

The assumptions that we live in a rational universe and that we are rational human beings imply that social events are caused by intentional human activities. According to the major traditions of Western civilizations, cooperative activities of producing and exchanging goods (the province of private law) and cooperative activities of protecting life and property (the province of public law) are the cumulative result of voluntary agreement between the persons in the society.

Contract as the basis of cooperation may explain how two persons with equal knowledge and bargaining power agree upon, for example, the sale of a horse. However, this scarcely explains the reciprocity necessary for cooperation in more complex commercial transactions. Furthermore, contract is even less satisfactory in explaining and justifying a balance between individual freedoms and the general interest in the liberal state. Professor Jorgensen discusses these issues in his analysis of individual rights and contract. Professors Dorsey and Jorgensen served together for several years on the Executive Committee of IVR.

INDIVIDUAL RIGHTS AND CONTRACT (FREEDOM AND RECIPROCITY IN CONTRACT LAW)*

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I. INTRODUCTION

For several years I have dealt with contract law without ever being quite satisfied with any legal theories that have been given to explain the binding nature of contracts. I have been equally dissatisfied with the conclusions drawn from this aspect of contract law. It has been even less satisfactory, when other sciences, such as economics, have presumed the binding force of the contract.

Many years ago as a legal practitioner, I was struck by the difficulty of

* I wish to refer particularly to three of my earlier articles: *Private Property and Regulation*, *Contract as a Social Form of Life*, and *The Crisis of Democracy*, reprinted in *REASON AND REALITY*, 109, 129, 145 (1986) [hereinafter *REASON AND REALITY*]. See also Stig Jorgensen, *Contract as Form*, and *Grotius' Doctrine of Contract*, reprinted in *10 SCANDINAVIAN STUDIES IN LAW* 97 (1966), 97 and 13 (1969), 107 reprinted in *VALUES IN LAW*, 84 (1978).

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conforming practice with the theory of contract as a combination of a promise and an acceptance. Usually one signed a document, which was written in advance, or one referred to a general formula, or one actually took commodities in self-service stores and paid at the exit without exchanging one word. Several other practical situations could be mentioned, only a few of which would resemble the model of contract law. This discrepancy is a fact that does not affect judges and other jurists, who consider the parties to be bound all the same.

II. IDEOLOGICAL AND FUNCTIONAL EXPLANATIONS

I have always found that ideological and functional arguments are two sides of the same coin.¹ Even Fichte realized that one (as a necessity) chooses the philosophy that one needs:

Was für eine Philosophie man wähle, hängt daran ab, was man für ein Mensch ist; denn ein philosophisches System ist beseelt durch die Seele des Menschen, der es hat.²

Historical and other comparative analyses are therefore necessary means to "reveal" the functional factors that contribute to influencing our ideological and, consequently, our logical concepts. It seems to be a fundamental assumption based on history or nature that man is a social being who must have a certain social organization in order to survive as a species. From this fundamental assumption the conclusion may be drawn that an exchange of values or services must take place among human beings.

This may be called the *functional* basis of contract in the widest sense. An essential element in the functional basis of the contract is *reciprocity* or "balance," which from time immemorial has been conceived of as *the* basic ideological demand on "justice." Aristotle says that private law and criminal law have always demanded reciprocity and balance (the commutative justice), whereas the distributive justice, taking as its starting point the merits of the individual, is without importance until the development of the city-state at the time of Solon.³ Roman law also considers reciprocity as its formal basic principle. Unilateral promises are binding with due regard given only to formal documents, whereas recip-

1. STIG JORGENSEN, *LAW AND SOCIETY* 100-103 (1971).

2. "What kind of philosophy one chooses depends on what kind of person one is; for a philosophical system is characterized by the aims and goals of the man who has it." (Editor's translation)

3. STIG JORGENSEN, *VALUES IN LAW* 65 n.1; *PLURALIS JURIS* 11 (1982); *REASON AND REALITY*, *supra* note 1, at 104.

roccally binding promises are binding in more practical situations. The same is true of the later English contract law that developed the doctrine of "consideration." This doctrine has survived — albeit as an empty formality — up to the present time. The idea of the medieval moral philosophy of *iustum pretium* is based on this practical consideration. The same is true of the natural law theory's doctrine of mutuality which developed from this idea. The natural law theory, however, goes beyond the demand for reciprocity and works out a general doctrine of the binding force of promises or agreements as a consequence of the ideological assumption of the individual's sovereignty.

