 131, 148 ff.; also see *N. Hoerster,* Rechtsethik ohne Metaphysik, Juristenzeitung 1982.265 ff., *D. N. MacCormick,* Law, Morality and Positivism, Legal Studies 1 (1981) p. 131 ff.
44. Note 40 above, cf. *William L. McBride,* Fundamental Change in Law and Society (1970).
45. LS p. 17 ff., 28 ff.
46. To the following see LS p. 30 ff., VR p. 129 ff., VL p. 62 ff., 83 ff., *Stig Jørgensen,* Die rechtliche Lage des Menschen in einem ständig wechselnden gesellschaftlichen Modell, Österreichische Zeitschrift für öffentliches

Recht 1972.213 ff., *same,* Ethik und Gerechtigkeit (1.c. note 35) p. 8 ff.
47. Ethik und Gerechtigkeit (1.c. note 35) p. 15.
48. VL p. 114 ff., *Stig Jørgensen,* Das Individuum, die Gesellschaft und das Widerstandsrecht, Österreichische Zeitschrift für öffentliches Recht 1973.19 ff.
49. *Ole Fenger,* L'influence du droit romain dans la Scandinavie mediévale, Jus Romanum Medii Aevi, Pars V, 14, 1981, p. 29.
50. VL p. 83 ff., 117 ff.
51. Ethik und Gerechtigkeit (1.c. note 35) p. 18 f.
52. VL p. 33 f., 42 f., *Stig Jørgensen,* Grundzüge der Entwicklung der skandinavischen Rechtswissenschaft, Juristenzeitung 1970.529 ff., *same,* Skandinavische Rechtswissenschaft 1850-1950, Österreichische Zeitschrift für öffentliches Recht 1976.241 ff.
53. VL p. 108 ff.
54. *John Rawls,* A Theory of Justice (1971), see VL p. 80 with note 49, and *Brian Barry,* The Liberal Theory of Justice (1973), *Robert Paul Wolff,* Understanding Rawls (1977), *David Schweikart,* Should Rawls be a Socialist? Social Theory and Practice 1978.1 ff., *Donald H. Regan,* Utilitarianism and Co-operation (1980); also see note 132 below.
55. *Robert Nozick,* Anarchy, State and Utopia (1974).
56. *Peter Stein,* Adam Smith's Jurisprudence – between Morality and Economics, Cornell Law Review 1979.622 ff., *same,* Legal Evolution (1980) p. 29 ff.
57. See above in notes 6 and 40.
58. *Ronald Dworkin,* What is Equality? Part 1. Equality of Welfare, Philosophy and Public Affairs 1981.185 ff., Part 2. Equality of Resources, ibid. p. 283 ff. In his earlier works, like Rawls and Nozick independently, Dworkin departed from natural law. He assumes that the Constitution is built upon a set of basic human rights which may supplement the positive law in hard cases and which is often used to justify the courts' setting aside of the acts of Congress, cf. Taking Rights Seriously (1978), Is Law a System of Rules? Essays in Legal Philosophy, ed. R. Summers (1968) p. 25 ff., The Model of Rule, Symposium: The Philosophy of H. L. A. Hart (1967) p. 14 ff., *K. K. Lücke,* The Common Law: Judicial Impartiality and Judge-Made Law, The Law Quarterly Review 1982.29.
59. *Dan Usher,* The Economic Prerequisite to Democracy (1980), *David Miller,* Social Justice (1976), *R. A. Posner,* The Economics of Justice (1981), *B. Ackerman,* Social Justice in the Liberal State (1980), *Larry Alexander,* Liberalism as Neutral Dialogue, UCLA L.R. 1981.816 ff., *W. Nelson,* On Justifying Democracy (1980). See on the whole Ethic, Economics and the Law, Nomos XXIV (1982), and see also *Stig Jørgensen,* Demokratie und Völkerbewegung (1.c. note 40), *same,* Der Begriff des Eigentums (1.c. note 11), *same,* Private Property, Regulation and Governmental Direction, in: Festschrift für Ilmar Tammelo (in the press). See also *Paul Burrows,* The Economic Approach to Law (1981).
60. Vertrag als Form, VR p. 13 ff. (Contract as Form, Scandinavian Studies in Law 1966.97 ff. and note 59 above.
61. Ethik und Gerechtigkeit (1.c. note 35) p. 19 ff., Moral und Effektivität (in the press). In the moral philosophy a decision: »I will, because I will« can in the end be justified without a relative, pragmatic argumentation, see even *Puchta,* Institutionen I (5. Aufl.) Sec. 2, against the claim of the Hegelians that »real« is identical with »reasonable«, i.e. reason is but a

tool to liberty, which proposes its own objects, see also *G. Radbruch*, l.c. note 36 above. The »idea of law« consists of three elements: justice, expediency and security of life and property, which cannot be reduced to each other; see *D. A. Lloyd Thomas*, Liberalism and Utilitarianism, Ethics 1980.319 ff.

