SOME BASIC PROBLEMS OF JURISPRUDENCE

BY

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1. SOME YEARS AGO Professor Alf Ross of the University of Copenhagen published what may undoubtedly be regarded as his most important work, *Om ret og retfærdighed. En indførelse i den analytiske retsfilosofi* (On Law and Justice. An Introduction to Analytical Legal Philosophy, Copenhagen 1953). Ross already has behind him a quarter of a century's experience as an author in this field. Unfortunately, most of his works have been presented only in Danish. But two of them, *Theorie der Rechtsquellen* (1929) and *Kritik der sogenannten praktischen Erkenntnis* (1933), were published in German, and one, *Toward a Realistic Jurisprudence* (1946), in English.

In his new book Ross points out that he wants to present not a general philosophy of law, but certain problems within this discipline. And so it must be. Philosophy has no province of its own, and it is least of all "deductions from principles of reason through which a reality transcending the limits of sense-experience manifests itself to us". Philosophy is a *method,* namely logical analysis. "Philosophy is scientific logic, its subject scientific language" (p. 34).

Therefore, the philosophy of law is not a branch of legal science parallel to the other branches. On the contrary, it has legal science itself as its subject. "The philosophy of law lives, so to say, one floor higher than legal science" (p. 35). But even within the traditional legal dogmatic treatment of the different subjects, we find to a large extent logical analysis. "There are no inner criteria telling us where legal science ends and 'legal philosophy' begins. A reasonable limitation of the boundaries of 'legal philosophy' must be made with due regard to what legal science itself has produced." If the division of labour is to be sound, and the tasks of the philosophy of law not too extensive, it should be limited to "taking up such problems as are either not treated at all in the common doctrine, or are considered to have been treated in an unsatisfactory way" (p. 35).

From this starting-point, Ross gives—after an introduction on

maturity". Precisely the same statement could be included in a text-book on the law of bills of exchange. But then it would have another content. It would be the expression of a relation of reality, namely: "In this country it is valid law that the drawee by his acceptance engages that he will pay the bill of exchange at the date of maturity". This is a proposition which can be tested in the same way as the proposition about the connection between the pressure and volume of a gas, though certainly not until we have performed the none too easy task of explaining what facts lie behind the concepts "valid law" and "engaged". But the legal provisions contain something more than a story; they aim at directing. As Ross expresses it, "Parliament is not an information bureau, but a centre of social direction" (p. 19). The "engagement" that is mentioned in the rule of the act is due to the fact that sec. 28 in the Bills of Exchange Act (or a "legal rule" of this content) exists as it does. If this section of the Bills of Exchange Act were to be understood as a statement describing a real event, it would be a proposition which was true just because it was stated in the same sentence. And that would be meaningless: "A proposition must refer to a state of affairs outside itself, and its truth must be independent of whether the proposition is expressed in a sentence or not. Everything else would be pure mysticism: words that create what they express and thereby their own truth" (p. 16).

As the concept "valid law" enters into—or at any rate ought to enter into—every statement of legal science, the first main task is to make clear what this means. And with this we also have the starting-point for the question of the "nature of law". "Deprived of its metaphysical formulation, the problem of the 'nature of law' is the problem of interpreting the concept 'valid (Danish, Swedish, etc.) law' as an integral part of every statement of legal science" (p. 21).

Before he starts investigating the problems of the legal rule, Ross invites the reader to join him as a spectator of a game of chess between two persons (pp. 22–28). If the spectator knows the chess rules (that the players make moves alternately, and how the different pieces may be moved—this in contrast to the chess theory which analyses the strategic value of the moves), the activity of the players will mean to him something else and something more than an activity in which certain objects are transposed in space. The moving of the pieces becomes "chess-relevant" or "chess-meaningful" just because the players follow a set of rules

of a supra-individual character—not necessarily of general validity, but at least accepted by the two players. In this way the chess game becomes a simple model of a social phenomenon. The directives which the chess rules represent are experienced by the players as socially binding—differently from the chess theory telling them about the strategic value of the different moves. This difference is important. A spectator who did not know the chess rules beforehand, would not be able to deduce them from observing the actual behaviour of the players. He would not be able to distinguish between the limits to the movements of the pieces fixed by the rules of the game, and the limits dictated by the strategic value of the moves—one could look at a lot of chess tournaments without realising that each player sends his king out on to the board as soon as the closing pawn is removed. To establish that a rule is a chess rule, two things are necessary. We must (1) ascertain that it is in fact followed, and (2) ask ourselves why this happens. More than external observation is needed—it is necessary to ask the players what rules they consider themselves bound to follow.

> After this we can say: that a rule is *valid* as a chess rule means, that within a certain social connection (which principally consists of two players of a concrete game) this rule is effectively followed because the competitors feel themselves socially bound by the directive comprised in the rule. Thus, in the concept of validity (as far as chess is concerned) two elements are included. One of them refers to the factual effectivity of the rule, which may be established through external observation. The other refers to the manner in which the rule is experienced as motivating, i.e. as socially binding (p. 25).