Now we have arrived at the *ideological* basis of the legal effect of the contract: an individualistic social conception, which is developed in an urbanized economy based on division of labour and money. In antique Athens and later in 18th century Europe the contract was a manifestation of individual free will. It was an intellectual tool used for justifying democracy as a system of government through the "social contract" and the establishment of individual rights and obligations through private contracts.

Modern moral philosophy, however, has also used the contract as a normative idea. John Rawls has revived the social contract as a justification of a social-liberal moral philosophy. Robert Nozick and Richard Posner have justified the "minimum state" and the rules of law by market economic arguments, which depend on the contractual obligations justified by the sovereignty of the individuals. F.A. Hayek, on the other hand, realizes that the economic theory must be subsidiary to the legal and political theory. He assumes that the human feeling is biologically attached to what he calls "the small society." The intellect, however, will often demand nonspontaneous actions when it functions in "the great society" created by man throughout the ages. Like Hume, Hayek advances three fundamental laws: 1) protection of private property; 2) transfer of goods by consent; and 3) fulfillment of given promises. He bases these laws on the demand for *confidence* within social life. Without mutual confidence, any form of individual and social planning would be impossible. Therefore, the demand for *truth* has always been fundamental.

III. REALITIES AND CONCEPTS

As we know, concepts do not exist in the physical world, but only in the human consciousness as structures of ideas with certain meanings. It

is hard to say what is meant by "meaning." I believe, however, that it is a rather good working hypothesis that the meaning of a word is its "office," as Niels Egmont Christensen⁴ put it, i.e., its capability to transmit associations from one individual to another. Consequently, concepts are individual in the sense that only individuals think as contrasted to entities such as "mankind" or "the Danes" that cannot think. On the other hand, concepts must be intersubjective to be able to transmit the right "meaning" from the sender to the recipient. Without a certain intersubjectivity in the language, any communication would be impossible.

I do not intend to go into detail as far as the philosophy of language is concerned, but only point out that the linguistic faculty is a human capacity. Certain animals, for example the chimpanzee, have a rudimentary ability to use abstractions. The systems of communication of these animals, however, are signalling systems and not systems of concepts that use symbols to represent constant relations (in contrast to relations attached to concrete situations) among human beings and things. The linguistic faculty is a human "faculty" which, like the upright walk, has to be developed. It is not merely acquired. The linguistic faculty is attached to the left side of the brain (which, incidentally is also the seat of analytical thinking), in contrast to the right side of the brain, which mainly works out forms and proportions. Developmental psychology has illustrated that individuals first develop from concrete applications and then move towards more generalizing applications of language and concepts. The development of culture and law demonstrates an identical progression from a concrete, collective and objective concept towards a generalizing, individualistic and subjective conception of man and society.⁵

It is reasonable to conceive the language as a human "faculty" and thus the concepts as tools. The "purpose" of these concepts is to promote man's possibilities of surviving by establishing a refined social system of communication.⁶ This is a very naturalistic way of dealing with concepts and ideas, but as Aristotle admitted, the certainty of recognition cannot be "proved." Reality and language belong to different logical categories. A concept, therefore, cannot be deduced from reality, just as an "ought" cannot be deduced from an "is." Kantianism *assumes* that a connection exists between language and reality. Without this connec-

4. ON THE NATURE OF MEANINGS (1961).

5. REASON AND REALITY, *supra* note 1, at 148.

6. *Id.* at 109.

tion, it would be impossible to communicate with words. Experience also confirms this fact.⁷

So it must be assumed that cognition and consequently concepts are *purposive* (intentionalistic) in the sense that we talk about what interests us in a way that reflects our interests. As Rudolph v. Ihering put it, "Eine Handlung ohne Motiv ist wie eine Wirking ohne Ursache."⁸