62. VL p. 73.
63. VR p. 64 ff., 75 ff., Juristenzeitung 1970.529 ff.
64. *Bernd Rüthers*, Die unbegrenzte Auslegung (1968).
65. Note 19 above.
66. *H. L. A. Hart*, Law in the Perspective of Philosophy, New York L.R. 1976.538, *same*, Between Utility and Rights, in: The Idea of Freedom (ed. Allan Ryan 1979) p. 77 ff.; also see *David A. J. Richards*, Rights and Autonomy, Ethics 1981. 3 ff., *Gerald F. Gans*, The Convergence of Rights and Utility, Ethics 1981.57 ff., and *Neil McCormick*, H. L. A. Hart (1981), *same*, l.c. note 43. Further see *D. D. Raphael*, Justice and Liberty (1980), who more strongly than most theorists emphasizes the connection between »justice« and »liberty« and states that there is a deeper conflict between »justice« and »utility« than between »liberty« and »equalitarian justice«. *P. Atiyah*, Promises, Morals and Law (1981) also rejects a utilitarian basis of both legal and moral obligations, and regards the contract institution instead as the basis thereof, not so much because a promise is given as because a bargain is made. To be true the concept of liberty is an important prerequisite of the will principle, but this is not a sufficient basis of a moral and legal obligation as presupposed by the classical as well as the neoclassical natural law schools (note 54 above). The principle of expectation is no sufficient basis either (cf. note 60 above) as assumed by Hume and Adam Smith, see *Peter Stein*, Legal Evolution (1980) p. 29 ff., but in the end the moral and legal basis of an obligation is created by a combination of these and other elements.
67. Note 19 above.
68. Note 29 above.
69. *P. M. S. Hacker*, Hart's Philosophy of Law, in: *Hacker and Raz*, Law, Morality and Society (1977) p. 12 f. (»Hart's primary distinction as a legal theorist is that he introduced the hermeneutic method to our jurisprudence«).
70. *Stig Jørgensen*, Hermeneutik und Auslegung, Rechtstheorie 1978.63 ff., VL p. 9 ff., 160 ff., LS p. 76 ff., *same*, On Meaning, Opinion and Argumentation, in: Reasoning on Legal Reasoning (ed. A. Peczenik and J. Uusitalo, 1979) p. 87 ff., *Aulis Aarnio*, On So-called Hermeneutic Trend in Finnish Legal Theory, in: Legal Points of View (1978) p. 82. See also *same*, On Legal Reasoning (1977) p. 134 ff., 282 ff. and Denkweisen der Rechtswissenschaft (1979) p. 18 ff., 71 ff., 95 ff. Also see *Owen M. Fiss*, l.c. note 132 below.
71. *Peter S. Stein and John Shand*, Legal Values in Western Society (1974).
72. At notes 29 and 68 above, VL p. 146 with note 44, LS p. 100 ff.
73. LS p. 73 f., VL p. 174 f.
74. *Stig Jørgensen*, Die rechtliche Entscheidung und ihre Begründung, in: Rhetorische Rechtstheorie (1982) p. 337 ff.
75. *Karl Larenz*, Methodenlehre der Rechtswissenschaft, (4. Aufl. 1979) p. 20 ff. and 302 ff., *Olivecrona*, l.c. note 16, p. 18 ff., 65 ff. (Bentham p. 27 ff., John Austin p. 31 ff.).
76. *Hans Kelsen*, General Theory of Law and State (1945), Allgemeine

54

Theorie der Normen (1979).

