# IDEALISM AND REALISM IN JURISPRUDENCE

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## 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.[1] In Norway Torstein Eckhoff and Vilhelm Aubert have practised a legal theory orientated towards social science.[2]

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,[3] whereas the attacks against positivism have been

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

[2] Torstein Eckhoff, *Rettferdighet*, 1971, *Rettskildelære*, 1972; Vilhelm Aubert, *Rettssosiologi*, 1972.

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

made especially by hermeneutic/analytical[4] and materialist/Marxist[5] 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.[6]

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.

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.[7] 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

[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.

[7] Niels Egmont Christensen, *Logisk-filosofiske overvejelser over symmetribegrebet, Det Lærde Selskabs publikation* no. 7–8, Århus 1975, pp. 69 ff.

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.[8]

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.[9]

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

[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).

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

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 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.[1]

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.[2]

*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 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

[1] 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.

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

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.[3] 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.[4] 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 Hegal that development is the result of an interaction of reality and reason.[5]

### 4. *Naturalism–Idealism*

A naturalist philosophy assumes that everything in nature, including mental processes, can be explained through natural laws.[6] 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

[3] Reinhold Zippelius, *Das Wesen des Rechts*, 2nd ed. 1969, pp. 15 ff.
[4] Justus Hartnack, *Den ny filosofi*, 1963, p. 71.
[5] Johs. Witt-Hansen, *Historisk materialisme*, 1973, pp. 15 ff.
[6] Justus Hartnack, *Den ny filosofi*, pp. 78 f.

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 truths independently of observation. Certain things happen of necessity.[7] 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.

[7] Justus Hartnack, *op. cit.*, p. 95.

### *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 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.[8]

## 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*[9]

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.

[8] Justus Hartnack, *op. cit.*, p. 80.

[9] 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, "Symmetrie und Gerechtigkeit", in *Homenaje al Profesor Legaz Lacambra,* Madrid 1977; *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", 13 *Sc.St.L.*, pp. 107 ff. (1969), "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 (*zóon 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 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.[1]

Thibault wanted a consistent carrying into effect of a legal science, founded on inner theoretical criteria, which also ought to provide the basis

[1] W. Lövenhaupt, *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.

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 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*[2]

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.[3] 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.[4] 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 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).[5] Eugen Ehrlich, too, did not fully equate sociology with legal science. Although he looked upon legal science as part of the theoretical social

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

[3] Cf., for instance, E. Fechner, *Rechtsphilosophie*, 1956; Georg Cohn, *Eksistentialisme og retsvidenskab*, 1952.

[4] R. Zippelius, *op. cit.*, p. 16.

[5] 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. 16 f.

science, sociology, he still assumed that regularity in itself was not the same as a prescription.[6]

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 truth with a consequence of action.[7] 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*.[8]

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

[6] Karl Larenz, *op. cit.*, pp. 69 f.; A. Verdross, *op. cit.*, pp. 194 ff.; R. Zippelius, *op. cit.*, p. 17.
[7] Edgar Bodenheimer, *op. cit.*, pp. 111 ff.; Lon Fuller, *The Morality of Law*, 2nd ed. 1969.
[8] Carl Schmidt, *Gesetz und Urteil*, 1912.

useful tool of scientific cognition.[9] 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.[1]

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,[2] 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,[3] subscribed to the phenomenological method.

The modern system theory, formulated in concurrence with Parson and presented above all by Niklas Luhman,[4] 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 norm systems. The so-called Marburg School

[9] Karl Larenz, *op. cit.*, pp. 119 ff.; Ulrich Matz, *Rechtsgefühl und objektive Werte*, 1966.

[1] 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.

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

[3] Cf. Jørgensen, *Lovmål og dom*, pp. 19 ff.

[4] *Legitimation durch Verfahren*, 1969; cf. also Torstein Eckhoff and Nils Kristian Sundby, *Rettssystemer*, 1976.

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.[5] 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.[6]

## 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 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

[5] *Die Idee der Konkretisierung im Recht und Rechtswissenschaft unserer Zeit*, 2nd ed. 1968.
[6] *Rechtsphilosophie*, 8th ed. publ. by H. P. Schneider and Erik Wolf, 1973.

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[7] and Heinrich Henkel[8] 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 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.[9] 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

[7] *Legal Values in Western Society*, 1974.
[8] *Einführung in die Rechtsphilosophie*, 1964.
[9] Jørgensen, *Lovmål og dom*, pp. 131 ff.

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 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.[1] 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.[2] Olivecrona, too, understands law as an actually existing conception which is the causal element of observable legal behaviour.[3]

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

[1] *Op. cit.*, pp. 12 f.

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

[3] *Rättsordningen*, 1966; in English *Law as Fact*, 1971.

for the authorities to employ the monopolized coercion of the state.[4] 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 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.[5]

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.[6] 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 kg" or "a 10-metre-high tree". Such adjectives have the same content at all

[4] *Reine Rechtslehre*, 2nd ed. 1960.

[5] *The Concept of Law*, 1961.

[6] 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.

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,[7] Josef Esser,[8] and Arthur Kaufmann[9] have pointed to the immanent *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

[7] *Die Hermeneutik als allgemeine Methodik der Geistewissenschaften*, 1962.

[8] *Vorverständnis und Methodenwahl*, 1970. Cf. also Jørgensen, *Lovmål og dom*, pp. 86 ff.

[9] *Rechtsphilosophie im Wandel*, 1972, *Grundprobleme der zeitgenössischen Rechtsphilosophie und Rechtstheorie*, 1971. "Durch Naturrecht und Rechtspositivismus zur juristischen Hermeneutik", *Juristenzeitung* 1975, pp. 337 ff.

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.[1] In his book *Theorie der Rechtsgewinnung* (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

[1] Cf. Jørgensen, *Lovmål og dom*, pp. 74 ff.

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 formulaions.

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.[2]

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

[2] 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 publikationer*, no. 6, Århus 1973.

realistic view 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.