The concept "chess rule", however, has to be divided. One thing is "the idea of acting" experienced by the individual player, another the norm which can be abstracted from the concrete experience—the rules according to which the different pieces may be moved. "Thus, the chess norms are the abstract content of ideas (of directive character) which is common to the players and makes it possible, as a pattern for interpretation, to understand the chess phenomena (the acts of moving the pieces and the ideas of acting) as a connection of meaning and motivation, a game of chess; and, together with other factors, to predict the course of the game within certain frames" (p. 26).

The legal rules are built according to a similar model. "Law can also be regarded partly as *phenomena of law*, partly as *legal norms*, in mutual correlation" (p. 26). When the buyer claims

damages for defects in the goods, gets a judgement in his favour, and—if necessary—carries the matter through execution to its very end where part of the defendant's property is sold, a sequence of human acts with a series of motivations is included in this course of events. But when the legal norms enter into this picture, this happens in principle in the same way as was the case with the chess norms. This means that "valid (Danish) law" refers to the abstracted set of normative ideas which serves as a pattern for interpretation of Danish legal phenomena; which furthermore means that these norms are effectively followed, and are followed because they are "experienced as socially binding" (p. 27). In other words, "The legal norms are the abstract normative content of ideas, which, used as a pattern for interpretation, makes it possible to understand the legal phenomena ('legal life') as a meaningful connection of legal activities, and within certain limits to predict the course of 'legal life'" (p. 41). The word "meaningful" must be understood in the same sense as when applied to the "chess-meaningful" activities, which become understandable to us when interpreted in relation to a set of norms.

Ross draws attention to the parallel between chess rules and legal rules because the likeness gives him a starting-point for what is a main theme—perhaps *the* main theme—in his theory: that law is not of divine or, in any other sense, of supernatural origin. It is a network of norms, created in, by and for the social life of man, and it is observable in the social life of man. The norms are the "rules of the game", certainly much more important than the chess rules, but in principle of the same character.

In close connection with this, Ross stresses that law must be a neutral concept, morally and emotionally. It is the actual enforcement, combined with the feeling of social obligation, which is conclusive. Therefore, it has no bearing upon this point to ask if Hitler's system was a "legal order", because "a descriptive terminology has nothing to do with moral approval or disapproval. At the same time as I characterize a certain order as a 'legal order', I may consider it my highest moral duty to overthrow it" (p. 44). It is no contradiction if Ross, the defender of democracy,[2] registers an authoritarian social order as a legal order: in our herbarium we include even the poisonous plants. Ross rejects the reproach that it would be moral treason if legal positivism "uncritically" sanctioned Hitler's decrees as law. He considers it rather

[2] Cf. Ross, *Why Democracy*, Cambridge, Mass., 1952.

to be scientific treason to include moral views in a definition which pretends to be descriptive; a definition must describe, not tempt or persuade.

Obviously, Ross's views on law being what they are, he cannot hold natural law in high esteem. And natural law is not a phenomenon which belongs only to a couple of centuries of the history of legal philosophy. It can be traced back to the early times of European philosophy—Ross traces its roots back to primitive Greek mysticism—and it still is a living reality among us.

Behind natural law there is a faith in *justice* as something absolute. "The thought that in our inner consciousness there is a simple and immediately evident idea, the idea of justice, which is the highest principle of law in contrast to morality, is as old as the history of natural law" (p. 351). (I wonder if it is not even older than natural law?) But here we are pursuing shadows—in so far as we direct our demand to the legislator and do not specify it any further. Hitherto, it concerns "an idea, which can apparently be harnessed to every cart" (p. 352)—and there must be something wrong with that.

What is wrong is simply that such a claim for justice is without any content. If we stick to the formulation that what is equal shall be treated equally, this does not tell us anything until we know what is to be counted as equal.

> The case would be quite different if the claim was given a *specific* content, e.g. as a claim for equality to all without regard to sex or race. Such a claim is meaningful. It contains a prohibition against having criteria, determined by a person's sex or race, in the general rules of his legal status, or taking this into consideration in concrete decisions (p. 371).

The formal claim for equality goes, in fact, no further than to "a demand for all differences to be linked to general criteria (no matter what they may be), to *"a demand for rationality"* (p. 356). But very often we have something else in mind. When we demand that the legal solution of a certain conflict of interests should be just, this means that we transfer this attribute to a rule which we ourselves consider to be right but about which there is no common agreement. However, then we shuffle the cards:

> A says: I am against this rule because it is unjust. He ought to say: This rule is not just, because I am opposed to it. To plead justice is the same as striking the table: an emotional expression which makes one's claim an absolute postulate (p. 358).

If we are to pass on to a rational level we must be satisfied with a formal claim for justice, a claim that "the treatment which is given to a person shall be predictable through objective criteria, the meaning of which is stipulated by common customs of language" (p. 356). The opposite is *arbitrariness*. An objective regularity in contrast to subjective arbitrariness will at least in Western civilization be "experienced as a value in itself" (p. 366).

