On Concepts in Law

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The analysis of legal concepts depends on which philosophy of science is used. A positivist theory will lead to a formula, an empty concept, which provides nothing more than terminological support,[1] while a natural law theory will fill legal concepts with a substantive pre-legal content.[2] A third route is the hermeneutic philosophy of language and science, which regards concepts as practical tools for a teleological and pluralistic theory of cognition and science.[3] To illustrate the various approaches to legal concepts, I have chosen the concept of causation, which is central to all legal theory. But before proceeding, I shall provide a brief account of the concept of "positivism", which is also used in various ways and for various purposes.[4]

I Positivism

The word and the concept of "positivism" have been used and misused for many purposes. The literal meaning of the word is "that which is given" (from *pono*), and when used in many ordinary and non-scientific and legal contexts, it is a positive word (positive in contrast to negative). In the scientific and university debate of the sixties, however, the word was used in the contrary sense, namely as the main enemy of "progress", the social revolutions of that time having been legitimised through the adoption of a "critical science" in which positivism was perceived as a reactionary (and capitalist) means of oppression of the "working

1 Alf Ross, *On Law and Justice* (1958) p. 170 ff.

2 Stig Jørgensen, *Legal Positivism and Natural Law*, Values in Law (1978) pp. 103 ff; and *Fragment und Ganzheit in der juristischen Methode*, Rechtsdogmatik und praktische Vernunft, Symposium zum 80. Geburtstag von Franz Wieacker (1990) pp. 58 ff.

3 Stig Jørgensen, *Lawyers and Hermeneutics*, *infra* pp. 181-188 in this volume of Sc.St.L.

4 See Stig Jørgensen, *Reason and Reality* (1986) pp. 96 ff (Pluralis Juris) pp. 109ff (Private Property) p. 129 (Contract as a Social Form of Life); and "The State of Legal Dogmatics", *Sprache, Performanz und Ontologie des Rechts*, Festgabe für Kazimir Opalek (1993) p. 35, *Rechtfertigkeit und Gerechtigkeit*, Erkenntnis, Auslegung, Beschreibung, Rechtsnorm und Rechtswirklichkeit, Festschrift für Werner Krawietz (1993) p. 515.

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classes" through the construction of a "false consciousness", which took the existing (capitalist) society and its economic growth rationale for granted.[5]

The logical-positivist theory of knowledge of the 1920s defined science partly as analytical statements and partly as assertions which are capable of verification: all other statements are "metaphysical" or value judgments, a theory which presupposes an objective scale and an objective language. The preceding idealist theory of cognition presupposes an identity between language and the surrounding world, either because thought creates reality (subjective idealism) or because reality is logical (objective idealism).[6]

Positivism was also posed in contrast to natural law, and presupposed, contrary to the latter, that law is the creation of man and not derived from metaphysical forces: God, reason, the ideal. While it was assumed in ancient times and in the Middle Ages that morality and law were derived from human nature (*zoon politikon*) through the use of reason, and while the rationalist theory of natural law of the Age of Enlightenment continued this tradition, the resulting theory of the constitutional state led to a legal positivism which could only legitimise the law via its constitutional theory of the separation of powers.[7]

The concept of positivism thus touches on three different issues:

1. The theory of knowledge
2. The theory of law
3. Legal positivism

With respect to 1: *Can science be expressed in objective language?*
With respect to 2: *Can lawyers speak authoritatively about moral requirements?*
With respect to 3: *Does the creation of all law require legislation?*

1 Language and Reality

Language is not a reflex reaction to, or a property of, things, for which reason it is *not* possible to speak of a *necessary connection* (*rapports necessaires*) between object and action (*nature de chose*, *Natur der Sache*).

Every description is an interpretation because, like cognition, language is *teleological* (determined by its purpose). Language is an implement of cognition on a par with other organs which contribute to the survival of the individual and the species, and it must be understood as a genetically-based means of communication belonging to the species which processes and communicates significant facts so that they can be transmitted to and processed by other individuals. Concepts and words therefore necessarily retain human values and objectives which cannot be removed. Language and cognition cannot be

5 Stig Jørgensen, *Legal Positivism and Natural Law* (l.c. note 2) pp. 103 ff; *and Natural Law Today*, Values in Law (l.c. note 2) pp. 135 ff.

