

STIG JØRGENSEN

# VALUES IN LAW

IDEAS, PRINCIPLES AND RULES



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VALUES IN LAW

Ideas, principles and rules

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5. Legal Positivism and Natural Law (printed in: Sociology of Law and Legal Sciences, Budapest 1978).
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## PREFACE

Law is both a reflection of the existing ideal and material culture and a means of the political control of society.

In both respects law is, therefore, a positive phenomenon, but at the same time it reflects the value conception of the society. Culture is the systematic organization of human needs and the conceptions of value derived from those. Politics are the authorized distribution of the values of the society.

Nowadays it is generally recognized that law deals with values, but also that the judicial decision and the dogmatic legal science make evaluations.

The seven articles collected here have this recognition of the value-related and thereby necessarily open character of law in common. This conception, however, has from time to time been replaced by a positivist conception of law as a closed system of rules.

The conclusion of the considerations that the articles bring about must be that certain fundamental conceptions of value have always existed in the history of law. Justice and natural law are the ideas which in the past and in the present have been used to describe these conceptions, which presumably have had a certain fundamental structure, but nevertheless a content and a function that have been changing with the social conditions and the political situation.

In our time the debates about, on the one hand the form of the law as guiding principles and binding rules, a variant of the old theme of estimation and rule, and on the other hand the basis of justice in a social contract is a living manifestation of the constant vitality of the value problems of law.

## IDEOLOGY AND SCIENCE

### 1. Metascience

When discussing the relation between ideology and science it is essential to start with an exact definition of the two concepts. Much of the vagueness which has characterized the debate of recent years is undoubtedly due to an — intentionally or not — imprecise use of the concepts.

I propose to devote the following pages to an entirely theoretical analysis of the relation between science and its prescientific basis. In other words, I shall not so much deal with science as with what lies behind it as a guiding principle, the so-called metascience or philosophy of science, which, so to speak, puts science in inverted commas. I shall mainly concern myself with the social sciences and among these especially legal science, which, in the nature of things, I know most about.

What is known as metascience, or philosophy of science, does not, any more than does philosophy, constitute a subject of its own but is the science of science. Like philosophy it deals with the basis of science; it does not, however, treat the question of cognition as such as a central problem, but rather focuses on the methods applied by science. I mean the methods which are actually applied, but I might equally well have said: the methods which ought to be applied by science or the sciences. Thus metascience, according to the definition chosen, is a descriptive as well as a normative activity. In the former respect metascience is certainly a scientific activity, provided that it satisfies the other requirements of science, whereas

in the latter respect it is, to speak in terms well known among scholars, not a theoretical but a practical activity. Any definition of the concept of science implies the use of certain criteria which must be fulfilled by an activity claiming to be a science. The definition, then, is so far as it goes normative to the extent that it makes certain qualitative demands on the activity in question. Another and separate question is whether science is and ought to be or can ever be value-free, i.e. is not to be carried on with a specific purpose of either a moral or a political character. These two demands on science thus fall into different categories. In the first case, we have some criteria which may be varied and vague but are nevertheless objective in principle. It must not be overlooked, however, that every scientific activity must, in the last resort, fulfil a demand for truth which cannot without further proof be regarded as having no moral implications, although the concept of truth is an integral part of the scientific method. In the second case, however, the criterion is teleological, purposive in a wider sense. Here we meet a demand, beyond truth, on the purpose of science. This demand may aim at promoting the cause of a certain religion, a certain political movement, or a certain ideology. The demand may aim to make mankind better; it will then imply a specific anthropology. It is obvious that science *qua* science must have a purpose in itself no matter what further demands may be made on it. If the function of science is to increase our knowledge and so enable us to control our life and surroundings more effectively, it must, naturally, have the independent aim to achieve this goal in the best possible way. If we look upon science as a tool it must, like other tools, be designed so as to suit its purpose in the best way. Possibly the other demands which may be made on science will conflict with this purpose that is implied in the very concept of science. When framing a metascience, therefore, these purposes must be ranked in order of precedence.

## 2. Science

What, then, is science? Not every activity that increases our knowledge can be called science. It is unnecessary to state that an arbitrary and casual collecting of data cannot be characterized as a scientific activity. To be that it must be based on methodical work. Conversely, science may in principle concern anything, so that the determining criterion must relate to the method applied. The material studied must be collected and processed by means of accepted methods which can be communicated, reproduced, and re-examined. What definitely separates an intellectual, scientific activity from an intuitive, poetic, or religious experience is its communicability and intersubjectivity. Beyond these formal criteria there must be a material demand, as mentioned, that the scientific activity shall be methodical, i.e. be organized according to certain criteria adopted in advance. The purpose or result of the scientific activity must be to put the area studied into a wider systematic context, thereby enabling us to acquire an increased understanding of the phenomena studied or making it easier for us to predict or control these phenomena. As a matter of fact it is extraordinarily difficult to give a brief definition of the concept of science. Science is like the elephant: it is difficult to define it, but you recognize it when you see it! The point is that nowadays we have a number of different sciences, each with its subject and specific method. One cannot do much more than pronounce in general that science is a methodical activity pursued according to the methods which are for the time being accepted in the area in question. Obviously, such a pluralistic point of departure involves a risk of chaos or dilettantism. On the other hand, historical and current experience shows the risk involved by monistic attempts to dictate one specific method for each individual science or for all sciences.

Until this century it was a common practice to divide the sciences into two groups: theoretical and practical sciences. The theoretical sciences examine the actual, existing relation between the phenomena, whereas the practical sciences try to state what the relation ought to be. The former group studies our cognition, the latter our acts. The former are causal sciences dealing with empirical



causal relations, whereas the latter are final sciences claiming to be able to deduce general principles of human action from theories of God's will or the order of Nature or Reason. From the beginning of this century a distinction has generally been made between natural sciences on the one hand and cultural sciences on the other (Dilthey). This distinction was originally made in consequence of the difficulty of merging the generalizing methods of the natural sciences in the individualizing methods of, above all, historical science. Nowadays, when historical science as well as the other social sciences are increasingly applying generalizing methods themselves, the distinction is more often made between positivistic and hermeneutic methods. The key concepts of the former are certainty, description, function, predictability, and objectivity; those of the latter group are probability, understanding, explanation, and intersubjectivity. However, it is not quite relevant to speak of positivistic sciences on the one hand and hermeneutic sciences on the other. Positivism is rather a general metascience or philosophy of science founded during the 1920s by the so-called Wiener-Kreis (Carnap, Wittgenstein, Popper). The linguistic expression is its point of departure. Only positive statements, that is to say assertions which can be empirically verified or which are analytically, i.e. logically, self-evident can be accepted as scientific statements. Metaphysical assertions which cannot be verified and statements containing evaluations are of no scientific relevance. These demands on science have been applied with great success in mathematics and the natural sciences since the day of Descartes. The new practice is to make the same demands for objectivity on other sciences: the social sciences and the humanities.

In opposition to positivism, various movements among the cultural sciences have framed a hermeneutic, dialectical or critical scientific ideal. The point of departure in recent times has to be looked for in the French and German phenomenology of the thirties and forties. To the functional description of its object adhered to by positivism, Heidegger raised the objection that any human activity is based on a conscious or unconscious intentionality. Human conduct is purposive. If, therefore, science confines itself to a description of human activity, that description

will at most be a very imperfect one. It will be able only to answer the question how, not the question why. Science cannot deal scientifically with the interpretation of the meaning of the activity. Moreover, linguistic theory acknowledges that language is in itself filled with a hidden meaning and interpretation of reality. It is impossible to apply a linguistic expression without at the same time speaking intentionally. You cannot, for instance, mention the word "table" in a sentence without having also said something about the use of this piece of furniture. When analysing other words, concepts, and sentences, one must end up with the theoretical assumption that it is impossible to pronounce on anything whatever without having a preconceived opinion of it. This is the so-called hermeneutic circle. From this phenomenological identification of reality and its linguistic contents there have been drawn several conclusions which I shall not go into here. As it is of importance to what follows, however, I shall mention that, like Hegel, certain phenomenological schools are inclined to look upon the physical world as created by the human spirit, an idea already described as megalomania by Georg Brandes in the previous century. Another branch of phenomenology, the so-called structuralism or semiology, seems to regard reality as a reflection of linguistic structures. A more relevant observation, perhaps, is the underlining by the ideology-critical Frankfurt school of the fact that the basis of cognition is interest. From this ideology-critical point of departure various conclusions have been drawn. The neo-Marxist school, which regards society as a class society and science as a tool in the hand of the ruling class (in Western Europe the capitalists), claims that science, the people having thus been made conscious of its purpose, should through revolutionary practice be put at the service of the working class according to the objective necessity of dialectic materialism. The Left-Hegelian negativism itself goes no further than to claim consciousness and explanation of the basis of science. In the last analysis, however, the adherents of this school, especially Jürgen Habermas, seem to have a more extreme belief: they hold that reason, as the basis of science, and the dialectic process of thought, as the material part of human nature, will necessarily lead to increased self-knowledge as well as to a more open society. The

theory of science thus acquires a moral undertone owing to the belief that practical reason will lead to the maximum realization of the individual and social life through an open and dialectic process in the individual as well as the social sphere.

From what has been said so far it will be evident that while the two concepts "positivistic" and "hermeneutic" do not relate to a division of different sciences, but rather to different methodological details which may be applied by different sciences, yet, in the last analysis, they refer to a philosophical or metascientific distinction of principle between two different ideals of science. On the other hand, it is evident that the methodological details prevailing in positivism are especially dominant in the mathematical and natural science disciplines, whereas the typically hermeneutic and dialectic methodological details are especially relevant to the social sciences, the humanities, and theology. However, there is no reason why the social sciences should not formulate quantificative and behaviouristic problems as well as making hermeneutic and phenomenological descriptions. No more than it is possible to accept a monistic concept of science is it possible to accept a monistic metascience.

### **3. Theory and Ideology**

A theory is an assumption regarding facts and their connection and interpretation, which forms the basis of scientific activity. A theory may be simple, relating to isolated facts, or complex, relating to more or less widespread connections. An ideology, too, formulates an assumption regarding the structure and connection of reality in an abstract linguistic form. According to the normal understanding, however, an ideology is a more comprehensive and continuous system of ideas based on a hierarchical set of value concepts forming the frame through which one looks at and estimates one's surroundings. I shall not otherwise try to equate a theory with an ideology, but I would underline the fundamental difference that a theory is an open assumption which, so to speak, calls for verification by experience, whereas an ideology makes demands on reality to fit in with its axioms. In case of a conflict between theory

and reality, theory will yield; in case of a conflict between ideology and reality, reality will have to yield. There are well-known examples, in the past as well as nowadays, of ideologies trying to deny the existence of the cognition of natural science. However, it is more common that ideologies interfere with the social sciences.

Theories and ideologies, as mentioned, are necessary prerequisites, but no more than prerequisites, of our cognition. The formation of theories as well as of ideologies is in principle non-scientific, since it does not form part of a logical deductive process of thought nor can it be the result of the process of cognition of which it is a prerequisite. Everybody who has been involved in scientific activity, however, will confirm that the formation of a theory is mostly a result of a dialectical process between intellectual prerequisites and current insight into the facts studied, and that the final formation of a theory or hypothesis is actually the result of the ongoing research project and is in reality verified at the same time as the theory is formed. It would be absurd to try to deny that our original theoretical prerequisites were also related to our knowledge and education regarding facts in the area studied as well as in other areas and regarding life in general. On the other hand, it would be equally absurd to try to deny the creative function of imagination and associations, at any rate in the formation of quite new and comprehensive theories. In the last analysis, then, the formation of a theory rests on a choice based on value concepts.

#### **4. Cognition and interest**

The problem that has to be solved next is that of finding out what factors determine our choice of value concepts in the formation of theories as well as ideologies. It seems natural to lay stress on anthropology or human biology, i.e. the fact that man is created in such a way that he is able to feel certain needs and consequently to have certain interests.

As a matter of fact Kant's theory of cognition was an underlining in principle of the limits which are set to cognition by the human

apparatus of cognition. To this must be added the biological assumption of the influence of our needs on the direction of our interests and so on our interest in the direction of cognition. It has already been mentioned that cognition is an activity which has an intellectual and therefore a linguistic character. Our cognition is, so to speak, limited by our linguistic capacity. What cannot be formulated in language cannot easily be made the object of cognition, although I am aware that a certain school of psychoanalysis presupposes the existence of a non-linguistic cognition. However, as far as I can understand this is not an intellectual but an emotional process. If we reserve scientific cognition for the intellectual sphere we shall probably have to accept language as a prerequisite of science. The analytical philosophy of language has been occupied especially with analysing everyday language on the assumption that it contains the cultural heritage of mankind which is held to have settled into the language through the progress of culture and consequently of cognition.

It has been said that there is a probable connection between the grammatical structure of the Indo-European languages — the distinction between subject and object — and the concept of causation derived from that. To all appearances this has been of importance to the development of Western technological culture, the fundamental basis of which is this concept of causation and consequently the idea that man is able to control his surroundings by his own efforts. This example is illustrative whether one looks upon the grammatical structure as the primary factor from which the technological culture is derived or whether one takes primitive technological experience to be the mother of the concept of causation as well as of the linguistic structure. In our time, at any rate, there is no doubt whatever that tradition has an independent influence on the trend of thought and consequently on the formation of theories. At all events we must conclude that tradition and upbringing are of essential importance for our linguistic orientation and consequently for our formation of theories. However, it is interesting in itself to call to mind that modern linguistic theory — I am thinking especially of Chomsky's transformational grammar — conceives of linguistic capacity as a part of

human nature which like other qualities is latently present in the biological inheritance and which will develop when stimulated at a certain age. Chomsky's assumption seems to me to have a good deal to recommend it, and if it is valid the conclusion must be drawn that language is not merely a conventional means of communication but an organ bound together by particular structures which are in their turn inherent in the biological code. Whatever the relationship between our biological needs and our linguistic capacity, these relationships being more or less close, we must assume that the possibilities of language are unlimited, apart from certain limits set by the biological code. Whether this may mean that we are actually able to formulate questions regarding things we know nothing about, and whether if so the so-called hermeneutic circle is broken, I would not venture to say. As I understand the matter, it must in any case be assumed that the linguistic capacity can only develop through linguistic education, which simply means that the cultural heritage is built into the language. The above-mentioned Frankfurt school, in particular, with its ideological criticism has underlined the ideological prerequisites of cognition. To be sure, the ideological criticism is especially levelled against the metascientific question of the scientific method: positivism *versus* negativism. When science deals scientifically only with positive facts, it will remain conservative; this leads to false consciousness as the growth of society overtakes cognition, and this again leads to individual as well as social frustration or alienation and, ultimately, oppression. In living up to the demand for value-freedom or ethical neutrality, science comes to play the game of reaction. In connection with the philosophy of Adorno, there was formulated a negativism according to which the ideal science must be in search of alternatives of every established order. An important means in this negative activity is to unveil the ideological and interest-directed assumptions which are probably the leading factors in the scientific formulation of questions. It is evident that this negativism not only is levelled against scientific activity as a whole but may equally well be directed against any theoretical formulation. To put it briefly, our ideological and other value concepts are prerequisites of our formation of theories.

## 5. Marxism

What is known as Marxism may be used as an illustration of the relation between scientific theory and political ideology. In its original shape, Marxism was a theory, especially a theory of history. The two fundamental assumptions of Marx's theory of history and society were as follows.

(1) That human culture was not, as the idealists assumed, derived from prevailing ideas but that, on the contrary, the ideas were derived from the material socioeconomic conditions prevailing at the time in question – were in fact a superstructure built on top of this basis. The culture and, with it, the ideology of a society are derived from its material conditions of production.

(2) That history must necessarily pass through a dialectical process of development in which the material conditions of production pass through successive phases, viz. a hunting stage, an agrarian-feudal stage, a capitalist stage and, finally and inevitably, a socialist stage. Concurrently with the development of forms of production, the social forms change from a feudal state dominated by an aristocracy via a capitalist society with middle-class convictions to a socialist society with complete democracy. According to this analysis, mankind suffers oppression in the first two of these stages. Thus in the feudal era it was oppressed by the aristocracy and in the capitalist society it is oppressed by the state, which was created precisely as a means of oppression (since the public and private interests of the subjects conflicted). The socialist society, on the other hand, by abolishing private ownership of the means of production, simultaneously ends the conflict between the private and public interests of the citizens, and as a result the state will wither away in a future communist phase.

A social theory of this kind is based, just like any other comprehensive scientific theory, on an anthropology, i.e. a certain conception of man. According to Marxist anthropology, man is an absolutely social creature who, when the material conditions of production are organized in a certain specific way, will automatically behave socially and of his own free will act for the benefit of the whole. The alienation of man resulting from the fact that society is

not organized in harmony with his nature, so that he cannot reconcile himself with his surroundings, will cease with the introduction of the socialist society.

To the extent that the Marxist assumptions are altered according to the testimony of experience, we may still justifiably speak of a Marxist theory. Where the Marxist theses are immune to the testimony of experience, the Marxist theory has, however, turned into an ideology. That is just what has happened in the East European countries, where dialectical Marxism has been made an ideology which justifies the acts of the party or the state. Today no non-Marxist ideologist would maintain that a given culture will necessarily develop according to the Marxist model. We have experienced several deviations from this scheme, which ceases, therefore, to be a scientific theory. Nor would anybody nowadays claim that culture is a mere superstructure built on the basis of the material conditions of production. On the contrary, it is a main task of the Frankfurt School, and especially of the Left-Hegelians, to underline the central importance of an ideology for the social and cultural development. If it was not so, theoretical criticism of ideologies would be absurd.

Marxist anthropology, too, is of a rather questionable character. There is no indication that man's mentality is exclusively collective. On the contrary, the observations of the theory of organization as well as ethology and other sciences seem to confirm the opinion always maintained by writers, namely that man is both an individual and a social being and consequently has individual as well as social needs. Man is at the same time an egoist and an altruist. Nor does the alienation seem to be less marked in the East European socialist states than in the West European democracies. Against this the neo-Marxists argue, plausibly enough, that the East European states are not socialist but state-capitalist forms of organization. If man is a collective being by nature, and if it were to be assumed that he could be happy living in collective units without any other governance or control than his own consciousness of the interests of the collective and the other members, this would probably presuppose groups of the same size as the ones "programmed" in man's biological code, and at any rate not groups of the



kind to be found in the modern highly industrialized society. It is, in fact, a characteristic of neo-Marxist theory and practice that these are anarchic in principle, i.e. based upon self-government by small individual groups. It is difficult to see how this can be reconciled with the demands for governing and organization placed by our present society unless one is prepared quite literally to return to nature. According to recent interpretation the young Marx was influenced by the early romantic ideas of Rousseau; this is a paradox, however, since on this point Rousseau is no more to be taken literally than is the mature Marx. Like every romanticist, Rousseau as well as Plato and, in the early 18th century, Vico departed from the dual nature of man, the symbiosis of emotion and reason, of individual and social being. The philosophers in question thought that the organization of society must at any given time be such as to meet all these divergent needs in the best possible way. No more than Rousseau thought it possible to return to the natural state can we today think it possible for the men and women of the highly industrialized modern society to return to anything similar to nature.

If Marxism wants to be taken seriously as a social theory it must take the consequences of testing against reality. If it is not willing to do this it must play the part of an ideology, and in doing so it cannot possibly be called a social theory. Although it must be admitted that what is known as Marxism has elements of theory which are indisputably valid, these elements were not invented by Marx or any other Marxist. The idea of a connection between the material and the ideal culture dates further back. This also applies to the theory of the development of history through different stages and to dialectics as the basis of the method of cultural science. All these characteristics are found as early as the beginning of the 18th century in Giambattista Vico, the Italian theorist of science, in his criticism of the individualistic and rationalistic scientism of Descartes. Vico's approach to the monistic theory of science of Descartes foreshadows the modern dialectic-hermeneutic-pluralistic theory of science, its positivism and its natural science philosophy. One might be tempted to use the old locution that what is good in Marxism is not new, and what is new is not good!

Most people, even neo-Marxists, do recognize today that the relation between ideal and material culture is a dialectical interaction. Just as it is important for the social sciences to deal with fine arts such as literature, music, and art in order to get a complete picture of the social conditions of a period, so it is, of course, valuable for the humanities and aesthetics to have a thorough knowledge of the cognition and methods of the social sciences in order to get a wide and realistic basis of their scientific cognition. (By the way, this is not meant as an admonition to study Marxism and its history but is intended as an appeal to those working in the humanities to seek closer cooperation with social scientists).

## **6. Ideology and legal science**

I shall now proceed to deal with legal science in a narrow sense, i.e. as a designation of the so-called dogmatic legal science, the task of which is a coherent systematic account and interpretation of valid law in, e.g., Denmark. In accordance with this terminology I shall keep legal history, sociology of law, and philosophy of law or jurisprudence outside the concept of legal science, although, of course, they are parts of a more comprehensive concept. If there has been a tendency to equate science, ideology and politics, this has especially been the case with legal science. Several times during recent years we have been presented with statements and alleged proofs that law and politics as well as legal science and politics are the same thing.

In a Marxist interpretation the state is the means used by the ruling class of the bourgeois-capitalist society to oppress the proletariat. The most important instrument of the middle classes consists of legal rules, which they look upon as commands to the people enforceable through coercion. In this respect the Marxist definition of law coincides with the positivist definition personified in Hans Kelsen, the neo-Kantian philosopher and spokesman of the Wiener-Kreis. According to Marxist theory, the legal system, being part of the ideal superstructure, is derived from the existing material basis. The same theory – or rather ideology – asserts that

when a society develops into a communist society the oppression will cease, after which the state will wither away and the instruments of the state, the legal rules, will cease to exist since they will no longer have a function to perform. Until this Utopia is brought into being, legal science must recognize the political function of the legal rules as instruments for the oppression of the working class by the upper middle class. The established legal science deceives the people by presenting an ideal justification of legal decisions, which in reality are political acts. The justification expressed by the judge and the legal scientist is, in reality, only a "façade legitimation", the decision having been made from quite different, hidden considerations of a political character. The jurist's task may quite literally be said to be that of proving that black is white, as one of my colleagues has said in a newspaper article. He is right in saying that the legal system is part of the political system and that the legal judgment does not express a logical conclusion but a decision, but to go on from this to assert that the jurist's role is to make arbitrary decisions as a stage of a political oppression, and afterwards to give them an ideal "façade legitimation", is quite a different matter.

Only when viewed from outside can the legal decision be understood as a more or less arbitrary political act. When estimated from within, the decision is limited to the existing legal sources. As a rule these sources will lead to fairly clear solutions, but in a considerable proportion of cases they will not give an unambiguous answer. It is because of such cases that a legal argumentation technique has developed through generations. This technique may certainly be abused, although in fact its purpose is to limit such abuses by providing a fixed framework for the argumentation, a framework which is generally respected by jurists. It is true, too, that the judge's decision is no logical conclusion which has a given legal rule as its major premise, the facts of the case as its minor premise, and the judgment as its conclusion. This dilemma is due to a purely theoretical problem, which I cannot go into here, regarding the relation between language and reality. However, the dilemma is connected with the fact that a given situation has to be qualified in relation to a linguistic description in the legal norm. In at least three

respects an estimate is involved in the legal decision: (1) it will be possible in most cases to apply several different rules leading to widely different results; (2) when interpreting the possible relevant rules, attention must be paid not only to the lexical meaning of the words of the statute but also to the systematic grouping of the single rules in the statute and the system of laws, to the information given in the *travaux préparatoires* as to the purpose of the statute and the rule, and to considerations regarding the means of achieving the objects declared or implied; (3) when selecting the facts which are to be considered in the decision, estimates will be made which depend on the same considerations regarding the object of the rules and the means of achieving these objects checked with general considerations regarding the consequences of the decision and regarding legal and moral ideas and principles.

Only analytically, however, will it be possible to distinguish between these different aspects of the estimate, which will in practice be one process of thought moving from facts to law and vice versa, limiting step by step the possible choices and in the end leading to a decision. To many people this process looks like a purely intuitive activity. Indeed, many highly esteemed judges actually describe their own decisions in this way. Against this it may be remarked that the main reason why these judges have this conception is probably the indoctrination to which every judge has been subjected in the long process of learning and acquiring legal norms and legal methods. The legal judgment implies decisions, conclusions, estimates, and logic. The importance of formal logic is its control function. Logic prevents the discussion from degenerating. It must be emphasized that the estimates and decisions are not irrational. It is true that the judge must make a choice, but a choice is not irrational simply because it is a choice and not the result of a logical process. The choice is directed by the legal ideas which lie behind and govern the legal system. Besides the rules or principles of legal argumentation used by the jurist in his work with and his cognition of the legal system, there are the material legal principles or ideas which are not given with the laws. The function of the substantive legal principles is partly that of being the point of departure of the legal argumentation, thereby ensuring unity and

consistency in the application of the legal rules, and partly that of deciding the extent of the rules. None of these principles indicates one specific solution to the jurist. They only mark out the framework of the solution and depend, as mentioned, on the view and approval of the period in question. On the application of the law the judge must answer two questions: (1) Is the rule applicable? (2) Must the rule be applied? To answer the first question, he may find guidance in the principles mentioned. In deciding on the second question, he must pay pragmatic consideration to the effects of the decision, teleological consideration to the desirability of the result, and systematic consideration to the adaptability of the decision to the legal system.

It is obvious that the legal ideas – the principle of formal justice saying that equal cases must be treated equally, as well as the substantive legal principles – besides being part of the political and ideological system, which is a commonplace, are also connected with the fundamental conditions of human coexistence. I am referring to the basic substantive ideas, the ideas of reciprocity and retribution, of reward and punishment. Next we have the well-known commandments: Thou shalt not lie, steal, kill. Without mutual reliance and respect for the property and integrity of one's fellows, no group community can exist. In so far as norms take the place of instincts as social control and man creates a cultural society, the basic ideas mentioned are necessary and can consequently be characterized as natural law or primitive law. The study of the various social and cultural sciences indicates that these norms are the minimum contents of all known legal systems. Besides these basic formal and substantive legal ideas, western civilization has developed a series of legal ideas lying behind and directing the legal argumentation in different spheres. From criminal law we may state the principle *in dubio pro reo*, i.e. the suspect is innocent until the contrary has been proved. The same idea of the legal protection of the individual is implied by the maxim *nulla poena sine lege*, i.e. nobody can be punished for an action which has not expressly been made a criminal offence by a legal provision. From the law of procedure we know the principle *audiatur et altera pars*, i.e. nobody can be sentenced without having

had a chance to give evidence during the trial. The principle of public administration of justice is regarded as a necessary correlate to freedom of speech and freedom of the press, private autonomy is regarded as the basis of the law of property of a liberal society, and the rule of law is regarded as the legal guarantee of the citizens' position in relation to the state. In addition to this, we have the so-called civic rights, which originally were political-ideological programmes but now are fundamental legal rules in most western countries' constitutions.

Out of this, obviously, there results an ideological pattern based on the view of man which is commonly held in liberal societies and which accords an independent importance to the individual. The limitations upon freedom of action made by the modern welfare state in the interests of the whole imply the social-liberal view of humanity which is based on the assumption that man is an individual as well as a social being. There is no question, therefore, whether the ideology, and with it the legal ideas, lie behind the legal system, deciding its contents and the direction of the argumentation which will be applied by a given jurist acting within the framework of the system. As a matter of fact there are several prominent legal writers in Denmark, among others Ross and Illum, who regard the legal rules as being expressive of the ideology prevailing in the society in question. It does not follow from this, however, that law is identical with ideology or that law is politics. On the contrary, the jurist acting within the framework of the system is reduced to complying with certain rules of the game, the legal rules, and the accepted legal argumentation, and it is precisely in this way that society is secured against political or ideological infringements. The superior legal idea is indeed the rule of law which contains the guarantee of the individuals' security from arbitrary infringements. When the ideology forming the basis of the social order is pluralistic, there will be an immanent control function in the ideology. If it is a totalitarian ideology, on the other hand, an immanent control function will be lacking. This very factor is of decisive importance for the ideology-critical philosophy. It is the very possibility and the utilization of the possibility of uncovering and criticizing the ideological assumptions of law and

science — including of course, legal science — that determine the dialectical process which is the prerequisite for a mutual adaptation of individual and society. Such adaptation is, in the last analysis, the moral demand made on society, law and science by ideology-criticism. From this, however, one cannot draw the conclusion that legal science must be "critical science" according to the neo-Marxist interpretation of law. Since, according to this view, law is in principle a means of oppression, the means by which today the upper middle class oppresses the working class, the task of legal science must be that of fighting the present legal system and altering it in what one believes to be the interests of the working class. It is evident that critical legal science in this sense has nothing to do with science but is instead legislative policy or simply politics. Its purpose is not to describe and interpret the legal rules from the viewpoint of the aims of the prevailing political system and to adapt the latter to the development of the social conditions. Only when one assumes the necessity of an historical process and a specific anthropology can such an activity be called science; and even if these basic assumptions were true there could probably not be any talk of legal science, since the legal rules, as mentioned, must be regarded as an integral part of the prevailing political system. It is no use expecting a carpenter to be an architect, or a piano player to be a composer. No more can a legal technician or a legal scientist be expected to be a politician.

## **7. Conclusion**

I accept to a large extent the demand of the ideology-critical school that we must be made conscious of the ideological and other value-coloured prerequisites of human activity in general, especially of science and legal science. On the other hand, I cannot accept the neo-Marxist theory of the identity of politics and science and of law and politics. I also accept in principle the assumption that a specific anthropology must be the point of departure of any science. How would psychiatry, for instance, fare without any preconceived opinions of mental health and so of the nature of man? On the

other hand, one has to be careful when constructing one's picture of man. When Habermas, and to a certain extent Popper, consider themselves able to make logical conclusions regarding the nature of man, moving from the assumption that thought and its dialectical way of functioning are essential qualities in man to the assumption that man is a dialectic-critical and rational being, this seems to be a questionable argument which is, in fact, widely contradicted by experience. The neo-Marxist picture of man as a collective-minded being who will expand in full freedom without any need of any kind of organization and control in a communist society seems to be a romantic vision rather than a scientific theory. It may be unfair to romanticism, however, to call the Marxist anthropology romanticist, since romanticism in all its varieties has at all times emphasized that mankind is a symbiosis of individual and society and of feeling and intellect. It will probably be necessary to operate with an anthropology when choosing the direction of one's scientific activity, but it will be reasonable, nevertheless, to beware of the risk that such a necessary and humane theory, which is constantly corrected by experience and practice, might develop into a tyrannical ideology in which man will be caught as in a bed of Procrustes.

This article is derived from a lecture based upon earlier works by the *author*:

1. *Law and Society*, Aarhus 1971.
2. "Argumentation and Decision", in *Festschrift til Alf Roos*, Copenhagen 1969, pp. 261 ff.
3. "Typologie und Realismus", *Nachrichten der Akademie der Wissenschaften in Göttingen*, Göttingen 1971.
4. "Norm und Wirklichkeit", *Rechtstheorie* 1971, pp. 1 ff.
5. *Vertrag und Recht*, Copenhagen 1968, pp. 111 ff.

The author discusses, *inter alia*, the following works:

1. Ernst Topitsch (ed.), *Logik der Sozialwissenschaften*, Cologne and Berlin 1966.
2. G. Radnitzky, *Contemporary Schools of Metascience*, 2nd ed. Gothenburg 1970.
3. H. G. Gadamer, *Wahrheit und Methode*, 2nd ed. Tübingen 1965.
4. H. G. Gadamer, "Rhetorik, Hermeneutik, Ideologiekritik", in *Kleine Schriften* 1, Tübingen 1967, pp. 113 ff.
5. "Hermeneutik und Dialektik", in *Festschrift für H. G. Gadamer*, Tübingen 1970.



6. Jürgen Habermas, *Erkenntnis und Interesse*, Frankfurt a. M. 1968.
7. Jürgen Habermas, "Zur Logik der Sozialwissenschaften", in *Philosophischer Rundschau*, Beiheft 5, Tübingen 1957, ch. 3.

## IDEALISM AND REALISM IN JURISPRUDENCE

### I. THE ISSUE

It has become a habit with the youngest generation of Nordic legal writers to look upon the question of idealism *versus* realism in jurisprudence as being identical with the dispute of the school of so-called Scandinavian realism with its predecessors. In legal reasoning the tenets of that school meant that expediency was now adduced instead of justice. Legal decisions were no longer deducible from legal principles or maxims, but were based on the courts' usage and on factual grounds in those cases where the existing sources of law did not supply a clear answer to the question raised. In his book *On Law and Justice* (London 1974, 2nd ed.), Alf Ross has expressed this realism more consistently than any other legal writer. Knud Illum, however, in his book *Lov og Ret* ("Law and Legal Order", Copenhagen 1945) has also put forward a form of legal realism which can to a large extent be traced back to such early 20th-century Danish writers as Viggo Bentzon and even to the great early 19th-century scholar A. S. Ørsted. In Sweden, above all Vilhelm Lundstedt and Karl Olivecrona have been the spokesmen of the so-called Uppsala School with which Axel Hägerström is identified.<sup>1)</sup> In Norway Torstein Eckhoff and Vilhelm Aubert have practised a legal theory orientated towards social science.<sup>2)</sup>

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1) Cf. S. Strömholm and H.-H. Vogel, *Le "Réalisme Scandinave" dans la philosophie du droit*, Paris 1975.

2) Torstein Eckhoff, *Rettsferdighet*, 1971, *Rettskildelære*, 1972; Vilhelm Aubert, *Retts-sosiologi*, 1972.

Nowadays, however, this way of presenting the problem is less evident than it was before. Scandinavian realism has been criticized from various quarters. It has been looked upon as a variant of the so-called logical empiricism or logical positivism which has been countered by phenomenological, existentialist, hermeneutic, topic, critic, materialist, neo-Thomistic, and naturalist theories of law. Some of these theories have not been of any outstanding importance in the Scandinavian debate. I think, for instance, that Frede Castberg is the only exponent of a moderate natural-law conception,<sup>3)</sup> whereas the attacks against positivism have been made especially by hermeneutic/analytical<sup>4)</sup> and materialist/Marxist<sup>5)</sup> groups. In the debate of recent years, however, the conflict between idealistic and realistic legal theories cannot be reduced to a mere question of being for or against hyperpositive legal rules. Nowadays the discrepancy is more often between different attitudes to general questions of science and cognition.<sup>6)</sup>

Before we proceed to present the various legal theories, it is necessary to define a series of philosophical problems and issues. We can begin this analysis by drawing up a number of dichotomies between concepts and methods related to the question of realism *versus* idealism:

1. realism-idealism
2. positivism-idealism
3. materialism-idealism
4. naturalism-idealism
5. positivism-natural law
6. empiricism-rationalism
7. a posteriori-a priori
8. induction-deduction
9. conceptual realism-nominalism

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3) Frede Castberg, *Forelesninger over rettsfilosofi*, 1965. More difficult to place is Fr. Vinding Kruse, *Retslæren* I-II, 1943.

4) Stig Jørgensen, *Ret og samfund*, 1970 (in English: *Law and Society*, 1971), *Lovmål og dom*, 1975; Preben Stuer Lauridsen, *Studier i retspolitisk argumentation*, 1974.

5) Lars D. Eriksson, Ole Krarup, Torben Wanscher, Henrik Bang, Ulla Paabøl and Henrik Zahle, in *T.f.R.* 1975, No 2 (the whole issue is devoted to Marxist theories of law).

6) Cf. Preben Stuer Lauridsen, *op. cit.* at note 4 above.

These relations seem to refer to the same issue. Upon closer analysis, however, essential variations in the meaning of the pairs of relations will appear; to use them indiscriminately would, therefore, lead to misunderstandings.

## 1. Realism-Idealism

### a. *The epistemological issue*

The difference between an idealistic philosophy and a realistic one is a consequence of the different prerequisites for arriving at a cognition of truth.<sup>7)</sup> Whereas to supporters of a realistic theory the object of cognition exists independently of perception, to those of an idealistic theory the surrounding world is constituted by consciousness. And whereas according to a reflective realism the result of our cognitive process and the corresponding linguistic expression reflect, so to speak, a pre-structuralized world, every idealist will assume that the structure of our cognitive apparatus and the phenomena of consciousness produced by it constitute a reality which is not pre-structuralized. But there are more variants of both realistic and idealistic theories.

Platonic idealism originated in the philosopher's endeavours to bring order into an apparently confused reality. In order to obtain this, Plato assumed, for instance, that the horses which could be observed in the surrounding world did not really exist but were only manifestations or copies of the idea of the horse, which was the only truly existing entity. In contrast to the observable things in the empirical world, ideas are eternal and unchanging; but they cannot be observed because they have no observable qualities. They are not empirical but are exclusively objects of the thought which can only be perceived by thinking.<sup>8)</sup>

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7) Niels Egmont Christensen, *Logisk-filosofiske overvejelser over symmetribegrebet*, *Det Lærde Selskabs publikation* No. 7–8, pp. 69 ff.

8) Justus Hartnack, *Filosofiens Historie*, 1969, pp. 19 ff.; Johs. Sløk, *Platons Dialog Protagoras*, 1963; A. Verdross, *Abendländische Rechtsphilosophie*, 2nd ed. 1963 (Verdross I), pp. 30 ff., *Grundlinien der antiken Rechtsphilosophie*, 2nd ed. 1948 (Verdross II).

Empirical idealism, formulated above all by George Berkeley at the beginning of the 18th century, denied the existence of substance, assuming that the empirical world consists merely of ideas. Whatever we observe, we observe by means of our sense organs, which transform the objects observed into the phenomena of consciousness called ideas.<sup>9)</sup>

The debate of the last 150 years on idealism *versus* realism has been founded, however, upon the transcendental idealism formulated by Kant in the late 18th century. Kant sought to combine rationalism with empiricism. On the one hand, he agreed with Hume that necessary causal relations could not be deduced from empirical observations, but, on the other hand, he agreed with the rationalists on the desirability of being able to gain a certain cognition through deduction from the natural laws. Kant therefore adopted the artifice of moving the law of causation from the physical world into our apparatus of cognition, assuming that the concept of causation was a necessary prerequisite of a systematic human cognition.