IV. DEVELOPMENT OF THE CONCEPTS OF CONTRACT AND RIGHT

These introductory remarks about reality and cognition and about function and concept illustrate that it is unprofitable if the concept of contract and the concept of right are understood only from an ideological point of view. The ideas are only reflections of the function. By this I do not mean that the ideas are solely another side of the material conditions — as maintained by a materialistic theory of cognition — but that idea and function form part of a dialectic process. Ideas and concepts are parts of a greater system of ideas: ideologies, which at a given time and place form the "horizon of understanding." This "horizon" is the pattern of interpretation from which we start when we treat reality intending to find a meaning in our cognition and evaluation.

When the contract is understood as a consensus (meeting of minds) that establishes the private right and duty and exhausts the content of the obligation, it is evident that this conception results from a picture of man as an individual with an autonomous will. This conception originated in ancient Athens but reached its blossom in 17th and 18th century Europe with Grotius' and Hobbes' teachings of natural law and the later philosophy of enlightenment. Both Grotius and Hobbes used the social contract as a tool to justify the social organization as originating from the national will. They reached different results, however, because they evaluated different political experiences. While Hobbes — from a pessimistic experience — argued for a sovereign monarchy, Grotius favoured a real democracy. Regardless of the different conclusions, this rejection of the superhuman sources of the social power eventually influenced Montesquieu and Rousseau to defend democracy as the right form of government.

This support for democracy especially reflected the citizens' interests

7. STIG JORGENSEN, *NORM UND WIRKLICHKEIT, RECHTSTHEORIE 1* (1971); *TYPLOGIE UND REALISMUS, NACHRICHTEN DER AKADEMIE DER WISSENSCHAFTEN IN GÖTTINGEN* (1971); *LOVMÅL OG DOM 89* (1975); and *VALUES IN LAW* at 9 n.1.

8. "An action without a motive is like an effect without cause." (Editor's translation)

in partaking in the social power because growing prosperity gave them considerable economic power. In addition, this new predominant social group needed new tools and ideas to further promote its trade. A need arose for a complete liberation from the limitation that the medieval emphasis on traditional types of contract imposed on contractual relations. For this reason, the abstract concept of contract was well suited for bringing about the necessary flexibility.

The liberal conception of the state was based upon the assumption that individuals are free and autonomous as well as rational, enlightened and capable of looking after their own interests. The democratic process resulted from a rational debate among enlightened persons. Private law as well was dominated by the "principle of will." In the beginning of the 19th century *von Savigny* had claimed that the state, and thus public law, had nothing to do with relations pertaining to private law. He opposed the proposal of codification advanced by Thibaut. Rather, he referred to the "national spirit" as the real source of private law and found it materialized not in ancient German law, but in the superior Roman sources of law.⁹

Under this conception, the establishment of the obligations was a result of the parties' sovereign will — "sovereign will" being derived from the sovereignty of the state; "sovereignty of the state" being derived from the social contract. Likewise, the content or extent of the obligations was also considered to be governed by the parties' will. This meant that a valid contract was not made unless the parties consented, as their dissent would invalidate the obligation. Invalidation arose because the parties had different things in mind. Moreover, in principle the parties were bound only as far as their will could reach or was considered to reach. Thus, *the interpretation* of the contracts was based on the parties' subjective will, regarding both the considered circumstances as well as the unconsidered "assumptions." Consequently, it was presumed that these assumptions had to be considered from the parties' will.¹⁰

V. FROM STATUS TO CONTRACT AND VICE VERSA

It is self-evident that such a theory of will results in practical problems. It produces *uncertainty* in contract matters, which contra-

9. REASON AND REALITY, *supra* note 1, at 67; STIG JORGENSEN, VERTRAG UND RECHT 64 (1968).

10. STIG JORGENSEN, VERTRAGSVERLETZUNG, Festschrift für Karl Larenz 59 (1973).

venes the fundamental need for predictability in social life. About one hundred years ago, however, the English legal historian J.S. Maine formulated his famous maxim for the development of contract law: From status to contract.¹¹ Simultaneously, the German jurist Rudolph V. Ihering comprised the development of the law of torts in the sentence: Kein übel ohne Schuld.¹² One year later strict liability had been imposed on the Prussian railways.¹³