While it is a misuse of slogans to refer to justice in a legislative discussion, the position becomes quite different when it "is asked, if the idea of justice has any validity for valid law understood as a demand that the concrete legal decision shall be a correct use of the norms of valid law" (p. 369). Here Ross is in no doubt about the answer:

> While justice as a norm for the legislator (as a scale for the "rightness" of law) is only a chimera, justice as a norm for the judges is, on the other hand, a living and tangible reality. While a statement that a legal rule is unjust is only a theoretically empty, pathetic expression for the speaker's antipathy to the rule, a statement that a decision is unjust refers to real facts. It expresses that the decision is not arrived at in accordance with the rules, but is due either to an error (unjust in an objective sense) or to a conscious deviation from law (unjust in a subjective sense) (p. 369).

This implies a claim for a comprehensive re-evaluation of the activities of the judge.

> The decision is objective (just in an objective sense) when it is covered by such principles of interpretation and evaluations as are common in practice. It is subjective (unjust in an objective sense) when it diverges from this. The subjectivity or the injustice is an expression for the decision's being felt to have sprung from the individuality or subjectivity of this judge in contrast to what is typical of the body of judges as a whole. The sentences pronounced by the well-known French judge Magnaud *("le bon juge")* were therefore not only "wrong"—there are many decisions which are that—but arbitrary or unjust in an objective sense. That this man, however, is not considered an unjust judge in a subjective sense, is due to the fact that he undoubtedly acted in accordance with his convictions, from a legal understanding marked by a deep moral sense (p. 370).

For the traditional philosophy of law, which seeks to deduce law from an idea of justice or some such conception, and to confer validity *a priori* on it, *the relation between law and power becomes a main problem*. Power can be the obedient servant of law, but it can also be its enemy. Ross has no problems here.

The acts of power of the single individual can certainly create concrete conflicts, and then the task of law is to make its own power prevail. It represents the power of the community in conflict with the individual. The characteristics of a state are "that the possibility of using physical force is mainly monopolized by the official authorities. Thus, when there is an apparatus for monopolized use of power, we talk about a state" (p. 47). But force is not something that stands outside or "behind" law, so that there can be set forth certain "primary" norms about what law is and some "secondary" ones about how this law is "enforced". The characteristic of "the relation of the legal norms to force is that *they concern the use of force, not that they are maintained by force*" (p. 67). Without this insight, for which Ross gives Kelsen credit, one would, among other things, be unable to explain large parts of public and administrative law as legal rules. The *norms of competence,* which establish the territory of the respective authorities, are not maintained by force as far as the higher authorities are concerned. But certainly they are rules about the use of force.

The valid legal norms are divided into two main groups, *norms of competence* and *norms of conduct.* I have already touched on the norms of competence. I shall here concentrate my discussion on the norms of conduct. It concerns those norms which, according to the traditional point of view, are directives for the conduct of the individual. Ross looks upon this matter differently. He stresses—and stresses very strongly—that the norm of conduct "is a directive to the *judge* as to how in a possible case he shall execute his authority as a judge. And it is evidently this *and this alone* that is of interest to the lawyer" (p. 45—my italics). When the directive to the judge is present, it is not necessary to give the private individual a directive *as a supplement to the first one.* Here we are concerned with "two sides of the same matter. The instruction to the private individual manifests itself through his knowledge of what reactions he, under given conditions, may expect from the judge" (p. 45). Ross gives an extreme formulation of his opinion by saying that the rule in the penal code concerning homicide

> does not say anything about whether the citizens are forbidden to commit murder, but only gives the judge a direction how he shall decide in such a case ... So far as the norms of conduct are concerned, the *real legal norm is a directive to the judge,* while the instruction to the private individual is only a dependent and unreal

> legal norm derived from the real one, and conditioned by the interest of the private individual in avoiding certain reactions on the part of the judge (pp. 45–46; Ross's italics).

But at the same time these norms—which Ross wants to reduce to "quasi-legal norms"—also have an ideologically motivating function which is independent of the fact that sanctions are tied to them.

Thus if we want to examine whether a rule is valid law we have to turn to the activity of the courts. This does not mean that we pass to pure behaviourism. Part of what can be observed in the courts informs us about *customs* and nothing more; though, it must then be "added, that the customs of judges have a strong disposition to develop into binding norms, and the custom will in that case be considered as an expression of valid law". (pp. 50–51). If we are to be able to establish valid law, it must be presumed that we establish "not only regularity but conformity in the behaviour of the judge. Two elements are included in the concept of validity: partly the external observable regular acting in conformity with a pattern of behaviour, partly the fact that this pattern is experienced as a socially binding norm" (p. 50). On the other hand, it is not conclusive if a rule proves to be of little effect in motivating the behaviour of the citizens. The prohibition of abortion is still a guiding principle even if it is violated every day, provided it is effectively maintained by the courts "when the violation is detected and prosecuted" (p. 48); however, if we get to the point where violations are not regularly prosecuted, we come to the border cases, the *erased* norms, and we may come to the point where we ought not any longer to talk about "norms" at all.

What has now been said is often expressed by saying that a rule is valid law when it is used in the practice of the courts. But this must be defined more closely.

The very use of the *present tense* in this expression may give rise to misunderstanding. In fact it is the future which counts—though certainly not *any* future, for the state of the law may be changed. The statement must

> be understood as referring to hypothetical future decisions under certain conditions. If a case falling under the legal rule in question should come before a court, and if in the meantime no change has happened in the state of the law (i.e. in the circumstances conditioning our statement that the rule is valied law), the rule will be used by the courts when they decide the case (p. 54).