However, Kant was above all preoccupied with the problem of freedom. If it must be presumed that the physical world is determined by natural laws, then human acts, which belong to physical nature, must also be given as a logical consequence. In this way the freedom of man and, with it, his responsibility disappear. And Kant thought that responsibility was of the utmost importance to human society. Human freedom is possible only when it is realized that mathematical natural science is not reality itself, "das Ding an sich", but only the appearance of reality. By this Kant means the picture of things formed "a posteriori" by our senses, and which we only subject to experience by making use of the modes of perception called time and space and the rational concepts, including the concept of causation. Only the physical world can be the subject of a theoretical, i.e. intellectual and scientific, cognition, whereas practical knowledge of the right way of acting can only be the subject of a rational belief. Theoretical cognition, then, concerns the question what has happened, and

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9) Justus Hartnack, *op. cit.* at note 8 above, pp. 130 ff.

practical knowledge concerns what is to happen. With this distinction Kant has established the essential dichotomy between "Sein" and "Sollen". Kant does not seek to deny the pre-existence of a physical world, but only the possibility of getting into contact with it in any other way than through the human apparatus of cognition, which constitutes the prerequisite of scientific cognition and therefore, so to speak, creates reality. Nor does Kant seek to deny, on the other hand, that ideas may influence scientific cognition; they can, however, only do so by contributing to the making of hypotheses. Ideas themselves are beyond the scope of science.<sup>10)</sup>

Later Fichte and Hegel denied the existence of an objective reality. According to Hegel, reality is a logically connected whole, "world reason". Everything real reflects this reason and is, therefore, determined by the principles of the inner logic (dialectics) of thought, i.e. the idea. To understand the dialectics of thought is to understand reality. These are the reasons why Hegel is able to say that reality is reasonable and reason is real. To him they are two aspects of the same matter. But reason, and with it reality, will always aspire to perfection through a continual interplay of reason and the change of the surrounding world brought about by reasonable action. Generally Hegel speaks of thesis, antithesis and synthesis as the terms of a continuous process necessarily leading to perfect reason and so to perfect reality.<sup>11)</sup>

#### *b. Norm and reality*

The concept of "realistic legal theory", as will appear later, has also been applied in another meaning less closely related to the theory of cognition, connoting a more or less clearly formulated theory of the problem of legal decisions, especially the theory of the

10) Justus Hartnack, *op. cit.* at note 8 above, pp. 155 ff.; K. E. Løgstrup, *Kants kritik af erkendelsen og refleksionen*, 1970; A. Verdross I, *op. cit.* at note 8 above, pp. 142 ff. Regarding special perceptual dispositions, see Henrik Poulsen, *Kognitive strukturer*, 1972.

11) Justus Hartnack, *op. cit.*, pp. 189 ff.; John Plamenatz, *Ideology*, 1970, ch. 2; A. Verdross I, *op. cit.*, pp. 151 ff.

application of abstract norms to concrete reality and of the backlash of legal decisions on the content of the law. While the so-called Scandinavian realism of this century belongs to the epistemological variant mentioned above under *a*, the traditional Nordic realism from A. S. Ørsted onwards is to be ranged with the variant presented here.

## 2. Positivism-Idealism

Philosophical positivism dates back to Auguste Comte (1798–1857) who assumed that man has moved from a theological stage of science via a metaphysical one to a positivist one. He rejected all transcendental and *a priori* thinking and sought, with philosophical resignation, to limit cognition to the positive phenomena, i.e. the facts as we see them, to try to find the relations between these facts and lay down the laws of the actual courses.<sup>12)</sup> The phenomena dealt with by a positivist social science need not necessarily be the social reality. The object of positivist legal science is either legal sources or legal norms, whereas realist legal science finds its object in social reality, i.e. in actual behaviour or mental conceptions. Positivism may develop into naturalism, materialism or phenomenology.

## 3. Materialism-Idealism

A materialist philosophy recognizes the existence only of three-dimensional things, i.e. physical and social phenomena, and does not recognize the human consciousness as being of scientific interest.<sup>13)</sup> Marxism, for instance, is materialist in looking upon consciousness as derived from material conditions, but Marxist materialism calls itself dialectic, which means that it assumes with

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12) Reinhold Zippelius, *Das Wesen des Rechts*, 2nd ed. 1969, pp. 15 ff.

13) Justus Hartnack, *Den ny filosofi*, 1963, p. 71.

Hegel that development is the result of an interaction of reality and reason.<sup>14)</sup>

#### 4. Naturalism-Idealism

A naturalist philosophy assumes that everything in nature, including mental processes, can be explained through natural laws.<sup>15)</sup> It was against this assumption that Kant directed his critical idealism. Consciousness is reduced into biological processes and actual behaviour, and psychology and social science into behaviourism.

#### 5. Positivism-Natural Law

While legal and moral positivism have always regarded legal and moral norms as being a result of human convention, the adherents of natural law have always looked for the basis of right action in sources lying beyond human convention, human nature in some meaning or other: reason, God's law or a categorical imperative. Kant criticized the static and mechanical character of rationalist legal naturalism; but he did not remove the dualism of positivism and natural law. On the contrary, he amplified the dualism into a fundamental dichotomy between *Sein* and *Sollen*.

#### 6. Empiricism-Rationalism

Empiricism, identified above all with the philosophy of David Hume, assumes that it is observation that creates the reliable basis of our cognition but that, on the other hand, nothing can be said to be certain. Rationalism, founded by René Descartes, finds that reason is the basis of our cognition, since it is able to think out

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14) Johs. Witt-Hansen, *Historisk materialisme*, 1973, pp. 15 ff.

15) Justus Hartnack, *Den ny filosofi*, pp. 78 f.



truths independently of observation. Certain things happen of necessity.<sup>16)</sup> The following set of concepts belongs to this antinomy and refers to the sources and methods of cognition.

## **7. A posteriori-a priori**

A statement *a priori* is necessarily true, because it is analytical, i.e. the predicate is comprised by the subject, whereas a statement *a posteriori* can only be verified through experience, as the predicate is not comprised by the subject. The statement "All bodies have an extent" is analytical, because one cannot imagine a body without an extent. The statement "The earth is round", on the other hand, is synthetic, since one can imagine an earth which is not round; but it is also a true statement, because experience has proved its correctness.

## **8. Induction-Deduction**

While the antinomy of *a posteriori-a priori* referred to the *sources* of cognition, that of induction/deduction refers to the *method* of cognition. Induction takes as its starting point single observations on the basis of which it tries to make statements on regularities, which, however, are not necessarily true. The result of a deduction, on the other hand, is necessarily true, if the point of departure was true, as by this method one moves from a general statement to a special one which is comprised by the major premise.

## **9. Conceptual Realism-Nominalism**

Conceptual realism is not realism in the same sense as the realism defined under (1) above, being used as a designation of the idea that concepts really exist as opposed to nominalism, which denies the

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16) Justus Hartnack, *op. cit.*, p. 95.

existence of universal concepts and maintains that concepts are only names and joint designations which are attached to phenomena presenting a similarity which fulfils certain criteria.<sup>17)</sup>

## II. LEGAL THEORIES

After this exposition of the general philosophical problems of philosophical realism and idealism we shall now look at legal theories which can only be understood on the basis of general philosophical assumptions. We shall see how, in legal theories, the different issues enter into different combinations and compositions. When speaking in what follows about the application of the issues to legal philosophy I shall confine myself to a reference to the introductory analyses, except where defining is necessary.

### 1. An Historical Survey<sup>18)</sup>

The pre-classical concept of law was cosmic and fatalistic. The gods were the rulers of the cosmos and of man, too, since he was part of the cosmos; but the gods were themselves subject to the cosmic order. In a religious, cosmic concept of law of this kind there is no antinomy between nature and positive law, between ideal and reality. This fatalism recurs as late as in the older tradition of the classical tragedy, whereas in the younger tradition a new individualism dawns, as for instance in the tragedy of Orestes, where individual law is confronted with stern necessity.

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17) Justus Hartnack, *op. cit.*, p. 80.

18) This development had been anticipated by Pothier in France and Blackstone in England, cf. Stig Jørgensen in *T.f.R.* 1966, pp. 600 f., and in *Juristenzeitung* 1970, p. 530. See on what follows, Stig Jørgensen, "Symmetry and Justice", *infra* p. 59, *idem.*, "Die Bedeutung Jherings für die neuere skandinavische Rechtslehre", in *Jherings Erbe. Göttinger Symposion zur 150. Wiederkehr des Geburtstags von Rudolph von Jhering*, ed. Franz Wieacker and Chr. Wollschläger, 1970, pp. 116 ff., *Entwicklung und Methode des Privatrechts. Vertrag und Recht*, 1968, pp. 49 ff., "Grotius's Doctrine of Contract", *infra* p. 83, "Das Individuum, die Gesellschaft und das Widerstandsrecht", *Österreichische Zeitschrift für öffentliches Recht* 1973, pp. 19 ff.

In the middle of the 5th century B.C., when these dramas were created, Athens was a prosperous republic in which science and the arts flourished. What created the basis of modern science was above all the linguistic analyses of the sophists. Nor is there anything remarkable in the fact that such environments create a confidence that man is the master of his destiny, and that laws and legal rules are solely a result of the agreement of the citizens. What the citizens can agree upon is law, and only that which has been thus decided is law. In return it was assumed that there were no natural limits to what could be agreed upon and so to the contents of the law. The sophist legal concept, then, reflected in principle a legal positivism.

After the Persian wars radical optimism was replaced by scepticism towards the human faculty of creating legal rules which were not governed by an ethical attitude, i.e. a responsibility towards society as a whole. Plato founded an idealistic social philosophy based on the assumption that the good life was best ensured within the framework of a state ruled by philosophers, guarded by soldiers and maintained by citizens and peasants. The state reflected human needs in the individual sphere. At the top was the governing reason, beneath were the controlling feelings, such as courage, hope and ambition, and at the bottom were the fundamental physical needs, such as the need for food and sleep and the sexual instinct. Thus Plato's doctrines of state and law had an anthropological basis, since he chose human needs as his point of departure and among these was the need to live in a society. Aristotle rejected Plato's doctrine of ideas, but he maintained in all essentials his fundamental views. The dichotomy of ideal and reality is, in Aristotle's philosophy, replaced by the distinction between form and substance. According to Plato the individual physical objects were manifestations of that which is the essence of things, the form to which each of them aspires. Good, therefore, is the striving towards a state which realizes the essence of things in the highest degree imaginable. Since it is assumed that the form and essence of man is reason, the reasonable thing for man to do is to strive towards that social system which corresponds as closely as possible to man's reasonable will. Like Plato, Aristotle looked upon man as a social being (*zōon politikón*), and to him the Greek *polis*

was the form of government which best fulfilled the needs of man; he assumed, therefore, that the good life could best be realized under this kind of system. As is well known, Aristotle did not distinguish natural law from justice. Corresponding to an historical evolution, justice consists of two parts. In the first place, there is commutative justice, which means that there must be harmony between performance and payment in private-law relations and between violation and punishment in the penal system. Secondly, there is, in developed societies, distributive justice, which refers to the assignment of advantages to individuals and groups according to their social status; in this respect Aristotle was rather conventional. A third branch of justice, first formulated by the sophists, is the so-called *epieikeia*, which refers to the application of general legal rules to actual cases and which is a means to provide a safeguard against unreasonable results. This doctrine later developed into the *aequitas* of Roman law and the *equity* of English law.

As in any primitive legal conception, custom was the primary source of law during the Middle Ages. Since the law of God applies to mankind, only the Church can make new laws. Only customary law and canon law are recognized as legal sources. Thomas Aquinas also held this basic view, but he thought that God had only formulated some natural general principles which had to be complemented by human reason. This view, according to which man, i.e. the prince, had a certain measure of legislative power, was further developed by Marsilius of Padua, Bodinus, Niels Hemmingsen and others and found its most distinctive expression in Machiavelli's *Il Principe*. On the other hand, Thomas Aquinas recognized that positive law might be contrary to God's law and therefore invalid; he did not, however, accept any real right of resistance to such invalid laws, save in extreme cases. The conflicts between princes and popes in the subsequent period concerning, *inter alia*, legislative power, turned out, as in the case of Philippe le Bel and Boniface VIII, to the princes' advantage; but the natural-law concept lived on and was later consistently formulated by Hugo Grotius in close connection with Spanish moral theology. Whereas according to the medieval natural-law doctrine there exists a natural law, the social philosophers of the Enlightenment held that man

had certain natural rights deducible from his reasonable nature. Being founded on human reason, these human rights formed a certain *a priori* point of departure for deduction. During the following years Grotius's thoughts were further developed by Pufendorf, Thomasius and Wolf into a systematic body of natural law which appeared as a perfect parallel to the positive legal system with, however, a claim to superior validity. Hume, as mentioned, rejected rationalism and a natural law founded on it. He also rejected the natural-law doctrine of sovereignty and the social contract on the ground that those acting and contracting in the real world were individuals and not the people as a whole. Hume and, in particular, Bentham sought to found a hedonist philosophy of morals and law. The justification of the existence of a moral or legal rule, then, is that compliance with the rule must be considered a necessary condition of happiness and pleasure. Ethical hedonism, which claims that the greatest possible happiness for the greatest possible number of people is what ought to be aimed at, is not the same thing as egoistic hedonism.

By means of his transcendental idealism Kant tried to bridge the gap between rationalism and hedonism. He agreed with Hume that rationalism and, with it, rationalistic natural law are unhistorical, and he also held that naturalism puts an end to freedom and thereby to human responsibility. On the other hand, he agreed with the classical natural-law tradition that happiness is not the only aim of human aspirations, and that, therefore, it is not the individual's egoistic will but his reasonable will that must be the basis of an acceptable social morality. The result was the distinction in principle between theoretical and practical cognition and the moral-philosophy separation of "is" from "ought".

On the one hand, this separation opened the way for a scientific treatment of positive law. On the other, a need was created for a restoration of the connection between "is" and "ought", between cognition and evaluation.

The beginning of the 19th century saw the foundation of a legal science in the true sense. The German historical Romanist school originating from Thibault and Savigny, John Austin's analytical jurisprudence and A. S. Ørsted's realism had as a common feature,

from the point of view of method, that they analysed the actual legal material and deduced from this material general principles which could be made the basis of a systematic account as non-contradictory and comprehensive as possible. Austin developed a special legal positivism which distinguished between positive legal science and legislative policy, which in his opinion formed part of moral philosophy. In Austin's presentation positive law was expressive of the sovereign's commands. These commands, however, need not necessarily come from the legislative power; they could also be produced by other organs, for instance by the courts, whose authority was derived from the state. According to Austin one could speak of unjust laws in a rather loose sense, but such reflections did not affect the validity of positive law. From a consistent positivist point of view the corrective role of natural law was taken over by legislative policy. In this respect Austin fully adopted Bentham's utilitarian approach.<sup>19)</sup>

Thibault wanted a consistent carrying into effect of a legal science, founded on inner theoretical criteria, which also ought to provide the basis for a new comprehensive codification of German law on French lines. But Savigny wanted a systematic account based on external criteria. To him the time did not seem ripe for a common German codification. He built his presentation of legal science on the conditions of human life and the legal institutions developed throughout history, and he looked upon law as a continuous realization of the spirit of the people. On the other hand, he rejected the idea of an external and unchangeable natural law, maintaining that the existing traditional law must develop according to the conditions of life. Starting as it did from the actual conditions of life, Savigny's jurisprudence was realistic up to a point. Nevertheless Savigny came to be the founder of the later German legal positivism, because he used the Roman sources of law as the material for his construction of a common German civil-law system. He could do this because Roman law as adapted by

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19) W. Löwenhaupt, *Politischer Utilitarismus und bürgerliche Rechtslehre*, 1972; John Austin, *Lectures on Jurisprudence or the Philosophy of Positive Law*, vol. 1, 1885, reprinted 1972, *Preface* (Sarah Austin), pp. 5 ff.: Advertisement to 5th ed. by Robert Campbell, pp. V ff., with a list of works in Austin's library.

Romanist legal science was accepted as valid German law. Savigny's successors developed the so-called "*Begriffsjurisprudenz*", or legal conceptualism, according to which the task of science was to specify the conceptual and ideographical expressions in which the Roman legal sources presented themselves after adaptation, and to deduce general concepts from the existing legal phenomena through abstractions which in their turn were traced back to abstractions at a higher level and to a single or a few general principles. The perception of new phenomena does not lead to a revision of the concepts developed but to the creation of a more comprehensive abstraction. The administration of law now consists in a mere subsumption of the facts under the abstract legal principles. In spite of the positivist method, then, German positivism – unlike its English counterpart – was founded on an idealistic philosophy, seeing that the scientific conceptual apparatus is not required to conform to reality; on the contrary, reality must conform to the concepts.

This idealism of principles was opposed by Rudolf Jhering, who made human needs and interests the basis of jurisprudence, although he had himself created a "constructive method" in compliance with *Begriffsjurisprudenz*. It was Jhering's ambition to build up a realistic legal science in accordance with natural science and on a strictly naturalistic basis. Jhering's work, as will be shown in the following pages, was to have a strong influence on the later German "*Freirechtsschule*" and "*Interessenjurisprudenz*", as well as on the more recent Scandinavian realism. Through Pound, moreover, it has left its imprint on American legal science.

Like Austin and Savigny, the Danish legal scholar A. S. Ørsted was in his youth much influenced by Kant's theory of science. Like Savigny he wanted to build a true legal science on a positive Danish foundation, and he rejected the existing systematic works, which were inspired by natural law. Unlike Savigny, however, he did not use Roman legal sources but instead had recourse to the traditional national legal material. This material was rather incomplete but Ørsted consistently equated it with practical needs, openly recognizing "the nature of things" as a general or subsidiary source of law. As will be shown later, "the nature of things" is one of those

legal constructions which have often been used by posterity as a kind of connection between the actual conditions of life and the necessary legal regulations. Seeking a more secure basis for the estimation of the demands of practical life, Ørsted started the publication of printed law reports, thereby rendering it possible to establish that alliance between theory and practice which was later to be a characteristic of Nordic legal science.

Another early 19th-century legal writer, F. C. Bornemann, however, subscribed to Hegelian idealism, holding that the task of legal science is, first, to collect and interpret norms and institutions empirically as they are and, secondly, to systematize the norms rationally in order thereby to get an insight into their nature, which is the inmost and unchangeable essence of legal institutions. The legal order is a progressive manifestation of the spirit of the people in its striving to achieve perfection in ordering the external conditions of human life. While at the same time due consideration is to be given to material conditions, the primary aim is the elevating of human existence to the eternal life of the spirit. The basis of law is sought in general principles, the principles of personality, family and state, from which principles deductions are made. Practical considerations can only be entertained as an alternative. Goos, a later Danish scholar, tried to throw a bridge between Ørsted's realism and Bornemann's idealism: he held that the idea of law is nothing but a demand on society and does not deprive the positive law of its validity. Referring to Ørsted, Goos underlines the necessity of a penetrating analysis of the actual conditions of life and the real basis of these conditions. Like Rudolf von Jhering, Goos had been influenced by English utilitarianism; this is apparent in the two authors' definitions of subjective law, which is called "legally protected interest" by Jhering and "morally protected good" by Goos. Goos's doctrine of unlawfulness ("retsstridighed") is an attempt to limit individual freedom of action in consideration of the freedom of other individuals as well as of the interests of society. Goos agrees with Bornemann that legal science is an ethical science, although it is no province of ethics in general, inasmuch as the idea of morality implies that freedom must be definitely limited in order not to disappear, and that such limits are



maintained by force. Goos did not succeed, however, in justifying and defining the force of law beyond a general reference to the necessary freedom of the individual. In the last resort it is the right of the powers that be to mark out the limits.

## 2. Norm and Reality<sup>20)</sup>

When studying the various legal theories of this century we shall find that the question of the connection between norm and reality occupies a prominent position. The problem has two aspects.

(1) From what do legal rules derive their validity? The legal norm – the legal "ought" – must become valid, must be legitimated, by referring to something else, and this must be something actually existing.

(2) The abstract legal rule must be applicable to the concrete reality; thus the question is not only that of deriving an "ought" from an "is" but also *vice versa*.

The existentialist legal theorists find it easy to answer these questions, since they recognize no abstract rules. For them the nature of the case and all the concrete circumstances create together the basis of the concrete decision by which the rule is also produced. Variants of this existentialist legal philosophy have been formulated by, e.g., Alessandro Baratta, Erich Fechner, Werner Maihofer and Erik Wolf, and in Denmark by Georg Cohn.<sup>21)</sup> Neither for a purely sociological legal theory, placing prescriptions on an equal footing with norms, does any problem of legitimation or validity exist. This view was formulated in principle already by Adolph Merkel in 1874.<sup>22)</sup> The later German *Freirechtslehre* had no such great ambition but refused to subscribe to the statement made by *Begriffsjurisprudenz* that the legal system is exhaustive and

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20) See on what follows, Jørgensen, *Lovmål og dom*, pp. 54 ff., 33 ff. and 9 ff.; *Law and Society*, p. 19.

21) Cf., for instance, E. Fechner, *Rechtsphilosophie*, 1956; Georg Cohn, *Eksistentialisme og retsvidenskab*, 1952.

22) R. Zippelius, *op.cit.*, p. 16.

that legal decisions are purely deductive. Instead this school called attention to the imperfect nature of the legal system and the vagueness of legal concepts, in consequence of which legal decisions must to some extent be made on the basis of a series of value-coloured considerations. Likewise the later *Interessenjurisprudenz* (Müller-Erzbach and Heck) was aware of the decisionist character of legal decisions and the fact that legal rules were the result of conflicting interests. It must be possible from these facts to infer the objective purpose of a given rule, and this purpose must form the basis of the interpretation of the rule in concrete cases (the teleological method of interpretation).<sup>23)</sup> Eugen Ehrlich, too, did not fully equate sociology with legal science. Although he looked upon legal science as part of the theoretical social science, sociology, he still assumed that regularity in itself was not the same as a prescription.<sup>24)</sup>

The so-called American realism (Chipman Gray, Holmes and Frank) has some features in common with the theories mentioned, denying as it does in principle the existence of general rules and assuming that law is created by the courts through their practice *per se*. Law is what the courts actually do. At the same time the American realists started from a purely causal and naturalist theory of legal sources, assuming that these sources embraced all elements of importance for the legal decision, such as legal rules, morality, personal and political sympathies, and even what the judge had had for breakfast ("the digestion theory"). Later American legal theorists (Cardozo and Lon Fuller) have stressed the regard for law and order, and Lon Fuller has also put forward a series of claims which must be fulfilled if a norm system is to be called a legal system. American legal realism has features in common with the American pragmatic philosophy which connects the concept of

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23) Karl Larenz, *Methodenlehre der Rechtswissenschaft*, 3rd ed. 1975, pp. 64 ff.; A. Verdross, *Abendländische Rechtsphilosophie*, 2nd ed. 1963, pp. 172 ff. A similar development takes place in France with François Gény, *Méthode d'interprétation et sources en droit privé positif*, I-II, 1919; cf. also Bodenheimer, *Jurisprudence*, rev. ed. 1974, pp. 116 f.

24) Karl Larenz, *op. cit.*, pp. 69 f.; A. Verdross, *op. cit.*, pp. 194 ff.; R. Zippelius, *op. cit.*, p. 17.

truth with a consequence of action.<sup>25)</sup> In P. O. Bolding's book *Juridik och samhällsdebatt*, 1968, there is an echo of these sociological legal theories, but Bolding cannot be cited in support of a legal theory which is sociological in principle. He only states that social facts and social evaluations contribute to the legal decision alongside with the legal rules which he regards as binding norms.

The German neo-Hegelian jurisprudence, which is based on an objective idealism – law as the self-realization of reason – has assumed the form of an actual decisionism that connects the validity of law with the actual decision, seeing that the important thing is not *how* a decision is made, but *that* it is made. This theory has been advanced above all by Carl Schmidt in his book *Konkretes Ordnungsdenken*.<sup>26)</sup>

In agreement with the value philosophy of the phenomenologists, attempts have been made to solve the problem by laying down a system of such values as are supposed to be valid *a priori*, so that an insight into the contents of the value system cannot be obtained through the intellect but only through intuition, which is regarded as a common human quality. This artifice, however, does not help the phenomenologists to get round the scientific demand for control of reality. Their phenomenological descriptions of human needs and values may be correct, but this must be proved through real research, not by references to intuition. Intuition, as was said by Kant, may be a splendid source of hypotheses but is not a useful tool of scientific cognition.<sup>27)</sup> Representatives of this legal theory are in Germany, for instance, Hans Welzel (*Sachlogische Strukturen*) and Gerhard Husserl, in Switzerland Alois Troller, and in Scandinavia, in some respects, Otto Brusiin.<sup>28)</sup>

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25) Edgar Bodenheimer, *op. cit.*, pp. 111 ff.; Lon Fuller, *The Morality of Law*, 2nd ed. 1969.

26) Carl Schmidt, *Gesetz und Urteil*, 1912.

27) Karl Larenz, *op. cit.*, pp. 119 ff.; Ulrich Matz, *Rechtsgefühl und objektive Werte*, 1966.

28) H. Welzel, *Naturalismus und Wertphilosophie im Strafrecht*, 1935; Gerh. Husserl, *Recht und Welt*, 1964; A. Troller, *Überall gültige Prinzipien der Rechtswissenschaft*, 1965; Paul Amselek, *Méthode phénoménologique et théorie du droit*, 1964; Otto Brusiin, *Über das juristische Denken*, 1951.

Neo-Thomism, too, attempts to create a new point of departure for natural-law philosophy. In his book *Statisches und dynamisches Naturrecht*, 1971, Alfred Verdross has tried to show that, as a social being, man needs certain legal structures, although the contents of these will vary according to the stage of the economic, social and cultural development. René Marcic also represents this new anthropological natural-law theory,<sup>29)</sup> as likewise does the circle around the *Natural Law Forum*, a periodical published by Notre Dame University, USA.

The German trend called topics, presented by Theodor Viehweg in his book *Topik und Jurisprudenz*, 1953, and the neorhetorics of the Belgian scholar Chaim Perelman, go back to the philosophy of Aristotle, in this particular case to his rhetorics. The legal decision is considered to be the result of a reasoning on the basis of a catalogue of legally relevant points of view. This method has gained many prominent supporters in German legal science, one of them being Helmut Coing, who originally, in his book *Die obersten Grundsätze des Rechts*, 1947<sup>30)</sup> subscribed to the phenomenological method.

The modern system theory, formulated in concurrence with Parson and presented above all by Niklas Luhman,<sup>31)</sup> finds the legitimation of law in no other circumstance than its functional ability: "Legitimation durch Verfahren" ("Legitimation through procedure"). According to this theory the primary purpose of law is to avoid social conflicts by means of mutual adaptation and feedback between the legal system and the social processes.

The schism of "is" and "ought", of norm and reality, on the other hand, has been a crucial problem for the various branches of neo-Kantian philosophy. Neo-Kantianism, in all its shapes, maintains that, like all other objects of our cognition, law is created by the human consciousness. So we have a special capacity which enables us to know what belongs to law and what belongs to other

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29) *Rechtsphilosophie*, 1969; cf. also Johannes Messner, *Das Naturrecht*, 1966, and Michel Villey, *La formation de la pensée juridique moderne*, 1961–66.

30) Cf. Jørgensen, *Lovmål og dom*, pp. 19 ff.

31) *Legitimation durch Verfahren*, 1969; cf. also Torstein Eckhoff and Nils Kristian Sundby, *Rettssystemer*, 1976.

norm systems. The so-called Marburg School maintained that law was a manifestation of the common will, while the so-called South-West German School conceived of law as a cultural phenomenon, so that already for this reason law as an object of study implied value concepts. Karl Engisch, who represents the Marburg School, has mainly been concerned with transferring the form of law to the substance of reality and has regarded the application of law as a dialectical process from the rule to the reality to which it was to be applied and *vice versa*, until the distance has become sufficiently short.<sup>32)</sup> As a representative of the South-West German School, Gustav Radbruch has pointed to justice as the basis of law, although a legal rule, even when unjust, may be valid law. Assuming that social institutions, which are culturally created and value-orientated facts, would by themselves (axiologically) demand certain legal solutions, Radbruch has also applied the concept of *Natur der Sache* ("the nature of things") to bridge the gap between norm and reality.<sup>33)</sup>

### III. RECENT DEVELOPMENTS

Before proceeding to recent theories, the analytical and hermeneutic ones, on the one hand, and the critical and Marxist ones, on the other, I propose to give a short account of the so-called logical positivism and its relation to Scandinavian realism and of the criticisms recently levelled against these philosophical trends and their application in legal theory.

As will be seen from the foregoing, the theorists have constantly endeavoured to find out what circumstances qualify the social regularity actually observed as law. Some theories have focused upon formal validity, while others have laid the main stress on the contents of the law. The former may be called formalistic theories and the latter ethical or natural-law ones. The neo-Kantian idealistic

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32) *Die Idee der Konkretisierung im Recht und Rechtswissenschaft unserer Zeit*, 2nd ed. 1968.

33) *Rechtsphilosophie*, 8th ed. publ. by H. P. Schneider and Erik Wolf, 1973.

theories regard the law as a manifestation of a hypothetical common will or as a cultural tradition governed by justice, whereas neo-Hegelianism regards law as the actual manifestation of "world reason". The phenomenologists look upon law as intuitive derivations from an *a priori* value kingdom and the existentialists see it as a manifestation of the individual's sovereignty. Some realistic theories go so far as to equate law with actual behaviour. These are the sociological theories. The so-called system theories find the justification of law in its actual conflict-solving effect, while other schools of thought see it as reflecting the actual behaviour of the authorities who apply and maintain the law. Hence it follows that there is nothing to prevent a theory from being idealistic and positivistic at the same time. Apart from the neo-Thomistic and the phenomenological ones and certain variants of South-West German neo-Kantianism (Gustav Radbruch), which was provoked by the experiences of the Nazi era, we do not know of many recent natural-law theories with an axiological content. Other writers, like H. L. A. Hart, have tried to isolate analytically the minimum content of all the legal systems known in history, whereas for instance Alfred Verdross, Edgar Bodenheimer, Peter Stein<sup>34</sup>) and Heinrich Henkel<sup>35</sup>) have chosen an analysis of anthropological and cultural material as their point of departure for statements about the individual and social needs which legal prescription is meant to satisfy.

The most recent debate on legal theory, however, has focused not so much on the concept and content of the law as on the position of legal science as a science. By legal science in this connection I think especially of the dogmatic legal science which analyses and systematizes valid law and suggests solutions of hypothetical legal conflicts.

Even Hume had assumed that values (goodness, beauty, justice) are qualities not of the object but of the evaluating subject. He who evaluates, then, tells us nothing of the object of evaluation but something about his own feelings. This was the idea adhered to by

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34) *Legal Values in Western Society*, 1974.

35) *Einführung in die Rechtsphilosophie*, 1964.

Kant in his distinction between cognition and evaluation. The same idea lies behind the so-called realistic or positivistic philosophical schools of modern times, the logical positivism or empiricism originating from Vienna in the 1920s (Carnap and others), Scandinavian realism (Hägerström), and English analytical philosophy (G. E. Moore, Ryle, etc.). These philosophical trends have in common the assumption that only statements on facts in the surrounding world are meaningful, evaluative statements being meaningless. Since methods are at hand to decide whether outward facts exist or not, statements asserting something about such facts can be true or false, whereas statements expressing evaluations can be neither true nor false. This positivistic philosophy, which is above all a scientific theory, has greatly influenced the modern debate on legal theory. Hans Kelsen's pure theory of law, H. L. A. Hart's analytical legal theory and Scandinavian legal realism, personified by Vilhelm Lundstedt, Karl Olivecrona and Alf Ross, are all indebted to this scientific theory.<sup>36)</sup> The centre of their attention is the concept and validity of positive law, while the question of the legal decision is passed over by Hart and dismissed by Kelsen and Ross on the ground that it cannot be treated scientifically. A legal decision, like all other decisions, is an evaluation which cannot be true or false, and, adopting the view of Jerome Frank, Ross therefore stamps the grounds of the judgment as a face-saving justification or "transcendental nonsense". If legal science, then, in the traditional dogmatic sense, considers the solution of hypothetical legal conflicts, it is not a science but a technology. In consequence of this the Swedish legal writer Knut Rodhe, among others, has stated that legal dogmatics can do nothing but describe and systematize positively existing legal material, and cannot say anything about the solution of hypothetical legal conflicts. However, as will be seen, descriptions and systematizations do contain evaluations as well.

This view turns out to be fatal to Alf Ross when he defines law as the ideology dominating the judicial authorities but at the same time assumes that this ideology can only be recognized through the

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36) Jørgensen, *Lovmål og dom*, pp. 13 ff.

judgments given. If, in other words, the grounds of the judgments do not correctly express the authorities' conception of the content of the law, we have no real source of knowledge of valid law. According to Ross, then, law is an actually existing ideology, and it is the knowledge thereof that enables us to predict the future decisions of the authorities.<sup>37)</sup> Knud Illum also regards law as an ideology, but to him it is the ideology that animates the population and is mastered especially by lawyers; in order to get a correct insight into legal ideology one is not obliged to ask the authorities but may equally well consult legal scientists and other lawyers.<sup>38)</sup> Olivecrona, too, understands law as an actually existing conception which is the causal element of observable legal behaviour.<sup>39)</sup>

The reality dealt with by the Scandinavian legal realism belongs to the outward empirical world as conceptions or behaviour; but according to the logical positivistic theory of science the underlying reality may also be phenomena which do not belong to the material world. Scientific statements as to the existence and validity of a legal norm can be verified by referring to the existence of a superior legal norm, which can in its turn be justified by a norm one step above itself, and so on, until the process of recourse ends up in the assumption of a so-called basic norm which does not exist in reality but is a logical prerequisite of the maintenance of the system. According to Kelsen's pure theory of law, the contents and observance of the law were the concern not of legal science but of sociology and moral philosophy. According to this theory a legal rule is a directive for the authorities to employ the monopolized coercion of the state.<sup>40)</sup> Like Kelsen and Ross, Hart conceives of each individual legal rule as a directive forming part of a coherent pattern of rules of the same nature as the rules of a game, which render it possible to understand and explain the behaviour of the actors and to predict their future behaviour. Unlike Austin and Kelsen, both Hart and Ross distinguish between being bound or

37) *Op. cit.*, pp. 12 f.

38) Ross, *Lov og Ret*, 1945, pp. 43 ff., Review of Ross, *On Law and Justice*, in *U.f.R.* 1953 B, pp. 61 ff.

39) *Rättsordningen*, 1966; in English: *Law as Fact*, 1971.

40) *Reine Rechtslehre*, 2nd ed. 1960.



obliged and having an obligation, i.e. feeling obliged. Hart, too, rejects the American realists' understanding of law as another expression of the actual behaviour of the courts. This understanding is nothing but an outward description of the course of events, whereas an inward description must consider the circumstances by which the judge feels himself bound and which justify his decisions. These circumstances are legitimated by means of the rules of recognition of the society, which consist in references to sources from which information of valid law can be obtained. The legal rules are not only rules of behaviour but also rules of authority, i.e. rules limiting the authority of others to produce legally binding directives.<sup>41)</sup>

In recent years criticism has been levelled against this basic philosophical view limiting the scope of science to statements on positive facts, which are regarded, then, as objectively, i.e. universally, true or false, while statements concerning values are unscientific, because they are of subjective, i.e. individual, meaning. Several trends of modern philosophy and scientific theory realize that all facts must be worked up in language and structured into abstract concepts in order to be communicated and treated scientifically. Both the German hermeneutic philosophy (Heidegger, Gadamer and Apel) and English analytical philosophy in its most recent stage (Stephenson, Hare, Searle, etc.) realize that most of our concepts are intentional, i.e. created with a view to human ends.<sup>42)</sup> For instance, no fact called "table" exists in the surrounding world, but only a construction fulfilling the purposes presupposed by the concept "table". This is especially true of social and legal institutions, such as promise, marriage, penalty, etc. Besides being open and flexible on the time level, these concepts are value-loaded inasmuch as they are tools of human ends. Moreover, it is realized that most adjectives are not predicative. Predicative adjectives pronounce something about a subject, for instance "a man of 70

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41) *The Concept of Law*, 1961.

42) On what follows see Nils Jareborg, *Värderingar*, 1975, Hans Fink, *Moralbegrundelse og logik*, 1970. Cf. also Jørgensen, *Lovmål og dom*, pp. 13 ff., and K. Makkonen, *Zur Problematik der juristischen Entscheidung*, 1965; Nils Kristian Sundby, *Om normer*, 1974.

kg” or ”a 10-metre-high tree”. Such adjectives have the same content at all times, in all places and in all relations. Adjectives which could be called attributive and which pronounce something about a subject only at a particular time, in a particular place and in a particular relation or situation always call for a supplementary or a more explicit definition of the situation and the relation which is to be estimated. Generally such complementation will also comprise the purpose explicitly or implicitly aimed at. A detailed analysis will show that most adjectives are attributive – not only value words like good, pretty, just, etc., but also words like big, small, thick, thin, etc. A big elephant is not the same size as a big mosquito.

So it must be the task of an analysis of the situation and the context to find out what sorts of relations and purposes are implied and then to decide whether the words good, pretty, big, etc., are applied correctly. Accordingly it ought to be possible to analyse a situation so exactly that one could tell whether any of the terms true, false, correct or incorrect can be used about the application of adjectives like good, bad, etc. In most cases the meaning will be ”good at”, ”bad at”, etc., but words like pretty, just, etc., can also be defined so exactly that there will be no doubt as to their meaning. A large number of ordinary legal concepts, like murder, crime, private property, etc., imply some generally accepted evaluations. In so far as it becomes possible to define the circumstances under which such value concepts and other open concepts are applied, it also becomes possible to discuss objectively the choice and application of the values. At the same time it will become possible to subject values to a scientific treatment. Such an issue of the dispute would, of course, be of great importance to the legal authorities and to dogmatic legal science.

In modern Continental legal philosophy Emilio Betti,<sup>43)</sup> Josef Esser,<sup>44)</sup> and Arthur Kaufmann<sup>45)</sup> have pointed to the immanent

43) *Die Hermeneutik als allgemeine Methodik der Geisteswissenschaften*, 1962.

44) *Vorverständnis und Methodenwahl*, 1970. Cf. also Jørgensen, *Lovmål og dom*, pp. 86 ff.

45) *Rechtsphilosophie im Wandel*, 1972, *Grundprobleme der zeitgenössischen Rechtsphilosophie und Rechtstheorie*, 1971. ”Durch Naturrecht und Rechtspositivismus zur juristischen Hermeneutik”, *Juristenzeitung* 1975, pp. 337 ff.

*Vorverständnis* (*a priori* comprehension) of the legal system and of legal rules, i.e. the implied value concepts, ideas, principles, maxims, etc., which govern the contents of legal rules and consequently also legal argumentation. Concrete valid law comes into existence as part of an historical process through which it is generally accepted. In a legal context it is the courts and the other legal authorities that lay down the right understanding of the legal rules in force, having regard to the general political value system lying behind the legal system. In underlining the open and evaluative character of legal rules the hermeneutic trend is related to the topics and neorhetorics mentioned above, which also invoke history and the existing value system as criteria to be applied in the final ranking of arguments and values.

The so-called Frankfurt School has its origin in hermeneutic philosophy, but in opposition to the historical traditionalism of the latter it underlines the political content of every human activity and turns above all on the alleged value freedom of the sciences, especially the social sciences. Horkheimer, Adorno, Marcuse and Habermas see the liberation of man through a free dialogue as the object of science. The idealistic basis of the Frankfurt School is reflected by the fact that its adherents assume that reason is man's nature and that, owing to the dialectical way in which thought functions, critical reasoning must necessarily lead man towards an increasing degree of truth. Even if the idealistic basis of the critical theory is rejected, so that the ideas of reason as man's most important guide and of the logical necessity of its increasing perfection must seem less convincing, there are good reasons for believing in the usefulness of an open and critical dialogue as recommended by Karl Popper. It may be reasonable, too, to consider it to be part of the critical activity of science to analyse social institutions and rules, thereby isolating the political and other evaluative motives on which these institutions and rules are based. When analysing in this way one distinguishes between motive and justification without necessarily making such activity an ethical obligation of science.<sup>46)</sup> In his book *Theorie der Rechtsgewinnung*

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46) Cf. Jørgensen, *Lovmål og dom*, pp. 74 ff.