Maine's maxim was falsified by reality just as was Ihering's and for the same reason. Clearly, an idea is formulated most beautifully just when it has culminated. It became obvious at the end of the 19th century that the technological development contradicted the condition of the individuals' strategic equality, on which the "nightwatchman state" was based. Capitalism had divided the population into factory owners and workers opposing one another. Likewise, the conception of the state was changed from a consensus-model into a conflict-model! Ihering conceived the state and law as a fight among interests, Karl Marx characterized it as a fight among "classes."¹⁴ Private law — especially the law of property — was changed so that the prevailing "principle of will" was replaced by a *principle of expectation (or trust)*.¹⁵ Not only the problem of dissent but interpretation was considered objectively. It took as its starting point the common or typical understanding, just as the extent of the obligation depended on normal expectations. The legislature began to develop subsidiary rules of law, which were to be used in cases where the parties had not specifically decided anything. A new problem, however, arose due to the rapidly changing social conditions, as the legislative activity was too heavy and incompetent to keep up with the practical needs of a new regulation. The legislature was too engaged in especially political matters to deal with the economic organization, production and sale.

Trade took control of these matters and made, so to speak, its own private legislation. Thus, to replace and supplement the delivered "*types of contract*," trade worked out new "*type contracts*." These "type contracts" took either the form of *agreed documents*, about which opposite

11. ANCIENT LAW, 1861.

12. "No wrong without fault." (Editor's translation)

13. Stig Jorgensen, *Decline and Fall of the Law of Torts*, 18 THE AMERICAN JOURNAL OF COMPARATIVE LAW 43 (1970); JHERINGS ERBE, DIE BEDEUTUNG JHERINGS FÜR DIE NEUERE SKANDINAVISCH RECHTSLEHRE 125 (1970).

14. REASON AND REALITY, *supra* note 1, at 68.

15. *E.g.*, CONTRACT AS FORM at n.1; VERTRAG UND RECHT at 75 n.8; VERTRAG-SVERLTZUNG, *supra* note 11, at n.9.

groups of trade came to terms, or the form of one-sided conditions, which the individual factory or branch of trade worked out on their own. The former method was used especially within *maritime law*, which came about through the adoption of various conventions concerning different types of charter parties. Also, *labour law* was established, after tough conflicts, in the form of "general agreements," which regulated the conditions of the individual labor employments. This pattern was increasingly followed wherever strong national and international trade interests found it profitable to agree upon "general terms" of delivery and work out completely new types of contract (contracts concerning the supply of gas and electricity, leasing, and so on), where tradition provided no guidance.

Within trade as a whole a need arose to adapt the rules of sale to the conditions of mass production; standardized production demands standardized sale in order to facilitate the predictability of the costs of investment and marketing. As a rule courts went to great lengths to accept even one-sidedly drafted standard terms as part of a contract that consumers and other buyers had made with the producer or distributor. The courts generally accepted express terms, unless the terms were unusual or unreasonable to the customer. The courts undoubtedly upheld terms of contract to protect industry in its "Gründerperiode" against uncalculated costs, especially "product liability." When a factory or branch of trade achieved a monopolistic status, however, the legislature intervened to protect the consumers against exploitation of their take-it-or-leave-it situation. Banking and insurance business were regulated. A monopoly law was introduced, which did not affect private law relations.