Only the future can bring forth the real verification and there may be instances where we have little certainty. This brings a relativity into the statements of legal science which it is important to take into consideration but which is too often overlooked (p. 58). Thus, the rules can be said to be valid to a higher or lower degree, according to the degree of probability. A result of this is that when we want to give a presentation of a certain set of rules, we must call for specific demands: "An honest presentation requires a gradation in such a way as to show the fields in which we can express ourselves with a high degree of probability of what valid law is, and the fields in which our views on this in fact are only to be characterized as guesswork" (p. 59).

But even the point that a rule can be expected to be used by the courts needs some further precision. The statement that the acceptor is liable to pay the sum of the bill does not mean that he will always be ordered by the court to pay if he is sued. Even if we do not want to include those cases where proofs are lacking it may for instance happen that the suit will be dismissed because the drawee was not of age or because he has already paid. Every legal rule enters into a complex together with many others. The usage which will show if a rule is valid law can therefore only mean "that in decisions, in which its conditional facts are supposed to be present, it is entered as an integral part of the premise of the judgement and thus has been determinative for the conclusion of the judgement" (p. 55).

When we consider legal rules as rules directed to judges—according to Ross these are the *real* legal norms—we can count upon a high degree of uniformity in the motivation. And we can trust the judges to act in accordance with the norms, not because they are afraid of sanctions, but out of a feeling of duty (could we not just as well say as a matter of habit? A conscious concession to the demand of duty is perhaps seldom present, and the whole process of motivation is perhaps rather complicated). "We may presume that the real legal norms are observed just as 'voluntarily' as the chess norms are observed by the chess players" (p. 68).

Concerning the "quasi-legal norms of conduct", those which direct the activities of the citizens, it is evident that the knowledge of risking sanctions when violating them plays an important rôle. But this is not everything. "Most people obey the laws not only because they dread police and prison and social sanctions outside the law (loss of prestige and confidence etc.), but also out of a disinterested respect for law and order" (p. 69). Besides

many other things—among them the feeling of moral duty—a respect for law as law also has an effect. "Law is law, and law must be obeyed, we say, and we apply this maxim precisely to those cases where the demands of law are in conflict with an evaluation of its content from the point of morality or justice" (p. 69). Ross here talks about a *formal* or an *institutional* sense of justice. As far as firmly established legal rules are concerned, this sense of justice has such a power over people that no conflict whatever will arise, because "any impulse to act contrary to law will not appear at all. There are probably few persons who have ever felt and had to struggle against a desire to commit a murder" (p. 69).

The fact that we must look to the court to find "valid law", does not in any way mean that we make legal theory a slave of practice and refuse to allow it to criticize a court decision as wrong. Even according to Ross's point of view a judgement may be wrong, i.e. in conflict with valid law. So it is

> when—everything considered, including the judgement itself and the criticism it may evoke—it must be assumed in all probability that the courts in the future will not follow the decision in question. This judgement on the judgement can often be passed with great certainty by able lawyers (p. 68).

But in the presence of a well-founded court practice

> the legal theory must capitulate, just as in the presence of a new statute. It is mere word-play if a legal writer . . . holds on to a rule as "valid law", at the same time as it is stated in a foot-note that practice "wrongly" follows another rule (pp. 64–65).

The view Ross has of the concept "valid law" also colours his conception of *legal science*. But legal science has several branches.

The dogmatics of law, or legal science in a narrower sense, has legal norms as its subject. "Its task is to find out the content of ideas, or we can also say the ideology, which functions as a pattern for interpretation of legal life, and to present it in a systematically arranged context according to its own inner structure and meaning" (pp. 28–29). It must present legal norms which are really effective, but not lay down norms on its own—it is "normative in the sense of being *norm-descriptive,* not in the sense of being *norm-expressive*" (p. 29). It must result exclusively in a presentation of those norms which may be counted upon to be observed by the courts; if there is any doubt in this respect, it must give information about that and if possible tell whether the probability

is great or small (cf. *supra*). Here, however, we are faced with a paradox. Even if legal dogmatics solely aims at predicting future activities of the courts, it will itself be a factor in the causation. A weather forecast does not influence the weather, but an assertion in a scientific work that a certain rule is valid may have a motivating effect when a court has to decide how to solve a problem. In this respect, the prediction is "also an actual factor which may influence the course of events, and as such, a political act. *Therefore legal science cannot in principle be separated from legal policy*" (p. 63, Ross's italics). In fact, a twofold paradox is probably present here: the more a certain author tries to keep back his personal views on how a question should be answered and the less he consciously tries to influence the courts, the greater is the probability that his opinions will be taken into consideration, even if, on a single occasion, he has no backing for them.

The *sociology of law* is the next main branch. It faces "the real life of law, the legal activities and the ideas of law" (p. 29). The norms tell us about the rules of the game, the sociology of law the extent to which the game is played.