(1967), Martin Kriele has considered it to be part of scientific legal analysis to give a detailed account of the political, social and economic interests and values which have motivated or are maintaining the existing legal system and individual legal rules or institutions.

In his dissertation *Studier i retspolitisk argumentation* (1974) (Studies in the reasoning of legal policy), the Danish theorist Preben Stuer Lauridsen has assumed that the obligation of legal science goes further still, being an obligation to argue, on an objective and scientific basis, in favour of alterations of the existing state of law in cases where the latter has undesirable social effects. In my private capacity I quite agree with the author, but I find it hard to realize how this demand can be derived from the concept of science. One cannot conclude, from the fact that both sociology of law and legal dogmatics are to be considered as parts of a wider concept of legal science with specific scientific methods, that the dogmatic legal scientist has a "duty" to carry on a legal policy (*op. cit.*, p. 342).

Lauridsen's idealistic point of departure also manifests itself in his adherence to the so-called coherence theory. According to this theory a scientific statement can be verified not by being related to certain facts in the real world but only by being related to an infinite number of other linguistic statements at a still higher level of abstraction, so that contact with reality can only be established through an arbitrary choice (*op. cit.*, pp. 144 ff.).

I do not propose to discuss the general philosophical criticism which may be directed against this doctrine, but will confine myself to outlining the main ideas put forward in this context. According to the criticism in question, coherence is merely a negative criterion of truth, while observation is always a necessary prerequisite of verification or falsification. Even if the necessity of these considerations were not recognized, another aspect of the problem of coherence must be the cause of some doubt, especially to lawyers. A legal decision, as a matter of fact, is an example of how a general linguistic formulation can be used to govern and, if occasion should arise, to intervene in concrete actual relations. If it is in principle impossible to establish a reasonable connection between norm and reality, it will, of course, also be impossible to make a legal

decision. It is true that the actual situation must be described before it can be translated into the same language as the norm, but it is absurd to presuppose that such linguistic description is quite arbitrary, especially if you assume, like Lauridsen, that it is possible to make what he calls a correct linguistic description (*op. cit.*, p. 148). The correctness of such descriptions must be measured by some standard. Just as there are conventions and norms for the use of ordinary language, so it is part of the generally accepted legal method, which Lauridsen acknowledges as such, that facts must be linguistically and legally qualified according to certain rules and norms. In principle the linguistic qualification is an alogical choice, but it is certainly not arbitrary. On the contrary, it is governed by rational and regular criteria. I think that a theory of correspondence to the effect that scientific statements can be verified or falsified by direct comparison must be rejected as too primitive. In the scientific process of verification as well as in the legal process of deciding, the actual situation must be qualified in a linguistic form in order to render a comparison possible. Of course, this will cause difficulties with regard to scientific objectivity, but this is not sufficient reason to reject observation as a necessary element of the criterion of truth and replace it by a projection of our conceptions and linguistic formulations.

Marxist legal theorists do not seek to describe the world but to change it, and they take it for granted that such change will inevitably take place in consequence of certain laws of economic development. They consider law as an ideological superstructure of the material conditions of life and maintain that it will change in a dialectical relation to these conditions. This legal theory must be looked upon either as a set of maxims for legal policy, since it does not intend to describe reality, or as an idealistic legal theory, since it presupposes the existence of objective laws of development. These laws of development form the essence of capitalism, and what we are able to observe are the manifestations of these laws. If our immediate observation of these manifestations does not fit in with the objective laws, we are the victims of a false consciousness. So it is a question not of remedying the presupposed regularities but of correcting the false consciousness. The Marxist analysis of

the development of history may be correct, but the weakness of Marxism as a scientific theory is the same as that of Freudianism: it operates with concepts, such as false consciousness, which render a scientific verification impossible. The phenomenological analysis with its assumption of a hierarchy of objective values may be correct, too, but the reference to intuition as a specific apparatus of recognition cannot be called a scientific justification. This scientific method is cognate with the medieval view, which was based on the metaphysics of Plato and Aristotle, according to which ideas or forms have an objective existence and physical phenomena are manifestations thereof.<sup>47)</sup>

I shall conclude by repeating what I have said before, that it is necessary to operate with an anthropology when choosing the direction of one's scientific activity. But one should not overlook the risk that such a necessary and human theory, which is open to constant correction in the light of experience and practice, might develop into a tyrannical ideology. It is of especial importance to the social sciences to realize and respect the distinction between, on the one hand, an ideological or idealistic activity aimed to create and change the surrounding world and, on the other, a realistic theory aiming to describe reality as far as possible, because the social sciences deal with what can be called the soft reality as opposed to the hard physical reality.

It is difficult to sum up the interplay of the idealistic and realistic views of philosophy and jurisprudence. It might be said perhaps, very generally and therefore very inaccurately, that it is connected with the general development of the political and socio-economic conditions prevailing at the time in question and especially with the needs of science and social structure. If it is assumed that society must at any time be ordered with a view to bringing about security and freedom, an idealistic view can be understood as an attempt to stress the need for security and with it consideration for the interests of the whole, whereas, on the contrary, a realistic view

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47) T. Wanscher, *T.f.R.* 1975, pp. 184 ff. (187). For an account of historical materialism and a criticism of ideologizing Marxism, see Johs. Witt-Hansen, *Historisk materialisme*, 1973, and in *Det Lærde Selskabs publikation* No. 6, Århus 1973.

underlines the regard for freedom and consequently for the interests of individuals and groups.

An idealistic legal and social philosophy must work for the projection into society of the ideology lying behind the idealism, while a realistic philosophy will be more inclined to allow the needs and interests prevailing in the society to influence the social order and with it the content of the legal system.

The grouping of legal theories into idealistic and realistic schools is not exhaustive, however, as will at once be seen from the foregoing. It is only one of several angles from which legal philosophy can be approached, and my treatment of the subject is only one of several possible accounts. Idealistic and realistic theories, as mentioned, emphasize certain needs which are very essential. They do not, however, take up all those that exist. There are a number of other needs and scientific problems. But not everything can be said at the same time. And here I have dealt with realism and idealism in jurisprudence.

## **SYMMETRY AND JUSTICE**

### **I. INTRODUCTION. THE ISSUE**

The word symmetry means, among other things, an equal or correct measure, thus holding some of the same semantic elements as the word harmony. Both words are of Greek origin and tell us important things about the Greek way of thinking and judging. The idea of a cosmic order controlling nature and mankind according to eternal and unalterable laws dates back as far as the Homeric ideology. It is certainly true, that these ideas were most clearly expressed by the Greek and that our very range of ideas has been highly influenced by their determined striving towards a scientific and rational philosophy. But the philosophy behind the idea of symmetry is of a more universal character, and even the Greek have had their inspiration from the old Middle East cultures. I shall not venture the claim, that the idea of symmetry is a basic human way of thinking, but I shall try to show that the social philosophies of most wellknown cultures of different times are dominated by certain common patterns of thought and reaction. I shall keep within such areas of the theory of the State and the history of legal ideas which I know best, so nobody should expect a universal survey of history.

What is in general understood by symmetry is the concept used in physics and geometry to describe the state of similitude between two or more points, lines or figures in relation to a vertical axis or a central plane. But the word has some related meanings. Just as in physics the scales are the most perfect manifestation of symmetry,



it is a provocative and fascinating thought, that the scales have been the symbol of law and justice at all times.

Even nowadays the symbolic picture of law as the Goddess of Justice, blindfolded with the scales in one hand and the sword in the other has its appeal. This picture contains several different symbols, to which I shall return. For the time being I shall merely state the fact, that the concept of justice has always included different notions of equality and balance as criteria of the social order and of the relations of mankind. The demands made on Justice can be split up into different relations. Analytically a formal aspect can be distinguished from a material one. In principle the formal aspect is identical with the norm itself, i.e. with the idea that equal cases must be treated equally according to some criterion.

Since the days of Aristotle we have two material problems, one regarding the mutual relations of the individuals, the commutative justice, the other regarding the distribution of values in society. The third relation is the criterion of the application of general norms to concrete cases. The serious call on justice is said to be modifiable through equity (*epieikei*, *aequitas*). The development of the three material ideas has taken place in the said order.<sup>1)</sup>

There is no doubt that the word symmetry is what the linguists call a positive word. It corresponds with other positive words like harmony, balance, equilibrium, peace, order etc., while the word asymmetry associates with negative concepts such as disharmony, instability, chaos and trouble. However, one should not be led astray by the linguistic expression. The meaning of the expression has several variants with an opposite sign. To the positive meaning of symmetry there are corresponding negative meanings like stagnation, boredom, lack of excitement, peace and order in these cases meaning very much the same as oppression. And in addition to the negative content of the word asymmetry we find positive meanings like growth, development, innovation. It is worth emphasizing this fact, since it reflects our ambivalence towards the

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1) *Ota Weinberger*, Österreichische Zeitschrift für öffentliches Recht 25 (1974) p. 23–38, analyzes the concept of equality and its relation to formal and material justice philosophically. *Torstein Eckhoff*, Rettferdighet (1971) analyzes the arguments used in social sciences in connection with the exchange and distribution of values.

conception of symmetry on the whole and the corresponding social rights. Society as well as the individual need both security and freedom, stability and development, and we are lucky to have words and concepts to express and justify both. Especially the institution of contract has been useful as justification of one as well as the other. The idea of return, which is perhaps the very core of our conception of law, will apply in static and dynamic periods as well, in the former to justify the keeping up of unchangeable and static relations, in the latter to express the individual freedom of breaking the traditional relations and developing new ones. The idea of the good life always presupposes the idea of the controlled development. And no wonder. It would be a disastrous situation, both to the individual and to the society, if the consequences of human intendings and actings — one's own as well as those of others — were unpredictable. A certain measure of stability and regularity is indispensable to human co-existence.

## II. MYTHOLOGY AND SYMBOLISM

I said above that the scales have always been the symbol of law. From the oldest Egyptian cultures (about 3500 B.C.) we know a sepulchral painting representing Anubis, the God of Death, weighing the good deeds of the deceased on a pair of scales. In one scale he has placed the heart of the deceased, in the other some feathers are symbolizing justice. Underneath we see Amemit, the monster, waiting to devour the deceased, if he is found wanting. The scales, then, are not only the symbol of the law, but also of death. This is also stated cosmically, seeing that the Babylonian astronomy has given the name of the Sign of the Scales to the constellation, in which the sun is situated on the 23rd of September, the autumnal equinox. According to the myth the sun, and with it life, dies on this date and is reborn at the vernal equinox, which is Easter. It is important to note, that the pre-Socratic philosophy of nature, especially the so-called Pythagoreans, were later on greatly influenced by the Chaldean wisdom with its mystical interpretation of numbers and its cosmology based on the sun and the stars. The

Chaldeans not only made a calendar, but also divided the year into four seasons symbolized by the sun wheel with four radii, in a way a double symmetrical symbol of justice.<sup>2)</sup>

If, for a moment, we turn to the Greek cosmology, we will find that the Greek first operated with two seasons, which were summer and winter. As early as at Homer's time, however, climatic changes and the dependence of the shipping on the firmament made it suitable to divide the year into three seasons, viz. spring, summer and winter. Autumn as a fourth season is mentioned for the first time in the 5th century B.C. by Hippocrates, the astronomer.<sup>3)</sup> Even during this period, which was dominated by the Persian expansion in Asia Minor, Greek philosophy was under a strong influence by Persian philosophy, by which the Babylonian culture had been adopted. The philosophers were in search of the eternal and unalterable values in the changing material world and therefore imagined life as a constant cycle.<sup>4)</sup>

Originally, the Greek gods were not very much interested in the human race.<sup>5)</sup> The course of nature follows regularities to which even the gods are subject. Winter succeeds summer, and summer succeeds winter, and men may hope for and trust in the alternation of the seasons. In the 7th century, however, the gods and with them

2) *Bernhard Rehfeldt*, *Die Wurzeln des Rechts* (1951), Kap. IV, *same*, Einführung in die Rechtswissenschaft (3. Aufl. ed. by *Manfred Rehbinder*, 1973) § 21; *A. Jeremias*, (infra n. 7) p. 184 ff. and 193 ff. The scales are not known as a symbol until about 2000 at the Semitic Dynasty about the time of Hamurabi. Perhaps the Semites have brought it to Babylon, cf. *Jeremias*, p. 205; at the same time the Ram became a vernal symbol.

3) *Kleine Pauly*, II (1958) (cf. n. 5) col. 1301, *West* (infra n. 4) p. 109.

4) *M. L. West*, *Early Greek Philosophy and the Orient* (1971), *B. L. van der Waerden*, *Die Astronomie der Pythagoreer* (1951).

5) *Hugh Lloyd-Jones*, *The Justice of Zeus* (1973) p. 161 and passim. See also *Roscher*, *Ausführliches Lexicon der griechischen und römischen Mythologie*, re *Dike*, *Horai*, *Moirai* and *Tyche*, and *Pauly*, *Realencyclopädie der klassischen Altertumswissenschaft*, re *same* words.

Regarding Greek law and mythology, also see *Julius Stone*, *Human Law and Human Justice* (1965) §§ 2–4, *Rudolf Hirzel*, *Themis, Dike und Verwandte* (1907), *H. Vos*, *Themis* (1956), *J. E. Harrison*, *Themis* (1927), *Felix Flückiger*, *Geschichte des Naturrechts I* (1954), *A. Verdross*, *Abendländische Rechtsphilosophie* (1963), 1. Abschnitt, *Erik Wolf*, *Griechisches Rechtsdenken I* (1950) p. 19 ff., *Edgar Bodenheimer*, *Jurisprudence* (rev. ed. 1974), Ch. I.

the seasons became moral quantities. In Homer the three Horae are the goddesses of the seasons, but according to Hesiod they are the goddesses of law, justice and peace as well. The Horae are daughters of Zeus and Themis, who was originally Zeus' adviser, but as time went on became the goddess of the traditional customary law and social order. Eunomia, one of the Horae, is the custodian of law and order, Dike, the other, is the goddess of law, and Eirene, the third, is the goddess of peace. In this allegory Hesiod illustrates the old Greek view that cosmic order corresponds with human order, and that peace is of vital importance to society and depends on law and the maintenance of law. The enemies of justice are Hubris (insolence or rather excess) and Eris (discord) and the daughters of Eris, who are Dysnomia (disorder), Lethe (forgetfulness) and Amfilogiai (false and ambiguous words).<sup>6)</sup>

Among these Hubris is of special importance to the understanding of Greek thought in this area. To commit hubris means to take more than "one's portion", i.e. more than one has been allotted by fate or the Moirae, who, like the Nordic Norns, measure, spin and cut the human thread of life. It is a crucial idea of the later Greek, Roman and European natural law philosophy, that everybody has an allotted portion in life, that he must content himself with this portion and always give every man his due. It is an interesting fact that the three Moirae are the sisters of the Horae and have also, to some extent, the same functions being present on occasions of birth, wedding and death. More interesting still is the metamorphosis which comes about in the course of time. As early as in Pindar, about the year 500, the goddess Tyche has become one of the Moirae. Eventually she becomes the most important one and substitutes the rest. Tyche is the goddess of fortune, therefore also of death, and later she becomes the goddess of good luck and success. During the 6th century Tyche becomes the fourth Hora. It cannot be proved that this change takes place at the same time as the division of the year into four seasons, but it is remarkable, after all, that the fourth season was autumn, and that the scales were made the symbol of autumn, as also done by the Babylonians.

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6) See among others *West*, (loc. cit. n. 4) p. 176 ff. and *Frisch*, (infra n. 17) I p. 362.

In the course of the preceding 2200 years the axis of the earth had changed its precession so far that the autumnal and vernal points had moved to another position on the firmament, so that the Virgin had taken the place of the Scales.<sup>7)</sup> Tyche is often identified with the Virgin, and she is often pictured with the scales in her hand.<sup>8)</sup>

In this way a double symmetry is established. The four axes, then, represent law, fortune, order and peace. Tyche, however, originally personifies the destiny of man, and it was not until later she came to personify the good fortune. In this latter capacity she is an important goddess of the post-classical era, and her role is taken over by the old Roman Dame Fortune, mostly depicted holding the sun wheel in her hand, but also sometimes with a pair of scales. In Rome she was the goddess of abundance and trade,<sup>9)</sup> and the scales were a ritual instrument for the transfer of ownership. According to the Law of the Twelve Tables ownership could only be transferred *per aes et libram*, a ritual which was equivalent to our deed of conveyance at the transfer of real property. The parties struck a piece of copper placed upon a pair of scales, probably a ritualized relic of an earlier weighing practice.<sup>10)</sup>

It is a wellknown fact that the old monetary units were always weight units. The word lot means both the weight used in the scales, the fate one is allotted in one's life, and the luck one has the chance of winning by means of a lottery ticket. The word has undergone an important change of meaning just as the ideas of the human conditions of life have changed.

In order to get finished with the mythology we might imagine

7) Cf. *Jeremias*, Handbuch der altorientalischen Geisteskultur, 2. Aufl. 1929, p. 202 and 220.

8) See *The Oxford Classical Dictionary*, re Tyche, *Roscher* V (loc. cit. n. 5) col. 1330 ff., esp. 1341 and 1343. Also see *Pauly* VII (loc. cit. nr. 5) col. 1649; by and by a Pantheia (a universal goddess like Fortune in Rome).

9) *J. E. Harrison*, (loc. cit. n. 5) p. 524 ff., *The Oxford Classical Dictionary*, re Tyche, *Horae*, *Fortuna* and *Fate*, and also re *Balance* and *Justice*, *Pierre Lavedan*, *Dictionnaire illustré de la mythologie et des antiquités grecques et romaines* (ed. 1931) re *Balance* and *Justice*, *Lloyd Jones*, (loc. cit. nr. 5) p. 160.

10) *Max Kaser*, *Das Römische Privatrecht. Erster Abschnitt* (1955) p. 37 ff., *György Diosdi*, *Ownership in Ancient and Preclassic Roman Law* (1970) p. 62 ff.

that the later Goddess of Justice represents a combination of Dike and Tyche. If we assume that Tyche represents the scales, it comes natural to look upon the sword as a successor of the staff, which was originally the attribute of Dike. Eunomia and the symbol of the legal power very likely originate from Dike. In Homer Dike is the goddess who comes between the contending parties or strikes the earth between them with her judge's staff. We can imagine Dike as the arbitrator throwing her staff and thus settling a dispute.<sup>11)</sup> Also the umpire is in the middle of the contest. In the Iliad we hear that Zeus holds the dead bodies of Achilles and Memnon upon a pair of scales.<sup>12)</sup> In the Book of Daniel, ch. 5, verse 25, we also find the wellknown story of Daniel interpreting the writing on the wall to the Babylonian king: *Mene mene tekel ufarsin*, which means: You are weighed and found wanting. Mines and shekels were also monetary and weight units as well, and the anecdote is based on this ambiguity and profundity. The scales, then, symbolize at the same time destiny, trade, morality and law.

### III. RECIPROCITY, PROPORTIONALITY AND EQUIVALENCE

#### A. The enforcement of law

In primitive societies there exists no central power to distribute values and to confer status,<sup>13)</sup> nor to maintain order and react against violation. All the individuals of each single tribe were united by virtue of the common dependence on the economic unity, which might be a herd, as with the nomads, or an agricultural unit. At still

11) *Hirzel*, (loc. cit. nr. 5) pp. 93 and 99.

12) *Hirzel*, (loc. cit. n. 5) pp. 89 and 228.

13) See to the following *Stig Jørgensen*, *Kontraktsret I* (1971), ch. I with references, *same*, *Erstatningsret* (2. udg. 1972), ch. I with references, *same*, *Erstatning for personskade og tab af forsørger* (3. udg. 1972) p. 4 ff. with references, *same*, *Law and Society* (Akademisk Boghandel, Århus, 1971), p. 69 ff., cf. p. 30 ff.; also see *Torstein Eckhoff*, *Rettferdighet* (1971), *Max Gluckman*, *Politics, Law and Ritual in Tribal Society* (1965) pp. 17 f., 48 f. and 63 f., *same*, *Ideas and Procedure in African Law* (1969), p. 71 ff., *P. B. Bohannan*, *Law and Warfare* (1967), p. 3 ff., *Jeremias*, (loc. cit. n. 7), p. 52 ff.

more primitive stages of development the proceeds of the chase were distributed among all the members of the tribe according to a certain order of precedence. There is no contract needed, since everybody contributes and receives his share in conformity with the traditional norms. The old folks represent experience, the children represent the future. In a static society experience will be of great value, and therefore no contracts or social or philanthropic organizations will be needed to care for the oldest and the youngest members of the society. Even the most primitive cultures, however, show examples of goods being exchanged among the tribes, which was normally done immediately according to the principle of *quid pro quo*.

The enforcement of law was necessarily a private matter. If anybody was wronged, he or his family must carry out the reaction themselves, a reaction which was always some sort of revenge. The chance of being revenged, of course, depends on the number and power of one's helpers. So it was very important to belong to a powerful tribe or family. Also the chances of being left in peace were obviously proportional to one's possibility of fighting back. It is rather thoughtless and at any rate unhistorical to condemn the right of revenge. Originally this right was not only accepted, but it was the necessary basis of society. The right of revenge is effective not only in repairing harm done in the past, but also in preventing future harm.<sup>14)</sup>

In every primitive society we will find that the enforcement of law — which does actually take place — is objective just like the distribution of values. The individual has no legal personality of his own, but is only important in his capacity of member of the collective. An injury of the individual is an injury of the entire family or group, and the vengeance is theirs. But if vengeance was allowed to sway to and fro among families and tribes, it would at length turn out rather damaging to both agriculture and trade, on which society depended. Therefore, in all known cultures from the law of Hamurabi to the modern Western Europe, we observe that

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14) See *Ole Fenger, Fejde og Mandebod* (1971) and review of the book by the present author in *Historisk Tidsskrift* 12, VI (1972) p. 209 ff.

the unlimited revenge is substituted by the idea of proportionality between injury and revenge. The best known principle is that of *talion*, found in the Old Testament: An eye for an eye and a tooth for a tooth. No doubt the principle of talion was originally a great step forward in the social development.

The next stage of development was the conversion of revenge and talion into fines, i.e. punishment in the form of an economic loss. We must imagine that such compensation was at first fixed by arbitration in each conflict situation,<sup>15)</sup> but by and by we see that the sums are fixed at certain rates, a sort of catalogue prices: so much for killing somebody, so much for an arm, a leg, a toe, or a nose. The institutes of vengeance and feud are literarily connected with the descriptions of earlier social formations, the Homeric society of big farmers about 800 B.C. and the Icelandic Sagas, whereas the penalty systems are found in the Nordic provincial laws of the 12th and 13th centuries as well as in the law of Hamurabi about 1700 B.C., in the contemporary Hittite penal laws, in the somewhat younger Pentateuch (6th – 8th centuries B.C.), in Solon's Greece about 600 B.C., and in the Twelve Tables of the preclassic Rome about 450 B.C. In all these cases we see that the penalty system presupposes an underlying right of revenge, which now and then makes itself felt, and that the penalty rates are competing or concordant with a duty to pay damages for harm done.<sup>16)</sup>

The oldest form of reaction, as mentioned, was collective and objective and was independent of the offender's guilt. But as time went on the collective systems broke up, and ideas of individual responsibility came into being. From about the middle of the 5th century all the Mediterranean cultures, Palestine as well as Greece and Rome, moved towards a conception of society as consisting of individuals. Consequently, the individual and nobody else was considered responsible for his works, and so, to a certain extent, the responsibility was attached to the subjective guilt of the delinquent.

15) Erstatningsret (n. 3) p. 3; also see *Torstein Eckhoff*, (loc. cit. n. 1), p. 161, *Gluckman*, Ideas etc. (loc. cit. n. 13) p. 71 ff., *same*, Politics etc (loc. cit. n. 13) p. 169 ff., *Bohannon*, (loc. cit. n. 13) p. 12 f.

16) *A. S. Diamond*, Primitive Law (2nd ed. 1950), p. 1 f., *Stone*, (loc. cit. n. 5), p. 18 ff.



The Oresteia by Aeschylus still shows how the guilt is taken over by the family and the case is decided by the inexorable fate, but only a few years later, in Euripides, the individual responsibility has developed. The same development takes place in the European countries, only a couple of thousand years later. Not until the middle of the 18th century do we find the punishment, the reaction of the society, fully developed and separated from the individual responsibility in fact attached to the negligence of the delinquent.

We cannot go into details here, but broadly speaking we may say that the punishment is fixed and enforced by society proportioned to the crime committed, whereas the payment of damages is a private law reaction allowing the sufferer of an economic loss the right to claim damages from the tortfeasor in proportion to his loss.

An especially interesting theme in connection with the idea of symmetry is that of the so-called "reflecting punishments", which survive rather late in history. The point of a reflecting punishment is, just like the talion principle, to eradicate the crime by wiping out its tool, for instance when the thief's hand is cut off or the incendiary is burnt to death.

The thought of retaliation in law is deeply rooted in moral and religious ideas. Good deeds are rewarded with a clear conscience in this life and with the salvation of the soul after death, while evil works are punished with a bad conscience and damnation of the soul.<sup>17)</sup> In St. Matthew 25.33–46 the Day of Judgment is painted, when the sheep are separated from the goats, the former to live forever and the latter to suffer eternal punishment. According to the Law of Moses evil must be returned for evil, and sin must be punished. But in his Sermon on the Mount Jesus tells us to return good for evil, and promises forgiveness of sins. In both cases, however, the line of thought is symmetrically structured.

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17) Corresponding ideas were introduced in Greek philosophy through the Pythagorean School, which was strongly influenced by the Persian Zoroastrianism, cf. *v. d. Waerden*, (loc. cit. n. 4) p. 8 f., *West*, (loc. cit. n. 4), p. 176 ff. By virtue of this influence the metaphysics of Plato and Aristotle, which led to the a priori ethics, was framed, perhaps also influenced by the decline of democracy and the sophist relativism after the Peloponnesian War, cf. *Hartvig Frisch*, *Europas Kulturhistorie* (2. udg. 1961) I, p. 468.

This development, of course, must be considered in connection with the economic and social development. The rise of the great cities resulting from the increasing trade and shipping was one of the most important factors which broke up the traditional status relations and made it possible that the development of the institutions of society could keep pace with the increasing production and division of labour, which cause the need for social institutions to grow.

## B. Contract

The individualistic concept of society is not only a condition of the belief in individual responsibility, but also the prerequisite of the private law contract. The idea that the individual was able to, and had a free right to, make contracts with others regarding exchange of values presupposes the philosophy of individualism, but of course it all comes back to the new society, which was dominated by trade and shipping, and which called forth an increasing need of new patterns for mutual binding of parties. From the earliest civilizations, however, the total freedom of contract has been distrusted for fear of abuse and exploitation. Even the classical Roman law had not yet accepted other contracts than the wellknown types as being legally binding. It was considered of special importance to establish formal guarantees against abuse of unilateral obligations. Normally a contractual obligation must be established according to one of the traditional contract patterns to secure payment (*synallagma*).

Not until the beginning of the 17th century with Hugo Grotius was a free and formless making of contracts accepted in principle.<sup>18)</sup> In the static mediaeval society it was a general endeavour to protect the individuals against abuse. Such endeavours were

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18) See *Stig Jørgensen*, Grotius' Doctrine of Contract, *infra* p. 83, *same*, Vertrag und Recht (1968), p. 49 ff., *same*, Vertragsverletzung I, Festschrift für Pan. J. Zepos (1973), p. 283 ff., *same*, Vertragsverletzung II, Festschrift für Karl Larenz (1973), p. 549 ff. and *F. Wieacker*, Privatrechtsgeschichte der Neuzeit (2. Aufl. 1967), pp. 295 ff., 311 and 520.

based on the great authority of Thomas Aquinas and his doctrine of the right price (*justum pretium*) and proportion between performance and payment (*laesio enormis*), and a fine-meshed network of price controls and prohibition of interest and exploitation was introduced and maintained.

This doctrine of equivalence, which served the purpose of securing a fair balance of value of the parties' payments in ordinary mutually obliging contract relations, was taken over by the later Spanish moral philosophy and came to be part of the general doctrine of contract framed by Hugo Grotius at the beginning of the 17th century. Grotius and the later natural law scholars (Pufendorf, Thomasius, Wolff) supplemented the traditional doctrine of liability for breach of contract with a doctrine of right to reduction of the price if the delivery is defective, and right to cancel the contract in case of non-fulfilment. These doctrines may be looked upon as a limitation in return for the freedom and formlessness of contracts. In his statement that in a contract you must take in the same amount as you spend Pufendorf has expressed this idea very concisely. This doctrine has been adopted by the more recent European contract law and has been supplemented with a general doctrine of frustration. In German legal science *Äquivalenzstörung* is mentioned as the most marked breach of the *Geschäftsgrundlage* of the parties. In order to secure the contract parties against abuse a series of reasons such as duress, fraud and error, all dating back to Roman law, have been accepted as justification for cancelling contracts. In addition most countries have accepted rules of invalidity in cases where one person has exploited another's state of inferiority to obtain a payment which is disproportionate to his own contribution, and various so-called general clauses with the purpose of setting unreasonable contract terms aside, especially in cases of exploitation of consumers or other relatively weak groups. In Denmark, as is wellknown, a Bill has been passed which allows such setting aside, but also other countries have rules which justify the setting aside of contracts and conditions contrary to *gute Sitten* and *Treu und Glauben*.<sup>19)</sup>

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19) Cf. Stig Jørgensen, Unreasonable Contract Conditions in Nordic Law, The Journal of

Several unwritten *legal practices* rooted in Roman law are based on similar ideas of proportionality and consideration. Just as the criminal law is based on a negative sanction proportionate to the seriousness of the crime it follows from the so-called doctrine of unjustified enrichment that he who obtains an "unjustified" enrichment must hand over this enrichment or at least the saving to the one who suffers a loss by this, for instance if somebody improves the things of others in good faith or has such things at his disposal. Correspondingly, he who acts on behalf of another person with good cause, but on his own initiative, has a right to compensation for his expenses (*negotiorum gestio* and *jus necessitatis*).<sup>20)</sup> This line of thought is wellknown in moral and political reasoning regarding the proportionality of input and output, cf. V below.

#### IV. LAW AND EQUITY

This doctrine of modification of onerous contract terms is ideologically derived from the third form of material justice mentioned above in the introduction.<sup>21)</sup> The idea dates back to the pre-Socratic sophists, who framed a general doctrine of meaning, etymology, and the distinction between the general problem and the individual case, and thus became the founders of the grammatical science. Gorgia, the sophist, was the first to consider the relation between the general absolute rule and the demands of the individual case as a question of justice (*epieikei*), but it was Plato who worked out a general doctrine of this question. According to the formal justice equal cases must be treated equally. But which are the

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Business Law 1975, p. 324 ff. Regarding the recent development of private law under the influence of the criticism of the positive law from an equity point of view, see *Wieacker*, (loc. cit. n. 18), p. 514 ff.

20) Obligations *quasi ex contractu*, cf. *Kaser*, (loc. cit. n. 10) p. 489, *Stig Jørgensen*, *Kontraktsret I* (loc. cit. n. 13) p. 64 ff., *A. Vinding Kruse*, *Erstatningsretten* (2. udg. 1971), par. 19.

21) See to the following *Stig Jørgensen*, *Vertrag und Recht* (1968), p. 111 ff., *same*, *Law and Society* (loc. cit. n. 13), p. 68 f.; also see *Erik Wolf*, *Griechisches Rechtsdenken II* (1952), p. 67 f., *H. Meyer-Laurin*, *Gesetz und Billigkeit im attischen Prozess* (1963).

criteria to decide whether cases are equal? The qualification of a concrete case as compared to the general rule is corrected and amplified by a series of individual factors, especially since it has become usual to accept the importance of psychological and moral factors, a circumstance which greatly influenced the later doctrines of contract and legal interpretation, according to which, after Cicero, considerations regarding will and purpose were recognized.

As time passed by the Roman praetorship developed a practice which allowed both writs and objections against legal proceedings, neither of which were known according to traditional law.<sup>22)</sup> This *bona fides* practice developed into the general doctrine of *aequitas* of the postclassical Justinian law, and, as suggested by the name, it had the purpose of securing equity between the legal status of the parties to a concrete case as opposed to the general rule.<sup>23)</sup> The same distinction between the strict traditional law and equity is found later on in English mediaeval law according to which the Lord Chancellor, whose office was partly corresponding to that of the Roman praetor, was given the authority to allow new complaints and objections which were unknown to common law.<sup>24)</sup>

From this it is evident that also the application of rules in concrete cases was considered to be a question of fairness or equity of the parties' duties. *Summum ius, summa iniuria*.<sup>25)</sup>

22) Max Kaser, (loc. cit. n. 10) p. 183 ff., 404 ff., F. Pringsheim, *Aequitas und bona fides*, Gesammelte Abhandlungen I (1961), p. 154 ff., Edgar Bodenheimer, (loc. cit. n. 5), p. 13 ff. and ch. XII.

23) Max Kaser, (loc. cit. n. 10) p. 172 and F. Wieacker, (loc. cit. n. 18) p. 26 ff. and same, *Vulgarismus und Klassizismus im Recht der Spätantike. Vom Römischen Recht* (1961) p. 222 ff., E. Levy, *Weströmisches Vulgarrecht* (1956) p. 14 ff., Flückiger, (loc. cit. n. 5) p. 257, Zippelius, (infra n. 32) p. 30 f., R. A. Newman, *The Unity of Law*, Xenion, Festschrift für Pan. J. Zepos (1973) p. 327 ff., N. Horn, *Aequitas in den Lehren des Baldus* (1968), Guido Kisch, *Erasmus und die Jurisprudenz seiner Zeit* (1960), Edgar Bodenheimer, (loc. cit. n. 5) p. 16 ff.

24) Peter Stein and John Shand, *Legal Values in Western Society* (1974) p. 97 ff., Ralf A. Newman (ed.), *Equity in the World's Legal Systems* (1973), same, (loc. cit. n. 23), Edgar Bodenheimer (loc. cit. n. 5) p. 250.

25) Also see G. Eisner a.o. in "Summum ius summa iniuria" (1963) p. 1 ff. and Johannes Stroux, *Römische Rechtswissenschaft und Rhetorik* (1949), Edgar Bodenheimer (loc. cit. n. 5) p. 229 ff.

## V. SOCIAL UTILITY AND SOCIAL CONTRACT

Even though the ideology of consideration and retribution seems to be a universally historical phenomenon, especially prevailing in primitive societies, it is a fact that the most explicit expression of the idea of equality and consideration as a general concept of justice has been given by Aristotle in the 5th book of his *Nichomachean Ethics*.<sup>26)</sup> As mentioned, Aristotle distinguishes between the commutative justice and the distributive justice. He regards the former as being of an early origin, whereas the latter presupposes an organized community, a *polis*. He, therefore, dates the distributive justice to Solon, about 600 B.C., since Solon did not build upon the traditional customary law (*nomos*) but is known just because he was a social reformer who adapted Athens to the new money economy and defined the legal status of the inhabitants as that of the citizen, according to which everybody must make his contribution.<sup>27)</sup>

Aristotle says himself that he has taken over the idea of the commutative justice in private law relations from Pythagoras or the Pythagoreans, who found the essence of things expressed through numbers. Justice manifests itself in reciprocity and equality, and since it represents such great social value, it was expressed by means of a number, viz. 4, the first square number.<sup>28)</sup>

The Pythagorean ideas, however, were connected with the dualism of the Persian thinking of the 6th century, which, according to the experts, had a special influence on the creative Greek thinking of that period.<sup>29)</sup> The dualism of soul and body, of good and evil, of salvation and perdition was part of Heraklitus' philosophy of the identity of opposite concepts such as good/evil, up/down, day/night, just/unjust, peace/war, etc. A quality cannot be conceived as such except compared to its contrast, and these

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26) The *Nichomachean Ethics* V, 1129a (Loeb Classical Library 1968), p. 253 ff.

27) *Politics* II, 1273b (Loeb Classical Library 1967), p. 165.

28) *Aristoteles* (loc. cit. n. 26) 1132b (Loeb p. 227 ff.), se v.d. *Waerden* (loc. cit. n. 4), p. 8 f.; *Guthrie* (infra n. 30), p. 303. On the wonderful doctrine of numbers, harmony and cosmos, see v.d. *Waerden*, (loc. cit. n. 4), p. 9.

29) *M. L. West* (loc. cit. n. 4), p. 213 ff.

contrasts are nothing but two aspects of the same matter.<sup>30)</sup>

The generally accepted doctrine of the constant change of physical things is closely connected with this idea of the identity of contrasts and with the Greek conception of the development as a cyclic movement.

Pythagoras and the Pythagoreans elaborated this dualism theoretically as the contrast between the limited world (*peras*) and the unlimited world (*apeiron*), which were the beginning of the universe. Since *peras* is also the same as good and is identified with the cosmic order, and *apeiron* is identical with evil, the world must consist of the contrast of good and evil, of order and chaos. The unity of the total and perfect cosmos is divine because of its ordered, harmonious and beautiful nature. As is wellknown for instance from the natural sciences, the concept of limitation is expressed by the odd numbers and that of limitlessness by the even numbers.<sup>31)</sup>

The most consistent understanding of life as a harmonious equilibrium of two opposites is found in Plato, both in his Symposium in the myth of Eros and in his state theory, which deal with this harmony in the individual as well as in society.<sup>32)</sup> But Aristotle rejected Plato's idealism and founded an empirical and naturalistic science instead. He accepted the Pythagorean idea of justice as proportionality, but only as one single aspect of justice. The commutative justice must be supplemented by the distributive justice.<sup>33)</sup>

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30) See Guthrie, *A History of Greek Philosophy I* (1962), p. 442 f., West, (loc. cit. n. 4), p. 111 ff., Wolf, (loc. cit. n. 21), p. 235 ff.

31) The contrasts stand in the following relations to each other: limited/unlimited, odd/even, one/more, right/left, male/female, at rest/moving, straight/crooked, light/dark, good/evil, square/oblong. What is right, accordingly, belongs to the good category. Etymologically the word right has the same meaning as straight or proper. See Guthrie, (loc. cit. n. 30), p. 157 ff. especially p. 212 ff., West, (loc. cit. n. 4), p. 213 ff., Pauly, (loc. cit. n. 5) Bd. 24, col. 172 ff.

32) Hartvig Frisch, *Platons Stat* (1924), p. 51–55, Reinhold Zippelius, *Geschichte der Staatsideen* (1971), p. 5 ff., Flückiger, (loc. cit. n. 5), p. 125 ff., Verdross, (loc. cit. n. 5), p. 30 ff., Edgar Bodenheimer, (loc. cit. n. 5), p. 6 ff.