6 Stig Jørgensen, *Argumentation and Decision* Values in Law (l.c. note 2) p. 151; and *Scandinavian Legal Philosophy*, Reason and Reality (1986) p. 80.

7 Stig Jørgensen, *Legal Positivism and Natural Law* (l.c. note 2); and *On Justice and Law* (1990) pp. 20 ff.

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"objective", but neither are they "subjective", because a certain degree of *inter-subjectivity* is necessary for successful "communication", i.e., for the transfer of a common conceptual content.[8]

In other words, a *consistent positivist theory of knowledge* must be rejected for reasons of principle.

2 The Problem of Natural Law

Lawyers use and describe the rules of law in terms of the relevant legal system's criteria of validity, but lawyers have no political mandate to alter the rules of law. Both the courts and lawyers must therefore keep their own moral and *aesthetic judgments outside their application of the law*. In primitive societies it is not possible to distinguish between morality and law because, in such societies, custom identifies the applicable rules of law (*morality* from *mos – mores*: customs; *ethics* from *ethos*: customs). It is only with the emergence of modern society and the *political* function that the distinction between law and morals arises out of the emphasis placed by Renaissance man on the individual as the smallest unit of society, governed by society's supreme (law-generating) will. The law is made by the society and enforced by its courts, while morality is a personal matter enforced by the court of conscience.[9] *Natural law is the demand which morality makes on the court*.[10] In the moral philosophy of Antiquity and of the Middle Ages, both goodness and truth were considered to be properties inherent in any given action and capable of recognition through reason. This rationalist theory of natural law was continued in the Catholic moral philosophy of Europe in 1600-1700, until Hume's and Kant's critique of reason led to the idealism and legal positivism of the 19th century.

3 The Constitutional State – the Welfare State

Legal positivism is a more recent legal theory which, in agreement with the principle of democratic government, equates law and state, and thereby identifies the concept of law with the actual laws adopted by parliaments (the will of the people). Legal positivism corresponds to the constitutional distribution of powers and has the *rule of law* as its basic value, in contrast to the modern welfare state's regulatory legislation, which has *instrumentalism* as its basic value and which uses various means, e.g. preambles, framework legislation, plans and guidelines to secure the greatest possible realisation of its political *objective*.[11] It is self-evident that the law which existed before the

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8 Stig Jørgensen, *Language and Reality*, Law, Life and the Images of Man, Festschrift for Jan Broekman (1996) p. 121.

9 Stig Jørgensen, *Jydske Lov i europæisk sammenhæng*, Jydske Lov 750 År (Ed. Ole Fenger and Chr. Jansen) Viborg (1991) pp. 18 ff; *Grotius' Doctrine of Contract*, Values in Law (l.c. note 2) pp. 83 ff.

10 Stig Jørgensen, *On Justice and Law* (l.c. note 7) pp. 75 ff.

11 Stig Jørgensen, *Contract as a Social Form of Life*, Reason and Reality (l.c. note 6) p. 145; "Limits of Law", *Rechtstheorie*, Beiheft 11 (1989) pp. 23 ff; and *Law and Society* (1970) pp. 30 ff.

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constitution – to a broad extent the *law of custom* – must still apply unless revoked by parliament, and customary practice will still be an open source of law. Large parts of the legal system, for example the law of torts, have until recently had their most important source in customs and legal practice.[12]

In recent times, *private creation of law* has gained increasing significance: company law and the law of associations are governed by private statutes and agreements, and labour law is a network of collective agreements, while the legal relationships in the world of business are widely governed with the aid of "agreed documents", "conventions", or standard terms which are "adopted" either expressly or tacitly.

Legal positivism is not enough.