> A person who only knows the norms does not know very much about the corresponding social reality. On what grounds are divorce-suits based in different groups of the population? ... How will the courts regard these different grounds for divorce, particularly in respect to the question of proof—with favour or with disfavour? ... How does the sense of justice of the citizens react to tax evasion, and what part does it play in the actual behaviour? etc. etc. (p. 30).

Between the dogmatics and the sociology of law there ought to be an intimate collaboration. But the sociology of law is still a young science, and but little research has yet been made in this field. Apart from certain works of a more specific character, notably reports *(travaux préparatoires)* by committees preparing statutes contain investigations which really come up to standard.

The third main branch is *the policy of law*. Unlike many of those who call themselves legal realists, Ross does not want to cast this into outer darkness. Indeed, he ascribes great importance to it and stresses the close connection between the policy of law and the dogmatics of law—compare the quotation above. When Ross here parts company with, among others, his old teacher Kelsen, he does it "not ... without regret" (p. 430). But he also sets out very strict requirements for legal policy. It must not turn into a "legal-economic-social-political polyhistory" (p. 420).

where one believes oneself able to be a super-judge in fields where one's professional knowledge is not approximately on the same level as that of the experts. And the policy of law must not pretend to be more than what it is—here one has passed on from presenting the objective facts to forming the practical directions for action.

The policy of law may be practised within a wider or a narrower framework—as advice to the legislator, or as advice to judges, who, at least to a certain degree, are bound by precedents, statutes and so on. There is a difference between considerations *de lege ferenda* and *de sententia ferenda*.[3]

And now I will start my discussion. But I must point out that I want to discuss the problems themselves and not the attitude that Ross has taken. I want to stress this, because I shall partly be discussing views which are just as remote from Ross as from me.

3. When one is trying to give an adequate and detailed explanation of the concept "valid law", there are many pitfalls.

One such danger is trying to explain something which is known with the help of something unknown. I am fully aware that the concept "valid law" is vague, and that it may be ambiguous. But I am by no means sure that the concepts which are intended to give the explanation are always more intelligible.

The next question which presents itself is whether we do not run a certain risk by presuming that it is possible to find *one* criterion for "valid law"—both when we consider what people in fact understand by it, and when we discuss what we ought to understand by it. At least, we cannot *a priori* exclude the possibility that "valid law" comprises, and ought to comprise, phenomena where *a* has traits in common with *b* and *b* with *c*, whereas *a* and *c* have nothing in common.

A third difficulty is this: when in a definition of "valid law" the rules which the courts may be expected to use are placed in the foreground, this is done by Ross with the precise limitation that he then refers to "valid law" as part of a theoretic statement concerning the norms in force within a certain community. Other authors are not so definite on this point. But as far as I can see, we also need the concept "valid law" about the very complex of

[3] Therefore the universally admired rule in the Swiss Civil Code, stating that, where positive rules are lacking, the judge shall follow the rule he himself would have laid down if he had been a legislator, has in my opinion a formulation which is not only inexact, but may be directly misleading.

norms which the courts apply. And it must be fairly evident that when the judge—I have in mind a judge of a supreme court—asks for "valid law" and lets it enter into his motivation, he does not ask for what the courts (i.e. he himself and some colleagues) may be presumed to arrive at. Nor am I sure whether this is always what the ordinary citizen wants to know when he asks his lawyer "what the law is" in a certain situation (see *infra,* 10). And who knows whether "valid law" is not a fourth concept to the members of the Bar, a fifth to those who enforce law in administrative capacities, etc.? Possibly, too, sociologists must operate with concepts of law different from those the jurists employ.

4. A significant tendency in cultural development during the last century is the enormous expansion of science and technique. It is quite natural that this has left its marks upon the older sciences, also—I use the word science in a traditional (and imprecise) sense, without putting any element of evaluation into it. This has, no doubt, been fruitful. It has yielded impulses, and it has forced the older sciences to revise their main concepts and methods. But I do not think it has been fruitful only. We cannot *a priori* assume that a method which is useful in natural science can, without further qualifications, be transferred to a science which studies psychological and social phenomena; certainly there is a distressing reality in what Karl N. Llewellyn has called "the modern metaphysics of physics" (*Yale Law Journal* 1949, p. 1355).

In the clash between old and new thoughts in legal science, it was natural that a great part of the battle concerned the older conception of the legal rules as *norms,* perhaps even as norms of an *a priori* nature and of a supernatural or clearly divine origin.

In spite of his anti-metaphysical starting-point, Ross insists very firmly that legal rules are norms. For my part, I am not completely happy about this starting-point. Perhaps it would be more cautious —might we not even say more realistic?—to build upon an *a-metaphysical* conception rather than upon an *anti-metaphysical* one; is not this starting-point suspiciously close to the *a priori?* However, I accept the propriety of conceiving legal rules as norms, although in part I look upon them in a different way from Ross. At this point, I will confine myself to referring to Ross's discussion. To me, the two main points are that the legal rule is considered by the common people to be a norm (a directive, an imperative) for their activities and thereby acts as a norm, and that so far as

it is the result of a conscious thought of the legislator, it is also meant to be a norm.