33) Zippelius, (loc. cit. n. 32), p. 18 ff., Stein and Shand (loc. cit. n. 24), p. 59 ff., Flückiger, (loc. cit. n. 5), p. 163 ff., Verdross, (loc. cit. n. 5), p. 40 ff., J. Ritter,

It was, as mentioned, an old Greek idea that the cosmic laws were reflected in the life of the individual man as well as in the social regularities. Nature had allotted every man his station and his share, and it was deemed in defiance of the measure assigned (the symmetrical one) to secure more for oneself or give less to others than their share. That was called *hybris* and would be punished by the Gods. This conception of the origin of law changed with the sophists of the 6th century.<sup>34)</sup> They thought that the Gods and the laws as well were the work of man, and that justice and the rules of law were the expression of a convention, a contract between the citizens, who, therefore, were free to alter the social order and the laws at any time.

Taught by the bitter experience of the Peloponnesian War both Plato and Aristotle had their doubts, whether the good qualities of man would unconditionally prevail in the form of a reasonable constitution and reasonable laws. We all know Plato's model of the ideal state as a communist dictatorship governed by the philosophers, defended by the soldiers, and fed by the peasants. We also know that Aristotle considered man as a social being, whose noblest appearance was the citizen of the Greek polis. Aristotle, however, says nothing definitive about the ideal state. Indeed, he says, every man should have his due, but the social distribution of values, nevertheless, takes place according to certain criteria depending on the form of government: in monarchies according to status and rank, in aristocratic communities according to effort and achievement, while in democracies the distribution is said to be equal, although it is only so within the individual social groups, as in the Greek polis. As to slavery, that does not cause Aristotle much anxiety.<sup>35)</sup> First of all it was the later stoics who framed the theory of the equality of all men. Combined with the Christian concept of man this theory developed into the late Roman ideology of equality, which was not, however, applied consistently in actual

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Naturrecht bei Aristoteles (1961), *Edgar Bodenheimer*, (loc. cit. n. 5), p. 10 ff. and 208 ff.

34) *Erik Wolf*, (loc. cit. n. 21) II, *Zippelius*, (loc. cit. n. 32), p. 1 ff., *Flückiger*, (loc. cit. n. 5), p. 86 ff., *Verdross*, (loc. cit. n. 5), p. 15 ff.

35) *Zippelius*, (loc. cit. n. 32), p. 26.



practice.<sup>36)</sup> On the whole, Roman culture does not contribute materially to the theories of justice. The Romans were practical people, not philosophers. Still they developed the practical legal procedure with two parties and the judge in the middle, and they were the first (Seneca) to set forth the maxim of *audiatur et altera pars* (the other party must also be heard). This line of thought leads straight to the systems of procedure of the modern constitutional state.<sup>37)</sup> By the way, the quintessence of the Roman ideas of justice was the maxim of *honeste vivere, neminem laedere, suum quique tribuitur* (to live honestly, do harm to nobody and give every man his due).<sup>38)</sup>

Like the Greek constitution, the classical Roman form of government was in principle a republican democracy, which was, as a matter of fact, based on the contract, which was, according to the sophists, the warrant for the giving of human laws. Formally the later empire was a continuation of the republic, and through the postclassical era, therefore, the emperor's legislative power was pretended to be derived from such popular consent. But the truth, of course was otherwise.

After the fall of the empire in Western Europe the feudal system and the customary law were revived, and, as time passed by, no secular legislative power was recognized, in as much as only the church had the authority to supplement the traditional customary law by canon law. Thomas Aquinas, however, held that a fixed framework for the social life of mankind was provided by the law of God, and that this framework was to be filled by the secular authorities. If the secular laws were at variance with the natural divine law, the secular law should be invalid in principle, but Thomas did not recognize any right of resistance except in extreme cases. The regard for peace and order came before everything.<sup>39)</sup>

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36) Zippelius, (loc. cit. n. 32), p. 31 ff., Flückiger, (loc. cit. n. 5), p. 186 ff., Verdross, (loc. cit. n. 5), p. 46 ff.

37) Max Kaser, Das Römische Prozessrecht (1966), p. 6 ff. (9), Stroux (loc. cit. n. 25), p. 23 ff.

38) Flückiger, (loc. cit. n. 5), p. 257, Kaser, (loc. cit. n. 8), p. 172 f., A. Hägerström, Minnesskrift för 1734-års lag (1934), p. 571 ff. (597 ff.).

39) Zippelius, (loc. cit. n. 32), p. 42 ff. and to the following especially Sten Gagnér,

The succeeding constitutional philosophers (Marsilius of Padua, Bodinius etc.) believed that the human race is especially gifted with power to organize their own relations. This sovereignty belongs to the people as a whole and cannot be divided. It is difficult to tell the origin of this idea, but it is generally accepted that it must be sought in the Jewish culture with its idea of the Ark of the Covenant, the contract of Jehovah and his people, Exodus ch. 24 and 34.<sup>40)</sup> Later, at least, Hugo Grotius makes this contract of the Lord and his people the model of his general doctrine of contract, which covered not only private law contracts, but also contracts between states. And such was exactly the point of departure that Grotius had chosen for his ponderings on the organization and legislation of states.<sup>41)</sup>

Not until the works of Hobbes, and later Locke, Montesquieu and Rousseau, however, do we find the idea of the sovereignty of the people and the social contract consistently developed.<sup>42)</sup> Hobbes, Locke and Montesquieu held that man was unable of limitation and founded their theories of the social contract and later of the tripartition of power on that opinion. From this same point of departure Hobbes, highly inspired by the threatening civil war in England, defended the sovereignty of the king, while Locke and Montesquieu advocated democracy. Rousseau, as is wellknown, presupposed the fundamental goodness of man and therefore advocated absolute democracy.

Both the American and the French constitutions are based on the ideas of the people's sovereignty and the democratic equality of the citizens. But, as later demonstrated by Marx, the equality is only formal, since real equality cannot be established without economic equality, because this is a condition of the realization of the formal

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Studien zur Ideengeschichte der Gesetzgebung (1960).

40) Also see Numbers, ch. 30 on private promises to God, cf. Deuteronomy, ch. 23, verse 23.

41) R. W. M. *D(ias)*, in *Encyclopedia Britannica* 13 (1973), p. 154, *Stig Jørgensen*, The doctrine of Grotius (loc. cit. n. 18), *Rehfeld*, (loc. cit. n. 2), p. 262 ff., *Zippelius*, *Allgemeine Staatslehre* (3. Aufl. 1971), p. 233.

42) *Zippelius*, (loc. cit. n. 41), p. 245 ff., *same*, (loc. cit. n. 32), p. 90 ff. *Rehfeld*, (loc. cit. n. 2), p. 264 ff., *Edgar Bodenheimer*, (loc. cit. n. 5), p. 45 f. and 53 f.

possibilities of equality. The constitutional democratic rights are a manifestation of the freedom from oppression and equality before the law, more than it is freedom to act equally.

The theories of state which are based on the social contract have all been inspired by the leading principle behind the contract institution, that the individuals, as free, equal and sensible beings, form the foundation of society.<sup>43)</sup> Men are neither the passive tools of history, as held by the conservative state theorists, nor the subjects of princes or dictators.

Hume and Bentham, however, rejected the idea of a social contract, because, as they said, the people as such could not think and act, only the individuals. Bentham rejected the idea of justice too and preferred the social utility as a basis of his theory of the state. Good is what leads to the greatest benefit of the greatest number of men. This line of thought was closely connected with the economic liberalism of Adam Smith, a theory which formed an important factor of the economic growth of the 19th century. Adam Smith rejected the mercantile system, according to which the main stress should be laid on the international strength of the trade balance and exchanges.<sup>44)</sup>

Kant rejected Bentham's philosophy of benefit and utility and revived justice as an independent factor of the social philosophy. Unlike those who adhered to the tradition of natural law, he did not accept the idea that the human reason alone could answer the questions of what is right to do and how society should be organized. He found that the duty towards one's fellow beings must be the fundamental basis of morality and society. The freedom of the individual is the supreme good and is only limited by the consideration for the freedom of others. He framed "the golden rule": Do to others what you want them to do to you.<sup>45)</sup> The result of this philosophy is individualism and the so-called night

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43) See to the following among others *Stein and Shand*, (loc. cit. n. 24), p. 63 ff.

44) *Stein and Shand*, (loc. cit. n. 24), p. 69 f., *Stone*, (loc. cit. n. 5), p. 105 ff., *Edgar Bodenheimer*, (loc. cit. n. 5), p. 84 ff.

45) Cf. St. Matthew, ch. 7.2 ("With what measure ye mete, it shall be measured to you again").

watch state that does not — as far as possible — interfere with the business of the citizens.<sup>46)</sup>

However, two other ideas came to prevail in the 19th century and have done so until today. One was Hegel's idea of man as a social being, who can only be free in his capacity of part of a whole.<sup>47)</sup> This reasoning was continued by Karl Marx, who combined it with Bentham's philosophy of utility.<sup>48)</sup> The other idea was the liberalism of John Stuart Mill, who also regarded social utility as a leading principle of morality and social organization. In spite of the theoretical difference between Marx' socialism and Mill's liberalism they agreed that what was good for society was good for the individual, whatever the consequences to him. This philosophy, of course, is very expedient to a developing society, whether its economic system is state capitalism or private capitalism.

Although the object of marxism is a communist society with absolute equality, the interests of the whole are still superior. The ideal of giving according to ability and taking according to requirement is subordinate to the public benefit. It is a thought-provoking fact that such theories of development and growth should be dominant in societies making great economic progress. This is a disharmonious-asymmetrical theory.

The consequences of the recent social development have caused an increasing doubt as to the legitimacy of subordinating the individual rights to the demands of the whole and of preserving inequalities between countries, groups and individuals for the sake of social utility or economic growth. The question is, whether regard for growth is able to justify that everybody gets richer, if at the same time the inequalities increase.

Can we accept as a matter of course that the wisest, the cleverest, the strongest — as the sophists thought natural and as was also accepted by the 19th century philosophers — procure much more

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46) Zippelius, (loc. cit. n. 32), p. 137 ff., *same*, (loc. cit. n. 41), p. 126 ff. Stone, (loc. cit. n. 5), p. 82 ff., Edgar Bodenheimer (loc. cit. n. 5), p. 60 ff.

47) Zippelius, (loc. cit. n. 32), p. 153 ff., Stone (loc. cit. n. 5), p. 184 ff., Edgar Bodenheimer, (loc. cit. n. 5), p. 65 ff.

48) Zippelius, (loc. cit. n. 32), p. 162 ff. Edgar Bodenheimer, (loc. cit. n. 5), p. 79 ff.

for themselves than is obtainable for their less favoured fellow beings, even if the latter have become better off on the whole?

These questions are taken up by John Rawls, the American moral philosopher, in his book, *A Theory of Justice* (1971). He rejects the conservative as well as the socialist philosophy of development and also the idea of social utility as a foundation of the morality and politics of a modern community.<sup>49)</sup> Instead he is inspired by the traditional theory of the social contract. The regard for the interests of the whole must be harmonized with the regard for the individual. Rawls introduces an interesting artifice consciously based on Kant's demand for equal freedom. How can the greatest possible individual freedom be secured on one hand together with the greatest possible equality on the other? Rawls imagines humanity placed in a hypothetical choice situation with no knowledge of their own economic social or intellectual position. What social principles would they be able to agree upon? Rawls supposes that they would agree on two basic principles:

1. Everybody has a right to the widest freedom compared to a similar freedom of others.
2. Social and economic inequalities cannot be accepted except in two cases:
  - a. they must be justified by regard for the benefit of all, especially the poorest,

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49) Rawls' book has given rise to a vast discussion, see review by *J. Leon*, *Modern Law Review* 1973 p. 667. *Th. M. Scanlon and D. J. Bentley*, *University of Pennsylvania Law Review* 1973 p. 1020 and 1070, *L. McBride and J. Feinberg*, *Yale Law Journal* 1972 p. 980 ff. *Ch. Fried*, *Harvard Law Review* 1972 p. 1691. *N. McCormick*, *The Law Quarterly Review* 1973 p. 893, *H. Oberdiek*, *New York Law Review* 1972 p. 1012, *G. Meritt*, *Vanderbilt Law Review* 1973 p. 665, *D. Lyons*, *Cornell Law Review* 1974 p. 1064. *A. Schwartz and L. Choptiany*, *Ethics* vol. 83 (1973) p. 294 ff. og 146 ff. See also *Stein and Shand* (loc. cit. n. 24), p. 71 ff. and the following articles in *Philosophy and Public Affairs*: *Brian Barry*, *John Rawls and the Priority of Liberty*, Vol. 2, 1973 p. 274 ff., *Robert Nozick*, *Distributive Justice*, Vol. 3, 1973 p. 45 ff., *Richard Miller*, *Rawls and Marxism*, Vol. 3, 1974 p. 167 ff., *William N. Nelson*, *Special Rights, General Rights and Social Justice*, Vol. 3, 1974 p. 410 ff., *Michael Lessnoff*, *Barry on Rawls' Priority of Liberty*, Vol. 4, 1974 p. 100 ff. See in Scandinavian literature: *Karen Dyekjær Hansen*, *Kan retfærdighed defineres?* *TfR* 1970 p. 67 ff., *Edgar Bodenheimer*, (loc. cit. n. 5), p. 157 ff.

- b. they must belong to positions and institutions which are open to all.

Rawls comprises these two principles under a principle of fairness, according to which he rejects both an extreme equality and an inequality, which does not provide equal conditions for all. I shall not in this place talk about the extensive international debate aroused by Rawls' ideas on legal policy, tax policy and political theory, but shall confine myself to sum up the most important objections.

A very sensible objection is that the theory does not tell anything about what should be done about the people who would not choose the same political values as Rawls thinks that all reasonable people would do.

And what does equality mean? Obviously, it does not mean equality within the groups of a status society. But does it mean equal payment for the same work, or rather equal payment for all kinds of work? This we know, was the problem of Marx and others. The dilemma is due to the fact that some kind of reward seems necessary to motivate the individuals to make an effort. The idea of return has always, as mentioned, controlled the public mind and for practical reasons. But since the ability of making an effort may depend on circumstances beyond the individual's control, such as native social and cultural possibilities, Rawls tries to justify certain inequalities by deciding that they must be to the advantage of the poorest and belong to positions and institutions which are open to all. This social democratic idea, that the inequalities will eventually be reduced, if the access to education and other benefits is open to all, has very much to speak for it, but it will hardly be enough to justify the inequalities nor to work for a neutralizing. To this the social legislation and the tax laws must contribute.

On the whole the correct conclusion must probably be that Rawls' theory is no definitive answer to his question: How can inequalities between the individuals be justified? It must be admitted that several competing criteria are to be considered at the weighing, and that Rawls' merit is just the demonstration of a special procedure for social alterations allowing these competing

political values to wrestle with each other, apart, of course, from the core of his theory: that justice is an independent criterion which has to compete with the social utility.<sup>50)</sup>

If anybody should assert that the ideas of justice and equilibrium are not alive in recent social debate, this last illustration shows the opposite, and with that I shall end this discursive and summary account of the rôle of symmetry in the legal and social sciences.

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50) Also see *Ota Weinberger*, Gleichheitspostulate (loc. cit. n. 1), *A. M. Honoré*, Social Justice, in: *R. S. Summers*, Essays in Legal Philosophy (1968), p. 61 ff., *same*, Evaluating and improving legal processes. A plea for "process values", *Cornell Law Review*, Vol. 60 p. 1 ff. (1974), *R. S. Summers*, *H. E. Kiefer* and *M. Munitz* (ed.). Ethics and Social Justice (1968). *John Wilson*, Equality (1966), *H. M. Drucker*, Just Analogies?: The place of analogies in political thinking. *Political Studies*, 18 (1970), p. 448 ff., *C. E. Baker*, Utility and Rights. Two Justifications for State Action Increasing Equality, *Yale Law Journal* 84 (1974), p. 39 ff., *R. Dworkin*, Taking Rights Seriously. Is Law Dead? ed. by *E. Rostov* (1971), p. 176 ff. *Weinberger* distinguishes:

1. logical equality: the legal judgment must follow a set of general rules = formal justice.
2. equality before the law: any inequality of the legal treatment must be justified.
3. equality as to contents:
  - a) prohibition of discrimination
  - b) equality as to standards
  - c) evenness (social adjustment).

Like Rawls *Weinberger* considers the *absolute equality* Utopian. The effectiveness of the society depends on reward of skill, merit and performance, but the effectiveness must be subordinate to the regard for human dignity, so that evenness is aimed at as far as effectiveness and freedom allow. — Equality, he thinks, is a necessary but not sufficient condition of justice, but he does not, like Rawls, present a definite model for solution of the dilemma. Instead he recommends a critical discussion of values according to a democratic political procedure. — *E. Bodenheimer*, *Power, Law and Society* (1973) distinguishes:

1. equality of rule classification,
2. commutative equality,
3. equal treatment of equals,
4. equality of fundamental rights,
5. equality of need satisfaction;

also see *Perelman*: Über die Gerechtigkeit (1967) and *Karl Larenz*, Gerechtigkeit als Leitbild der Justiz? *Meyers Enzyklopädisches Lexikon* (1975), p. 277 ff., *same*, *Methodenlehre der Rechtswissenschaft* (3. Aufl. 1975), p. 366 ff., *Edgar Bodenheimer*, (loc. cit. n. 5), Ch. XI.

## GROTIUS'S DOCTRINE OF CONTRACT

Hugo Grotius is generally considered to be the creator of the modern theory of the law of contract.<sup>1)</sup> There is hardly any doubt that to a great extent he built on the foundations laid by scholarly tradition in the field of Roman law and by scholastic moral theology; but unlike his predecessors, he adopted a free attitude towards his sources. Grotius could feel bound neither by Roman law as adapted by secular writers in the Middle Ages – a subject, incidentally, with which he was not thoroughly acquainted – nor, being a Protestant, by Canon law or Catholic moral theology. Therefore, he had recourse to a very large extent both to the Stoic authors – Cicero in particular – and to the Old and the New Testament.

### I. THE MAKING AND FOUNDATION OF THE CONTRACT

#### 1. Roman law and moral theology

The classical Roman law of contract was throughout casuistic and formalistic. The Roman jurists, with their eminent legal sense, had worked out, on the old foundation of formulas, different types of

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1) M. Diesselhorst, *Die Lehre des Hugo Grotius vom Versprechen*, 1959; Hugo Grotius, *Drei Bücher über das Recht des Krieges und Friedens von J. H. v. Kirchmann*, I-II (Berlin 1869): 1st vol., 2nd book, ch. XI on promises, ch. XII on contracts; Pringsheim, "L'Origine des contrats consensuels", *Gesammelte Abhandlungen II*, 1961, pp. 179 ff.



contract: *consensus*, *verbis*, *scriptura*, and *re*. All these, *pacta vestita*, were binding under civil law, while all others, *pacta nuda*, involved no legal obligations.<sup>2)</sup> In post-classical western vulgar law, a general law of contract<sup>3)</sup> gradually gained recognition, but in the high Middle Ages, when the study of the Roman sources and Aristotle's writings had been resumed – from the middle of the 12th century – learned men returned to a stricter approach.<sup>4)</sup> In the medieval theory of commutative justice as formulated by Thomas Aquinas, the moral theologian, and Cajetan,<sup>5)</sup> the jurist, the Roman doctrine of *causa*, the requirement that the acquisition of a right shall have a reason approved by the legal system, is merged with Aristotle's doctrine of equalizing justice, the requirement of equality between what is given and what is received.

Concurrently with the legal obligation and beyond it, a moral obligation was held to be justified on the strength of the principle of truthfulness, which Plato, Aristotle and the Stoics alike regarded as the foundation of justice.<sup>6)</sup> According to canon law, which had the salvation of the soul at heart, all promises were binding in principle; the duty of *fidelitas*, however, was a *debitum morale* enforceable only in the court of conscience. It did not have the character of a *debitum legale* that could be exacted in a civil court. According to Thomas such promises were binding before God if they satisfied the following three conditions:

- (1) *ratio* (consideration),
- (2) *deliberatio* (definite formation of intention),
- (3) *pollicitatio* (declaration to God).

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2) M. Kaser, *Das Römische Privatrecht*, 1955–59, §§ 8, 57; *Id.*, *Römisches Privatrecht*, 1965, pp. 32 f.

3) Levy, *Weströmisches Vulgarrecht*, 1956, pp. 14 f.; Kaser, *Das Römische Privatrecht*, § 200.

4) Stig Jørgensen, *Vertrag und Recht*, 1968, pp. 47 ff. (T.f.R. 1966, pp. 584 ff.).

5) Thomas v. Aquin, *Opera Omnia*, Tomus 9, *Secunda secundae Summae Theologiae* a quest. LVII ad quest. CXXII, cum commentariis Thomae de Vio Cajetani. Rome 1897. (Jacobus de Vio Cajetani 1469–1535).

6) As early as in Byzantine times an ethicization of legal life set in under the influence of a Stoic-Christian doctrine, cf. M. Kaser, *Das Römische Privatrecht*, § 200.

These promises were not subject to the requirement of equalization but, on the other hand, they were not binding in the world of civil law. Molina<sup>7)</sup> and Lessius,<sup>8)</sup> the moral theologians, however, translated St. Thomas's doctrine of solemn promises to God to the secular world, assuming that certain promises of a gift were binding in law on the same terms and conditions even though there was no equality between giving and receiving or any *stipulatio*: the mere promise was sufficient. However, Connanus,<sup>9)</sup> the jurist whose work constitutes the immediate starting point of Grotius's legal thinking, was opposed to the theory of ethical law propounded by the moral theologians, who searched after the socio-ethical core of ancient casuistry, and he based his reasoning upon a traditional doctrine which, in agreement with Aristotle, accentuated the typical factor of objectivity in the ancient rules of contract.

## 2. Grotius

### a. *The principle of will*

As mentioned above, Grotius used the works of his predecessors, but he also drew upon the classical authors as well as the Bible. Grotius laid down a general rule of the binding force of informal promises. His reasoning in this matter was peculiar in several respects: it was both radically new and related to medieval moral theology. Grotius was not primarily a scholar; he was first and foremost a bold and imaginative thinker in the field of legal policy, who often misunderstood his sources and was also quite capable of taking liberties with them if it suited him to do so.

He misunderstood both the Roman doctrine of *causa*, in that he considered the form of *stipulatio* as constituting only a piece of

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7) Luis de Molina (1535–1600), *De Justitia et Jure*, Tomus secundus: De Contractibus. Mainz 1614.

8) Leonhardus Lessius (1554–1623), *De Justitia et de Jure ceterisque Virtutibus cardinalibus Libri quattuor*. Ad 2.2 D. Thomae a quest. 47 usque ad quest. 171. Louvain 1605.

9) Franciscus Connanus (1508–1551), *Commentariorum Juris civilis Libri decem*. Basel 1557.

evidence concerning the intention to be legally bound, and the Aristotelian doctrine of equalization, as interpreted in the Middle Ages, in so far as he identified this doctrine with the doctrine of unjust enrichment. Thus Grotius held the erroneous opinion of the doctrine of Connanus that the transfer of a thing together with an informal promise always involved a legal obligation in the sense that the thing could not be claimed back. It is therefore easy to understand Grotius's doctrine that a promise always contains a transfer either of a thing or an "action". This pattern caused Grotius to apply the model of transfer.

Inter-state treaties are referred to by Grotius as another important argument that all kinds of contracts are binding, since states cannot be limited in their acts by the principle that there are only certain types of contracts. In further support of this point of view Grotius mistakenly cites Aristotle for the idea that the state itself is founded upon a common contract between its citizens. In Aristotle's view the *polis* was a community between free and equal citizens, and it is true that this polity was "natural" to man as a rational being and as a *zoon politicon* (political animal), but Aristotle did not say anything about an agreement between citizens. If anything, the "state", as Aristotle understood it, was conceived of as a self-evident institution and as a realization of what is natural and common and positively laid down by the legislators.<sup>10)</sup>

The religious basis for Grotius's doctrine of promise can be found in his peculiar dualistic views: (1) a Stoic-rational theology (Greek-Stoic rationalism) and (2) the Christian doctrine of man created in the image of God (Judaean-Christian voluntarism). The idea derived from the first view is that man can obtain an insight into unalterable justice, inasmuch as the reason of man is part of divine universal reason. The idea derived from the second view is that on earth man creates law through his own law-making, which aspires after the divine ideal. God, who is not bound by any law,

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10) Joachim Ritter, "Naturrecht" bei Aristoteles, 1961, pp. 28 ff.; P. Shuchman, "Aristotle's Conception of Contract", *Journal of the History of Ideas*, vol. 23, 1962, pp. 257 ff.

acts in contravention of his nature if he breaks his promises.<sup>11)</sup> The logical conclusion of this would be that man must abide by his promises. In particular, Grotius referred to Numbers xxx. 2: "If a man vow a vow unto the Lord, or swear on oath to bind his soul with a bond; he shall not break his word, he shall do according to all that proceedeth out of his mouth."<sup>12)</sup> In his doctrine of contract Grotius gave the voluntaristic component a dominant position, especially in the chapters on error and interpretation. In these respects, it is always the "rational will" which is decisive for the validity and content of the promise. When Grotius conceives the Judaeo-Christian doctrine of the freedom of will as the power to give voluntary gifts to one's neighbour it is a misinterpretation of St. Paul, who regarded liberty as a means of delivering man from sin, death and the slavery of the flesh.<sup>13)</sup> However, Grotius also relied on Cicero, Horace, and the Platonists who, as mentioned above, considered trustworthiness the basis of justice.

By consistently applying his version of the Stoic-Christian doctrine of the autonomy of personality Grotius arrived at the following results:

- (1) he rejected Connanus's traditional "socio-typical casuistry"; he taught that an obligation could only arise if it could be traced back to a person's act of self-binding,
- (2) he held that any autonomous act which has a certain quality creates a legal obligation irrespective of the socio-typical circumstances.

Thus, going back beyond Connanus and also, to a great extent, beyond Thomistic late-medieval scholasticism, Grotius returned to the "pure" ancient sources. The rudimentary application of the

11) Grotius referred to the Ark of the Covenant, the Lord's covenant with his people, Nehemiah ix.8, cf. Genesis xii.7, Hebrews vi.18, x.23, I Corinthians i.9, x.13, I Thessalonians v.24, II Thessalonians iii.3 and II Timothy ii.13.

12) Cf. Deuteronomy xxiii.21 and xxiii.3, Leviticus xxvii.2, Ecclesiastes v.4, Proverbs vi.1-3 ("My son, if thou be surety for thy friend, if thou hast stricken thy hand with a stranger,/Thou art snared with the words of thy mouth, thou art taken with the words of thy mouth./Do this, my son, and deliver thyself, when thou art come into the hand of thy friend; go, humble thyself, and make sure thy friend").

13) Erik Wolff, *Grosse Rechtsdenker*, 1963, pp. 268, 251, 300.

Roman law of contract, the adoption of the idea that the promise is a legal transfer, and the rejection of the doctrine of *causa* as well as the accentuation of the community in *societas humana* in the ethico-religious state of dependence, all these elements in Grotius's thinking prove the use he made of scholastic moral theology. The relationship is particularly evident in his basic doctrine of the three kinds of promises:

- (1) declaration of a present serious intention to perform a future act,
- (2) declaration of an intention regarding a future act,
- (3) manifestation of the intention to transfer a right.

The Thomistic *deliberatio* is found in the first kind, and both *propositum* and *pollicitatio* are found in the second kind. The first two kinds thus comprise the conditions which the Scholastics considered necessary and sufficient for a binding promise – only founding, however, a duty of faithfulness, i.e. a duty of constancy. The third kind contains Grotius's analogy with the transfer of property; by virtue of the promise, a "particle of freedom" is transferred and a legal obligation is undertaken to give or perform something in the future.

These four basic elements of a binding promise can be found in later Romanistic theory, where the basis of the doctrine of will is more strongly emphasized through the adoption of the wider term "declaration of intention". These basic elements can also be found in later Scandinavian law of contract, even after the swing-over in views in the 1870s from the doctrine of intention to the so-called doctrine of reliance. According to the modern Danish writer Ussing the following are the fundamental conditions of a promise: it must (1) be definite and in earnest, (2) be the result of a decision, (3) be made with a view to a legal obligation and (4) be given as a volition.<sup>14)</sup>

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14) Henry Ussing, *Aftaler paa Formuerettens Omraade*, 3rd ed. 1950, pp. 31 ff.

*b. The principle of agreement*

On the basis of the post-classical doctrine of "consensus" as accordant wills (cf. II below) and on the strength of *Dig. 2.14.1.*, a general doctrine of the agreement as a fact on which a right is based was advocated up to the end of the Middle Ages. The conclusion drawn from this was that in order to be legally binding also a promise of a gift had to be accepted by the donee.<sup>15)</sup> Without further discussion Grotius subscribed to this traditional doctrine, though his conception of the individual's will as an autonomous law-making power should rather have led him to the opposite result. The model of the transfer of a right played an important part in Grotius's reasoning; he assumed that the transfer of property required an agreement, and from this he concluded that promises transferring "freedom of action" also had to be accepted in order to become irrevocable.

## II. ERROR

As mentioned above, the voluntaristic basis of Grotius's reasoning had far-reaching consequences for his attitude to the problem of error.

### 1. Classical Roman law

The Roman law of contract<sup>16)</sup> was limited to formal agreements or agreements standardized as to content. When the conditions as to content and form had been fulfilled, the contracts were in principle

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15) Diesselhorst, *op. cit.*, pp. 106 ff. On the grounds for the principle of agreement, see Stig Jørgensen, *Fire obligationsretlige afhandlinger* (Four papers on the law of contracts and torts), 1965, p. 86.

16) J. G. Wolf, *Error im Römischen Vertragsrecht*, 1961; Jörs-Kunkel-Wenger, *Römisches Privatrecht*, 1949; pp. 107 ff.; Max Kaser, *Das Römische Privatrecht*, §§ 58, 59 and 201, and *Römisches Privatrecht*, pp. 43 ff., seem to attach somewhat greater importance to the element of will already in the consensual contracts of classical

valid irrespective of the will of the parties. Even in the so-called consensual contracts it was not the accordant will that constituted the obligation. Consequently the problem of dissent, in the modern sense of lack of correspondence between the declarations of intention of the two parties, did not exist as a legal problem, though the Roman lawyers did not fail to appreciate the psychological phenomenon. The examples of invalidity because of *error* found in the Roman authorities did not, therefore, refer to mistake but to a faulty identification of the contractual obligations or the object of the contract. The designations still call to mind this classification according to the object of the error: *error in negotio*, *error in pretio*, *error in persona*, *error in corpore* and *error in substantia*. In classical Roman law *error in materia (in qualitate)*, on the other hand, was irrelevant, as the properties of the object itself were of no importance for the identification of the object of the contract. But it is evident that *error in corpore* was relevant, because the physical unity of the object was necessary for the purpose of identification. *Error in substantia* presents a peculiar transitional case which was considered relevant in late classical times, although it was not recognized in the early stages of legal development. Recent writers on legal history assume that *error in substantia* was not incorporated into the law until at a later date, no doubt as a result of the late-classical Aristotelian renaissance (c. A.D. 300). In Aristotle's metaphysics substance (*ousia*) meant "essential" quality, i.e. the properties causing something to be what it is and not something else. On the other hand, other properties were accidental, i.e. properties whose non-existence did not neutralize the identity of the object.<sup>17)</sup>

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Roman law. See also Fritz Schulz, *Principles of Roman Law*, 1936, pp. 524, 528; Thøger Nielsen, *Studier over ældre dansk Formueretspraksis*, pp. 246 ff. The Greek law of contract attached no importance to either *formal* or *consensual* elements, but paid heed only to *real* elements (e.g. *Arrha*); cf. H. J. Wolff, "Die Rechtshistoriker und die Privatrechtsdogmatik", in *Festschrift für Fritz von Hippel zum 70. Geburtstag*, 1967, p. 695; also see I. C. A. Thomas, "Form and Substance in Roman Law", in *Current Legal Problems* 1966, pp. 145 ff.

17) J. G. Wolf, *op. cit.*, pp. 139 ff.

## 2. Post-Classical Roman law and medieval theory

In the post-classical<sup>18)</sup> Byzantine period the basis of the law of contract shifted from form to voluntarism, no doubt as a result of influences from both Christianity and the Stoic philosophy; the development was probably also influenced by the increased internationalization and urbanization of the community. In later western vulgar law the notion of will developed into the principal element of a general doctrine of contract, which, on many points, anticipated later European theories of natural law. This development should, however, be considered in the light of the decay caused by the inadequate training and education of jurists. In Byzantine law the classical rule was maintained in principle, but it was re-interpreted in accordance with the new doctrine of will. The constituting element of a right was now the will, and therefore it was decisive for the making of consensual contracts that a "consensus", i.e. a concordance of wills, could be found. This, in turn, was due to the fact that legal theory now recognized the possibility and importance of *error* in the contracting parties, i.e. an error of ideas and lack of intention. As mentioned above, the problem of dissent in this sense did not arise in classical times, just as there was no regard paid to the unilateral error apart from that caused by fraud. In classical times *interpretation* was the basic notion, and it was attempted to get the best possible sense out of the contract; in post-classical times the key notion was lack of intention and *dissent*. Dissent is the corollary of lack of intention.

The doctrines of interpretation and of error evolved in *Romanistic* jurisprudence have developed on this basis.<sup>19)</sup> The starting point, from a conceptual point of view, was the *declaration of intention*. The contract consisted of two intentions dependent on the psychic and external circumstances of the parties. First it was endeavoured through interpretation to state the "objective content

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18) Kaser, *Das Römische Recht*, § 197; Levy, *op. cit.*, pp. 14 ff.; Pringsheim, *op. cit.* I, pp. 300 ff., Stig Jørgensen, *Vertrag und Recht*, 1968, p. 16.

19) Lennart Vahlén, *Avtal och tolkning*, 1961, also bases himself essentially on these doctrines; cf. my review in *U.f.R.* 1961 B, pp. 176 ff.



of intention" of each of the two declarational intentions, the next step was to find out whether they corresponded to one another. If this was not the case, there was a matter of "open dissent", and the contract was invalid. If *ambiguous* intentions corresponded to one another, the contract was valid provided the parties had the same subjective intentions; if, on the other hand, their intentions differed, it was a case of "hidden dissent", and the contract was invalid. If the intentions were *unambiguous and concordant*, it had to be examined whether there was error. In the event of error in one or both parties as regards content, so that the party's conception was in conflict with the "objective" content of intention, a relevant error existed. The concept of intention was also of importance in the case of *pro forma contracts* which, in the post-classical period, were construed in accordance with the intention of the parties to the contract. However, a clearly *feigned intention* was already invalid according to classical law, because it did not possess the objective characteristics that were necessary to create an obligation.<sup>20)</sup> Not only did the post-classical authors misinterpret the structure of the consensual contract, but they also misinterpreted the concept of the error of substance, which they regarded as comprising all properties, *inter alia materia (qualitate)*, which according to Aristotelian metaphysics did not constitute an *essentiale* but only an *accidentale* of an object. This misunderstanding gave rise to very great difficulties for later jurists, who would conceive error of quality in general as a factor impeding consensus. It therefore became necessary to make a distinction between material and immaterial qualities.<sup>21)</sup>

### 3. Medieval moral theology

Medieval jurists and moral theologists started from Byzantine law.<sup>22)</sup> Both the doctrine of will and the established doctrine of

20) Jörs-Kunkel-Wenger, *Römisches Privatrecht*, 1949, pp. 106 f.

21) J. G. Wolf, *op. cit.*, p. 171.

22) After its revival in the 11th century, see Stig Jørgensen, *Vertrag und Recht*, 1968, pp. 47 ff. (*T.f.R.* 1966, pp. 584 ff.).

error recurred in Molina and Lessius. Molina in particular adhered to the post-classical doctrine and regarded *error in negotio, in persona, in pretio, in corpore* and *in substantia* as relevant, whereas he considered *error in nomine* and *in materia* to be irrelevant. In this respect both Molina and Lessius, who were conversant with Aristotle's metaphysics, distinguished in the same way as the classical jurists. There was no question of a consistent distinction between *error in motivis* and lack of intention, but in Lessius we find a distinction between such error in substance as, in contracts creating mutual obligations for the parties, caused invalidity only if it was insurmountable and such error as was a *conditio sine qua non* for the making of the contract. Further concurring in the view of Thomas Aquinas, Lessius thought that *materially altered circumstances* would also give a right to withdrawal from the contract.<sup>23)</sup>

The medieval moral theology based upon Thomas Aquinas's theories proceeded in other fields and supplemented the rule of fraud with a duty to give information of latent defects and with the doctrine of the "proper consideration" (*justum pretium*) and *laesio enormis*.<sup>24)</sup> The contract was invalid if the decrease in value arose as a consequence of a defect and the excess price were greater than one half of the true value; otherwise repayment of the excess amount had to be made. This peculiar rule must be viewed as an objectification of the underlying distinction between those circumstances which are the *causa* of the entire contract and those which are only modalities.

#### 4. Grotius and later natural law

To a large extent Grotius followed his predecessors, but he had recourse to *Cicero* to find the grounds for a general radical rule to the effect that any error causes invalidity. Promises being an action

23) Diesselhorst, *op. cit.*, pp. 82 ff.

24) H. Bartholomeyczik, "Äquivalenz, Waffengleichheit und Gerechtigkeitsprinzip", *Archiv für die civilistische Praxis* 166, pp. 30 ff. (1966); cf. Dando B. Cellini & Barry L. Wertz, "Unconscionable Contract Provisions: A History of Unforeseeability from Roman Law to the UCC", 42 *Tulane Law Review* 193 (1967).

of rational law-making, whereby the promisor lays down a law for himself, which law is based upon the assumption that certain facts exist, the logical conclusion is that just as the *foundation* of law ceases to exist so does the foundation of a promise if the assumed facts do not exist or have ceased to exist. Here it should be borne in mind that as regards both the making and the interpretation Grotius treated promises as equal to laws. Here — as with Lessius — it is decisive whether, under a rational analysis, the promisor would have made the assumption a condition.

Moreover Grotius distinguished between several different types of error. There was (1) error concerning *materia*, the object of the contract; by this he understood all circumstances referring to the kind and extent of the contract, its object, and its parties. In these cases the contract was invalid if an essential error existed. In subsequent chapters on contracts some obscurity appeared because here, subscribing to the (post-classical) Stoic (and medieval) doctrine of moral theology, Grotius assumed that defects and unjust consideration independent of the condition of essentiality involved a demand for equalization, but not invalidity. Error could also relate to (2) *the wording* and (3) *other circumstances*; here, too, the demand for essentiality was made. As to the doctrine of fraud, he again based himself upon Lessius, in so far as he attached importance to fraud only when the opposite party was involved in the fraud. Probably a rule of liability to pay damages for inadvertently provoked error was also adopted from Lessius.