II The Concept of Causation[13]

"No more may be extracted from a concept than has already been put into it". This was Knud Illum's principal argument against the old distinction between rights in property and chattels on the one hand and rights of obligation on the other. The first step had been, he said, to observe the legal status, and it was noted that rights in property and chattels could often be protected against creditors and other unsuspecting later acquirers of rights, while rights to money, i.e. financial claims, normally did not enjoy protection against third party. Rights to objects were consequently called proprietary interests, and financial claims were called rights of obligation, for which reason rights of ownership were systematically divided into the law of property and the law of obligations.[14]

So far so good, but now a further step was taken which put the cart squarely before the horse: it now became permissible to draw conclusions about the protection of property from the type designation "proprietary interests", while the designation "rights of obligation" led to the conclusion that such rights offered no protection against third party without a "binding individualisation". The so-called *Begriffsjurisprudenz* (concept-based law) which dominated Continental jurisprudence in the early half of the 19th century took its point of departure in ordinary concepts and principles from which the solution to legal problems was then deduced relative to the intrinsic systematics which aimed at maintaining an exhaustive and contradiction-free context.

On the one hand this scientific method was a significant advance for jurisprudence. As for the empirical sciences, they could now, with the aid of

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12 Stig Jørgensen, *Law and Society* (l.c. note 11) pp. 42 ff.

13 See my previous works: *Kausalitetsproblemer*, Ugeskrift for Retsvæsen 1953B:37 ff and 145 ff; *Årsagsproblemer i forbindelse med personskade*, Nordisk Forsikringstidskrift, 1960:196ff; *Spredte bemærkninger om adækvans*, Juristen, 1961:195 ff; *Erstatning for personskade og tab af forsørger* (1st ed. 1957, 3rd ed. 1973) Chap. II; *Erstatningsret*, 1966, Chap. 15; *Ethik und Gerechtigkeit*, Veröffentlichungen der Joachim Jungius-Gesellschaft, Hamburg, 1980; *Johs. Andenæs og almenprøventionen*, Lov og frihet, Festschrift for Johs. Andenæs, 1982:177ff; *Fragments of Legal Cognition*, Acta Jutlandica LXIV:3, Social Science Series 18, pp. 42 ff.

14 Knud Illum, *Dansk Tingsret*, 2nd ed. (1966) pp. 11-19; *Lov og ret* (1975) p. 177; *Some Reflections on the Method of Legal Science and on Legal Reasoning*, Scandinavian Studies in Law 12 (1968) pp. 48 ff.

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definitions of the concepts and their arrangements in a genus and species context, which justified binding logical conclusions, offer a reply to all of the questions within the system thus constructed. On the other hand, the method was separated from the reality which the law was to govern. The rule of law was quite obviously strengthened, but its practicability was highly limited.[15]

This science model was borrowed from the rationalist theory of natural law of the 18th century, which had based its first principles on the assumption of a common objective reason, which assumption was also transferred to morality and jurisprudence. As this assumption of a common objective reason and morality, which would provide an unambiguous answer when one thought enough about it, had to be abandoned after David Hume's and Immanuel Kant's critique of reason,[16] the legal system was derived in place from a set of general principles which were presumed to apply to all people, human society and the law. In private law, this was the principle of the individual person as the basic legal entity; in family law, the principle of association; and in national law, the principle of the state, which in general in the eyes of the liberal-conservative social philosophy of the time should play only a marginal role (the night watchman state). Freedom was society's highest goal, and humanity was the object for the state and not its means.