The point of view Ross has on the norms brings him, in fact, close to what the Swedish jurist Karl Olivecrona has called "independent imperatives";[4] as Ross himself stresses, it must be regarded only as a difference in degree, of small importance, that he prefers the somewhat weaker term "directives". The addition "independent" used by Olivecrona is intended as a safeguard against the confused ideas which otherwise might arise regarding the origin of the command. For my part, I must confess that I cannot attach any significance to a command which has no commander behind it. Nevertheless, I think Olivecrona's formulation is valuable, because it points to the fact that the individual legal rule is usually regarded as a command without people reflecting or needing to reflect about the person in command. For those who discuss the concept "valid law" within a certain legal system, this ought to be satisfactory. I suppose it becomes more complicated when one wants to explain why certain types of imperatives have legal relevance and others have not. But we may safely leave the explanation of this partly to historians and partly to social psychologists.

5. Here it may be convenient to touch upon a complex of problems to which both Ross and I attach little importance, but which has been much discussed.

If we return to the simple rule expressed in the Norwegian Bills of Exchange Act, sec. 28, that by his acceptance the drawee engages that he will pay the bill of exchange at the date of maturity, everyone knows that this does not contain an assertion to the effect that every person who has written his signature upon a bill will really be ordered to pay the amount if he will not pay voluntarily. First, it may happen that the creditor waives his claim, e.g. because he cannot afford to bring it to trial or because he does not dare to get into conflict with a superior opponent, because he considers himself unable to prove his case, or because it is useless to sue an insolvent debtor (I exclude the case where he wishes to be lenient towards the debtor). In more complicated legal matters, other difficulties may enter into the picture, e.g. the circumstance that people do not know how far-reaching their rights are. Besides, the application of one legal rule may be set

[4] Olivecrona has also presented his thoughts in a work in English: *Law as Fact*. Copenhagen & London 1939.

aside by another, e.g. the suit may be dismissed because the acceptor is a minor.

Many authors have found these problems difficult. This applies especially to those who regard legal statements as indicative expressions about something which *will* happen. Indeed, it is not true at all when one says that the "creditor" will always get his money from the "debtor", e.g. when a bill is accepted (and the acceptance is "binding"—the acceptor not being a minor etc.). What then?

Undoubtedly, it is important to be aware that the legal rules, the norms, do not give a complete picture of the state of the law, and it is no less important to be reminded of the interaction between the different groups of norms, especially between those which are usually called private law and those called law of procedure. Without doubt, it must be admitted that legal theory has certain sins of omission to atone for here.

It is of course true that, broadly speaking or at least from the financial point of view, it may be just the same to A whether he has no claim against B or he has a claim which the existing order of procedure makes it impossible for him to put through. A's position is not improved if he gets a judgement in his favour if B is without means—or even if B has means and pays the collector, who then embezzles the money.

Yet, if we should let this characterize our presentation of legal phenomena, it would be a mess—we may find it not too clear as it is. It would not be sufficient to establish a "valid" promise from B to A. If B could not be expected to pay voluntarily and A was unable to bring an action against him—because of poverty, depression, incompetence or dependence—then there would be no "right". But a shock treatment which awoke A from his lethargy, or an inheritance which made him able to carry the expenses of a legal action, would give new life to his "rights". If A's most important witness died, his "rights" would also die if the judge refused to accept A's case without that particular witness. But if a new judge who was less exacting as regards evidence took over, it would again be realistic to regard A as holder of the right. The same would be the case if the formerly rather relentless B underwent so complete a moral change that he admitted A's claim though A had no proof. And so on. If we wanted to follow these lines to be able to explain how legal relations are created and collapse, the presentation would gain much in colour. But I do not think that this, after all, would represent a gain in clarity.

The simple explanation is that we take *one thing at a time* when following the usual lines—both in the sense that we isolate the norms from the complex of facts within which they operate, and that we isolate the presentation of certain norms from a lot of others. In fact, this is probably not very different from what a physicist or a chemist does when he gives an account of a new "law" without explaining the whole order of the universe. If the traditional theory is to be criticized, this cannot be done on the basis that it is isolatory. If, on account of this, it has given a presentation which may be misunderstood, the theory is certainly to be blamed. It is possible that the criticism may be right so far. If this is the case, we ought to be grateful—although one may reserve the right to keep one's private opinion about the expressions which some of the critics have chosen.

6. According to Ross, the legal rule is characterized by its concern with the use of the force at the disposal of society. It is a norm directed to the courts (or to the enforcing authorities in the broadest sense), and it can only be established by being enforced by them. There will be no place for a "primary" norm about how people ought to behave and a "secondary" one about the use of force.

I accept the general idea of the norm (cf. *supra*, 4). But beyond that I am inclined to doubt both the statement that the norm is directed to the courts and the assertion that it can only be accepted as a norm to the extent that it is enforced by the authorities of the community, primarily by the courts. For the moment, I shall confine myself to the latter assertion.

(*a*) First, I want to mention a fact which has direct connection with the concept of right, but which also throws light on the present problem: A runs a business, and sells both to the state and to private customers. To me it is obvious that his claim for payment ought to be viewed from the same legal angle whether the buyer is the state or a private person—and I do not think that Ross holds a different opinion. But only the claim against the private buyer can be said to be based on rules concerning the force of society; according to Norwegian law, enforcement of a judgement against the state is not possible.