In later natural-law theory a return was made from Grotius's doctrine of error to a more moderate form. Pufendorf<sup>25)</sup> and subsequent authors applied the distinction between essential error and other forms of error. Only in the case of unilateral promises could all conditions be asserted.<sup>26)</sup> But "essential" now came to

25) Pufendorf, *Et Menniskenes og en Borgers Pligter efter Naturens Lov* (The duties of an individual and a citizen according to natural law), translated into French by Jean Barbeyrac and translated into Danish (Copenhagen 1742), 1st book 9th ch., particularly §§ 12, 16–17, and 15th ch., particularly §§ 6–7. On the importance of natural law for the doctrine of error, see Hans Thieme, "Der Beitrag des Naturrechts zum positiven Recht". *Deutsche Landesreferate zum VII. Internationalen Kongress für Rechtsvergleichung*, 1966, p. 84.

26) It will be remembered that these were not binding without acceptance; cf. I. 2b. above.

mean something different; it came to signify, as it normally does today, "decisive", i.e. causative. Moreover, such an essential error was normally relevant only as long as the contract had not been performed. Thus the concept of essentiality no longer had any connection with the concept of substance; in Pufendorf, too, any error of quality (defect) was relevant and gave rise to a demand for equalization. The Romanist authors of the 19th century developed this doctrine of error. According to Savigny, who suggested the distinction between "unreal" and "real" error, only the unreal error (disagreement between intention and declaration) was relevant as a principal rule, while the real error (*error in motivis*) was irrelevant. Moreover, Savigny revived the Canon doctrine of *clausula rebus sic stantibus*. Later Windscheid developed his general doctrine of assumption, which on the whole corresponded to Grotius's doctrine. While the German civil code mainly subscribed to Savigny's doctrine, the doctrine of assumption began to be adopted in Scandinavian literature, in which both Lassen and – later – Ussing accepted the doctrine with the modifications that followed from the additional recognition of the principle of reliance and, as far as Ussing was concerned, also in an "objective" sense. The Scandinavian Contracts Acts from the beginning of the 20th century, however, reflect an attitude of caution; they give only an express rule on lack of intention (sec. 32) and otherwise leave the question of *error in motivis* to the courts. Moreover, the problem of defects is dealt with both in German law and in the Scandinavian Sales of Goods Acts without reference to the doctrine of error; the legislators have mainly adopted the natural-law doctrine on the relevance of any defect that gives rise to a right of equalization or reduction.<sup>27)</sup>

### III. INTERPRETATION

In his doctrine of interpretation Grotius almost invariably drew upon earlier writers in the field of rhetoric, Cicero in particular. The

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27) Stig Jørgensen, *Fire obligationsretlige Afhandlinger*, pp. 45 ff.

reason for this must be sought in the fact that neither the *Corpus iuris* nor Grotius's other sources made any material contribution to the doctrine of interpretation. Grotius's basis, naturally, had to be the promisor's intention to incur an obligation himself, but for practical reasons he modified this principle.<sup>28)</sup>

## 1. Roman law and rhetoric

The *original method* of interpretation was of a linguistic-formal nature. Since a right is created by the observance of certain typical forms, it is a matter of course that interpretation is based on an investigation of whether the words and forms prescribed have been observed.<sup>29)</sup>

Already at an early stage, rhetoric had assumed importance in Greek procedural law, which did not regulate courts composed of lawyers but "people's courts" composed of elected laymen. Rhetoric was the art of styling one's statement in such a way as to render one's view plausible through arguments which partly emphasized individual features and partly put these into relation to the whole; the language and its proper use came to occupy a prominent position. This "art of persuasion" was made the object of scholarly treatment in the *Rhetoric* of Aristotle, who by the way disapproved of this designation. Unlike logic, the task of rhetoric was not – in his opinion – to find what is true but to find what is probable. Therefore the implements for this purpose could not be induction and apodictic (analytical) syllogism, but *example* and *enthymeme*, which are based on probable premises. The dialectic syllogism as further developed by Aristotle in the *Topics* was also of great importance to later rhetoric.<sup>30)</sup> An important element of the

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28) Salvatore Riccobono, in J. Stroux, *Römische Rechtswissenschaft und Rhetorik*, 1949, p. 104; Diesselhorst, *op. cit.*, pp. 55 ff.

29) H. Coing, *Die Juristischen Auslegungsmethoden und die Lehren der allgemeinen Hermeneutik*, 1959, pp. 4 ff.; Jörs-Kunkel-Wenger, *op. cit.*, pp. 82 ff. and 107 f.; Meyer-Laurin, *Gesetz und Billigkeit im attischen Prozess*, 1963, pp. 34 ff.; Stroux, *op. cit.*, pp. 13 ff.

30) Ernst Kapp, *Der Ursprung der Logik bei den Griechen*, 1965. In the apodictic

rhetorical method consisted in distinguishing between what was material and what was immaterial, in seeing the general in the particular, in defining the theme or themes to be debated, and in finding arguments which would make the chosen thesis probable. Gradually an advanced technique and a major device were created and collected in so-called *topoi* catalogues which served as an armoury for practitioners of the art.<sup>31)</sup>

The rhetorical method acquired great importance for Roman law in several stages.<sup>32)</sup> In this connection it is sufficient to draw attention to the influence acquired by rhetoric in the interpretation of laws and of contracts. As early as about 100 B.C. a grammatico-philological method of interpretation was formed on the basis of the sciences of grammar and etymology as developed by the post-Aristotelian philosophers. This method was particularly applied to the formation of legal concepts, which began to take place at this time.<sup>33)</sup> Already by Cicero's time a somewhat more liberal interpretation had been put on the law of the Twelve Tables, which was then about 400 years old; among other things the true purpose of legal rules could be taken into consideration.<sup>34)</sup> In Cicero's own days, and through him, rhetoric came to exercise a certain influence on Roman law. In particular the rhetorical doctrine of the relations between *verba* and *voluntas*, between word and meaning, gained a certain recognition together with the idea of equity. However, not until the post-classical period did *voluntas*, with the general doctrine of will (cf. II above), become of central importance in interpretation, concurrently with the growth of the idea of

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syllogism a conclusion is drawn from two given premises; in the dialectic syllogism the point is to find a premise when the other premise and the conclusion are known.

31) See also Stig Jørgensen, *Vertrag und Recht*, 1968, p. 58 with note 24 a and p. 94 (*T.f.R.* 1966, p. 592 with note 25).

32) At an early stage it probably influenced Roman procedure, in particular its method of delimiting the object of the issue: *accusatio, intentio-defensio, depulsio*: J. Stroux, *op. cit.*, pp. 23 ff. — H. J. Wolff, "Rechtsexperten in der Griechischen Antike", *Festschrift für den 45. deutschen Juristentag*, 1964, pp. 1 ff. (pp. 16 ff.); on the doctrine of evidence, cf. Carsten Høeg, *T.f.R.* 1943, pp. 247 ff.

33) H. Coing, *op. cit.*, pp. 4 f.

34) Georg Eisner, "Zur Deutung von 'Summum ius summa iniuria' im Römischen Recht" (*Summum Ius Summa Iniuria*, 1963), pp. 1 ff.; Coing, *loc. cit.*

equity.<sup>35)</sup> It was a characteristic feature that in this respect rhetoric did not distinguish between laws and contracts, but considered the subjective meaning of legislator and promisor in the same light (as opposed to the objective purpose of law, *ratio*).

Rhetoric,<sup>36)</sup> however, also transferred part of its general technique to the doctrines of legal interpretation by laying down different rules of interpretation intended, in particular, to counteract inconsistencies, to maintain unity, and to avoid loopholes in the law. In the case of conflicting and ambiguous laws the rules of argumentation referring to *lex specialis* and *lex posterior* were introduced; in the case of loopholes in the law, various supplementary rules were formed through logical and pragmatic methods of conclusion: analogy, converse conclusion *e contrario*, conclusions from the reasonable *ratio* of the law, and gradually also equity. Various principles of interpretation (*canones*) were formed: strict and free interpretation, restrictive and extensive interpretation, and concepts of interpretation: grammatical, logical, historical, and systematic. It is inherent in the nature of the topic method that there was no method presented for the combination of these various rules of interpretation, rules of argumentation, principles and concepts of interpretation. The final decision depended on a choice, which gave interpretation its character of an *art*.<sup>37)</sup>

35) Stroux, *loc. cit.*: Jörs-Kunkel-Wenger, *op. cit.*, p. 108; Meyer-Laurin, *op. cit.*, pp. 45 ff.; Eisser, *op. cit.*, pp. 1 ff.; Max Kaser, *Zur Methode der Römischen Rechtsfindung*, 1962, pp. 47 ff., *Das Römische Privatrecht*, §§ 58 and 55, *Römisches Privatrecht*, pp. 41 ff.; Uwe Wesel, *Rhetorische Statuslehre und Gesetzesauslegung der römischen Juristen*, 1967, contests that rhetoric has influenced the relation between *verba* and *voluntas*.

36) See, on rhetoric in general, Ernst Robert Curtius, *Europäische Literatur und lateinisches Mittelalter*, 4th ed. 1963, pp. 71 ff.; see also Manfred Fuhrmann, *Das systematische Lehrbuch*, 1960, on rhetoric as a method of research and technical description.

37) H. Coing, *loc. cit.*: Max Kaser, *loc. cit.*: Stroux, *loc. cit.*: Meyer-Laurin, *loc. cit.*: see also W. G. Becher, "Rechtsvergleichende Notizen zur Auslegung", *Festschrift für Heinrich Lehmann zum 80. Geburtstag*, 1956, pp. 70 ff.; Viehweg, *Topik und Jurisprudenz*, 2nd ed. 1966; Esser, *Grundsatz und Norm*, 1956, *Wertung, Konstruktion und Argument*, 1965; Raiser, N.J.W. 1964, pp. 1201 ff.; Diederichsen, N.J.W. 1966, pp. 697 ff.; Eriksson, F.J.F.T. 1966, pp. 445 ff.; Dias, "The Value of a Value Study of Law", *Modern Law Review* 1965, pp. 397 ff. See also Ross, *On Rhetoric*

## 2. Grotius and later writers

Grotius<sup>38)</sup> closely followed Cicero's doctrine of rhetoric in so far as he put the interpretation of law and contract on an equal footing. As mentioned above, his fundamental point of departure for the purpose of interpretation was the "rational" will. For practical reasons he assumed, however, that in order to avoid fraud it was necessary to build on external signs: words and other circumstances. The words were therefore taken in their usual meaning, unless circumstances indicated that something different had been intended. In case of contradiction the rhetoric rules of interpretation came into play. Extensive interpretation was admitted only when it was evident that the "rational and general" reason (*ratio*) was expressly or unmistakably the promisor's motive. Restrictive interpretation could apply (1) when the result would otherwise be absurd, and (2) when the "rational" reason had unmistakably determined the will – interpretation should be according to its *ratio*. It could also apply (3) when the speaker used the word in a wider sense than that unmistakably indicated by his intention; in principle the basis was the speaker's use of the word, not its general use – one of the principles of rhetoric. Incidentally, Grotius based himself entirely on the doctrine of rhetoric – in particular that of Cicero – and adopted in all essentials the above-mentioned principles of interpretation, rules of interpretation, and concepts of interpretation. Only the voluntaristic element was made the fundamental factor: the rational will is the *ratio* of the promise.

Thus Grotius was instrumental in bringing about the rhetorical doctrine of interpretation, which in all essentials has been accepted by posterity. Savigny systematized<sup>39)</sup> the doctrine of interpretation in his attempt to create an integrated non-contradictory system of norms. The modern sociologically and pragmatically orientated conception of law implies that such an exhaustive and non-con-

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*Retfærdighed*, 2nd ed. 1966 (English ed.; *On Law and Justice*, London 1958), Ch. IV; Stig Jørgensen, "Argumentation and Decision", *Festskrift til professor Alf Ross*, 1969, pp. 261 ff.

38) Diesselhorst, *op. cit.*, pp. 55 ff.

39) *Römisches Recht*, vol. 1.



tradictory system of norms does not exist, that the system of law is an open and flexible system, and that "interpretation" therefore cannot be applied according to uniform rules. A more or less objective or subjective method of interpretation can be chosen. The usual method in the interpretation of contract is the objectifying tendency, which attaches the greatest importance to the usual meaning of the words, unless circumstances clearly indicate something else. In the Scandinavian countries, where the "doctrine of reliance" prevails, this is only natural, because the problem of interpretation and error is dealt with according to the same principles. In German law, great difficulties have arisen from the principle laid down in sec. 119 of the Civil Code, according to which the problem of error is to be solved on the doctrine of will in favour of the promisor, while interpretation, according to sec. 157, is in principle to be made on the basis of common usage in accordance with good faith ("Treu und Glauben").<sup>40)</sup>

#### IV. CONCLUSION

As mentioned above, Grotius must be regarded as the creator of the modern law of contract, because he was the first to sever consistently the construction of contract from the traditional socio-typical model and to recognize the power of the free and rational will to create without limits rights independent of form and content.<sup>41)</sup> This basis of the doctrine of will affected his attitude to the problems of error and interpretation. It is an undoubted fact that in spite of his unresponsive attitude to the traditional law of contract, Grotius was strongly bound by the tradition of Roman

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40) Stig Jørgensen, *Fire obligationsretlige Afhandlinger*, pp. 48 ff.; H. Brox, *Die Einschränkung der Irrtumsanfechtung*, 1960; M. Drexelius, *Irrtum und Risiko*, 1964; H. Coing, in *Staudinger's Kommentar zum B. G. B. (Allg. Teil)*, 11th ed. 1954, pp. 495 ff., 532 and 583 ff.; Raiser, *Vertragsfunktion und Vertragsfreiheit*, 1960, pp. 103 f.

41) On the practical reasons for this development, see Stig Jørgensen, "Contract as Form", in *Scandinavian Studies in Law*, vol. 10, 1966, pp. 97 ff. (also in *Vertrag und Recht*, 1968, pp. 11 ff., and in *T.f.R.* 1965, pp. 400 ff.).

law as framed by Romanistic scholars.<sup>42)</sup> This is clearly proved by the principle of agreement used by him and also by his doctrine of error. In other respects he built first and foremost on Stoic philosophy and the rhetorical method of which Cicero was the great master; this influence is particularly evident in his doctrine of interpretation. However, it may not be so well known or so obvious to what extent Grotius was influenced by the medieval moral-theological tradition developed by Thomas Aquinas, who in turn to a large extent relied on Aristotle's metaphysics and natural law and on post-classical Byzantine law, which was very much characterized by Stoic-Christian ethics.<sup>43)</sup> This influence is particularly evident in the various kinds (or stages) of Grotius's doctrine of promise. In this connection it is strange to note that, in the subsequent development of the theory of natural law, ethics and jurisprudence were dealt with under the same heading. Kant was the first to undertake a distinction in principle between law and ethics.

Grotius was a product of humanism and Protestant rationalism, but he was deeply rooted in medieval Catholic and scholastic moral theology and scholarly tradition. He combined a Greek-Stoic rationalism with a Judaeo-Christian voluntarism and thus contributed much to the conception of law of later times. The contract as a central model based on the autonomous law-making of rational wills has survived him by 300 years, though the development of recent years has slightly shaken this foundation. Recent development has been characterized by an increasing objectification of the law of contract, in particular through the application of standard conditions and "contracts of adhesion", which are only to a very small extent (as regards content) covered by the declarations of intention of the parties.<sup>44)</sup>

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42) Stig Jørgensen, *Vertrag und Recht*, 1968, pp. 59 ff. (*T.f.R.* 1966, pp. 593 ff.).

43) Kaser, *Das Römische Recht*, § 197; Hans Thieme, *op. cit.*, p. 82, and in *Sav. Z. (Germ.)* 70, 1953, pp. 230 ff. and 262 ff.; A. P. d'Entrèves, *Natural Law*, 1951/67, pp. 50 ff.

44) Stig Jørgensen, "Contract as Form", in *Scandinavian Studies in Law*, vol. 10, 1966, pp. 97 ff. (*Vertrag und Recht*, pp. 11 ff., *T.f.R.* 1965, pp. 400 ff.) on standardized contracts and other objectification of the law of contract.

## LEGAL POSITIVISM AND NATURAL LAW

### I. THE ISSUE<sup>1)</sup>

On the face of it the headline of "Legal Positivism and Natural Law" seems to indicate an unambiguous and simple issue. The legal positivists maintain that the law is given with the legal norms validly created by the society, whereas according to the natural law conception the valid law is derived from forces beyond and above the social institutions. This latter conception means, among other things, that legal rules may exist which have not been created in the manner otherwise recognized, and that, therefore, positive rules which are contrary to natural law are invalid. This does not settle what social institutions are able to create law, nor from what

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1) Cf. especially *Martin Kriele*, *Rechtspositivismus und Naturrecht – politisch beleuchtet*, Juristische Schulung, 1969, p. 149 ff., *Gerhard Dilcher*, *Der rechtswissenschaftliche Positivismus, wissenschaftliche Methode, Sozialphilosophie, Gesellschaftspolitik*, Archiv für Rechts- und Sozialphilosophie, 1975, p. 497 ff., *Arthur Kaufmann*, *Rechtsphilosophie im Wandel*, 1972, especially p. 71 ff., *Edgar Bodenheimer*, *Power, Law and Society*, 1973, *Werner Maihofer* (ed.), *Naturrecht oder Rechtspositivismus*, *Karl Olivecrona*, *Law as Fact*, 2nd ed. 1971, Ch. 1, *Fr. Böckle & E.-W. Böckenförde* (ed.), *Naturrecht in der Kritik*, 1972, especially p. 61 ff.: *G. Otte*, *Über geschichtliche Wirkungen des christlichen Naturrechts*, *A. Ehrenzweig*, *Psychoanalytical Jurisprudence*, 1971, *A. Ross*, *On Law and Justice*, 2nd ed. 1974, p. 100 § 13 and Ch. 11; cf. also *Stig Jørgensen*, *Vertrag und Recht*, København 1968, p. 115 ff., *Law and Society*, Akademisk Boghandel, Aarhus 1971, p. 27 ff., 42 ff. and Ch. 3, (German edition: *Recht und Gesellschaft*, Göttingen 1971, p. 25 ff., 42 ff. and Kap. 3), *Symmetry and Justice*, supra p. 59. See also *Enrico Pattaro*, *Der italienische Rechtspositivismus von der Wiedergeburt bis zur Krise, Rechtstheorie* 1974, p. 67 ff.

overpositive forces the validity of law is derived. Whereas the term of "legal positivism" is of a recent date,<sup>2)</sup> the concept of "natural law" dates farther back and, as indicated by the name, is based on the idea that there are legal rules which conform to nature, either the natural order or the human order or "the nature of things". From old times this idea has been closely connected with the concept of justice, though never having been identical with this latter concept.

It is useful to make it clear that the problem: positive law/natural law may refer to different basic problems and to different political problems. Anyhow, it is not possible, as tried by some, to identify legal positivism with law and order and natural law with the demands made on the valid law by ethics and justice. First of all it must not be forgotten that the formal justice: that equal cases are settled equally, is also an ethical principle, just like the existence of a social order to secure that valid law is carried through serves a fundamentally ethic purpose: that the interests of the whole are safeguarded and not least those of the weak, who, as said by Aristotle, are first in pointing to law and justice; the strong know how to help themselves, as it is also said in the preface of *Jydske Lov* (the Jutlandic Law) (1241).

The problem of natural law/positive law, then, may refer to various basic problems:

1. The problem of the validity of the law; from where does law derive its validity? Who has an authority to create law?
2. The problem of the contents of the law; what demands must be made on the ethic or religious contents of law, if any? Who has an authority to censor?
3. The problem of filling the gaps in the positive law. Can the law be adapted to "the nature of things" in each concrete case, even against the letter of positive law?

These basic problems may be regarded — and will be so in the following — as partly political problems, and perhaps they are political in principle. At any rate, people's attitude to these

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2) *Olivecrona*, l.c. (note 1) p. 51.

problems will often reflect a political view. Not that legal positivism is always mentioned in recommendation of one specific policy and natural law of another. On the contrary, what is of interest is that the reasoning changes with the historical and social situation.

*Re 1.* The first basic question is the one with the most distinctly political character. It is self-evident that the question who has the competence or perhaps even a monopoly of law-making is an important – perhaps the most important – political question of all times. This question involves the political struggle between *the Church and the secular power*,<sup>3)</sup> the claim of the people to share the sovereignty in the form of a *right of resistance*<sup>4)</sup> against an unjust government, and the claim that the parliament should have a monopoly of law-making as opposed to the executive power.<sup>5)</sup>

Natural law openly seeks its validity in extrasystematic factors, whereas the legal positivism formally maintains that law is independent of religious, metaphysical, ethic and psycho-social factors. The legal realism, on the other hand, wants to identify law with these psycho-social phenomena. However, a consistent legal positivism is difficult to uphold, and we shall see that *Hans Kelsen* had to introduce a so-called "basic norm" as a logical prerequisite

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3) *Gerhard Otte*, l.c. (note 1), *Reinhold Zippelius*, *Geschichte der Staatsideen*, 1971, p. 42 ff., *A. Verdross*, *Statisches und dynamisches Naturrecht* (1971) p. 22 ff., *Kriele*, l.c. (note 1) p. 153, *Gail Belaiel*, *Spinoza's Philosophy of Law*, 1971, p. 130 f., *W. Eberstein*, *California Law Rev.* 1971 p. 625, *Hans-Peter Schneider*, *Iustitia Universalis*, Frankfurt – no date, *Ole Fenger*, *Fortalen til Jydske Lov*, *Convivium* 1976 (in course of publication at Lademanns Forlag). *Erik Anners*, *Den europeiska rättens historia I*, 1974, p. 117 ff.

4) Cf. on the whole *Kurt Wolzendorf*, *Staatsrecht und Naturrecht im Lehre vom Widerstandsrecht des Volkes*, 1916 (Scientia 1961), *Peter Cornelius Mayer-Tasch*, *Thomas Hobbes und das Widerstandsrecht*, 1965, *Kriele*, l.c. (note 1) p. 152 ff., *same*, *Zwei Konzeptionen des modernen Staates*, *Studium Generale* 22 (1969) p. 839, *Günther Scheidle*, *Das Widerstandsrecht*, 1969, *Sophia Wührer*, *Das Widerstandsrecht in den deutschen Verfassungen 1945, 1973*, *Stig Jørgensen*, *Law and Society* (note 1) p. 56, (*Recht und Gesellschaft* p. 67), *same*, *Das Individuum, die Gesellschaft und das Widerstandsrecht*, *Österreichische Zeitschrift für öffentliches Recht*, 24 (1973) p. 19 ff. with note 6, *same*, *Die rechtliche Lage des Menschen in einem ständig wechselnden gesellschaftlichen Modell*, *ibid.* 23 (1972) p. 213 ff.

5) *Kriele*, l.c. (note 1) p. 153 f.

of the legal system. The basic norm, then, is no causal factor, but an *a priori* prerequisite of the legal positivism.<sup>6)</sup>

*Re 2.* The second basic question is the one which has characterized the recent debate most.<sup>7)</sup> In the post-war era it has especially been called in question, whether any political system might be recognized as a legal system, but the Catholic moral philosophy and the rationalist natural law have also questioned the validity of positive legal rules at variance with the natural law. The so-called constitutional or human rights and other natural law-coloured principles, for instance the doctrine of equity, have to a great extent been made positive, and the rest of the legislation also makes frequent references to accepted morality, for instance the general clauses of the law of contracts.

*Re 3.* Below it shall be shown that the question of filling of the existing law by theory and practice is also a politically controversial question about the spheres of authority of the state and the citizens or of the people and the legal profession.<sup>8)</sup> In the first respect the

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6) Cf. *Torstein Eckhoff and Nils Kr. Sundby*, The notion of basic norms in jurisprudence, *Scandinavian Studies in Law*, Vol. 19 (1975) p. 121.

7) *Kriele*, I.c. (note 1) p. 155 ff., *Ross*, I.c. note 1), Ch. 10, *Stig Jørgensen*, Law and Society p. 54 (*Recht und Gesellschaft* p. 64), *Vertrag und Recht* (I.c. note 1) p. 59 ff.

8) Jurists often apply references to natural law in the form of the abstract term "the nature of things" (*Natur der Sache*), cf. *F. Wieacker*, *Privatrechtsgeschichte der Neuzeit*, 2. Aufl. 1967, p. 426, Note 27, *L. Recasens-Siches*, Das Problem der "Natur der Sache", *Archiv für Rechts- und Sozialphilosophie* 1972 p. 199 ff., *Stig Strömholm* in *Rabels Zeitschrift* 39 (1975) p. 702 ff., and *A. Ross*, I.c. (note 1) § 19 ("the cultural tradition"), *Stig Jørgensen*, *Argumentation and Decision*, *infra* p. 151 and *same*, *Grundzüge der Entwicklung der skandinavischen Rechtswissenschaft*, *Juristenzeitung* 1970 p. 529 f. Nature of things: cf. *Idealism and Realism in Jurisprudence*, *supra* p. 29. *A. S. Ørsted* was the first to apply the concept of "the nature of things" consistently as supplementary source of law, cf. *Haandbog over den danske Lovkyndighed* I, 1822 pp. 88 f and 345 ff.; about the earlier natural law see *W. Neusüss*, *Gesunde Vernunft und Natur der Sache*, 1970. This reasoning presupposes that each single case *demands* a specific solution, and that the finding of this solution is a cognitive not an evaluative process. This line of thought has its origin in the Socratic-Aristotelian idea that "good" or "right" are identical with acts that further the perfection of an object. This perfection is another expression of the "essence" of the thing, which means the qualities that decide its *identity*, i.e. decide whether it is

history of codification will teach us something. Each time a sovereign has consolidated his power he has wanted to express this by means of extensive codifications. Such codifications have often been accompanied by a prohibition of interpretation and of giving grounds for judgments, as well as of printing law reports containing such grounds. This practice was followed by the sovereigns Justinian, Napoleon, and King Christian the Fifth with their

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just that thing or another one. Knowing the essence of a thing is the result of an insight in the nature of the thing, which makes it possible to speak about the purpose of it. The essence of a stone is gravity, since it "strives" to fall to the ground. The ideal state of a stone, therefore, is rest. Likewise reason is the essence of man, since this is what separates man from other living beings etc. In short, since an insight in the "essence" of things can be gained it will also be possible to know what is "good", and therefore the insight in a situation, according to "the nature of things", will lead to a knowledge of the "right" act, cf. *Vertrag und Recht*, l.c. (note 1) pp. 78 and 62, and *Illum*, *Lov og Ret*, 1945, p. 147 ff. By "the right act" *Illum* understands, in agreement with *Viggo Bentzon*, a solution of a legal dispute based on an estimate of the demands of the sense of justice in the specific case and the applicability of the decision as a general rule, cf. also *Ross*, l.c. (note 1) p. 100. The formulation reflects the well-known dialectics between the general rule and the actual justice, dating back to the Greek doctrine of *epiēkeia* and the Roman doctrine of *aequitas* (equity), cf. *Stig Jørgensen*, *Symmetry*, l.c. (note 1), and also *Wasserstrom*, *The judicial decision. Toward a theory of judicial justification*, 1961, and *G. Radbruch*, *Die Natur der Sache als juristische Denkform*, *Festschrift für R. Laun*, 1947, and *same*, *Rechtsphilosophie*, 6. Aufl. 1963, § 1: the tension between "justice" and "law and order". This line of thought has also been revived in recent German legal theory, both in the *Protestant* natural law doctrine in the form of an "institutional" legal philosophy focussing on family, church, state etc., *E. Forsthoff*, *Lehrbuch des Verwaltungsrechts*, Bd. I, 6. Aufl. 1956, p. 148 ff., in the *phenomenological* legal theory ("sachlogische Strukturen"), *H. Welzel*, *Naturrecht und materiale Gerechtigkeit*, 2. Aufl. 1955, p. 197 f., and in the *existentialist* legal theory, *Werner Maihofer*, *Recht und Sein*, 1954, p. 121 ff., and the neo-Kantian philosopher *G. Radbruch*, l.c. (this note above), p. 157 ff., *Arthur Kaufmann*, *Die ontologische Begründung des Rechts*, 1965, *same*, *Rechtsphilosophie im Wandel* (note 1) p. 272 ff. On an analytical view institutions are value-orientated and therefore, of course, able to offer a sufficient basis for inferring an "ought". A contract, considered as an institution, means for instance that the parties are bound and it is quite natural, therefore, that the existence of a contract implies the existence of a duty. This is no inference from "is" to "ought", since an "ought" is already implied by the existing "is". "Good" and "right" are *attributive* adjectives, i.e. they refer to qualities which depend on a situation or a relation, as "big" and "broad" etc. The modern conceptual analysis so to speak affirms the Aristotelian conception of "good" as "being good at", which corresponds, by the way, to an older conception, as the abstract term "good" did not occur in the Greek language until the 7th century, cf. *Stig Jørgensen*, *Argumentation and Decision*, l.c. (this note above) and *Hartvig Frisch*, *Might and Right in Antiquity*, 1949, p. 233 f.

respective codifications *Corpus Iuris* 529, *Code Civil* 1804, and *Danske Lov* 1683, with the purpose of securing their own control of the contents of the law.<sup>9)</sup> At length, of course, this proved an untenable policy. *v. Savigny*, inversely, opposes codifications because he wants to keep the civil law independent of the state. Nowadays it has been adduced in the political debate that the jurists are conservative and thus incapable of securing a flexible adaptation of law and social development, and that legislation and administration must therefore be fully competent in that respect (legal positivism).

## II. LAW AND ITS FUNCTIONS

The connection between these questions and the nature of law is obvious. What is law? What is the function of law? The answers to these questions depend on the philosophy of the questioner or, for that matter, on the policy he supports. For it is an old truth that every time and every interest will choose the kind of philosophy which they need, consciously or unconsciously.

If the choice of philosophy and with it of terminology is conscious, and if this fact is concealed, this will be an attempt to manipulate the mind of the addressee. In this way a political attitude can obtain a double authority, but nevertheless a false one, in referring to both science and law in support of itself. And science and law as well have still a rather great authority.

If it is pointed out to the addressee that terminology and philosophy express a political choice, it is all right, but better still, of course, if it is acknowledged that truth has many faces, and that, therefore, no unambiguous definition of the concept of law can be given. Law has various functions, and none of these can be given absolute precedence of the others.<sup>10)</sup> The ontology of law (the

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9) *Olivecrona*, l.c. (note 1) p. 34, *Kriete*, l.c. (note 1) p. 151, *K. F. Hammerich*, *Den danske Dommerstand under Enevælden*, 1931, p. 44 ff.

10) *Stig Jørgensen*, *Law and Society*, l.c. (note 1) Ch. 1, especially p. 28 f. (*Recht und Gesellschaft*, Kap. 1, especially p. 38).



science of the nature of law) is a difficult matter. This does not mean that the question is meaningless, but since it is almost impossible to get a reasonably certain knowledge about the nature of man, it must be equally hard to get a certain knowledge of the nature of law. The old but constantly recurring debate about the existence of a natural law seems to make it meaningful to deal with the matter.

Although the concept of law and with it the natural law are in various ways made part of a political debate, it may very well prove that the debaters themselves are not aware of this. People often use references to law and natural law as a political weapon from a sincere belief in the correctness and infallibility of their own opinion. This innocence may indicate ignorance and incompetence, but in fairness it must be admitted that it can be difficult to realize the truth of the matter. Philosophy and ideology are woven together with the entire personality of the individual to such a degree that his perception of reality must be filtered through this structure. The corresponding language will often force a specific perception of reality including its problems almost irresistibly upon the actors. Not until today has it been generally known that the terminology of the sciences as well as of the ordinary language corresponds to a picture of the world which reflects the level of cognition and the interests of its own time.<sup>11)</sup>

To use a simplified expression the law may be understood instrumentally, as a means of social control. In this sense the legal rules form part of the political system the purpose of which is to lead the behaviour of the people in a certain direction in accordance with political aims. This view of the law is of recent date. However, the law can also be understood reflexively, as the natural framework round "the good life". In this sense law reflects the natural human behaviour in a given context. This view dates far back, but from time to time it has a renaissance, also in our own days.<sup>12)</sup>

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11) *Stig Jørgensen*, *Ideology and Science*, supra p. 9.

12) *Stig Jørgensen*, *Law and Society*, l.c. (note 1) Ch. 2, especially p. 38 ff. and p. 19 ff. (*Recht und Gesellschaft*, Kap. 2, p. 48 ff. and 28 ff.).

The conception of law just mentioned is to some extent, but only so, an expression of a positivist conception of law. Since the law is the work of man and fit for use in the political struggle for power, it must manifest itself as orders supported by the power of the state, especially in societies with an authoritarian government. This view was most consistently framed by *Immanuel Kant* who thought that the purpose of law must be to control human relationships and to protect the freedom of the individual as opposed to the corresponding freedom of others to act according to their own will, and therefore it must be the duty of everyone to obey the law. Of course such a view would not easily form itself in societies without a central power and, in fact, the early mediaeval family communities characteristically did not know this conception of law. A "positivist" conception of law formed itself in the late Middle Ages alongside of the consolidation of the crown and with it of the state. But it has not been the sole or primary purpose of the law, not even during the rise of nation states, to suppress the people, which is evident from the fact that the object of legislation has first and foremost been peace and solution of conflicts at home. As the interdependence of larger and larger geographical areas increases in consequence of the socio-economic development it becomes more and more necessary to replace the self-help of the old family communities and to find a way of protecting the individuals who are under the care of no family, especially in the rising town societies. This development can be observed in the old Middle East cultures as well as in our own legal history.<sup>13)</sup>

The other conception of law mentioned reflects historically a customary conception of law, but also in part a natural law conception. What is customary will often be taken as identical with what is natural, and this view is still to be found in the so-called primitive societies, often combined with religious and ritual ideas. During the Middle Ages the customary law, taken as a manifestation of the natural law, (King Valdemar's Law, Jutlandic Law) was used

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13) *Ole Fenger*, *Fejde og Mandebod*, 1971, p. 37 ff., *Stig Jørgensen*, *Law and Society*, l.c. (note 1) p. 30 ff. and p. 69 ff. (*Recht und Gesellschaft* p. 40 ff. and p. 82 ff.), *same*, *Symmetry*, l.c. (note 1).

by the nobility as a political weapon against the king who claimed to have a real legislative power, and references were inserted to this in the coronation charters.<sup>14)</sup> Aristotle looked upon law as the natural framework of man as a social being, within which he was able to fulfil himself in the best way and so become happy.<sup>15)</sup>

This hint will make it clear that law has several functions: it is a means of political control, but there must be limits to such control, or people — or a lot of people — would be discontented which would result in symptoms of personal and social diseases. The positive law, then, must be subject to an ethical or social control leading to alterations of the law, either in the form of a development of the judicial practice or of the legislation, or in the form of a revolution.<sup>16)</sup>

However, law is also an apparatus with the purpose of preventing and solving social conflicts according to the relative social status of the individuals and a specific procedure laid down by certain rules intending to settle equal cases equally. Through such measures some predictability and a relative security for the weak are obtained, the latter being able to call upon law for protection against naked display of force and self-help. On the other hand, law without force is powerless or only to be taken for good advice (Aristotle). But it is no more reasonable to identify the necessary social power behind the law with violence by the authorities, than it is correct to identify authority with authoritarian systems. Only if a society is based on power without law, this characterization would be appropriate, for instance if used about Nazi-Germany and the existing people's democracies. In a democracy the law is decided by the majority and is often a compromise between conflicting interests, and smaller or larger minorities cannot adduce the suppression and violence of the society in order to force their will through, because this would result either in a dissolution of society

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14) *Ole Fenger*, l.c. (note 13) Ch. VI.

15) *R. Zippelius*, l.c. (note 3) p. 18 ff., *Verdross*, l.c. (note 3) p. 17 ff., *Joachim Ritter*, *Naturrecht bei Aristoteles*, 1961, *Stig Jørgensen*, *Symmetry* l.c. (note 1).

16) *Leon McBride*, *Fundamental Change in Law and Society*, 1970, *same*, *An Overview of Future Possibilities: Law Unlimited?* in *Nomos XV, The Limits of Law*, 1974, p. 28 ff.

into a number of conflicting minorities, of which the weakest would go under, or in a dictatorship proper.<sup>17)</sup>

### III. HISTORICAL PERSPECTIVES

The oldest conceptions of law known in our culture group are the antique Babylonian-Greek and the Jewish ones.<sup>18)</sup> The Babylonian-Greek conceptions were closely connected with the conception of nature which was cyclic and fatalistic in principle. Just as the cosmic laws expressed themselves in the course of the heavenly bodies, the human laws reflected these same cosmic laws on the earth. Man's lot was decided by the Moiras, who span, measured and cut the thread of everybody's life just like the Nordic Norns. Every man's lot was premeasured and therefore it was up to him in this life to give everybody his due. This religious fatalism, which seems to be characteristic of peoples at a certain cultural stage, and which is reflected in the Greek tragedy, has some connection with the primitive agrarian society as found in the Greece of Solon about 600 B.C. and as the one lying behind the Iliad and the Odyssey from the 8th century B.C. At this time the urbanization and the formation of states began which formed the basis of an individualistic view of society and an ethic based on freedom and responsibility. In the legal area rights could now be based on contracts and individual responsibility replaced the collective family responsibility. In politics the commutative justice, which is based on the principle of equality, is replaced by the distributive justice, so that from now on the value of the individual was not decided by fate but by his social value.

The Mosaic tribal morality which was based on the Ark of the Covenant, although still collectivistic, gave birth to a new ethic after the return from the Captivity in the middle of the 5th century. This ethic with its Doomsday prophets took its departure in the changed

17) A. Ross, l.c. (note 1) p. 57 f., Stig Jørgensen, Law and Society l.c. (note 1) p. 42 ff., (Recht und Gesellschaft p. 52 ff.), Nomos XIV (1972): Coercion; cf. also Hannah Arendt, On Vold, 1970.

18) Cf. to the following Stig Jørgensen, Symmetry l.c. (note 1).

conditions setting in with the urbanization. Since the family was no longer responsible for the weak and the sick it became necessary to lay down ethic duties such as charity and love of one's neighbour, and these duties gradually developed into the radical Christian ethics.

In Greece the first to depart from the old religious and conservative legal concepts were the so-called *sophists* in the palmy 5th century Athens. As opposed to the anchoring of law in natural philosophy they advocated a legal positivism in principle maintaining that law, like all other human social conditions, was created by man and according to man's reasonable will. Society was solely based on a kind of social contract, and the laws could arbitrarily be made so as to suit human purposes. The individuals were free to utilize their opportunities to get what they wanted, and the distribution of the social benefits was decided solely by the ability of the individuals themselves.

After the Peloponnesian War the optimism in the democratic Athens of Perikles was replaced by a profound scepticism towards democracy and its legal positivism. *Socrates* found that this positivism led to egoism, and *Plato* and *Aristotle* in the 3rd century B.C. led the way in making the concept of law more ethic. Plato was brought to the view that "the good life" could best be secured the human race by a dictatorship directed by philosophers. By *Socrates* Plato had learned that what was "good" was an epistemological question. The problem was, by means of the dialectic reason, to obtain an insight in the good as an idea, i.e. as the eternal truth lying behind the imperfect human manifestations of the idea. Aristotle agreed with Plato that the relationship of society with law could not be a question of a casual agreement, but instead of looking for the true law in the world of ideas, he seeks it on the earth in the nature of man as a social being (*zoon politikon*). Without considering which might be the best social order Aristotle seemed to find that the Greek *Polis* was the "natural" form of state, and on such lines he formulated his thesis that what was good was to do one's best in the place allotted one, and otherwise to follow the happy mean.