The principle of will therefore came to dominate the treatment of private law, which was the main area of concern for jurists at the time, and for good reasons, as the scope of the government and the state to undertake major domestic tasks was limited by economic factors. The original theory of knowledge assumed that the principles which govern the basic concepts must also govern the concepts and solutions derived from them. Aristotles' metaphysics was constructed on the distinction between essential and non-essential properties in accordance with his assertion that all entities have a *nature*, i.e., properties which define them and set them apart from all other things, and which they therefore strive to realise to the greatest extent possible. Since man's nature was *reason*, which separates him from other "social animals", human actions can be considered as manifestations of this reason.[17]

It was this rationalistic outlook which, a couple of hundred years earlier, had started the speculative search in the Ionic natural philosophy for "the eternal in the changeable", and which, in the subsequent Hellenistic philosophy, led to formation of the "systematic" textbook which gained very great significance for classical Roman law. The art of rhetoric taught the Romans to distinguish between *verba* and *voluntas*, and thus formed the basis of a hermeneutic theory of interpretation and the inspiration behind Gaius' textbook "Institutiones".[18]

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15 Stig Jørgensen, *Entwicklung und Methode des Privatrechts*, Vertrag und Recht (1968) pp. 64 ff; *Fragments of Legal Cognition* (l.c. note 13) p. 40; and *On Justice and Law* (l.c. note 7) pp. 55 ff.

16 Hume: It is not humanity, but human beings, who think and feel! Stig Jørgensen, *Values in Law* (l.c. note 2) p. 40. In Kant's opinion it was necessary for the purposes of practical cognition to assume that theoretical and free will are governed by causal laws if we are not to flounder in subjective chaos.

17 Stig Jørgensen, *Entwicklung und Methode des Privatrechts* (l.c. note 15) p. 59.

18 Stig Jørgensen, *Fragments of Legal Cognition* (l.c. note 13) p. 47.

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The so-called glossators who founded Roman-derived jurisprudence at the northern Italian universities in the 1000s and 1100s saw their purpose as "interpreting" *Corpus Juris* as an authoritative text[19] in agreement with the ideal of knowledge of the rhetoricians, i.e., on the basis of its external systematics, to create a whole by abolishing contradictions through *distinctiones* and filling lacunae through analogy. The canonical jurisprudence made use of the same methodology in its development of a dogmatic exegesis (laying out of authoritative texts), as contact with the Arab world had led to a renewed knowledge of Aristotles' metaphysics and logic. The goal and method (*met-odos* – "the way by which") of Greek scholarship was reintroduced into Europe: *to* find the eternal in the changeable, and *to* unite thought and reality, and hence to build certain and true knowledge. Later rationalism (Descartes) emphasised certainty, and empiricism (Galileo) truth – thus creating a dualism between which posterity attempted to mediate.

With the introduction of nominalism in the 1300s, the Aristotelian metaphysics of material concepts was abandoned, and science lost its teleological quality, according to which the "nature" of things had been the object of research. No longer determined by its goal, science now (in accordance with the new world view) became occupied exclusively with the study of cause and effect. Jurisprudence was again joined to the social and political realities, and unlike previously, when the law was perceived as divine custom, it was now assumed that man could make law at will through temporal legislation and use it to attain political and social goals. Man had become a supreme being with the power to control the external (empirical) world through technology, and the internal (social) world through laws.[20] The problem of causation thus gained a prominent position in legal thinking with respect to both legislation and contractual and tort theory. While, in the old tribal society, the right of retribution had belonged to private law, it was now relegated through legislation to the status of an appendage to the royal powers, which included the maintenance of peace and justice, and was consequently financed principally through fines.[21]

In the law of torts, which was gradually separated from criminal law, a wrong was assumed to trigger a claim for compensation for the loss. Under the influence of the church, however, this liability was gradually limited to the evil will, i.e., intention and negligence, while the question of compensation for accidental damage arose only exceptionally. During the rationalist natural law theory of the 1600s and 1700s, the doctrine of human supremacy gradually developed, which, in political terms, is a demand for the population's competence to legislate, and, in terms of private law, which makes good will the basis for ordinary contract law, and evil will the cause of an ordinary *culpa* rule within tort law.[22]

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19 Codex, Digesterne [quotations from the great classical lawyers] and Gaius' *Institutiones*, 529 A.D.; Stig Jørgensen, *Juristerne og hermeneutikken*, Philosophia, 1996, 25, 1-2, pp. 93 ff; and *On Justice and Law* (l.c. note 7) pp. 54 ff.