77. *H. L. A. Hart,* l.c. note 35, p. 87 ff. distinguishes between »being obliged« and »having an obligation«, the latter depending on the existence of the rule and not on the underlying threat of a sanction.
78. Note 16 above.
79. *Karl Larenz,* l.c. note 75, p. 64 ff.
80. Note 14 above.
81. VL p. 144 f.
82. *Per Olof Ekelöf,* Zur naturhistorischen Methode Jherings. Jherings Erbe (l.c. note 6) p. 27, *Franz Wieacker,* l.c. note 3, p. 558 ff.
83. *Roscoe Pound,* A Theory of Social Interest (1921).
84. *Jes Bjarup,* l.c. note 15, p. 118 ff.
85. *Alf Ross,* l.c. note 17, p. 29 ff. (34), 34 ff. (36).
86. *Leon McBride,* The Essential Role of Models and Analogies in the Philosophy of Law, New York L.R. 1968.53 ff.
87. *Hermann Klenner,* Rechtsphilosophie in der Krise (1976) p. 21 ff., *Djanguir Kerimov,* La théorie genérale de l'État et du droit (1981) p. 163 ff.
88. Note 76 above.
89. Note 84 above.
90. Note 16 above.
91. *Jes Bjarup,* l.c. note 15, p. 104 ff.
92. Note 6 above.
93. VL p. 29 ff. (p. 33 and 42 f.).
94. VL p. 18 ff.
95. LS p. 100 ff., VR p. 111 ff. (138).
96. Retssystemer (1976), see also *J. Friedrich und Eberhard Sens,* Systemtheorie und Theorie der Gesellschaft, Kölner Zeitschrift für Soziologie und Sozialpsychologie 1976.27 ff.
97. Note 20 above.
98. *Max Rheinstein,* Die Rechtshonoratioren und ihr Einfluss auf Charakter und Funktion der Rechtsordnungen, Rabels Zeitschrift für ausländisches und internationales Privatrecht 1970.1 ff., *Stig Strömholm,* Legislative Material and Construction of Statutes, Scandinavian Studies in Law 1966.173 ff.
99. *J. H. Merryman,* The Law Machine. An Approach to Law and Development. A report from VIIIe Congrès International de Droit comparé (Pescara 1970), which describes the legal process as opposed to the legal norm as »the law machine«; see *same,* Comparative Law and Social Change: On the Origins, Style, Decline and Revival of the Law and Development Movement, The American Journal of Comparative Law 25 (1977), p. 457. – *Silvana Castignone,* La macchina del diritto (1974) and in: Il realismo giuridico scandinavo e americano (1981), p. 16 f., 71 ff. (on Olivecrona and esp. Lundstedt).
100. Lov og Ret (1945).
101. Den almindelige Retsbevidsthed (1970).
102. LS p. 59 f.
103. The Logic of Choice (1968).
104. *George Edgin Pugh,* The Biological Origin of Human Values (1978), p. 5: »It explains the specialized »behavioral tendencies« of each species, as well as our enduring »human values« as manifestations of a built-in *value system* which is an essential part of evolution's basic »design concept« for a biological »decision system«. The theoretical perspective is based on an

analogy between the artificial computerized »decision system« and the principles that evolution seems to have used in biological »decision systems« such as the human brain.« See *E. O. Wilson,* Sociobiology (1975), *Frank-Hermann Schmidt,* Verhaltensforschung und Recht, Schriften zur Rechtstheorie, Heft 98 (1982), *R. Zippelius,* Rechtsphilosophie (1982) p. 56 ff. See also *Peter Singer,* The Expanding Circle (1981), *same,* Ethics and Sociobiology, Philosophy and Public Affairs 1982.49 ff., *Julian Jaynes,* l.c. note 5.

105. Statisches und dynamisches Naturrecht (1971). See also (hermeneutics) *J. Esser,* Grundsatz und Norm (1956), p. 44 f., 53, 218 f. and 267, and (neo-Kantianism) *G. Radbruch,* l.c. note 36.
106. VL p. 144 f.
107. VL p. 146 ff. (notes 19 and 29 above).
108. Note 48 above.
109. Note 70 above.
110. Note 36 above.
111. Forelesninger over Rettsfilosofi (1965).
112. Note 58 above.
113. Note 70 above.
114. VL p. 12, 50, *J. Bjarup,* l.c. note 15, p. 33.
115. *J. Bjarup,* l.c. note 15, p. 177 ff.
116. In the English translation: »valid« law; see *Alf Ross* about the interpretation problem: Existence and Validity of a Norm, The Philosophy Forum 1969, *same,* Revista Juridica de Buenos Aires (1961) p. 46 ff.
117. On Law and Justice, l.c. note 17, p. 170.
118. Note 35 above.
119. Note 76 above.
120. The Ascription of Responsibility and Rights, Logic and Language, 1. Series, ed. A. Flew, cf. the Preface to Punishment and Responsibility (1968).
121. See *Stig Jørgensen,* Die rechtliche Entscheidung und ihre Begründung, l.c. note 74, *same,* Über die allgemeine Rechtslehre in Dänemark, Archiv für Rechts- und Sozialphilosophie, Beiheft, Neue Folge, Nr. 13 (1980) p. 30 f., VL p. 151 ff., note 18 above.
122. Note 117 above.
123. On Law and Justice, l.c. note 17, p. 32 (»rules of competence«, »rules of conduct«).
124. Note 70 above.
125. Die rechtliche Entscheidung etc., l.c. note 74.
126. Note 74 above and *Stig Jørgensen,* Norm und Wirklichkeit, l.c. note 24, VL p. 168 ff.
127. *Karl Larenz,* l.c. note 75, p. 128 ff.
128. Note 73 above.
129. LS p. 100 ff. and note 132 below.
130. *Henrik Poulsen,* Kognitiv Struktur (1972).
131. See *Felix S. Cohen,* l.c. note 1.
132. Note 58-59 above. See on the other hand *Owen M. Fiss,* Objectivity and Interpretation, Stanford Law Review (34) 1982.739 ff., who criticizes the functional conception of law, which he calls »new nihilism«, and emphasizes the hermeneutic character of the application of law, being interpretation according to public values administered by the judges' (jurists') »interpretative community«. In a comment, ibid. p. 765 ff., *Paul*

Brest points out the difficulty in distinguishing sharply between law and politics.