(*b*) Ross himself draws attention to "the apparent paradox that the more effectively a rule is lived up to in extra-judicial life, the more difficult it is to ascertain whether the rule is valid, be-

cause the courts will have no opportunity to reveal their reactions" (p. 48).

On this point, I believe Ross in fact stands on firmer ground than he himself seems to be aware of. If we take a look at the central rules about the binding force of a promise, it is quite evident that people will not readily take action in a court to have these rules tested. Nevertheless, they are used every day by the courts—not only in cases of debt collection, where the debtor agrees to his debt, but also in the many cases where there is a dispute about a question of facts; if the defendant pleads that the produced bill is a forgery, and the court rejects this objection and orders the defendant to pay, the court is just enforcing the basic rule about the binding force of a promise.

(*c*) Neither does the fact in itself that some rules are not used because the factual conditions are not present raise any difficulties. The present Penal Code in Norway has a special provision (with imprisonment for life as the only penalty) for the case of a person who takes the life of the King or the regent. Its predecessor, the Criminal Code of 1842, had corresponding (but more severe) provisions. They have never been used. Although we are here confronted with rules that have not been used for more than a century they are undoubtedly "valid law" and will be enforced if the factual conditions should appear. In the same way, a long period of peace will not nullify the provisions which govern matters in time of war.

(*d*) However, I find that other cases may be quite troublesome.

To take just one example: the Norwegian Domestic Service Act (Dec. 3, 1948, No. 5) stipulates in sec. 10 that a housemaid must not be kept working overtime beyond certain time-limits. As I interpret the rule, it is mandatory like many of the other rules in acts concerning the protection of workers. Let us assume that an employer has "kept" his housemaid working overtime contrary to sec. 10, but that he has paid her amply. The only reaction which here might come into question would be punishment. But, in spite of the previous rule, the penalty stated in sec. 18 of this act is conditioned by the fact that the provision has been broken "repeatedly in spite of protests".

It is possible—indeed probable—that we might find formulations which would force even these matters into a theory of law as a system of rules about the use of force by the community—e.g. in the form that we can call anyone who breaks the Domestic Service Act a lawbreaker, without his being able to have this, in

itself, injurious expression repressed by a court decision.[5] However, this does not seem to me to be a very realistic explanation.

If we do not want to say that the activities with which we are here concerned are forbidden by virtue of their secondary effects, must we not say that they are permitted? Should we not say, in spite of the law, that it is permissible to keep the housemaid on such overtime work as the act describes in sec. 10, provided this does not occur repeatedly and under protest—in much the same way as when the law allows monogamy but reacts very strongly against bigamy?

To this, the realist will possibly answer that he only claims that these activities are not forbidden. It does not matter that in many cases this disagrees with the expression of the statute, although I do not consider it a gain—the realist will maintain that a law with no power behind the words is no real law, but only a warning dressed up as a legal rule. But if the legal rules only concern the use of force by society and can be known only through their being enforced by the official authorities, how can we then reasonably distinguish between what is allowed and what is not forbidden?

(*e*) While Ross, in his characterization of the legal statements as predictions, is concerned with the statements which are presented in legal science, O. W. Holmes, in his well-known definition of law as prophecies of what the courts will in fact do, talks quite generally about "law". And his pronouncement has been interpreted as an entirely general characteristic of what we would call "valid law".

If his pronouncement is to be understood as a hint to the common man, then one must be permitted to say that, as spoken by a judge, it expresses a strong sense of the special function of the judicial office. If it is also to refer to "valid law" from the judge's point of view, then the whole matter is rather obscure. As far as I understand, we might say the following: The judge comes to his decision in accordance with valid law. And what valid law is, depends upon what the courts decide. As guidance for a judge who sits in a court of highest instance (not only the judges of the Supreme Court, but also others, so long as their decisions are final) the directive would be this: you shall decide in the way that you believe you and your colleagues will decide. Then you know what law is!

[5] Under Norwegian law it is possible to have a slanderous statement declared void if its truth is not proven.

It is not so easy to explain what most judges understand by valid law, and in what way the process of motivation really takes place when they make their decision. But I think that we may say with a high degree of certainty, that the judge does not allow himself to be dictated to by "prophecies" about the result he himself and his colleagues are supposed to come to. And I think —if I may venture an evaluation—that this is all for the best.

To arrive at a clearer way of stating the question I suppose it is useful to define what in this connection is meant by "the judge". First it is of course the professional judge we have in mind. And I think we should concentrate our attention upon the judge who knows that his decisions cannot be brought before a superior court, and particularly upon a judge sitting alone. In practice we shall probably find the judge, presiding over a court of arbitration, to be the best illustration.[6]

When the judge comes to his decision, there are certain rules which he intends to follow and also feels himself bound to follow. His considerations *de sententia ferenda* need not necessarily be identical with his idea *de lege ferenda* (see *supra*, p. 23). But I also think we may be quite confident that neither is he influenced by calculations about what the future decisions of the courts will be. He will probably in most instances make it his business to find the legal material which applies to the case. Sometimes this may be a difficult task, and sometimes it will raise no doubts at all.