20 Stig Jørgensen, *On Justice and Law* (l.c. note 7) pp. 54 ff.

21 Stig Jørgensen, *Entwicklung und Methode des Privatrechts* (l.c. note 15) pp. 59 ff.

22 Stig Jørgensen, *Tort Law and Development, 32 ScStL* (1988) pp. 69 ff.

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Both the contractual obligation and the obligation under tort law are limited to the consequences which can be foreseen by the players. This limitation is derived from the concept of will, which is assumed to underpin the private autonomy which governs all private law. Will must be limited to that which can be expected to follow; there is therefore no liability for "unforeseeable" injurious consequences of actions which cause damage, and the obligations and content of the agreement are therefore limited to the "assumptions" of the person who is liable. Other consequences are thus not *caused* in a legal sense.

It is clear that the concept of system is of major significance for legal science not less than for science in general, since it is the presumption for use of a scientific method, and hence for clarity and assurance. This is not, however, to say that the system concept is *decisive*, in the first place because major difficulties are associated with the conversion of concepts to real life application, and in the second place because it is necessary that there should always be a state of competition between rule and exception, between the rule of law and equity. Ever since Plato it has been a familiar dilemma for all rules which are to be applied to reality that the general limitations may lead to unfair results in specific situations.[23] In contrast to the general concept, which is defined, the concept of the type is open and subject to value judgment.[24] The principal problem for the theory of cognition is, however, the circumstance that language and reality belong to different logical categories, and that language and concepts do not exist in reality, but depict reality in the same manner as a photograph, which "represents" a reality without being there. It follows that when a phenomenon belonging to the real world is "called" by a name, an act of will is involved, a decision and not a logical conclusion; there is no necessary connection (*rapport necessaire*) - as Montesquieu and later thinkers in natural law believed - between concepts and reality (the nature of things, *nature de chose*, *Natur der Sache*).

Aristotle already knew the problem, which he treated in his second logic, where he drew attention to the fact that the underlying principles of the first logic cannot be derived from logic, but must be fixed by intuition (nous), and that it follows that reality must be qualified in language and concepts before it can be treated scientifically.[25] Later philosophy has attempted in many ways to overcome this dilemma, since a subjective (arbitrary) qualification will render science impossible. Language and the generation of concepts must thus be inter-subjective if they are to be used for a scientific purpose and for ordinary communication.[26]

The idealism of the previous century attempted to avoid the problem by assuming that we each create reality in our thoughts, which we project out into space (subjective idealism), or by assuming that reality is already logically constituted (objective idealism – Hegel: reason is the real and the real is the

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23 Stig Jørgensen, *Language and Reality* (l.c. note 8) p. 121.

24 Stig Jørgensen, *Typologie und Realismus*, Nachrichten der Akademie der Wissenschaften in Göttingen (1971) pp. 59 ff.

25 Stig Jørgensen, *Lovmål og dom*, (1975) pp. 86ff; and *Lawyers and Hermeneutics* (l.c. note 3).

26 Stig Jørgensen, *Values in Law* (l.c. note 2) pp. 9 ff.

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rational). After many attacks on idealism around the turn of the century, a number of variants arose which have only one feature in common: they reject the existence of any objective correspondence between language and reality.[27]

Intuitionism or phenomenology assumes that man possesses a special form of cognition which enables him intuitively to comprehend both empirical phenomena and moral values, and to rank them in a systematic context. Existentialist philosophy rejects objectivity and makes subjectivity the truth, while pragmatism's criterion of truth is the consequences of the action. The English common law philosophy and the modern variant "ordinary language philosophy" skip all formalities and make the ordinary language the genuine source of true knowledge.[28]

It was in agreement with this analytical philosophy dominant in the fifties that Hart and Honoré, in the book *Causation in the Law*,[29] attempted to remove theory from the concept of cause. Analysing a number of judgments in which English courts had upheld or denied a legal liability, and thus the "causal connection", these authors believed that they had sharpened the concept of cause. However, ordinary language is not adapted to solve complicated academic and scientific problems, and it also appears that the authors – unwittingly – committed the same conceptual error as conceptual jurisprudence, which confused concepts with reality. The action which the English courts took, and which all courts take, is to decide to assign liability for a particular consequence, which is then qualified as "caused" by the action under judgment.