To Aristotle equality holds good only within the separate social groups. The subsequent stoics were the first to renew the natural

law thinking by postulating that every man had a share in the great world reason and with that had a spark of God in him, which must make him equal, whether master or slave. The stoicism, mingled with the Christian ideology of equality, and later Christianity itself became the Roman state religion, which was carried on in Western Europe by the Roman Church that took over the role as unifying authority in the divided empire, also in the temporal area. And — as shall be seen — the Roman Church maintained a corresponding monopoly of legislation for a long time.

#### IV. THE STRUGGLE FOR THE LEGISLATIVE POWER

The natural law has been employed as a weapon in the political struggle between the population groups and the crown and in the *struggle between the temporal and the clerical authorities*.<sup>19)</sup> In the early Middle Ages, after the Roman Church had filled the political gap which had appeared after the fall of the western empire in the 5th century A.D., *St. Augustine* on the basis of the Gospel according to St. Luke framed the doctrine of the two swords, the clerical one and the temporal one, which were both subject to God's will. The prince, therefore, was prince by the grace of God indeed, but still only God's agent on earth, who had to derive his legislative power from the church. At the same time the church had the right to judge for itself in clerical matters, for instance to appoint bishops. Beyond the legal practice of the church, which gradually assumed the character of a legislation proper, the old customs were acknowledged as sources of law. The Germanic customary law brought along by Goths, Lombards and Franks was in the earlier parts of the empire mixed up with a vulgarized form of the classical Roman law, in which form it survived and became a codification in the eastern empire under *Justinian (Corpus Iuris)*.

In the Nordic countries, where the Roman law had not gained a

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19) See to the following *Ole Fenger*, l.e. (note 3), *Kriele*, l.c. (note 1) p. 153 f., see also *Sten Gagnér*, *Studien zur Ideengeschichte der Gesetzgebung*, 1960, *Stig Jørgensen*, *Das Individuum*, l.c. (note 4), *Zippelius*, l.c. (note 3) p. 42 ff., *Verdross*, l.c. (note 3) p. 22 ff.

footing, the church respected the customary law, although it was at variance with its own law (the canon law). The main differences were the theories of guilt and evidence. From the paraphrase by *Anders Sunesen* of the *Scanic Law* (about 1200) we learn that the church had to put up with the objective responsibility for breach of the law. This was a relic of the old system of family feuds which the church had successfully fought and replaced by a system of fines, though still resting on the family and not on the individuals involved.<sup>20)</sup> The church had successfully fought ordeal by fire as evidence but for the time being it had to put up with the oath system which enabled the accused to rid himself of a charge with the help of compurgators at the thing, instead of the subjective oral evidence which sought the truth of a case.

The same idea can be found in the Preface of the *Jutlandic Law* (1241) which says that no law is better to obey than truth, i.e. what is proved is right, unless it may be doubted, and in that case the law must prove the truth. *Ole Fenger*, a colleague of mine, has made a new interpretation of the Preface and has demonstrated that it is almost altogether a translation of the *Decree of Gratianus* (1150) and therefore a repetition of the common European conception of law at that time. This can also be understood from the fact that the men of the church were active in writing down the old provincial laws. As mentioned *Anders Sunesen*, the archbishop, edited the *Scanic Law*, and *Gunnar*, the bishop of Viborg, drew up the *Jutlandic Law*, and no doubt the *Sealand Law Books*, which are a bit older, have been created by other members of the clergy. In the first place only the clergy possessed the necessary education for the work, the laws only being handed down in oral tradition by law-speakers. In the second place, since the customs were inevitably vague and imperfect, the church might benefit from this writing down, because it was in fact possible to amend the law under the pretext of finding again or clarifying forgotten or obscure customs. This was important, because the king had no real legislative power which could change the customs. In relation to the people the king was traditionally a commander who could give orders during a war,

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20) *Stig Jørgensen*, *Erstatningsret* (2nd ed. 1972) p. 5.

but otherwise had no specific authority. In relation to the church he could confirm or abolish customs according to the law of God, i.e. of the church. Otherwise his legislative activity was confined to the peace laws resulting from his duty to protect the weak and punish evil-doers.

A limited legislative power was not granted the prince until later and after, owing to *Thomas Aquinas*, the philosophy of Aristotle had gained a footing in the moral philosophy of the church. Thomas assumed that the law of God consisted of a few basic principles leaving it to the king to fill the temporal law according to the specific conditions of the country. If the law was at variance with the natural law, it was indeed invalid, but a revolt or a right of resistance could only be justified in case of gross offences against the law of God, since Thomas attached great importance to law and order. During the following centuries the power struggle between the church and the princes was intensified, as regarded both the appointment of bishops (the Investiture Contest) and the legislative power. This struggle among other things led to the Reformation at the beginning of the 16th century. As early as 1324 *Marsilius of Padua* had broken the ice for the recognition of the legislative power of temporal authorities, but *Niels Hemmingsen*, the Dane, who wrote "Natures Ret", 1562, (The Law of Nature), and *Jean Bodin*, the Frenchman, who wrote "Six livres de la république", 1576, (On the State), were the first to base a theory of the state exclusively upon reason and sovereignty as the supreme power which is indivisible and lies either with the king, the aristocracy or the people. Like Aristotle Bodin did not consider the form of the state.<sup>21)</sup>

A reflection of the development which had taken place regarding the relationship between the clerical and the temporal power was the book written in 1527 by *Machiavelli* about the right of the prince of applying what means he chose in order to further his aim. On one hand the legislative power of the prince was fully recognized, on the other hand there were no ethics and religious demands to limit the contents of his legislation. The right policy is

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21) *Zippelius*, l.c. (note 3) p. 90 ff. (Bodin p. 90, Althusius p. 97).



the one that succeeds. This is the essence of the legal positivism or pragmatism also formulated by the sophists in Athens in the 5th century.<sup>22)</sup>

## V. THE RATIONALIST NATURAL LAW

During the next disturbed century, however, both the Catholic and the Protestant moral philosophy developed the idea of *aequitas* considering the demand for love of one's neighbour and for charity. This idea was rooted in the sophist doctrine of *epieikeia*, equity, which Plato developed into a general principle of applying abstract rules to concrete cases, and which was later taken over by the Romans.<sup>23)</sup> But with the Reformation the canon law ceased to be a legal source in the Protestant countries, where – in this century of orthodoxy – a more barbarian concept of law, with witch hunting and the like, came to dominate, as the Mosaic law filled in the gap that appeared in the law. At the same time the Inquisition developed a similar barbarism in the Catholic countries.<sup>24)</sup>

But at the beginning of the 17th century the two currents of the rationalist natural law were united in the Protestant provinces of the Netherlands with *Hugo Grotius*.<sup>25)</sup> In his book *De Iure Belli ac Pacis* (1624) he founded a natural human law on an *appetitus societatis*, a social inclination, and reason, which make people realize the benefit of making and keeping agreements in domestic and foreign politics as well as in private relations. The state is founded on a social contract which is binding on the citizens just like treaties between more states and private agreements of any kind. It is difficult to tell, where the idea of the social contract has its origin, but even the sophists knew it in principle. Grotius himself refers especially to the story in the Pentateuch of the Lord's contract with his people, and to the Spanish moral philosophy of

22) *Zippelius*, l.c. (note 3) p. 81 ff.

23) *Stig Jørgensen*, Symmetry l.c. (note 1), Danish version p. 59 ff. with note 21.

24) *Ole Fenger*, l.c. (note 3).

25) *Zippelius*, l.c. (note 3) p. 116 ff., *Verdross*, l.c. (note 3) p. 25 f., *Stig Jørgensen*, Vertrag und Recht (note 1) p. 141 ff. and *same*, Die rechtliche Lage, l.c. (note 4).

*Lessius* and *Molina* which he knew very well. Perhaps the Germanic legal thinking, according to which the power of the prince was based on an agreement with the squires, might also have been of importance. At any rate, the personal loyalty in the feudal system and the coronation charter of the king, in Denmark that of King *Erik Glipping* (1281), in England *The Magna Charta*, had had some influence on the idea of a *right of resistance* against an unjust prince, an idea which Thomas Aquinas, as mentioned, did not approve of, and which Luther did not like either, as the Reformation, it will be remembered, was in most places carried through from above on the initiative of kings and princes.<sup>26)</sup>

*Thomas Hobbes*, the English contemporary of Grotius, did not acknowledge any right of resistance either, but then he had a threatening civil war hanging over him. Whereas, however, the social contract of Grotius was based on an optimistic belief in the sociality of man, the social contract of Hobbes reflected a pessimist assumption that the human race were unrestrained egoists, whose natural state would be a war of all against all, but who had found it profitable to conclude an armistice and to place their sovereignty wholly, undividedly and definitively in the hands of a king. In this way Hobbes motivated the enlightened despotism, whereas Grotius, like Aristotle, found that the social contract might justify a monarchy, an aristocracy or a democracy alike. The paradox about Hobbes is that he was at the same time the first modern natural law theorist and the first legal positivist in principle. Grotius was rather the termination of the old tradition with his anthropologically founded *lex naturale*, whereas Hobbes assumed in principle a human *ius naturale*. The legislative power of the prince only reflects the will of the citizens and is therefore quite voluntaristic.<sup>27)</sup>

The king and the citizens had a common interest in maintaining a natural law implanted in the human nature and reason for ever. This would supply an effective political weapon against the aristocracy, already weakened, and the weapon used up till now by the latter:

26) Cf. to the following *Arthur Kaufmann*, *Widerstandsrecht*, 1972, and the literature quoted in note 4.

27) Cf. *Verdross*, l.c. (note 3) p. 25 f., *Zippelius*, l.c. (note 3) p. 95 f., *Kriele*, l.c. (note 1) p. 152 f. and l.c. (note 4) p. 839 f.

the traditional customary law (King Valdemar's Law) which they had successfully used against the attempts of the king to create a state by means of his own legislation.<sup>28)</sup> During the following time *Pufendorf*, *Leibniz*, *Spinoza*, *Thomasius* and *Wolff*, the successors, developed the original natural law into a detailed system of rules which could meet the demands of the modern business life in the civil law area, and led to an important humanization of the criminal law.<sup>29)</sup>

The most important thing, however, was the formulation of the civic rights of the individual, first by *Locke* and afterwards by *Montesquieu*, which were later incorporated in the American Constitution of 1776 and the French one of 1789. The idea behind these rights was that all people are born equal and therefore must be freely allowed to create their own lives. Later on these natural law demands on the legal order have turned into positive law by being adopted by it.<sup>30)</sup> The principle of equity, for instance, has by most countries been entered in the law as a general clause allowing the legal practice to set aside contractual duties which are or become unreasonable; most recently and fully in Denmark with sec. 36 of the Contracts Act.<sup>31)</sup>

What was new in the rationalist natural law of the Age of Enlightenment was that the natural law (*lex naturale*) had been substituted by a natural right (*ius naturale*), cf. above at note 27. It was no longer the objective law but the individual rights of every man that ought to conform to the law of nature and of God, and, in a way, it might be said that the Christian individualism was made positive, as among other things also the doctrine of the individual

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28) *Ole Fenger*, l.c. (note 13) Ch. 6.

29) *Zippelius*, l.c. (note 3) p. 116 ff., *Hans Thieme*, Der Beitrag des Naturrechts zum positiven Recht. Deutsche Landesreferate zum VII Internationalen Kongress für Rechtsvergleichung, 1966, p. 81 ff., *F. Wieacker*, l.c. (note 8) p. 249 ff., *Stig Jørgensen*, Vertrag und Recht l.c. (note 1) p. 59 ff.

30) *Gerhard Oestrich*, Geschichte der Menschenrechte und Grundfreiheiten im Umriss, 1968.

31) *Stig Jørgensen*, Symmetry l.c. (note 1), *same*, The Journal of Business Law 1975. 324.

guilt was fully acknowledged in the course of the 18th century.<sup>32)</sup>

Another interesting fact was that in his book "L'esprit des lois" Montesquieu makes the demand on law that it must be in accordance with the tradition, religion, trades, industries, climate and other outward conditions of the country. He pointed backwards to the Middle Ages as well as forward to the historical legal science of his successors in stressing the importance of the changing outward and inward conditions as directive of the contents to be filled into the framework of the natural law. Instead of the static and mechanical world picture of the Enlightenment and the corresponding unchangeable natural rights the dynamic and organic world picture was now formed together with the idea of changeable and relative rights. During the following time, as imperialism progressed, the primitive people and their law came to receive much attention, and this prepared the way for the comparative legal science and an anthropologically founded natural law. During the 19th century this contributed to the advance of European law together with western civilization and technology. In our time the theoretical basis of a new natural law aiming at a world law common to all people is being created, and attempts are being made to isolate the integral parts or, so to speak, the constant conditions of human social life by comparing all known contemporary and previous cultures.<sup>33)</sup> First of all *Herbert Hart*<sup>34)</sup> has dealt with this question, speaking of the "minimum content of the law": you must not lie, you must keep your promises, you must not steal, you must not kill. The Roman jurist *Celsius* expressed the stoic natural law credo of his time in this way: *honeste vivere, neminem laedere, suum cuique tribuere*. But other modern jurists for instance *Verdross*, the Austrian, also talk about static and dynamic natural law, a natural law with a changing content.<sup>35)</sup>

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32) *Stig Jørgensen*, Law and Society, l.c. (note 1) p. 69 f. and p. 72 f., (Recht und Gesellschaft p. 82 ff.), *same*, Vertrag und Recht (note 1) p. 129 f.

33) *Stig Jørgensen*, Vertrag und Recht (note 1) p. 115 ff.

34) *The Concept of Law*, 1961, p. 181 ff.

35) *Statisches und Dynamisches Naturrecht*, l.c. (note 3).

## VI. POSITIVISM AND LEGAL POSITIVISM

However, legal positivism is not the same as the philosophical or scientific positivism, which is a theory of science.<sup>36)</sup> The scientific positivism only wants to deal with facts, i.e. phenomena existing in the outward world, and the regularities of their mutual relations which can be derived through empirical studies. Ontological and metaphysical questions are rejected as being irrelevant, and the same, therefore, will happen to teleological and intentional questions.

The legal positivism may refer to various issues, but they have that in common that they do not derive the validity of the legal rules from metaphysical, but from worldly legal sources. The legal realism is also positivistic in so far as it wants to deal solely with worldly phenomena, but the phenomena which are considered relevant are not the formal legal norms (alone) but the psychic ideas and the social behaviour expressing the norms in the three-dimensional world.

The legal positivism, as mentioned, may refer both to the origin of the law and to its content, and, likewise, the conception of natural law may be considered either as a legitimation of the law as a norm system, or as a legitimation or control of the content of the individual rule. The legal positivism assumes that the law is the work of man but does not decide, what persons or institutions shall have the authority to create law. The legal positivism may be a law positivism aiming at preventing any creation of law through judicial practice. This is the form in which positivism has been maintained in periods of centralism, when the central political state authority tries to preserve law as a means of governing in competition with the legal science and the judges.<sup>37)</sup>

The legal positivism, however, may also turn on the idea of codification.<sup>38)</sup> As an example may be mentioned the German

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36) Cf. to the following *Olivecrona* l.c. (note 1) p. 50 ff. and *Stig Jørgensen*, *Idealism and Realism in Jurisprudence*, supra p. 29.

37) *Kriele*, l.c. (note 1) p. 151.

38) Cf. to the following *Dilcher*, l.c. (note 1), who underlines Savigny's political interest in maintaining the position of private law as independent of the state, both in order

pandect literature of the 19th century (systematic accounts of the civil law based upon the traditional or adapted Roman law). "Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft" (1814), the famous pamphlet by v. Savigny from the beginning of last century, turned polemically on *Thibaut's* suggestion of transferring the ideas of the new French Code Civil to Germany. v. Savigny formally subscribed to the historical school of law which rested on the idea of the development of "the spirit of the people" and thus had something in common with the romantic doctrine of nature. The spirit of the German people, however, was sought in the Roman law which has, very likely, been in force in Germany since the empire of the 16th century. But virtually it was a weapon in the political struggle to maintain the German national state against the French radicalism. The political disintegration into small states corresponded to a similar disintegration of the law into small particular systems. v. Savigny wanted to create a common German law by scientific means, and to do so he needed time. Already at the middle of the century, however, v. Savigny had completed his "System des heutigen römischen Rechts" so far, that, worked up by his successors, it was made the basis of the BGB, the comprehensive codification that came into force in 1901. At the same time it was consciously applied in the struggle to keep the civil law free of the state control according to the state theory of *Kant*. The civil law was founded on the private will instead of the will of the state.<sup>39)</sup>

The French radicalism repudiated by Savigny was an offshoot of the so-called rationalist natural law which, referring to human reason, claimed to represent the eternal law as opposed to the canon law and the positive temporal law handed down from the Middle Ages. In the 17th and 18th centuries the rationalist natural law represented the interests of the enlightened middle classes as

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to secure the development of private trade by preserving the freedom based on private autonomy and on the doctrine of will, and to secure a common German civil law in the politically divided Germany; cf. also *H. Coing and W. Wilhelm* (ed.), *Wissenschaft und Kodifikation im 19. Jahrhundert*, 1974, and *F. Wieacker*, l.c. (note 29) p. 348 ff., *Kriele*, l.c. (note 1) p. 151 f. and *Stig Jørgensen*, *Vertrag und Recht*, l.c. (note 1) p. 49 ff.

39) *Stig Jørgensen*, *Vertrag und Recht*, l.c. (note 1) p. 59 ff., 141 ff., and *F. Wieacker*, l.c. (note 29) p. 322 ff.

opposed to the old feudal aristocracy, and in understanding with the crown the governmental systems of most European countries were changed into the so-called enlightened despotism. The natural law system works developed from the thoughts of Hugo Grotius, Samuel Pufendorf, Thomasius and Chr. Wolff into detailed systems supplying rules and legal principles on individualistic and liberalistic lines for the rising trade, and they were once more made the basis of the codifications which came into being in Prussia (1720), Austria (1811), Denmark (D.L. 1683), Norway (N.L. 1687) and Sweden (1734).

The positivist legal theory of *Jeremy Bentham* expressed his estimate of the need for radical changes of the traditional English common law in the form of a comprehensive codification.<sup>40)</sup> His distrust of the jurists was reflected in his definition of law as the will of the ruler at the time in question. This conception of law was later accepted by *J. Austin*.<sup>41)</sup> The American legal realism of the thirties was characterized by the same desire for social reforms, although not connected with a formal codification policy.<sup>42)</sup>

## VII. THE MOST RECENT DEVELOPMENT

We are now close to a new variant of the natural law thinking which has its origin in Aristotle's biological conception of man (*zoon politikon*), revived by *Thomas Aquinas* and passed on to *Grotius* via the Spanish moral philosophy.<sup>43)</sup> According to this conception man has by nature a set of biological characters predisposing him to arrange his life in a specific manner not solely conditional on reason. The fundamental content of this view is that man is not

40) Cf. most recently *Karl Olivecrona*, *The Will of the Sovereign, Some reflections on Bentham's Concept of "a Law"*. *American Journal of Jurisprudence*, 1975 p. 95.

41) *The Province of Jurisprudence* (ed. *H. L. A. Hart*) 1954.

42) Cf. *T. Eckhoff*, *Rettsvesen og Rettsvitenskap i USA*, 1953. Private or half-private law commissions instead drafted systematic reforms of the civil law, for instance *Restatement of the Law and Uniform Commercial Code* (*Karl Llewellyn*).

43) *Stig Jørgensen*, *Law and Society*, l.c. (note 4) p. 57 f. (*Recht und Gesellschaft* p. 68 f.), *Verdross*, l.c. (note 3) p. 27 and p. 73 ff., *Zippelius*, l.c. (note 3) p. 116, *A. Troller*, *Grundriss einer selbstverständlichen juristischen Methode und Rechtsphilo-*

only an individual but also a social being endowed with what Grotius called an *appetitus societatis*. This view is nowadays supported by the ethology as well as by the linguistic philosophy which renders it probable that a social behaviour is implanted in the biological code of man just like language which is a social means of communication. Modern ethics also attach importance to the natural characters of man and underline the so-called "sovereign reactions": faith, care, love etc. as the necessary basis of a human social life. Quite recently this ethic with its attention turned to the surrounding world has got an *ecological* aspect, placing man in an organic whole together with the surrounding nature and making the survival of man conditional upon a harmonious interaction with nature and its resources.<sup>44)</sup>

These "anthropological" natural law theories: phenomenological, marxist and analytic-hermeneutic, are, of course, still respectable considered as *social theories*. That means as theories of how society ought to be arranged in order to create "the good life" described by both Plato and Aristotle. It must be realized, however, that ontological references to the "essence" of man, as found with left-hegelians like *Habermas* (critical reason) or with the marxists (social and working being), are dangerous as long as we are unable to grasp the "nature" of man. Among other things because no people are living in the "natural state", and because the outward conditions have undergone a fundamental change away from what is "natural", and man, of course, is an adaptable or opportunist animal.<sup>45)</sup>

More questionable as a political weapon was the natural law

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sophie, *same*, Überall gültige Prinzipien der Rechtswissenschaft, 1965, *H. Henkel*, Einführung in die Rechtsphilosophie, 1964, *Zippelius*, Das Wesen des Rechts, 2. Aufl. 1969, p. 53 ff., *Philip Selznick*, Sociology and Natural Law, Natural Law Forum VI, 1961, p. 84 f., *J. Messner*, Natural Law Forum IV, 1959, p. 101 ff., *C. Fay*, Natural Law Forum VII, 1962, p. 38 ff.; cf. also Ordnung im sozialen Wandel (hrsg. *A. Klose* u.a.), Festschrift für Joh. Messner, 1976.

44) *Ole Jensen*, Theologie zwischen Illusion und Restriktion: Analyse und Kritik der existenzkritischen Theologie bei dem jungen Wilhelm Hermann und bei Rudolf Bultmann, 1975.

45) *Stig Jørgensen*, Law and Society l.c. (note 1) p. 57 ff. (Recht und Gesellschaft p. 68 f.), *same*, Vertrag und Recht l.c. (note 1) p. 115 ff.



conception of the so-called youthful revolution in the sixties that started from the platonic-romantic conception of man as destined by reason and feeling (eros)<sup>46)</sup> at the same time. The modern technological society with its division of labour and its development of material wealth would reduce man into a "*one-dimensional man*" (Marcuse), since it encouraged his rationality and suppressed his feelings and intuition. This new "critical science" was rooted in the German hermeneutics and left-hegelianism, and its most important enemy was the so-called "logical empirism" or logical positivism developed in Vienna in the twenties by *Carnap*, *Neuroth*, *Wittgenstein* and other scientists. This latter philosophy, as mentioned before, denied that science could deal with anything but statements which either refer to empirically measurable facts or are analytical, just like natural science and mathematics. The purpose of this theory of science was, among other things, to keep all sorts of evaluations outside the objective scientific concept of truth, such evaluations being reduced to represent a question of tastes. It must not be forgotten that the object of this was not to suppress or throw suspicion on evaluations: political, ethic, aesthetic, but, on the contrary, in liberating them from the scientific objectivity to allow people freely to choose their political, ethic or religious conviction and so to protect democracy against the progress of totalitarian ideologies.<sup>47)</sup> It is true that this philosophy contributed to make the democracies independent of ideologies in the fifties, since it then became a common and necessary attitude that now, after the destruction caused by the war, was the time for encouraging the economic growth, so that politics became merely an "objective" means of attaining this unambiguous end. But this philosophy also contributed to break down the defence of the democracies against the militant marxism which had gradually taken over the western youthful rebellion. From the romantic affinity with Rousseau and the utopian socialists found in the young Marx the ideology of the rebellion had now shifted to an economic materialism as hard as bone. From the idea of a classless society governing itself without legal rules, as such rules formed

46) *Stig Jørgensen*, l.c. (note 4).

47) *Kriele*, l.c. (note 1) p. 150.

part of the superstructure which reflects not decides the material conditions of life, the ideology went on to an understanding of law as a means of suppression.

When the private property is abolished, the contrast between private and public human life will cease to be, and the state that procures this contrast will wither away.

When the private property is abolished, the contrast between private and public human life will cease to be, and the state that procures this contrast will wither away.

In his older days Marx attached greater importance to purely logical analyses of the capitalist society which he found would change from the dictatorship of the capitalists to that of the proletariat by virtue of economic laws based upon the classical economic theory of value and wages. By virtue of the so-called "Iron Law of Wages", which *Lasalle*, the German social democrat, attributed to *Ricardo*, the classical English economist, the capitalists would keep the wages at the minimum necessary to reproduce the labour force. The "surplus value" which comes into existence, because the workers' wages represent only part of the value created by their work, will be accumulated in the establishments which will then grow larger and larger. Since at the same time still larger parts of the population are proletarianized this proletariat will necessarily take over the productive apparatus from the decreasing number of capitalists and introduce the "dictatorship of the proletariat".

Lasalle and later social democrats have contradicted this "scientific" law of development and have worked to get an influence on the legislation of the political democracies instead. By such means and by organization in powerful trade unions they have on one hand undermined the "theory of surplus value" and on the other hand demonstrated that the legal rules are not merely part of the ideological superstructure of society, but, on the contrary, an efficient means of political governing. *Rudolf v. Jhering*, the contemporary of Lasalle, also considered law as a means of social governing, and this view seems to be realistic.<sup>48)</sup>

48) Cf. *Helmut Schelsky*, Sozialer Wandel durch Recht. Das Jhering-Modell (1978), and *F. Wieacker und Chr. Wollschläger* (ed.), Jherings Erbe, 1970.

The scapegoat of the marxist social criticism, therefore, has been the legal positivism which was an offshoot of the logical positivism. This legal positivism was very consistently formulated in the "Vienna Circle" by *Hans Kelsen*,<sup>49)</sup> who denied that legal science could deal meaningfully with questions beyond the positive law in a specified society. "Metaphysical" questions, i.e. questions referring to the ethic or political purposes of the law, or "sociological" questions referring to the relation of the law to the social reality, were of no importance to the *legal science*. This did not mean that these were unimportant questions, only they were not scientific and certainly did not fall within the scope of *legal science*. The validity of law, therefore, is not to be sought for in circumstances outside the law, but in the legal order itself, the latter being considered as a hierarchic system of rules which derive their validity from still higher-ranking norms ending up with the basic law, which is in its turn based on a "basic norm" that is no empirical phenomenon but a logical prerequisite of the system. The legal rules themselves are only the tools of the political system, being taken as directives for the judicial authorities to exercise the monopolized social coercion against offenders. During the forties and fifties *Alf Ross*,<sup>50)</sup> the Danish pupil of Kelsen, formulated this doctrine with passion and elegance and mingled with elements of the "Scandinavian Realism", which had branched off from the so-called Uppsala philosophy (*Axel Hägerström*), and with elements of the English analytical philosophy (*Moore, Ryle, Herbert Hart*). It was common to these schools of philosophy to reject "metaphysical" problems and questions of the fitness of evaluations for scientific treatment. Ross, first of all, used strong terms against the "ethic" legal theory referring to justice as an argument or to natural law which he calls such names as "a whore to be bought by anybody", "an inarticulate cry" or "a bang on the table" (emotive statements as opposed to assertions of reality).

The philosophical basis of the logical positivism and so of the legal positivism was disputed already in the time immediately after the war. It was easy to understand that in the first place the

49) *Reine Rechtslehre*, 1960.

50) *Law and Justice*, l.c. (note 1) p. 33 f. and 52 ff.

German jurists, but also some American and Scandinavian (*Lon Fuller, Frede Castberg*), tried to find a new legal departure, since many of them regarded the Nazi assumption of power as a result of the positivists' instrumental conception of law and the jurists' failure to resist the dictatorial suppression. Shortly after the war *Helmut Coing*, the outstanding German jurist, wrote a booklet on "Die obersten Grundsätze des Rechts" (1947), in which he tried, on a phenomenological basis, to link the positive law with some basic natural law principles, which were, by the way, later on in 1948 made positive in the Grundgesetz of the new Federal Republic. In the Art. 20 of this constitution an apparently self-contradictory provision has been introduced, which makes it a right and a duty of the citizen to resist attacks against the democratic institutions of the constitution, even if such attacks should be the result of legal acts of the authorities. This provision expressly legitimates the "right of resistance", although in a strictly limited form. Anyhow, this provision cannot legitimate the "civil disobedience" which followed in the wake of the youthful rebellion and which *Marcuse* justified by referring to a right of revolt based on natural law. He postulated a general humanitarian right of freedom of suppression, which was revealed by first provoking "violence" on the part of the authorities and then fighting this violence with "violence of liberation". This equates "execution of authority" with violence, a terminology also found with *Johan Galtung*, the Norwegian peace researcher.

Such references to "natural law" are, of course, extrasystematic and thus ethic or of legal policy character. They are no references to the valid law which must necessarily form part of the political system. References to natural law, then, are made in order to alter the political system, and references to law and justice have always been very effective in political struggles. In fact, most legal theorists of today choose to respect the distinction between law and politics, but not necessarily because they regard a given social system as a "just" society. Although the fascist and communist dictatorships are an abomination to most democratic-minded people, it is no use, as stated by *Herbert Hart*, to deny that the rules produced by the ruling system are legal rules or to talk about "Unrecht als System",

as the Nazi law has been called. Other theorists, among others *Martin Kriele*,<sup>51)</sup> have strongly disputed the correctness of the claim that the legal positivism is responsible for the Nazism in Germany. For instance, Nazism did not come into power by a *coup d'état*, but in consequence of the constitution of the Weimar Republic, and the system only gradually altered into a dictatorship. Instead of offering open resistance and suffering martyrdom for no useful purpose the jurists succeeded for quite a long time in preserving important parts of the democracy by means of interpretation and references to "gesundes Volksempfinden" according to the traditional understanding hereof. Moreover, a sharp distinction between law and politics will make it clear what game you are at yourself: to alter the law and the society, and will also make it easier to resist political attacks against the established society formulated in a "scientific" terminology.

### VIII. NATURAL LAW AND SOCIAL PHILOSOPHY

There is no reason, however, to doubt that there are limits to what man can be brought up to without getting ill. Neuroses, criminality and self-help are the symptoms of the existence of such limits and of the failure to respect them. Instead of falling for a totalitarian ideology trying to thrash the individuals into its own image, however, it would be better to depart from a liberal and humanistic point of view trying various arrangements and letting people's reactions to these arrangements decide the future development. A political attitude like this would be truly realistic and "scientific" allowing the experiment to decide what is truth and not the other way round. It may seem unpleasant, of course, to consider social life as an experimental theatre, but what other acceptable solutions are available? Is democracy not still the least bad solution?<sup>52)</sup>

It is a condition, of course, that the democratic politicians are not *solely* quided by regard for the next election. This is easier said than done. The politician must on one hand acknowledge his

51) L.c. (note 1) p. 154 f.

52) *Stig Jørgensen*, *Ideology and Science*, *supra* p. 9.

ideology and its necessity as the key to a specific philosophy of life, and on the other hand he must let himself be guided by the experts' affirmation or denial of parts of the same ideology. But politicians should not act as superior vulgar scientists, no more than the experts should be allowed to abuse a false authority to dabble in politics. Participatory democracy is an engaging idea and ought to be encouraged as much as possible to fulfil the human need of freedom. It must not be forgotten, however, that man as a social being is also in need of security, i.e. of a society which is able to take care that the interests of the whole, and especially of the weak, are not sacrificed for the freedom of the strong. Participatory democracy is especially wanted by the strong, as they will be able to utilize their liberty to dispose of their own lives. This means that the participatory democracy, now praised to the skies by conservatives as well as socialists, can very easily become a cloak for egoism. At any rate, the perfect participatory democracy presupposes a maximum of information, which is not available in our complicated society that rests on expert knowledge and division of labour. Otherwise the democracy will become a victim of the "terror of the loudspeaking" or sink into mediocrity.

It is interesting, however, to notice that *John Rawls*, the American social philosopher, in his lifework collected in the book "Justice as Fairness" (1971)<sup>53</sup>) has tried to find a formula for the balancing of social utility (the economic growth) with "justice", the latter hereby coming into favour as a primary social value. In agreement with *Kant* Rawls says that the individual cannot be a means but only an end and has therefore a right of a freedom only restricted by the regard for the equal right of freedom of others. Justice will not be able to tolerate a constant economic growth, if this leads to increased inequalities, even if the profit of everybody gets larger. Rawls refers to the old natural law theory of the social contract and concludes that men as reasonable beings, if they did not know their own natural and social position, would choose a society tending towards equality, but would also demand a well-organized society with certain limits within which the indi-

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53) *Stig Jørgensen*, *Symmetry and Justice*, l.c. (note 1).

viduals were enabled to expand and utilize their equal freedom. Considerations of space forbid me to go into details about Rawls' philosophy and the objections against it.<sup>54)</sup> I shall confine myself to the statement that it is an attempt to formulate a modern liberal alternative of the socialist theory and that it has reintroduced the reference to justice and natural law as part of its foundation.

## IX. CONCLUSION

I shall conclude by quoting myself: The fact that the content of justice is changing from time to time and from place to place, does not entitle us to reject it as senseless or naïve. On the whole I doubt the advisability of trying to reduce or brush aside apparently resistant and ineradicable basic conceptions whether of religious, moral or legal character.<sup>55)</sup>

On the other hand it must be realized that justice and natural law ask different questions at different times and consequently give different answers. Partly because social life raises different problems, partly because the means available are different. We have seen that natural law can be used as a defence of conservative, liberal and revolutionary societies, and that it may recommend both feudal, sovereign and democratic forms of government. We have seen that legal positivism has been used in the struggle against the temporal power of the church. Hans Kelsen, for instance, has in no other places been taken so seriously as in South America and Italy, where the church exercises a strong political power up to our time.<sup>56)</sup> We

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54) The construction presupposes what it should explain: that the contract is binding. Spinoza also criticized Hobbes of being too legalistic when he presupposed that the citizens were bound by their "social contract" and had no right of resistance, although the prince had no longer the power to maintain his sovereignty. Spinoza therefore held that sovereignty was constantly dependent on the power of maintaining it, *Zippelius*, l.c. (note 3) p. 100 f. Any natural law legitimation, like the positivist ones, must rest on extrasystematic factors or appear as postulates, cf. also *N. K. Sundby*, *Naturrettens legitimasjon for normativ kompetanse*, *Tidsskrift for Rettsvitenskap* 1975 p. 339, and *Eckhoff and Sundby*, l.c. (note 6).

55) *Law and Society* l.c. (note 1) p. 101 (*Recht und Gesellschaft* p. 116).

56) *Kriele*, l.c. (note 1) p. 153.

have also seen that legal positivism can be used as a tool for an authoritarian government, as is still the case in the people's democracies of Eastern Europe. To the legal profession legal positivism is useful as a weapon in the struggle against the legal monopoly of the state as opposed to the courts who justify their solutions of legal conflicts by the figure of "nature of things", considering partly the actual facts of the case and equity, partly such changes of the circumstances which make the positive laws seem out of date and inadequate. That is the reason why all sovereign codifiers from Justinian to King Christian the Fifth have prohibited every interpretation or printing of judicial decisions, as well as justifications of the latter. Experience shows, however, that in (relatively) liberal societies development cannot be detained but for a time. In Denmark *A. S. Ørsted* founded the Danish legal science just at the time, at the beginning of last century, when *Danske Lov* (The Danish Code) seemed to be antiquated and all attempts at law reforms had failed. Characteristically, Ørsted based his work on a compound of the Romanist legal science and the natural law system works which had through a century been applied to fill the gaps in the law otherwise applied. Roman law and the law of nature had been taught together with the positive Danish law as subjects for the law degree introduced at the university in 1736. By the way, Ørsted's "*Haandbog over den danske Lovkyndighed*" (Manual of Danish Jurisprudence) was in its form a current critical review in 6 volumes of a small natural law textbook by Professor *Hurtigkarl*.<sup>57)</sup>

At times natural law has also been a defence of certain "rights" which have later become parts of the positive law by being made positive in the constitution or the general legislation; in this way a strong defence had been established towards political attacks justified by "natural law" against these "rights".

I hope to have conveyed to the readers the impression, that the dichotomy of positive law/natural law is an ambiguous issue and that, considering the problem in a historical perspective, one cannot

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57) *Stig Jørgensen*, *Vertrag und Recht*, l.c. (note 1) p. 76, *same*, *Grundzüge der Entwicklung der skandinavischen Rechtswissenschaft*, *Juristenzeitung* 1970 p. 529 ff.



as a matter of course assign the part of the hero to one term and that of the villain to the other. Every time has its own problems and its own picture of the world. Every time and every interest choose the philosophy they are in need of.

## NATURAL LAW TODAY\*)

### I. HISTORICAL PERSPECTIVES

The idea that human society is controlled by natural laws – just as the physical world – dates back to the Greek philosophy of nature and further back through the Persians to the early Babylonian culture, which regarded human life as reflections of the cosmic laws.<sup>1)</sup> But a firmer philosophical connection between nature and social order was not established until Aristotle's metaphysics came about, in which *physis* and *nomos* form a synthesis, as all things, dead as well as living things, have a "nature" or "essence", which they endeavour to realize; the more this possibility has been realized the more perfect or "good" is the thing. The nature of man is, in accordance with his reason, to realize his instinct as a social being (*zoon politicon*). Reason orders man to show moderation in his contrasting wants for freedom and security, and the form of organization that best corresponds to Aristotle's conception of "the good life" was the Greek city-state (*polis*), as he knew it from the city-state of Athens in the 4th century.<sup>2)</sup>

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\*) About the interrelation between law and social facts, in *Stig Jørgensen*, *Law and Society* (Aarhus 1971), *Die rechtliche Lage des Menschen in einem ständig wechselnden gesellschaftlichen Modell*, *Österreichische Zeitschrift für öffentliches Recht* 23, p. 213 (1972).

1) *Stig Jørgensen*, *Symmetry and Justice*, *supra* p. 59.

2) *Joachim Ritter*, *Naturrecht bei Aristoteles* (1961); see also *Franz Wieacker*, *Zum heutigen Stand der Naturrechtsdiskussion* (1965) with contributions by among others *J. Ritter* and *H. Welzel*.

But before Aristotle's anthropological conservatism the Sophists had defended a radical legal positivism, as they considered the laws to be nothing but conventions, i.e. created by man just as the gods were created in the image of man. But the rational nature of man is just what enables him to change the transmitted customs by means of agreements. Platon's strict élite society as well as Aristotle's naturalistic theory of society were a protest against what they regarded as the unfortunate results of the vulgar democracy, which they thought to be the reason why Athens was involved in the Peloponnesian War.