During recent years, however, extensive legislation concerning consumer protection has been enacted everywhere. This legislation not only forbids certain business methods (door-to-door selling), but also introduces non-mandatory rules (i.e. rules the operation of which cannot be dispensed with by agreement between the parties) concerning hire-purchase and credit sales. In connection with a general marketing act, an *omnibus clause* concerning private law has been carried through in contract acts. (Danish act, Sec. 36, which governs terms in standard contracts, that are unreasonable to the consumers).¹⁶

In other ways the changed socio-economic conditions have weakened the traditional features of the contract institution. Nowadays an increas-

16. Stig Jorgensen, *Unreasonable Contract Conditions in Nordic Law*, THE JOURNAL OF BUSINESS LAW 324 (1975).

ing part of the formation of "contracts" takes place through "conclusive acts," which function as if an agreement existed. The decisive factor is the conduct of the parties, which must be considered a manifestation of their wish to be bound. Whoever deals at our modern supermarkets or drives his car into a car park knows that he appropriates something for which he must pay. In German, this appropriation is called "sozialtypisches Verhalten."

These tendencies of development led me to reformulate Maine's thesis in order to indicate that the ideological justification of private obligations and rights has shifted towards the material side: *Reciprocity* (from status to contract and vice versa).¹⁷ As already mentioned, we must assume the condition of men's mutual dependency and consequently of their need for a social organization. This means that goods have to be produced and distributed in accordance with certain rules. In primitive societies the individuals' status within the group determines to what share of the total yield of the herd, flock, or crop each individual is entitled. The old get their share because in static societies they represent valuable experience, while the children represent the future support of the group. Between different competing groups two possibilities exist: fight for or exchange goods, the latter of which is a substitute for robbery, just as a fine is a substitute for revenge in instances of offenses against other groups or their members.

VI. LIBERTY OF CHOICE AND PUBLIC UTILITY

As already mentioned this fundamental principle of reciprocity is considered in all cultures as a main variant of justice, if not the only one. Aristotle found, as we know, that it was the original one. The distributive justice, according to Aristotle, arose concurrently with the formation of cities, where the economic life was based upon division of labor and money economy. On the one hand this creates a need for contractual relations, and on the other hand makes possible a surplus. This surplus may be used for the realization of an idea of *public utility* as the basis of the distribution of goods according to the individual's deserts (*suum cuique*).

We have been following the manifestations of the *principle of reciprocity* within Roman law, English law, Catholic moral philosophy and rationalistic natural law. The modern Welfare State also endeavours to

17. REASON AND REALITY, *supra* note 1, at 129.

ensure a certain reasonable reciprocity through its regulation, especially as far as the ordinary consumer's legal situation is concerned. Clearly, however, reciprocity in the strictest sense of the word — historically as well as currently — is a *moral* demand on the secular law, which in this sense can be enforced only by the *court of conscience*¹⁸ and not by the secular courts. To Roman law and English law “*causa*” and “*consideration*” meant that one-sided obligations could be made only by special forms. In contrast, a certain “*reciprocity*” in itself guarantees a sensible consideration and therefore may also in itself “*cause*” an obligation (“An Englishman is not bound because he has made a promise but because he has made a bargain”). Within natural law the freedom of contract became a basic idea, but still the idea of reciprocity was maintained behind the scenes in the form of rules of nullity and breach of contract.¹⁹ In the modern Welfare State the freedom of contract has become less predominant, and the moral demand for “*reasonable*” terms has to a corresponding extent been made law.

On the other hand, it is evident that a connection exists between social organization and the concept of right and contract. If the intention is to maintain an element of *liberty of choice*, society cannot take full responsibility for the needs of the population. If this is the case, there will be no guarantee that the public utility corresponds with the actual needs of the population. *The freedom of contract* ensures, so to speak, that the development in society is in proper relation to the individual's feeling of happiness.

This connection between liberty of choice and public utility demonstrates, in my opinion, the fundamental social problem of the Eastern and Western Worlds. The concept of right is a product of Western philosophy and expresses the value that the individuals are not means or objects of society, but goals in themselves.²⁰ The law of society must therefore ensure each individual an amount of liberty compatible with other individuals' equal right to *liberty and society's interest* that general rules must be conformed with (Kant). According to this analysis, the concepts of right and contract must change according to the realities in society, but must in the last resort accept their fundamental anchoring in the human liberty of choice.

18. VALUES IN LAW at n.1.

19. VERTRAGSVERLETZUNG, *supra* note 11, at n.9.

20. REASON AND REALITY, *supra* note 1, at 76.