It is also more realistic to perceive language "pragmatically" in a slightly different sense than that of American instrumentalism, as recent linguistic philosophy and physiology have taught us to regard language as a tool on a par with the five senses and other biological and physiological reaction patterns which enter into the survival strategy of our genes.[30] While signals are common to all species of animals (calls, warnings and reassurance), and, in social animals, also communication in connection with collective co-operative events such as hunting and care of the young, the human species has developed language as part of its survival strategy in connection with intelligence, upright posture, and a thumb which can grip and hold a tool. The difference between an aid, which many species of animals can use, and a tool, is the intelligent assumptions with respect to time and the individual which make it attractive to retain (and improve) an aid for later use, and thus to turn it into a tool. Language, which consists of concepts, i.e., generalised experiences, is therefore particularly suitable as a means of social communication and the storage of previous shared experiences, which can be taught to subsequent generations and not merely imitated.

Language thus becomes an important tool in our treatment of reality and the social rules, for in naming things, we place values on phenomena and behaviour. All phenomena have a positive and a negative side. Aristotle himself described

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27 Stig Jørgensen, *Values in Law* (l.c. note 2) pp. 29 ff.

28 Stig Jørgensen, *Reason and Reality* (l.c. note 4) pp. 85ff.

29 H.L.A. Hart and Tony Honoré, *Causation in the Law*, 2nd ed., 1985.

30 Stig Jørgensen, *Language and Reality* (l.c. note 8).

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the different forms of control in this dualistic manner: one-man government: monarchy/tyranny; government by a small group: aristocracy/oligarchy; government by the people: democracy/ochlocracy. Individualism is not the same as egotism, and seen from different perspectives, a freedom fighter and a terrorist are different names for the same phenomenon.[31] It is strange that although this insight into the nature and function of language has been known since ancient times, it has only recently led to the understanding among scientists and especially legal scientists of the fundamental hermeneutic problem: to combine language and reality. The jurisprudence of the preceding 1000 years has attempted to limit arbitrariness in the application of the law by honing principles of language interpretation (word/meaning), interpretative tools (purpose, history, effect, analogy/contradiction, systematic arguments) and rules of conflict.[32] On the whole, the history of rhetoric has been an attempt to make the "true" meaning of the text real.

At the same time, the insight into the problematic relationship of reality to language has been allowed to rest in *claire-obscure* without anybody realising that to do so opened the application of the law to a significant level of arbitrariness through the qualification in language of the "raw" legal facts relative to the given legal rules. This is the very measure for the application of law, its touchstone as it were, but also its Achilles' heel. This is not to say, of course, that subjectivity and arbitrariness reign absolute, because in spite of everything, ordinary language has – and must have – a certain inter-subjectivity to be able to serve its purpose at all. To this it should be added that the teaching of the legal system and the corresponding professional ethos contribute to the profession's caring for the law to *the greatest possible extent*, but again only to the extent that is humanly possible.[33]

In a debate on the use of judicial inquiries in the investigation of political matters, the president of the Danish supreme court said that while judges each have their own personal characteristics, which of course affect their way of handling and deciding a case, the characteristics of several judges balance one another collectively. In saying this he was not merely saying something about the fragility of judicial inquiries, but also something important about the voluntary nature of the legal decision and the possibilities of limiting its consequences.

To conclude with an anecdote, we can recall the tale of Pooh Bear and his visit to Rabbit, where he was stuck in the door – not because, as Rabbit said, Pooh had eaten too much, but because, as he himself asserted, the door was too narrow!

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31 Stig Jørgensen, *Reason and Reality* (l.c. note 4) pp. 148 ff.

32 Step higher/step lower, older/younger, general/special rule, inter-temporal/ international law.

33 Stig Jørgensen, "Language and Reality" (l.c. note 8) p. 121.

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