It was Aristotle's idea of nature that had the greatest influence on posterity; in the first place the Roman Empire through the stoic doctrine of a life in accordance with nature, which man follows in accordance with his reason (*ratio*) in the same way as things follow the laws of nature by virtue of necessity and animals by virtue of their instinct. The Roman jurists dealt with several theories of "natural" normative connections (*ius naturale*) before the legal establishment of norms (*ius civile*). Even the nature of things (*rerum naturae*) and the nature of the human conditions of life make demands on the legal decision, just as the praetor's power (*bona fides*) to renew the law was based on pre-positive demands for changes of the law by virtue of changes of the conditions of life. But from time immemorial justice (*iustitia*) and equity (*aequitas*) had been regarded as corrections of the strict application of the law. It is a well-known fact that Aristotle had divided justice into two categories: an original commutative justice (fair is fair) and a later distributive justice (social justice). The Stoics applied these thoughts on each individual being and demanded that morally and legally the individuals should be placed on an equal footing.

When Gaius speaks of *ius gentium*, he thinks of the common principles of law, which result from natural reason (*ratio*), and which can therefore be found in all existing legal systems. When later on Ulpian speaks of *ius naturale* he thereby understands something else and more abstract: *suum cuique tribuere* (to give everyone his due), which is also an old Greek idea handed down by the Stoics.<sup>3)</sup>

3) See Wolfgang Waldstein, *Entscheidungsgrundlage der klassischen römischen Juristen*, H.

However, Aristotle's metaphysics also had a decisive influence on Thomas Aquinas and consequently on canon law and the later rationalistic natural law. In the first place Thomas accepted the anthropological conception of man and the necessity of the state as the natural institution for the achievement of security and justice. Secondly, Thomas accepted a competence for man, based on his rational nature, to legislate for himself within the limits of the divine *lex naturae*. At the beginning of the 17th century this double conception of natural law is adopted by *Hugo Grotius* through the Catholic (Aristotelian) moral philosophy. Man has an *appetitus societatis* which forces him to try to realize himself in an organized society, and a rational nature which makes him quite suitable for self-legislation by agreement through a social contract as well as through private and international contracts.

Already in *Samuel Pufendorf* natural law more and more assumes the character of being a system in competition with positive law, — a system which at the same time limits and supplements positive law. This tradition culminates in *Chr. Wolff*, who emphasizes the moral obligation to perfect one's faculties and spirit within the society. This material natural law conception of the law as a product of the society, the object of which is to develop man's moral nature — incidentally found in Hegel<sup>4</sup>) — springs from Aristotle's teleological anthropology. Conversely Kant, by emphasizing the individual freedom, which is limited only by other human beings' equal right to freedom, reduced natural law (the social contract) to a formal category, which was further emptied of its contents by *Fichte* and this smoothed the path for its contrast, the legal positivism, which dominated the legal thinking of the 19th century.

The same conclusion must be drawn from Hobbes' social contract, which was a little younger than that of Grotius. Unlike Grotius' social contract the former was based on a misanthropic conception of man which must be seen in the light of the unsettled

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*Temporini* and *W. Haase*, *Aufstieg und Niedergang der Römischen Welt* II (15, Band 1976) p. 3 ff., *P. Stein*, *Regulae Iuris* (1966), see also *Stig Jørgensen*, *Symmetry and Justice* (l.c. note 1).

4) See *R. Zippelius*, *das Wesen des Rechts* (3. Aufl.) p. 72 ff.

England of that time. Human beings in the state of nature are wolves, who ruthlessly fight each other and therefore in mere self-defence make a mutual agreement to place all the power in the hands of a sovereign king. But in Hobbes the king's legislative power is nothing but a complete reflection of the citizens' will and therefore completely voluntaristic, as it is based *not* on the *lex naturae* of the society, but on the citizens' *ius naturae*, i.e. not an objective natural law, but a subjective natural right. Later *Hume*, *Bentham*, and *Austin* build their theories on this positive conception of law by making human inclinations and – later with Stuart Mill – public utility the basis of an instrumental conception of law.<sup>5)</sup>

The paradox was, however, that rationalistic natural law, which was in fact based on an eternal and unchangeable natural law, led to great codifications in several countries among others in Prussia, Austria, and France. It was also a paradox that, nevertheless, by rejecting the natural law and the codification idea and acceding to a historico-organic conception of law instead *Savigny* through his jurisprudential work created the foundation of the following legal positivism and finally of the BGB.<sup>6)</sup>

Already in the middle of the 18th century *Montesquieu* had emphasized that the law must be in accordance with people's natural needs, but must also depend on geography, climate, religion, and economic conditions. Thus, at the same time he had reformulated the classic Thomistic idea of the static (primary) and dynamic (secondary) character of natural law<sup>7)</sup> and revived the Roman comparative *ius gentium*. In doing so he had actually founded the comparative jurisprudence and anticipated the historic legal school. In fact the laws (*les lois*) are a manifestation of the necessary connections derived from the nature of things (*nature des choses*), and these laws control both God, the physical world and the conditions of animals and human beings.<sup>8)</sup>

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5) See *Stig Jørgensen*, Legal Positivism and Natural Law, *supra* p. 103.

6) *Arthur Kaufmann*, F.C. v. Savigny (*infra* n. 25), cf. note p. 9.

7) *A. Verdross*, Statisches und dynamisches Naturrecht (1971).

8) *De L'Esprit des Lois* (par *Gouzagne Truc*) Tome I (1956) ch. 1–3.

Montesquieu calls these necessary connections between law and society the spirit of the laws (*l'esprit des lois*). These connections, as mentioned, refer to the nature of man: On one hand the emotional needs for self-preservation, propagation, security and the needs for living in societies, on the other hand human reason (*raison humaine*). But they also refer to the nature of things, i.e. the special conditions of life, under which the population lives. The most natural social order is the one that best corresponds to the conditions, under which the population lives, no matter if it is despotism, monarchy or democracy.

This basic idea, which is rooted in antiquity can be seen again in A. S. Ørsted, who rejected the rationalistic natural law, but found that the positive law should be supplemented with an unwritten natural law based on the natural sense of justice, common sense, the demands of civil life, the legal objects and the citizens' traditions.<sup>9)</sup>

Knowledge of the nature of things and experience from civil life are to direct the jurists when analysing such legal matters which arise out of the needs of civil life and the mentality of the nation.<sup>10)</sup>

According to this conception natural law is not a super-positive, speculative and unchangeable set of legal rules, but a number of principles, deduced from the *concrete social conditions* and the *political legislation*, for the interpretation and supplementing of the law in a certain society. Although Ørsted rejects a metaphysical and a priori natural law, he believes in the existence of such norms, whose validity could hardly be contradicted by any legally learned person. It appears from the context that Ørsted also here has different societies in mind, but with a more or less common mentality; for instance he refers to the position of monogamy in Christian states (l.c. p. 84 ff). It is not quite obvious how far he goes in accepting a *ius gentium* based on man's general nature. However, the connection with the classic doctrine of the nature of things, the conditions of life and their alterations, the sense of

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9) Håndbog over den danske og norske Lovkyndighed I, (1822) p. 83 ff. especially p. 90, 293 ff. and 349 ff.

10) On this subject see Ditlev Tamm, Fra "Lovkyndighed" til "Retsvidenskab" (1976) p. 393 ff.

justice and equity (p. 115 ff.) and common sense lies near at hand, although he does not himself state any sources. When he refers to the spirit of the legislation (p. 293) and the grounds of the law as a means of interpretation, he thinks of this specific provision and the other provisions of the legislation as well as the considerations of the *rational* intentions of the legislator and the consequences of the law, and not only of the motives manifested.

## II. NATURAL LAW TODAY

Nowadays the debate about natural law has especially been concentrated on the fact that the positivistic and realistic legal theories refuse to deal with what they call "metaphysics", i.e. to make statements about something that is beyond experience. And as the law as a verifiable phenomenon can only consist either of the rules of law validly laid down or of the social or psychological facts, which are an evident manifestation of these rules of law, these theories vigorously reject natural law. It is quite natural to mention *Hans Kelsen* as a representative of logical positivism. He assumed that jurisprudence could not deal with the relations between the law and the social or psychological reality, but only with the formal validity of the law. Jurisprudence can only describe and systematize the rules of law which have been validly and formally laid down by virtue of another norm at a higher level. This "fundamental norm", which is the logical basis of the system, is at any rate *a priori* and therefore of the same category as natural law. A logical basis of the system cannot justify a phenomenon in reality.<sup>11)</sup>

The "Scandinavian Realism" was especially engaged on anchoring the law in reality and criticizing the idealistic theory of will, but the Uppsala-school's conception of realism is not quite clearly defined.<sup>12)</sup> Both *Olivecrona*<sup>13)</sup> and *Alf Ross*,<sup>14)</sup> however, assume

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11) *Hans Kelsen*, General Theory of Law and State (1945) p. 110 ff; On the other hand it is doubtful whether the problem of validity can be replaced by an actual recognition, see *H. Hart*, The Concept of Law (1961) p. 97, see, however, *Nils Kr. Sundby* and *Torstein Eckhoff*, The Notion of Basic Norm in Jurisprudence, ScStL 1975, p. 123.

12) See *Stig Jørgensen*, a review of *Stig Strömholm* and *H. H. Vogel*: Le "Réalisme

that the law is a phenomenon of reality which excludes any over-positive reference to a natural law or to justice as a correction of the existing law or as a condition of its validity. Also *H. Hart*<sup>15)</sup> conceives the law as a system of rules which has been validly created in conformity with the actually acknowledged rules of recognition, but which differs in principle from the morality. Hart therefore rejects a correction of the law based on natural law, but he finds that in every society there has to be a minimum content of moral principles in order to make the society a unity: "(it) includes rules restraining the free use of violence and minimal forms of rules regarding honesty, promise-keeping, fair dealing and property".<sup>16)</sup>

However, in its consistent identification of the law with the legal procedure, the American realism was much more interested in the judicial decision and the forces that motivate the decision. Altogether they equated sources of law with actual causes and motives ("the digestion theory"), so that the consequence was a rejection of the existence of the rules.<sup>17)</sup> Just as is the case in the German *Freirechtsschule*<sup>18)</sup> at the end of the 19th century and partly in the later *Interessenjurisprudenz* it is emphasized that the judicial decision is dependent on the social and political interests on which the official rules of law are based.

It is beyond doubt that a positivistic view excluding references to extra-legal factors of any kind lies nearest at hand for a legal theory whose main task is to describe the law as a system of norms, whereas the legal conception that concentrates on the legal judgment is more likely to be confronted with the dilemma that arises because of the very character of decision involved by the

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Scandinave" dans la philosophie du droit (1975), in *TfR* 1975, p. 636.

13) *Law as Fact* (2. ed. 1971), *Die zwei Schichten im naturrechtlichen Denken*, ARSP 1977, 1 ff.

14) *Om Ret og Retfærdighed* (1953), English edition "On Law and Justice", London 1974.

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

16) Social solidarity and the enforcement of morality, 35 *U. Chicago L.R.* 9-10 (1967) p. 13.

17) *Jerome Frank*, *Law and the Modern Mind* (1930), *Felix S. Cohen*, *Transcendental Nonsense and the Functional Approach*, 35 *Col. L.R.* (1935) 809 f.

18) *Hermann Kantorowicz*, *Der Kampf um die Rechtswissenschaft* (1906).



judgment. This makes topical the distinction between the motive and the justification. The justification is the legal material referred to in the grounds of the decision, the motives are the actual interests and attitudes that decide the choice of facts and rules of law.<sup>19)</sup> The acknowledgement of the fundamental difference between motive and justification does not necessarily lead to the conception that the justification is only a pseudo-justification or a "legitimation" of the judicial decision.<sup>20)</sup> It is quite reasonable to assume that a jurist, when making his decision – the judge of concrete legal disputes, the legal scientist of hypothetical ones – will primarily be motivated by the consciousness of his duty to follow the rules of law.

However, it has been made evident, especially by the contemporary philosophy of language, that the basis of logical positivism, i.e. that it is possible to make an objective and unprejudiced description of the law, has failed.<sup>21)</sup> Any linguistic description involves a qualification of real phenomena in relation to an existing system of words and ideas, each part of which is open and ambiguous.<sup>22)</sup> Any description involves an interpretation of reality, including written or unwritten rules of law, and the object of this interpretation is to state a content or meaning that can be communicated from one person to another. And this interpretation must necessarily include some considerations concerning the object and the consequences of the application of the rules. The German hermeneutics and the English analytic philosophy have the recognition in common that the language holds a long historical experience and that the meaning of the terms are determined by human purposes and interests. The

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19) *Stig Jørgensen*, *Law and Society* (1971), Ch. 4; *same*, *Norm og Virkelighed* Tfr 1970, p. 484. In German: *Norm und Wirklichkeit*, *Rechtstheorie* 2. Bd. 1971, p. 1.

20) *A. Ross* (l.c. note 14) p. 166.

21) See *Stig Jørgensen*, *Ideology and Science*, *supra* p. 9.

Concerning the German dispute in general see, *Reinhard Damm*, *Norm und Faktum in der historischen Entwicklung der juristischen Methodenlehre*, *Rechtstheorie* 1976, p. 213 ff.

22) See *Stig Jørgensen*, *Typologi og Realisme*, *Nordisk Gjenklang* (1969), p. 144 ff. In German: *Typologie und Realismus*, *Akademie der Wissenschaften, I Philologisch-historische Klasse, Jahrgang 1971, Nr. 3. Ret og Samfund* (l.c. note 19), p. 16 ff. In English: *Law and Society* (1971) p. 8.

person using the language will therefore apply the standard of values implied by the language.<sup>23)</sup>

The basis of the strict legal positivism of the 19th century was another conception of language. According to this it was possible to give an objective as well as an exhaustive linguistic description of the law as a system, so that the description and the application of the law were a purely linguistic-logical operation. The German *Begriffsjurisprudenz* was an ideal example of this conception of law, as it was disconnected from the legal reality.<sup>24)</sup> Ironically enough, it was Savigny's historic conception of law and the fight against codification which resulted in the disadvantages that are normally considered to be the Achilles' heel of codification.<sup>25)</sup> But already in the 19th century there were certain campaigns influenced by natural law against this dogmatic-exegetic conception of law.<sup>26)</sup> In Denmark "the nature of things" had been recognized as a general supplementary source of law since Ørsted.

During the post-war era, especially in Germany, there have been several attempts to establish a new natural law based on the conception that the coercive system of the Nazism could not be a legal system. One of the first attempts to set limits to the validity of a legal system was made by *Gustav Radbruch*.<sup>27)</sup> Later *Lon Fuller* repudiated the pragmatic American realism, while *Frede Castberg* criticized the Scandinavian realism.<sup>28)</sup> They all found that positive law must respect some fundamental moral demands in order to be

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23) See *Stig Jørgensen*, *Hermeneutik og Fortolkning*, TfR 1973, p. 626 ff., *Arthur Kaufmann*, *Grundprobleme der Zeitgenössischen Rechtsphilosophie und Rechtstheorie* (1971) p. 65 ff.

24) *Karl Bergbohm*, *Jurisprudenz und Rechtsphilosophie* (1892).

25) I.e. the philological method of interpretation, see *Arthur Kaufmann*, *Friedrich Carl von Savigny, Enzyklopädie "Die Grossen der Weltgeschichte"*, Band VII (Zürich 1976) p. 403 ff., cf. above p. 138.

26) *Gény*, *Méthode d'interprétation* (1899), *Jhering*, *Der Zweck im Recht* (1877) and the later *Freirecht*-movement.

27) *Gesetzliches Unrecht und übergesetzliches Recht* (1946) printed in his book: *Rechtsphilosophie* (v. Erik Wolff), 6. Aufl. 1963, p. 347 ff.

28) *Fuller*, *The Morality of Law* (2. ed. 1969) Ch. 3, and *Frede Castberg*, *Forelesninger over Retsfilosofi* (1965) § 3. See also *H. Coing*, *Die obersten Grundsätze des Rechts* (1947), see also *Jacob Sundberg*, *Legum leges*, Sv.JT 1977, p. 116 f.

valid — and if not, the citizens must have a right of resistance.<sup>29)</sup>

In this connection I shall not go further into the natural law problem concerning the validity of the law. Instead, I shall emphasize the consequences of the modern acknowledgement of the *incompleteness of the law*. Within the modern continental legal philosophy different schools have arisen. On different bases these schools find that a normative material can be taken directly from an acknowledgement of certain facts given in advance and thus existing prior to the law.<sup>30)</sup> From the point of view of the *German Protestant institutional jurisprudence* state, church, marriage, property and other institutions are taken as established by God, so that these social facts are not mere facts, but also normative institutions from which binding conclusions can be drawn.<sup>31)</sup> The *phenomenologic jurisprudence* assumes that prior to the law there is an objective system of values, which is determined by the nature, needs and sociality of man.<sup>32)</sup> This conception is related to the *neo-Thomistic natural law*, which tries to find the static and dynamic elements of the law on an anthropological basis.<sup>33)</sup> And this view has been supported by comparative, anthropological and sociological studies of man's social organization.<sup>34)</sup> I have built upon this conception myself, when I speak of *natural law as social theory*.<sup>35)</sup> The *existentialist natural law* considers man's actual

29) *Stig Jørgensen*, Modstandsret og ungdomsoprøret, TfR 1970, p. 198, (German abbreviated version: Das Individuum, die Gesellschaft und das Widerstandsrecht, Österreichische Zeitschrift für öffentliches Recht 24, (1973) p. 22). *Same*, Legal Positivism and Natural Law (l.c. note 5).

30) See also *Stig Jørgensen*, Idealism and Realism in Jurisprudence, *supra* p. 29.

31) *H. A. Dombois*, Recht und Institutionen (1956).

32) *Hans Welzel*, Naturrecht und materiale Gerechtigkeit (4. Aufl. 1962), *Heinrich Henkel*, Rechtsphilosophie (2. Aufl. 1971), *R. Zippelius*, Das Wesen des Rechts (4. Aufl. 1978), *Alois Troller*, Überall gültige Prinzipien der Rechtswissenschaft (1965), *Michel Villey*, La formation de la pensée juridique moderne (1960–66).

33) *A. Verdross*, Statisches und dynamisches Naturrecht (1971), *Johs. Messner*, Das Naturrecht (1966).

34) *Margaret Mead*, Some Anthropological Considerations concerning Natural Law, Natural Law Forum 6, 1960, p. 51 ff., *Philip Selznik*, Sociology and Natural Law, Natural Law Forum 6, 1961, p. 84 ff.

35) Law and Society (l.c. note 19) p. 57 f., see also *Edgar Bodenheimer*, Jurisprudence (1974), *same*: Philosophical Anthropology of Law, Cal. L.R. 1971, p. 653, *Albert Ehrenzweig*, Psychoanalytical Jurisprudence (1971).

situation to be the essential thing, whereas the law is only temporary and imperfect attempts of concrete solutions of problems.<sup>36)</sup>

It is common to all these conceptions of the relation between law and facts that, like the classic natural law tradition, they assume that the nature of things, the nature of man and the social institutions are structures coming before the law, so that a reasonable knowledge of these facts directly offers the solution of legal problems, in any case where no compulsory statutory provision speaks against this. Other legal theories have taken the consequence of the new knowledge of the imperfect character of the language and the law and have more or less radically adopted the conception that law is primarily governed by a set of superior values. These are expressed either in the constitution or – where a constitution does not exist, as it is the case in Great Britain – in the total political and cultural system, as developed through history.

This conception is most consistently adopted by the German *topics* and the Belgian *neo-rhetoric*,<sup>37)</sup> which assume that the law wholly or partly consists of a catalogue of viewpoints competing to find acceptance in the judicial decision. Less extensive is the hermeneutic legal philosophy which considers the judicial decision to be a concretion of a possible meaning implied by the law, since the law gives nothing but imperfect instructions as regards future solutions.<sup>38)</sup> Similar ideas of a value system underlying the law and governing the political process and the judicial decision are put forward by *Peter Stein and John Shand*<sup>39)</sup> and by *Ralph Newman*,<sup>40)</sup> and I have indicated this conception too.<sup>41)</sup>

36) See *Werner Maihofer*, *Recht und Sein* (1954), *Naturrecht als Existenzrecht* (1963).

37) *Th. Viehweg*, *Topik und Jurisprudenz* (4. Aufl. 1969), *Ch. Perelman*, *De la Justice* (1945).

38) *Arthur Kaufmann*, *Rechtsphilosophie im Wandel* (1972), *Arthur Kaufmann and W. Hassemer*, *Grundprobleme der Zeitgenössischen Rechtsphilosophie und Rechtstheorie* (1971) p. 68 ff., *Joseph Esser*, *Vorverständnis und Methodenwahl* (1970) and *Grundsatz und Norm* (2. Aufl. 1964).

39) *Legal Values in Western Society* (1974). See also *Dias*, *The Value of a Value Study of Law*, *Modern L.R.* 1965, p. 397 ff., *Jurisprudence* (1964).

40) *Equity in the World's Legal Systems I* (1973). See also *M. Akehurst*, *Equity and general principles of law*, *Int. and Comp. L.Q.* 1976, 801 ff.

41) *Law and Society* (l.c. note 19) p. 96 ff., *Argumentation and Decision*, *infra* p. 151.

Finally I shall mention two conceptions of law based on the same acknowledgement of the law's fragmentary character and dependence on social values. I am thinking of the German "critical jurisprudence" and the recent American theory in *Ronald Dworkin*.<sup>42)</sup> According to these positive law is to be interpreted in compliance with the general principles embodied in the constitution. *Rudolf Wiethölter* and *Wolf Paul* have argued in favour of the opinion that the transmitted civil law, which came into existence under quite different social conditions, is to be interpreted in accordance with the new political reality in Germany as expressed in the constitution from 1948: human dignity, freedom, equality, democracy, and socialism.<sup>43)</sup> However, neither of them wants to transgress the existing political system (unlike the *Marxist law criticism* which believes in a necessary reformation of society on Socialist lines). However, most theorists have rejected the idea that a reference to the liberty guaranteed by the constitution is a sufficient argument in a civil law decision; only the principle of equality has partly been recognized.<sup>44)</sup>

But in other fields the German constitutional court has had to determine the constitutionality of certain laws and the legality of administrative decisions in relation to the constitution.<sup>45)</sup> In the same way civil-rights-groups in the U.S.A. have to a large extent been able to carry through racial integration and several interferences in the running of prisons and hospitals on grounds of the

42) The Model of Rules 35., U.Ch.L.R. (1967) p. 14 ff., *Hard Cases*, 88 Harv.L.R. (1975) p. 1057 ff.

43) *Wiethölter*, *Rechtswissenschaft* (1968), *Paul*, *Kritische Rechtsdogmatik und Dogmatikkritik*, in *Rechtstheorie* (Ausc. A. Kaufmann, 1971), *R. Eckertz*, *Was heisst "Politische Jurisprudenz"*, *Rechtstheorie* 1976, p. 153 ff.

44) *Ludwig Raiser*, *Grundgesetz und Privatrechtsordnung* (1967), *R. Zippelius*, *Verfassungskonforme Auslegung von Gesetzen: Bundesverfassungsgericht und Grundgesetz*, II (1976) p. 108 ff. + note; see also *Ernst E. Hirsch*, *Vom Kampf des Rechts gegen die Gesetze*, *AcP* 1975, p. 471 ff. *Martin Kriele*, *Theorie der Rechtsgewinnung* (1968) (2. ed. 1977) does not go further than indicating an openness in the legal argumentation that does not conceal the political contents of the law and the decision.

45) The East-West treaties, which were in contravention of the constitutional condition of reunification, and the cases regarding security of nuclear plants, see *Roger C. Cramton*, *Judicial Lawmaking in the Leviathan State*, *The Law Alumn Journal*, U.Ch.L. School 1976, p. 12 ff.

constitution. However, even the status of the U.S.A. and Western Germany as federations with a joint constitution and a joint supreme court makes it less dangerous to give the courts a special part as political guardians of the joint constitution. The courts have previously been used as a means to carry through a joint necessary social planning like Roosevelt's New Deal in the 1930s. But the danger connected with making the courts political can among other things be seen from the gruesome fact that for about 15 years a majority in the Supreme Court considered the death penalty to be unconstitutional, whereas today another majority is of the opposite opinion. Altogether the courts risk to lose the confidence that they have achieved as neutral arbitrators in conflicts, if in the future they are given political tasks which the politicians either cannot or do not want to solve.<sup>46)</sup> In unitary states and especially in a country that has no formal constitution it is not natural to give the courts such a part.<sup>47)</sup>

As already mentioned, Dworkin rejects the conception of the law as a system of rules and assumes that instead it consists of a set of very general principles and standards, which can be deduced from positive law, when this has been settled, but in hard cases, however, must be found in principles underlying positive law. This conception has been criticized by *Hart*, who has expressed the opinion that the judge who refers to a legal principle behind positive law risks concealing the fact that in reality he expresses his own personal moral conception.<sup>48)</sup>

A different explanation of the social and legal philosophy on a neo-natural law basis was given by *John Rawls*. Referring to the social contract he emphasized justice as a fundamental value

46) An example can be found in the so-called "Christianiasag" (UfR 1977, p. 315) where "Østre Landsret" (almost corresponds to high court) in fact dismissed a claim of unconstitutionality made against the Danish Government and Parliament (Folketinget), who had decided that the so-called "fristad" (free city) was to be evacuated, but stated, nevertheless, — without a legal qualification — that an evacuation might not be desirable from a social point of view.

47) *Ralph Dahrendorff*, A Confusion of Power, Politics and the Rule of Law, Modern L.R. 1977, p. 1 ff.; see also *A. Lester*, Fundamental Rights in the United Kingdom, U. Penna L.R. 1976, p. 337 ff., The British "Grundnorm", L.Q.R. 1976, p. 591.

48) New York L.R. 51 (1976) p. 538 ff. see also *Noel B. Reynolds*, Dworkin as Quixote, U. Penna, L.R. 1975, p. 574 ff.

competing with public utility, and stressed equality as such a fundamental value that can only be set aside, when regard for the unity and especially for the weakest part of the population speaks in favour of this.<sup>49)</sup>

### III. CONCLUSION

The object of this article has been to demonstrate: firstly that the idea that the nature of things automatically forces certain settlements of legal problems has been vivid throughout the Western history of civilization; secondly that the way of thinking that has dictated the legal argumentation in this respect has been fairly constant. On the other hand, the contents have alternated according to the different situations. Periods of natural law reasoning have alternated with periods dominated by positive law views, which in principle are based on the assumption that rules of law are freely laid down in accordance with human objects and that the application of the law is bound solely by such rules.

Everybody agrees, however, that the scope of the law is limited by the physical possibility and that human objects must naturally be determined by human needs. Even though a human nature including a biologically motivated tendency for social group organization is taken for granted, it is today extremely difficult or impossible to give an opinion with certainty of such natural social conditions, since man is a being who affects as well as adjusts himself to his surroundings and his conditions of life. It is an established fact, however, that man has certain fundamental needs of freedom and security and that some kind of society therefore is necessary to preserve the human race. Therefore, several authors have emphasized other demands on a human society motivated by biology or moral philosophy. Attempts to justify a legal obligation by contemplating social facts or institutions always meet with the fundamental difficulty of deducing a norm from a

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49) See *Stig Jørgensen*, Symmetry and Justice (l.c. note 1), Idealism and Realism in Jurisprudence, *supra* p. 29.

recognition of facts. To institutions such as marriage, church or state no other duties can be ascribed than those which are already connected with these. The basic human needs of self-preservation, reproduction, and striving towards success must always be proportioned to each other according to a political process. Justice rests upon certain basic structures such as the idea of equality, but its contents are varied.<sup>50)</sup>

The idea that fixed and eternal values determine legal argumentation is not made probable. On the other hand, there is hardly any doubt that centuries' experiences regarding the question what sort of society and institutions is best suited to solve certain problems of priority, especially through a legal procedure, have manifested themselves in the set of principles, ideas, and procedures which underlie and govern the Western societies and their legal systems today. Many of these principles have been codified in a constitution, but, even if this is not the case, they can still become the basis of a development of the society and of the law, and this process of adaptation does not necessarily have to take place through legislation. These legal principles, however, can be regarded as distillates of the existing positive law, and it is hard to say what is prior to what.<sup>51)</sup>

Also the courts and other legal authorities can register such a development of the law, whether one subscribes to a positivist or a natural conception of law. However, it is interesting to note that according to the new German law concerning general terms of contract it is possible to speak of "essential basic ideas of the legal regulation" and "essential rights and obligations as a result of the nature of the contract".<sup>52)</sup>

50) See also *Stig Strömholm*, Zum Begriff der "Natur der Sache", *Rebels Zeitschrift* 1975, p. 702 ff., *Stig Jørgensen*, Symmetry and Justice (l.c. note 1) p. 66 ff.

51) *Hubmann*, Naturrecht und Rechtsgefühl, *AcP* 1954, p. 309 ff. *Same*, Grundsätze der Interessenabwägung, *AcP* 1956, p. 85 ff., *H. Merz*, *Berner Kommentar Art. 2*, (1962) p. 213, "Treu und Glauben" p. 303, "Rechtsmissbrauch" p. 315, "Zweckwidrige Ungleichbehandlung"; see also *T. Eckhoff*, Guiding Standards in Legal Reasoning, *Current Legal Problems* 1976, p. 205 ff.

52) Gesetz zur Regelung des Rechts der allgemeinen Geschäftsbedingungen of 9/12 1976 § 9 (*Bundesgesetzblatt* 1976 No. 142) cf. *Stig Jørgensen*, *Tysk lov om almindelige kontraktvilkår*, *UfR* 1977. B. p. 161 f. (German law on general terms of contract).



## ARGUMENTATION AND DECISION

### I. ROSS' IMPORTANCE<sup>1)</sup>

There can be no doubt that Professor Alf Ross has had exceedingly great influence on the young generation of Danish jurists. The challenge of the often and strongly formulated demand for scientific approach and realism has been imperative to any one who wished to tackle theoretical problems. The uncompromising manner and enthusiasm with which the programme has been formulated has indeed particularly appealed to young people and thereby created interest in jurisprudential work.

While practical realism is time-honoured in Danish law since Ørsted, about 1800, in the sense that legal usage and practical considerations have been of great importance to decisions by courts of law as well as to dogmatic jurisprudence, fundamental theoretic realism has not been consistently formulated until Ross, at the beginning of the 1930's, under the influence of Hägerström and on the basis of logic empiricism, demanded that jurisprudence should be empirical science. The titles of Ross' principal works: *Virkelighed og Gyldighed* (1934) (English ed.: *Towards a realistic Jurisprudence*, 1946), and: *Om Ret og Retfærdighed* (1953) (English ed.: *On Law and Justice*, 1958) indicate what to him have been crucial problems of legal philosophy: (1) What is law?, and (2)

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1) The following exposition of Ross' views takes for its starting point: *Ret og Retfærdighed*, the 2nd edition of which was published in 1967 without alterations. Thus, in the main, corrections which Ross has made elsewhere in the meantime are disregarded. Quotations follow the English edition: *On Law and Justice* (1958).

From where does law derive its validity, or what does it mean that the law is valid? In connection with his philosophic starting point, Ross rejects the idea of basing law on a priori assumptions of a religious, rationalistic, idealistic or utilitarian character in the form of a material idea of justice as well as a formal category. Law is a social phenomenon, and dogmatic jurisprudence formulates assertions about such phenomena, which either may be confirmed or invalidated by a verification process, i.e. a procedure by which the assertions made are confronted with reality. On the other hand, only statements on verifiable phenomena have any meaning or "semantic reference", unless it is a matter of purely analytical sentences, since the language which is regarded as the object of philosophy is deemed to symbolize reality. — Only "is"-sentences, i.e. sentences relating to actually existing phenomena may be dealt with scientifically, since only such sentences may be true or false, whereas "ought"-sentences, i.e. sentences which express a norm or an evaluation, have no cognitive meaning. Science cannot be carried on *in* norms, but, to be sure, *about* norms.

A consequence of the starting point is that the concept "law" has a meaning only provided that it is "valid", i.e. can be verified as active. "Valid law" is the interpersonal *normative ideology* which actually animates the mind of the judge since it is experienced as socially binding, and *therefore* effectively conformed to (p. 35). — This interpersonal ideology, legal norms, is, like the rules of chess (§ 3) the *theme of interpretation* which makes it possible to *understand* the legal phenomena and to *predict* the course of legal practice (p. 29). Law is a correlation of legal norms and legal phenomena, but to Ross the ideology seems, as it appears from the definition cited, to be the most essential<sup>2)</sup> aspect of the concept of law, although knowledge of the contents of the ideology (pp. 73–4) is obtained through the phenomena (the application of law).

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2) The social acts (the application of law) are the "real substratum of the normative idéas", Danish ed. p. 47 (not repeated in the English ed. p. 34). "The doctrinal study of law concerns itself with the normative ideology which animates the judge", p. 43. The degree of probability depends in turn on the empiric material on which the prediction (the sources of law) p. 44 f., which is a further normative ideology, p. 75 f., depends. See also TFR 1957 p. 123 f.

It is, therefore, with justice that Ross denies that his understanding of the concept of law is purely behavioristic (p. 37), and dissociates himself from the American realism which has maintained that "valid law" *exclusively* refers to the actual behaviour of the courts, and to prognoses of such a behaviour (p. 72, cf. p. 15 f. and see p. 22). — On the other hand, Ross does not clearly indicate whether insight in the ideology (the norms) can be found only in the application of law, or whether it can also be found direct in the sources of law. If the latter can be the case, it seems to be justifiable to criticize Ross' verification apparatus for assertions on "valid law",<sup>3)</sup> which is used to predict the behaviour of the authorities applying the law (§ 9). If so, the scientist like the judge may immediately obtain knowledge of the contents of the ideology (the system of norms) through the sources of law, and, therefore, the verification procedure is superfluous beating about the bush.<sup>4)</sup> To be sure, it is said (pp. 75 and 110) that the normative ideology which determines the selection of normative ideology ("valid law") is the object of the science of sources of law and methodology, and that — as a part of "valid law" — it can be found only in the application of law. The science of sources of law is norm-descriptive and not norm-expressive. On the other hand, this ideology — as legal — is intersubjective<sup>5)</sup> (p. 75), and is intimately connected with the cultural tradition with which the judge, qua human being, is concerned (p. 99), a tradition and ideology with which the dogmatically working jurist is also concerned through his education in the juridical method (p. 110).

There are great fundamental difficulties in the circumstance that Ross apparently regards the complex of sources of law and the

3) The verification process of whether a *norm* is valid law is the same as the re-examination of the truth of the corresponding jurisprudential assertion on the basis of the theoretical starting point of logic empiricism, p. 39.

4) *Knud Illum*: *Lov og Ret* (1945), p. 51 ff., *Scandinavian Studies in Law*, vol. 12 (1968), p. 51 ff.

5) To be sure, the sources of law are defined, p. 77, as "the aggregate of factors which exercise influence on the judge's formulation of the rule on which he bases his decision", but, on the other hand, an inclination in American realism to attach importance to the individual and concrete psychology of the judge is repudiated (p. 102).

complex of the problem of methods only from the outside as the object of scientific description. Apparently he does not furnish an answer to how the *judge seen from within* as a partner of the legal play arrives at his ideas of "valid law", including the choice of sources of law and method. It is here of no use to refer the judges to an observation of the judge's own behaviour. The judges must necessarily have a possibility of immediate insight in the normative ideology. — Another fundamental difficulty is that science does not even obtain a realistic picture of the factors which actually have motivated the legal decision, since the grounds for the result given in the decision are a "façade legitimation" which to a greater or lesser degree deviates from that on which the judge has actually based his decision (pp. 152 and 44). Therefore, on studying legal decisions and taking them at their words it is not possible to avoid a considerable risk of misinformation on "valid law" in the widest sense (cf. Ross himself pp. 43—4).

Both the said objections are bound up with the logic-empiristic concept of science. According to logic empiricism, evaluations are fundamentally individual and personal ("there is no accounting for taste") and thereby unverifiable scientifically or rationally. Evaluating statements have no "semantic reference" and are therefore devoid of meaning (p. 6 ff.). Logic empiricism is "value nihilistic" in as much as it denies that there is a possibility of the existence of material criteria for evaluating statements, "natural law", "good and evil", etc. Something like that is metaphysical and therefore suspect.

There is something heroic in a method which passionately rejects the principles of its activity — ideology, culture, justice (pp. 85 and 99 f.) — in the case of the (honest) rational activity, and which banishes the values and the evaluations to the suspect irrational sphere which one, in powerlessness, must refrain from dealing with because one has beforehand defined it from science. It is not only heroic but also dangerous as the problems do not disappear because they are repressed; on the contrary, they will be difficult to control by being deprived of rational control.

Even though one must accept Ross' views that any application of law, any legal decision implies an alogic *decision*, and not a logic

*conclusion* from an abstract rule to a concrete case (p. 136 ff.), a necessary or reasonable picture of a legal decision is not obtained by asserting that it is first made intuitively and then provided with a suitable "façade legitimation" (pp. 44 and 152) ("transcendental nonsense").<sup>6)</sup> Probably Ross himself does not hold so strong views on this point as might appear from his sharp formulation since, in particular, he emphasizes that the dogmatically working scientist *should not(!)* accept it at its face value; by analysis he should endeavour to ascertain the judge's actual reasoning, and should, on the whole, abstain from rendering himself guilty of that kind of pettifogging (and things that are worse! p. 183 in the Danish ed. – not in the English); instead he should honestly give an account of his real grounds when interpreting a given set of rules or when making a statement on *de sententia ferenda* and suggestions on how to solve given or hypothetical legal disputes. In reality he probably means that judges actually can and should behave in a like manner although regard to the authority of the court sets a limit.<sup>7)</sup> The conception of the rationality of legal decisions leads to the result that the activity which the judge and the dogmatically working scientist perform is fundamentally, although not quite, identical,<sup>8)</sup> at any rate closely related and deeply rooted in the same ideology and method. Paradoxically, this view leads on to the said "verification technique" being superfluous, while at the same time there will be stronger reasons for trusting its ability to give a real picture of "valid law".

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6) *Felix S. Cohen*: Transcendental Nonsense and the Functional Approach in Col. L.R. vol. 35, 1935, p. 809 ff.

7) P. 154 f. and "Retlige fiktioner" in Sanning, Dikt, Tro, Till Ingemar Hedenius (1968), p. 255 ff.

8) The judge *must* make a decision, while the scientist may leave open a question, and, *therefore*, the judge must also have a greater freedom in doubtful cases to supplement or develop the law.

## II. THEORY OF ARGUMENTATION AND DECISION MAKING<sup>9)</sup>

### A. "The Naturalistic Fallacy"

#### 1. The Moral-Philosophic Problem

Generally, naturalism is characterized by holding that the universe requires no supernatural cause and government, but is self-existent, self-explanatory, self-operating, and self-directing. Thus, there is nothing beyond nature, and, consequently, all references to anything transcendental must be rejected. All phenomena and processes in nature, including the human being and its mental life, can be explained from insight in nature. In this respect, moral questions do not hold an exceptional position. They are subject to the same certainty or uncertainty as empiric questions, and they can be answered scientifically.

As against this there are the *antinaturalistic* views, all of which, as far as moral questions are concerned, consider these to be autonomous as regards their scientific treatment.

The *religious* view maintains that the underlying principle of moral questions is the transcendent, the Commandments, which decides the answer to what is good and what is evil.

The *intuitionistic* view maintains that the human being is directly able to see what is morally right or wrong without regard to the consequences of the act, and also that this insight is ultimative. Argumentation — at any rate regarding certain general principles — is futile and irrelevant in answering moral questions.

The *positivistic* view, on the other hand, rejects moral questions on the basis of an apprehension of the proper scientific method. The naturalists share the respect of the positivists for natural science; but the positivists put forward a criterion for distinguishing

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9) Below I have derived benefit from *Hans Fink's* unprinted gold-medal treatise: *Den naturalistiske fejl med særlig hensyntagen til de sidste 10 års diskussion*, 1967, and from *Jes Bjarup's* interest in the problems treated. — And as regards The Naturalistic Fallacy, see *Mogens Blegvad: Den naturalistiske fejlslutning*, 1958 (with a summary in English).

between science and metaphysics, according to which only analytic sentences and sentences which can be verified can be included in the science which can only describe, not prescribe. Moral sentences are not analytic nor can they be verified since they are not contentions but an expression of feelings or attitudes. Like existentialism, logic empiricism, therefore, maintains that reason has no justification in questions of evaluation since these are not intersubjective, and moreover cannot refer to outer observable empiric matters. To the positivists there is a clear distinction between description and evaluation. Moral questions can be dealt with only scientifically in as far as it is a matter of psychologic or sociologic examinations. Such examinations are descriptive, and sentences referring to them are meaningful, since it is possible to indicate the conditions on which they are true. On the other hand, it is not possible to conclude from purely empiric examinations what *should* be done. One would thereby make a logic mistake: the naturalistic fallacy.

In recent times the term "naturalistic fallacy" has been used in the sense: the fallacy which consists in identifying the simple notion which we mean by "good" with some other notion.<sup>10)</sup> It is probably true that it is not possible to indicate any absolute criterion of, for example, "pleasurable" for the term "good", since it will always be possible to ask in concreto whether something which gives us pleasure really is good. — On the other hand, it seems that by means of science it would be possible to answer the question what is best or right in any given situation and in a specific respect. "Good" is to Moore "a simple and undefinable non-natural attribute". But "good" is not a logic predicative adjective, but an *attributive adjective*.<sup>11)</sup> "There is no such thing as being just good or bad, there is only being a good or bad so-and-so". While, for example, the adjective "red" can be verified independently of the substantive, there is no common content in the adjectives "good", "the same", "great". Nor does it follow from this that "good" is

10) G. E. Moore: *Principia Ethica*, 1903, p. 58. To Moore, who coined the term, "naturalistic fallacy" rather meant "naturalistic mistake" than, as it did to his successors, "naturalistic fallacy".

11) P. T. Geach: *Good and Evil in Analysis*, vol. 17, 1956, pp. 33–42.

quite indefinable, but merely that the quality criterion depends on the entity criteria: (1) which entity is referred to? (2) in which respect are we interested in the entity? We can put forward precise quality criteria for each individual entity and thereby say that something is "good of its kind", "good for its purpose", "good for the health, thriving or well-being of an organism", and "good for human enjoyment".<sup>12)</sup> From this follows a relativistic, but not a skepticistic or subjectivistic view of the concept of value.

To Moore's successors the naturalistic fallacy consists in "deriving ought from is". It has been vividly discussed, whether it is possible to deduct from a sentence in which the word "ought" (or synonyms) is not found to a sentence in which it is found. In any case this does not refute naturalism. "He is not maintaining that such a deduction is possible; but only that "ought" can be defined in other terms. He is not saying that "I ought to do X", can be inferred from "X is conducive to the greatest general balance of pleasure over pain" *without any further conditions*, but that the former can be derived from the latter *with the help of a definition* according to which the two have the same meaning. The definition he is offering may not be correct, but this cannot be shown by citing the dogma about Ought and Is, for *if* his definition is correct, then "ought"-statements *can* be derived from "is"-statements in the only sense in which he is concerned to hold that they can".<sup>13)</sup>

And as against the positivistic distinction between description (is-propositions) and evaluation (ought-propositions) which serve to bar metaphysic features in science, it must be emphasized that this distinction is clear and sharp, but not, as the positivists assume, identical with the distinction between describing and evaluating sentences. Sentences are not in themselves descriptive or evaluating. This depends on the context and on the manner in which the sentences are used in that context. (J. L. Austin).<sup>14)</sup>

But the problem is not whether it is possible to infer from "is" to "ought", but whether it is possible with adequate certainty to put

12) G. H. von Wright: *The Varieties of Goodness*, 1963.

13) W. K. Frankena: *Ethical Theory in Philosophy* (Princeton Studies), 1964, p. 359, Erik Rasmussen: *Komparativ Politik I* (1968) p. 39 ff.

14) J. L. Austin: *How to do Things with Words*, 1962.



forward hypothetical assertions on what ought to be done. – Is it possible on an intersubjectively controlable basis to decide what one ought to do in a given situation and in a specific connection?

## 2. "The Nature of Things"<sup>15)</sup>

As against the moral philosopher, the jurist may here refer to the figure "the nature of matters or things". This points to the decision of the jurist being made after thorough examinations of the conditions of life concerned which are subject to legal control so that the best result is attained. But "the nature of things", or as Eugen Huber has it, "the real grounds" – (which in particular has inspired Danish jurisprudence) – is not a conglomerate of various factors: facts and various value premises which cannot be treated systematically and which the judge is to resort to only when traditional sources of law, such as statutes, legal usage, or custom do not provide a solution. On the contrary, "the nature of things" indicates that in solving any legal question, one must have "Rückgriff auf die ausserhalb der doktrinären Struktur eines Rechtsinstituts erfassbare allgemeine ("natürliche") Aufgabe desselben, und von da aus erst wird – in Verbindung mit der Angemessenheitsfrage – die konkrete Problematik bewältigt".<sup>16)</sup> – The object of a doctrine is to examine the various legal fields and to suggest solutions, so that the judge, who often – as distinct from the scientist – is not an expert on all aspects of legal practice, will have the best possible guidance to the decisions he must make; and weight is added to the decision of the judge through the acceptance of the doctrine, and also to the doctrine by its being adhered to by the courts of law.

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15) On "The Nature of Things", *Stig Jørgensen*: Vertrag und Recht; 1968, p. 118 f. with references in n. 18.

16) *J. Esser*: Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts, 1956, p. 102.

### 3. Importance of Judicial Decisions

Judicial decisions form an important and essential part of the legal system, which in particular has been emphasized by the American realism. This school of thought will endeavour to find a realistic understanding of law from the decisions of the courts of law. However, this school of thought overlooks that the legal system cannot be explained exclusively as a result of the functioning of the judicial process. The legal system is also a part of social conscience as a pattern of conduct concretized in legal rules: a part of culture. – Ross is also of opinion (cf. I above) that a tenable interpretation of the validity of the law – seen from the point of view of the doctrine – is possible only by decisions by courts of law being regarded as a synthesis of *ideologic* and behavioristic views. But Ross' perception of decisions by courts of law – especially the circumstance that he mentions the normative ideology which animates the mind of the judge – points to two important fields of problems which occupy present-day legal philosophy. It is common to both problems that they are activated in the legal procedure of decision making. One is the problem of value, the other one the emphasizing of the part played by argumentation.

#### B. Argumentation Theory<sup>17)</sup>

The judicial decision is not merely a logical deduction from a rule of law: on the contrary, it is the result of a dialectic argumentation. That the decision can be presented in a syllogistic form does not alter this fundamental statement. Syllogism is a justified and important means of ascertaining whether the conclusion of the judge follows from the premises set out, but it may be dangerous to use syllogism as a model in describing the procedure of decision

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17) Stig Jørgensen: op. cit. n. 15, pp. 58, 94 f., 136, 154 f. with references, *Jes Bjarup: Lidt om logik, retslig argumentation og fortolkning*, in *Juristen* 1957, p. 409 ff. *L. D. Eriksson: Rättslig argumentering och den dialektiska logiken*, in *JFT* 1966, p. 445 ff. *Ivanhoe Tebaldeschi: Justification and Justice as Topics of the "New Rhetoric"*, in *A.R.S.P.*, vol. 53, 1968, p. 89 ff.

making, since such a model may lead to the erroneous view that the judgment is exclusively the result of a logic conclusion, while it actually depends upon a decision, cf. below under C.

The perception that a judicial decision is logically deducible is of a relatively late date. The Roman jurists do not deduce their decisions from the rules; on the contrary, they are rhetoricians who with great skill reason for the purpose of attaining their results by means of arguments which are convincing. This Roman method recurs in the *sic et non* of scholasticism; here a hypothesis is advanced in the first instance, which is next countered by objections! The conclusion is reached by weighing the pros and cons of a number of arguments.

The more recent development of the law bears the stamp of scientists who under Greek influence strived to reach a systematic treatment of the legal material. Rationalistic natural law contributes towards this development in taking certain fundamental principles for granted. Claims for damages, for example, are considered a simple consequence of a wrong committed: the wrong is the cause (a fact in the legal sense), and the claim for redress is the legal consequence.<sup>18)</sup> From these fundamental principles one might logically infer a system of rules (cf. Descartes' *more geometrico*). It should be possible to solve any legal question simply by a subsumption of facts under the relevant rule.

This perception is also manifested in the great codifications. — Code Civil 1804, BGB 1900 — by means of which it should be possible in principle to solve any legal problem by deduction. However, even Portalis<sup>19)</sup> pointed out on the presentation of Code Civil that the codification was not exhaustive, and that positive law can never completely replace the use of natural reason in the affairs of life. As distinct from the development in France, where one has been allowed a comparatively free hand in respect of CC, BGB had the result in Germany that conceptual jurisprudence with its constructive methods degenerated, through which the interest in the underlying affairs of life and rational argumentation was neglected.

18) *Stig Jørgensen*: Erstatningsret p. 8, cf. *same op. cit.* n. 15, p. 61.

19) See *Julius Stone*: Legal System and Lawyers' Reasonings, 1964, p. 214.

## 1. Viehweg and German Topics

Therefore it is interesting to note that German doctrine is now seriously breaking up since earlier attempts at attaining a more up-to-date method, as for example interest jurisprudence, have to some extent been disregarded owing to the World War. – Thus, in his book published in 1953, *Theodor Viehweg*<sup>20)</sup> strongly advocates that law must be perceived as "ein besonderes Verfahren der Problemerörterung". As his starting point, Viehweg takes Vico, the Italian philosopher, who polemizes against the Cartesian method. As against this, Vico puts forward the old – topical – method. This method, which was founded by Aristotle, refers to the use of points of view and arguments in a discussion in which the solution is not obvious or given with mathematical certainty from the premises as in analytic syllogism. In topics, on the other hand, use is made of dialectic syllogism, the premises of which are based upon generally acknowledged opinions, i.e. what is the opinion of everybody, or of most people, or of the wise. Dialectic syllogism possesses only a degree of probability, and its validity depends upon an approval. With his topics, Aristotle intended to work out a theory of dialectics (the art of dialogue). On the other hand, Cicero, who takes up Aristotle's ideas, is more interested in the practice of argumentation in which points of view and examples – listed in *topoi* catalogues – are used in a certain field which is open to discussion. Cicero's topics were, incidentally, worked out in the form of a textbook for a Roman jurist. It is in particular characteristic of Roman jurists that they were educated at the rhetoric schools which taught the student how to convince his audience by the force of his argumentation. The topical method is conspicuous in particular in legal systems like the Roman and the English systems which are attached to and influenced by the courts of law. The Roman as well as the English development of law is casuistic and pragmatic, the rules of law are not written down in an all-embracing codification, but developed through judicial practice.

Viehweg maintains that to the jurist the crux of the matter is the concrete case which is to be decided upon. Here the topical method

20) *Theodor Viehweg: Topik und Jurisprudenz*, 1953 (3. Aufl. 1965).

will be well suited, and Viehweg mentions<sup>21)</sup> as "Einbruchstellen": (1) interpretation, (2) the language, (3) the application of law, and (4) the qualification of the legal facts.

Viehweg's topics may be seen as an approach to the Anglo-Saxon reasoning-by-example method, and as a dissociation from a strictly systematic method of deduction. It is here interesting to note that the Anglo-Saxon method now approaches the traditional Continental system and concept method.

Viehweg's ideas have been vividly discussed in Germany. — *Diederichsen*<sup>22)</sup> has pointed to the danger of unprincipled use of arguments, and emphasized the value of the legal system and the forming of concepts as a means of checking argumentation. — *N. Horn* and in particular *R. Zippelius*<sup>23)</sup> have raised the question of the relationship between system and problem thinking. The systematic axiomatic method underlines the need for firmness and certainty in the application of law, while the topic pragmatic method underlines the need for adaptation to the practical needs and the concrete justice. Several important jurists of recent times have supported the fundamental ideas of the topic legal method, but at the same time emphasized the importance of the preparation of a hierarchic set of values.

## 2. Perelman and the new Rhetoric

*Chaim Perelman*, the Belgian philosopher,<sup>24)</sup> has also taken up for close examination the part played by argumentation. Like Viehweg,

21) *Viehweg*: op. cit. n. 20, p. 59 ff.; cf. *Stone* op. cit. n. 19, p. 332.

22) *Uwe Diederichsen*: *Topisches und Systematisches Denken in der Jurisprudenz* in *M.J.W.* vol. 19, 1966, p. 669 ff., and cf. *Stig Jørgensen* op. cit. n. 15, p. 58, n. 24a.

23) *N. Horn*: *Zur Bedeutung der Topiklehre Theodor Viehwegs für eine einheitliche Theorie des juristischen Denkens*, in *N.J.W.*, vol. 20, 1967, p. 601 ff., *R. Zippelius*: *Problemjurisprudenz und Topik*, in *N.J.W.*, vol. 20, 1967, p. 2229 ff.

24) *Ch. Perelman & L. Olbrechts-Tyteca*: *Traité de l'Argumentation*, 1958, *Ch. Perelman*: *Justice et Raison*, 1963, *same*: *The Idea of Justice and the Problem of Argument*, 1963, *same* (edt.): *Études de logique juridique*, 1966. And cf. *Stone*: op. cit. n. 19, p. 324 ff. and see *G. Hughes*: *Rules, Policy and Decision Making*, in *Yale L. J.* vol. 77, 1968, p. 411 ff.

Perelman resorts to Aristotle and his distinction between analytic and dialectic argumentation. Analytic argumentation consists of a demonstration whereby, through application of the rules of formal logic, it is possible with unerring certainty to reach conclusions which necessarily must be true. This analytic argumentation recurs in Descartes, who made proof the distinctive mark of reason. The proof must be obvious (apodictic: true of necessity). To Descartes, true science can be attained only by adhering to the geometric method (more geometrico), so that a complete system of necessary propositions can be prepared in which doubt and probability are excluded; experimental sciences adhere to this way of thinking. Here, however, the starting point is not, as in the case of Descartes, the obvious but experience. But the proof must be true, i.e. agree with the facts. This view has had great influence on posterity, since after this a science could not deal with more or less probable or well-founded opinions.<sup>25)</sup> Against this Perelman objects that if this view is correct it means that if we are in a field in which neither experience nor logic deductions can give us solutions of a problem there is nothing left for us but to abandon ourselves to our irrational forces, feelings, and instincts. Here Perelman draws attention to the dialectic argumentation, the sphere of which is: the likely, the plausible, the probable to the extent that the latter escapes mathematical certitude.<sup>26)</sup> Here we must "look for precision in each class of things just so far as the nature of the subject admits; it is evidently equally foolish to accept probable reasoning from a mathematician and to demand from a rhetorician scientific proofs".<sup>26a)</sup> Perelman suggests, therefore, a study – the new rhetorics – of the techniques of deliberations and discussions which are applied to this field. It is here important to emphasize that any argumentation depends upon the audience and is formed accordingly, and that a dialectic argumentation is not limited to spoken words, but that the written words must also be included.

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25) Cf. *Stig Jørgensen*: op. cit. n. 15, p. 49 ff.

26) *Perelman*: *The Idea of Justice and the Problem of Argument*, p. 134, cf. *same*: *Proof in Philosophy in The Hibbert Journal*, vol. 52, 1953–54, p. 354 ff.

26a) Aristotle's *Nic. Ethics* 1094 b 12.

It is of particular interest to jurists that Perelman has examined the decision of the court and here emphasizes that it is not the result of formal logic conclusions but depends on an argumentation in which the character of the proof is not apodictic but dialectic. The activity of the judge does not depend on "the idea of truth", but on "the idea of reason".<sup>27)</sup> Likewise that the judge's qualification of the legal facts implicates a reference to "the rule of justice", which involves that substantially similar cases must be treated in the same manner. The characteristic point of the legal argumentation is that it consists of a development which depends upon the audience and its standpoints and reactions. In the audience must be included, besides the judge and the parties to the case, in particular the doctrine and the outside world.

### 3. Other related Methods

In his book: *Legal System and Lawyers' Reasonings*, *Julius Stone*<sup>28)</sup> has thoroughly dealt with reasons and reasoning in judicial and juristic arguments. Stone fully recognizes the justification of an examination of the juristic argumentation, but emphasizes at the same time that there is no reason to dethrone formal logic and syllogism. At the same time it should just be recognized that the judge's creativeness lies large beyond it, as part of the life blood of legal growth. Likewise it is a fact that judicial considerations of "values" or "policy" must enter very frequently into judgment. — Even though Stone is positively disposed towards topics and Perelman's new rhetoric, he is at the same time aware that jurists are not to expect too much from this. But Stone is of opinion that it is completely justified and desirable to recognize that what is not logic may nevertheless be positive and significant and call for inquiry.

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27) *Ch. Perelman*: What the Philosopher may learn from the Study of Law in Natural L.F., vol. 11, 1966, p. 1 ff., cf. *same*: What is Legal Logic, in *Is. L.R.*, vol. 3, 1968, p. 1 ff.

28) *Julius Stone*: *Legal System and Lawyers' Reasonings*, 1963, in particular Ch. 7 and 8, and cf. *same*: *Social Dimensions of Law and Justice*, 1966, in particular Ch. 14.

Independently of those referred to above, it may be mentioned that *Roy Stone*<sup>29)</sup> has also advocated a method which takes for its starting point the legal problems and which looks for arguments pro and con the solution. This method is confronted with induction and deduction, and termed *paraduction* by R. Stone. This is to show that the legal decision is arrived at by a complex procedure of argumentation. It is interesting to note that R. Stone also takes his starting point in antiquity, viz. in Cicero, and shows that this method is applied in modern analytic philosophy (Wisdom, J. L. Austin).

Similar processes of thought may also be found in moral philosophy; thus in *Stephen Toulmin*,<sup>30)</sup> the English moralist, who has taken the decisions of the courts as model for his exposition of morality. Toulmin's model for illustration of the ethic argumentation and his distinction between warrants and backing correspond to distinctions in Aristotle's topics. Toulmin's model illustrates considerably better than syllogism the complex character of the legal decision.

#### 4. Conclusion

The result of the theory of argumentation is that it is possible to *discuss* values and the reasons which are advanced in favour of them. The decisive question is then the difference between the good and the poor argumentation. This difference cannot be expressed by the distinction between objective description and subjective evaluation. There are subjective descriptions as well as objective evaluations. What we wish to know at the solution of a legal problem is whether the arguments and reasons which are indicated

29) *Roy Stone*: A Re-appraisal of Cicero's Jurisprudence, in A.R.S.P., vol. 53, 1968, p. 43 ff., and see *T. B. Hadden*: Law and Philosophy, in Cambridge L.J., vol. 26, 1968, p. 131 ff. with references.

30) *Stephen Toulmin*: The Place of Reason in Ethics, 1950, *same*: The Uses of Argument, 1958, and about the relation of this work to Aristotle's topics, *O. Bird*: The Re-discovery of the Topics in Mind. N.S., vol. 70, 1961, p. 534 ff. And as a criticism of Toulmin see *J. Stone*: op. cit. n. 19, p. 302, cf. 335, *same*: Human Law and Human Justice, 1965, p. 305.



for the solution actually hold good, i.e. whether they can be approved on an intersubjective basis. — At the decision of a moral question it is also essential to know whether the grounds put forward for the specific act are good grounds, i.e. worthy of approval by the parties involved and of acceptance by the outside world. We have hereby arrived at the other main problem, the value problem.

### C. Decision Theory<sup>31)</sup>

The value problem is the circumstance that the legal decision is a decision which takes for its starting point a number of different normative ideas.

#### 1. Decision Patterns of other Sciences

The problem of the decision function, and how the decision is made has also been taken up by other sciences. — Thus in *economics* an examination is made of how best to plan the decision procedure thereby to obtain decisions which are justifiable seen from an economic point of view. In *political science*<sup>32)</sup> examinations have been made of the decision-making procedure of the legislature and

31) *Stig Jørgensen*: op. cit. n. 15, p. 136, cf. p. 94 f., with references. And see *Nomos*, vol. 7, 1964, devoted to Rational Decision. Here direct mention is made of Decisionism, viz. that decision is somehow basic in the human condition. See also *P. A. Freund*: On Law and Justice, 1968, p. 63 ff., *L. Groll*: Något om Rättssociologi och offentlig Rätt, in *Förvaltningsrättslig Tidskrift*, 1968 p. 131 ff.

32) See *Glendon A. Schubert*: Quantitative Analysis of Judicial Behaviour, 1959. Constitutional Politics (Supreme Court Behaviour), 1960, *same*: The Juridical Mind (Attitudes and Ideologies of Supreme Court Justices), 1965, *same* (ed.): Judicial Decision Making, 1963 (collection of articles); A symposium: Social Science Approaches to the Judicial Process (*J. B. Grossman, W. F. Murphy, Samuel Krislov, Joseph Tanenhaus, Fred Kort, Lon L. Fuller*), 79 Harv. L. R. 1966, pp. 1551–1628. See also: *Nomos*, Yearbook of the American Society for political and legal Philosophy, 7, (1964): On Judicial Decisions and their Rationality. And see about this subject: *J. Stone*: Social Dimensions of Law and Justice, p. 687 ff. See also *Poul Meyer*: Politiske Beslutninger, 1966.

the administrative authorities as well as of the behaviour of the judge. Here it is endeavoured, on a behavioristic basis, to explain the decisions of the court as depending, to a material extent, on factors which are outside the premises embodied in the judgments. And this is certainly not new to the jurist; the new point is that endeavours are made to make these factors measurable and to create new methods of analysis (bloc analysis, game analysis, analysis by scalogram). — Even to natural science the procedure of decision-making has become topical, and ironically enough the scientist must apply to the jurist to learn how an impartial, rational decision is made. The jurist has recognized that logic does not reign supreme — which some patterns of preventing conflicts ignore — but that also normative ideas on social matters are decisive factors to decision making.

## 2. Decision Pattern of Jurisprudence — The Legal Decision

Indeed, as underlined by both recent English and German legal philosophy,<sup>33)</sup> the legal system is not a closed logic system; but the legal system is a movable or open system. The rules of law are norms for regulating human behaviour. Thus, they must be the basis of evaluations, the *evaluative* element, and at the same time they must lay down certain criteria which must be fulfilled in order that the rule may be applied, the *prescriptive* element.

### a. Qualification

In numerous instances the matters referred to in the legal norms will be settled in accordance with the criteria of the rules, and thus give no cause for conflict, or the mere existence of rules of law has the effect that conflicts are prevented. — Legal disputes which find their way to the law reports, and which jurists especially deal with, generally refer to specific or doubtful conflicts. The doubt may

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33) See *Stig Jørgensen*: op. cit. n. 15, p. 95, cf. 136, cf. *Spiros Simitis*: *Rechtliche Anwendungsmöglichkeiten kybernetischer Systeme*, 1966, p. 11.

relate to the legal facts, while the rule is clear, or, conversely, to the circumstance that the legal facts can be referred to several rules which, taken individually, will lead to different solutions. These instances are to be decided by the judge through *qualification*, because neither the rules of law nor the facts are given in advance. Through their argumentation, the parties endeavour to clear up the case to the best of their ability so that the judge can form an idea of the conditions of life concerned, and of the consequences of the decision to them. At the same time the plaintiff as well as the defendant endeavour to convince the judge that just *his* solution is the proper one. The characteristic point of legal disputes is in particular that often the decision is not certain but may be in favour of either party. In deciding upon the legal facts and the arguments adduced, the judge must make his qualifications in the light of the positive sources of law. The method applied here may be called the logic of inquiry, by Cicero called *ars inveniendi*, as distinct from the logic of exposition or the logic of justification, by Cicero called *ars iudicandi*.<sup>34)</sup>

#### *b. Dual Technique*

The syllogism used in the *logic of inquiry* is a dialectic syllogism in Aristotle's sense, i.e. the essential thing is to form one premise when one already has the other one, and the conclusion. But one must be aware of the interaction of the major premise and the minor premise, since the formation of both major premise and minor premise proceeds tentatively and correlatively in the course of analysis of the situation (Dewey). The rule of law is a *working hypothesis* which is confronted with the facts of the case, and the facts of the case determine the selection of the rule of law. By means of this method the judge endeavours to obtain rational cohesion of a relatively unarranged quantity of information. When the decision has been made about the selection (and qualification)

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34) John Dewey: Logical Method and Law in Cornell Law Quarterly, vol. 10, 1924, p. 17 ff., Stig Jørgensen: op. cit. n. 15, p. 153. See also R. A. Wasserstrom: The Judicial Decision (Toward a Theory of Legal Justification), 1961. K. Makkonen: Zur Problematik der juristischen Entscheidung, 1965, cf. my review in U 1967 B. p. 300.

of facts and the rule of law, the judge can through the *logic of exposition or justification* give his decision a logically closed form. The judgment logically follows from the premises put forward, and the judge can thereby hide the personal element of his decision. *Dura lex, sed lex*. With himself the judge justifies his judgment with reference to the rule of law. But his argumentation is first and foremost directed towards the parties of the case, and the grounds put forward must carry conviction and emphasize that the decision is not arbitrary. At the same time the judgment is addressed to the surrounding world where the decision has for its purpose to indicate that that rule will be applied at the hearing of similar cases in future.

### c. *Value Control*

Thus decisions and conclusions as well as evaluations and logic form part of the judicial decision. The importance of formal logic is its control function. Logic prevents the discussion from degenerating,<sup>35)</sup> and the evaluations and the decisions are not irrational. It is true that the judge must make a choice, but a choice is not irrational simply because it is a choice or cannot be the conclusion of a logic inference;<sup>36)</sup> the choice is guided by the *legal ideas which control the legal system*, and may "être justifiés d'une façon raisonnable grâce à une argumentation dont on reconnaît la force et la pertinence".<sup>37)</sup> The judge's evaluation is controlled by the argumentation of the parties, which provides him with the arguments on which he must base his decision, and also by the legal system to which the judgment must be attached in order to meet the demand for consistency and certainty, and at the same time also as far as possible to attain satisfactory results which can be accepted

35) H. W. Johnstone jr.: Some Reflections on Argumentation, in *Logique et Analyse*, N.S., vol. 6, 1963, p. 34.

36) W. K. Frankena: Decisionism and Separation in Social Philosophy, in *Nomos*, vol. 7, 1964, p. 24, cf. John Ladd: The Place of Practical Reason in Judicial Decision, in *Nomos*, vol. 7, 1964, p. 126 ff., esp. p. 131 f.

37) Ch. Perelman: La Théorie Pure du Droit et L'Argumentation, in *Law, State and International Legal Order, Essays in Honor of Hans Kelsen* (edt. S. Engel), 1964, p. 226 ff., (231) cf. Esser: op. cit. n. 16, p. 201.

by the doctrine.<sup>38)</sup> The doctrine is here of decisive importance to this decision: "bestimmt mit ihren Theorien (for example, dangerous enterprise), Begriffen (for example, community of property) und Methoden (for example, Ross) die Vorstellungsrahmen und die Denkweise der Praxis – und das ist ihre historische Rolle und Verantwortung im Rechtsleben".<sup>39)</sup>

#### 1°. Value System

To legal philosophy the most urgent problem is then whether it is possible to prepare a *value system* which can be of importance to the judge's choice and to the doctrine, since the different legal principles will thereby be coordinated and arranged in a hierarchy.

One tendency of legal philosophy, which may be called the *phenomenological* (H. Coing),<sup>40)</sup> will understand the legal system from its "Sinngesamt", and has for its purpose to establish an ideally objective "Wertreich" extending beyond the legal system, and this forms the judicial system. But the judicial system can be understood only "aus dem Inhalt des Fühlens und Wollens des Menschen" (Coing: Rechtsphilosophie p. 50). To Coing it is decisive that acts done by human beings are not determined by reason, but by feeling. All moral cognition can lean only on the feeling, and the values are then perceived intuitively by virtue of "Vorzugsgefühlen". As far as the judicial system is concerned its basic value, justice, is given in and by the sense of justice. In this light it should be possible to prepare a "Rangordnung der Werte". – To rely on this intuitive "Schauen" of the eternal values does not carry conviction. Of course, at legislation as well as at the making of the decisions of courts of law regard must be paid to the sense of justice, but to base a value hierarchy thereon is not satisfactory seen from the point of view of science. It must be possible to discuss and state the reasons for the values and the norms. One has precluded

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38) Stig Jørgensen: op. cit. n. 15, p. 96, *Illum*, op. cit. n. 4, p. 62 f.

39) Esser: op. cit. n. 16, p. 317.

40) H. Coing: Die obersten Grundsätze des Rechts, 1947, *same*: Grundzüge der Rechtsphilosophie, 1950.

oneself from doing this by referring to the sense of justice.<sup>41)</sup> In formal logic it is possible to make a well-defined distinction between the validity of an argument and the convincing force of the argument. But this distinction cannot be maintained in the case of the intuitive standpoint. The arguments are here simply effective or ineffective.<sup>41a)</sup>

In English legal philosophy, *R. W. M. Dias*<sup>42)</sup> has also suggested a value study of law as a way out of the dichotomy: natural law – legal positivism. Dias will study "the law behind the law",<sup>43)</sup> viz. the values which are inherent in and lie behind the legal system, since by values he understands any non-legal consideration which influences the process of decision by virtue of being an ideal. Dias stresses that it is not the different interests as such which are of importance, but that the decisive point is the ideals that underlie them. Thereupon Dias attempts to advance and examine certain ideals which can serve as fundamental standards of the evaluation, as for example, national safety, social welfare, freedom of the individual, morality, convenience, justice, and international comity. Dias also attempts to weigh these ideals, which often will be conflicting; the question is then which ideal is to take precedence, a question which has not been finally decided upon. Dias also stresses that law and moral (ideal) must be kept apart because only in this way is criticism of the legal system possible and important, since the march of society is measured by the changing patterns of ideals.

*Esser*<sup>44)</sup> has shown on a comparative basis the use of looking behind the positive law and has thereby subjected the legal principles to a close analysis. Esser demonstrates that both in

41) Cf. in the same respect *U. Matz*: *Rechtsgefühl und objektive Werte*, 1966.

41a) This is also an objection to Ross' account, op. cit. n. 1, p. 308. Ross' position owes much to *C. L. Stevenson*: *Ethics and Language*, 1944. For a critique of Stevenson, see e.g. *M. Blegvad*: op. cit. n. 9, Ch. III and IV with references. *Frankena*: op. cit. n. 14, p. 402 ff.

42) *R. W. M. Dias*: *The Value of a Value-study of Law*, in *Modern L.R.*, vol. 28, 1965, p. 397 ff., cf. *same*: *Jurisprudence*, 1964, p. 150 ff.

43) Cf. *John Dickinson*: *The Law Behind the Law*, in *Col. L.R.*, vol. 29, 1929, p. 113 ff. and p. 284 ff.

44) *Esser*: op. cit. n. 16, in particular p. 336 ff., cf. *Stig Jørgensen*: op. cit. n. 15, p. 115 ff.

common law and in code law by and large the same solutions of the same complex of problems are arrived at in spite of dissimilar formation of concepts and the different elaboration of the theories. This can be explained only from "universalen Rechtsbedürfnissen und gleichartig bewerteten Gerechtigkeitspostulaten".

The legal system is a cultural phenomenon, and its principles follow the social trend of life.<sup>45)</sup> Moral and legal ideas, principles and ideals are necessary correlates to reason, which permits man freedom in relation to the surroundings: to create culture. Political, economic, and aesthetic ideas also manifest themselves here at the creation of culture and thereby exert influence on the legal system. But the legal ideas differ from them thereby that "ein Prinzip nur zu rechtlicher Normbildung tauglich ist, wenn es spezifisch juristischer Argumentation aus dem Gesichtspunkte der Gerechtigkeit und Angemessenheit zugänglich ist".<sup>46)</sup>

## 2°. Norms of "permissible" Argumentation

*Legal argumentation* is characterized by *norms* on "how a precedent is to be used, a statute to be interpreted, an instrument to be construed, how large or how small a step of innovation is permissible under a given set of circumstances, how the decision is to be justified in the written opinion, whether, and, if so, in what manner an innovation is to be disguised as a mere application of existing law".<sup>47)</sup> It is difficult to characterize these norms, but there is no doubt that there are generally accepted norms indicating how far the legal argumentation may be carried, and to which arguments importance may be attached so that here there is an intersubjective basis of decisive importance to a discussion on a

45) G. Radbruch: *Rechtsphilosophie* (6. Aufl. 1963) § 1, *Dubischar*: *Grundbegriffe des Rechts*; mit einem Nachwort von *Joseph Esser* (1968), *Michael Barkun*: *Law without Sanctions* (1968), *Stig Jørgensen*: op. cit. n. 15, p. 113 ff., *Edgar Bodenheimer*: *Treatise on Justice* (1967) p. 44 ff., *Heinrich Henkel*: *Einführung in die Rechtsphilosophie* (1964) p. 8 ff.

46) *Esser*: op. cit. n. 16, p. 69.

47) *Max Rheinstein*: *Review of Esser: Grundsatz und Norm*, in *University of Chicago L.R.*, vol. 24, 1957, p. 599, who here expressly agrees with *Esser's* exposition. See also *Stone*: op. cit. n. 19, p. 23.

legal value hierarchy. — Statements as to the intent of such norms deserve a comprehensive and penetrating analysis of legal decisions.

### 3°. Legal Principles

But in addition to these legal principles or norms of argumentation, which the jurist applies at his work and cognition of the legal system, there are material *legal principles* which are not given either in or by legislation. But to call these principles natural law would be misleading. There is only one judicial system consisting of the legal system and the legal and material principles which form part hereof.<sup>48)</sup>

The function of the material legal principles is to serve as the starting point of the legal argumentation thereby to secure unity and consistency at the application of the rules of law, and also to determine the scope of the rules. — It is here an important task to comprehend which principles already form a part of the legal system and thus are existing law, and which principles are on the way to be recognized as existing law.

The material legal principles may be divided into basal and special ideas which control an individual sphere of problems.

The *basal* ideas have both a formal and a material aspect. In the *formal* sense the idea is manifested in: equal cases are to be treated equally. But this does not say anything about the details of the contents of the rules. The contents of the rules are more specifically determined by the material ideas and the special ideas. The basal *material* ideas are reciprocity and retribution ideas, i.e. the ideas of justice (corrective and distributive) and equity. But these are not everlasting and unchangeable, but their contents are transformed

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48) *Stig Jørgensen*: op. cit. n. 15, p. 116, *Illum*: op. cit. n. 4, p. 52, cf. *A. Kaufmann*: Analogy and "The Nature of Things", in *Journal of the Indian Law Institute*, vol. 8, 1966, p. 358 ff. *W. L. McBride*: The essential Role of Models and Analogies in the Philosophy of Law, 43, N.Y. Univ. L.R. (1968) p. 53 ff., cf. *R. Dworkin*: 60 *J. Philosophy* 1963 p. 624: Judicial Discretion, (the view of the judge's decision as "discretion" is false. The judge is fettered by "standards" and "rules", and by "ideas" and "justice"). See *A. Ross*: Validity and the Conflict Between Legal Positivism and Natural Law, in *Revista Juridica de Buenos Aires*, IV, 1961, pp. 46 ff. and 56, cf. *On Law and Justice* p. 101, *TfR* 1963, p. 509.



under the influence of political and economic ideas, and by the differences in the conditions of life and the patterns of culture.

The *special* ideas are intimately connected with the basal ideas, but unlike them they manifest themselves only within limited spheres. They are problem principles which are the legal basis and the norm of the legal solution. In private law, mention may, for example, be made of the idea of security of commerce in dealing with the complex of problems presented by the law of obligations, the idea of private autonomy in the law of contract. In public law we have the idea of the sovereignty of the Government at the making of treaties within international law, the idea of effective and appropriate administration within administrative law, the idea of force of law within the law of procedure, and the idea of *nulla poena sine lege* within criminal law.

But neither the basal material principles nor the special principles indicate a particular solution to the jurist. They indicate only the outlines of the solution and are dependent on the views and recognition of the time concerned. On applying the law, the judge must answer two questions: (1) is the rule applicable? (2) is the rule to be applied? In answering the latter question, the judge must pay pragmatic regard to the effects of the decision, teleologic regard as to whether the result is desirable, and axiomatic regard, since the decision must also be adapted to the legal system. The judge and the jurist must make their decision in the light of the nature of the matter, as an "Ausdruck der Besinnung auf die innere Gesetzmäßigkeit, in welcher im pragmatischen wie im axiomatischen Denken die Prinzipien und ihre Zweckgedanken zueinander stehen".<sup>49)</sup>

### III. CONCLUSION

Ross deserves merit for having emphasized that the legal decision is a decision which is motivated by social objectives and insight in the legal system. Ross has likewise emphasized that one must take

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49) *Esser*: op. cit. n. 16, p. 379. And see *R. Sartorius*: The Justification of the Judicial Decision, in *Ethics*, vol. 78, 1968, p. 171 ff., in particular p. 178.

positive law as the starting point. But in his exposition of the sources of law in "On Law and Justice" he does not make a detailed analysis of the material and the specific principles which underlie the rules of law, and which are decisive to the legal decision. Realistic jurisprudence must admit that evaluations and values are the deciding factors in the application of law as far as the judge as well as the scientist are concerned. But to Ross evaluations and values are metaphysics which cannot be dealt with on a scientific basis. Ross has remained true to himself in his untiring battle against metaphysical ideas of law and against the view that rational argumentation can be applied to morals. In Julius Stone's words<sup>50)</sup> used in another context, Ross' battle may be seen as an expression that "the hegemony of his chosen method may be in part an attempt to justify the way he has used the mortal lifespan of his thought. The conceptualised sketch of the state of knowledge at his own point in the ongoing stream of time is what is left of his life dedication. As such it is precious and irreplaceable".

Nordic jurists have reason to be grateful to Ross for his battle and for his dedication. But the battle for more realistic knowledge of the phenomena of legal practice will lead to further results by other methods, but not without regard being paid to Law and Justice.

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50) *J. Stone*: op. cit. n. 19, p. 4.