To give an exhaustive account of these matters, we should have to include all the subject-matter usually treated in the doctrine as "sources of law". Owing to lack of space, I must restrict myself here to hinting at the main features.

Normally, a judge will keep to the norms he thinks he is able to find in positive law, in the written and unwritten law which is actually present.

But sometimes this does not offer him any solution. This being the case, I think the judge will look for a rule—not a specific

[6] Naturally, I exclude the cases where the task given to the arbitrator is to find the concretely just decision independent of "valid law". When I choose the single judge, it is because it might be possible that a member of a collegial court would vote differently from the way he would have done as a single judge—it is easier for a judge who knows himself to be in a minority to dissent in order to indicate a point of principle, than it is to take the responsibility for the same result as a single judge. A judge of an inferior court is for other reasons in a special position. To him it may be both natural and right to base his decision upon the legal conception of a superior court. According to Norwegian law it is in fact sometimes his duty to do so.

solution—which he considers to be the best one *de sententia ferenda,* i.e. when it must fit into the system of rules otherwise in existence.

Regard to the desirable solution will, without doubt, also affect what the judge offers as an interpretation of positive law, sometimes in such a way that it turns into a plain misinterpretation.

Sometimes the course of events takes an extraordinary turn. It happens that an antiquated rule is disregarded—even in a case where it is not possible to plead derogatory customary law—and it happens that a new provision is not recognized as a legal rule.

But this does not at all mean that the courts exercise, or are of the opinion that they ought to exercise, a criticism of the value of the legal policy of the provisions. Among Norwegian lawyers a remark made by an experienced, decidedly conservative Supreme Court justice is often quoted: "The Supreme Court has never allowed itself to be forced by a statute to give a decision which it finds unjust."

Sweeping judgements quite often represent a certain simplification and I think the statement quoted contained an exaggeration when formulated—which must have been about fifty years ago. To-day, at least, it is wrong. Sometimes it may fall to the lot of a judge of the Supreme Court to vote in favour of a decision he does not find just. However, the stress may be so great that the Supreme Court says "No".[7]

The legal theory of former times can certainly be reproached for not making due allowance for the cases where the courts decide without the basis of any specific norm, or even do so contrary to the norms the courts themselves maintain that they follow. But it would be a tremendous overstatement in the opposite direction if we declared their only guiding principle to be the supposition about what the courts themselves will do—and this is certainly not Ross's meaning, either. The cases where the courts consciously disregard valid law must be registered as *muta-*

[7] Cases in which a statute is overruled because it is in conflict with the Constitution, or a supplementary decree is overruled because it goes beyond the frame of the law from which it derives its authority, do not belong here. What happens then is that the courts appear as the guardians of the norms—in virtue of the legal rule saying that a norm of a higher order takes precedence of one of a lower order, and the legal rule stating that it is within the competence of the courts to decide whether the lower norm is contrary to the higher one. It must be added, however, that the Norwegian courts, unlike the American ones, are very cautious in overruling a statute as being against the Constitution, and always stress that political evaluation is not within their province.

tions within valid law. We study such cases with much interest, and we register them with great care. But we ought not to build our main rule upon them. And I think we should maintain the rule to be that a court decision is followed because it is a right one, and not that it is right because it is followed (or becomes right as far and as long as it is followed).

(*f*) If we say that the courts follow the law, the defenders of Holmes's standpoint will perhaps object that our statement is *analytic* (it only expresses about its grammatical subject something which already *per definitionem* is implied in the subject—in other words, it establishes with a certain air of triumph that $a = a$). If law is to be characterized by being enforced by the official authorities of the state, there is little sense in arguing that these authorities in fact observe the law. Will this not be, as has been said, "to try to determine law by means of its own shadow?"

I do not consider this objection tenable, and I believe I can base my argument on something that Ross indicates in another connection (but I suppose this is one of the points where we disagree). Confronted with the possible objection that we are entering into a *vicious circle* by referring to what the judge does —because "the qualification as a judge is not only a factual quality, but can be determined solely with reference to valid law"—Ross stresses that "in principle it is the whole legal system which is verified collectively", and this task cannot be done

> without being put in relation to assumptions about what otherwise is supposed to be valid law—in the same way as with the verification of the laws of nature: the verification of a specific natural law is made on the assumption that a number of others may be assumed to be true. The question is, whether it can be said to be consistent with the system hitherto accepted (pp. 49–50 and note 4).

If it is true—and I suppose it must be—that the judge can only be characterized by a relation to valid law, it must be a matter of taste as to whether we choose to start our analysis by looking at the first or the second link in this relation. The choice must depend upon which will give us the simplest explanation, and in that case I do not think it is an advantage to start with the judge; cf. *infra,* 12.

Is it, however, absolutely certain that "law" can only be defined by being enforced by the official authorities of the state, and that it cannot be characterized by other qualities? Law has existed

in Scandinavia for more than a thousand years, and the courts have found it—and probably found it outside themselves. I willingly admit my inability to give an exact definition, but this may be my fault and not that of the law. Perhaps what a natural scientist once told me when we were discussing the definition of the concept "science", has some bearing upon this point: "It is difficult to define an elephant, but I know one when I see it." It is not easy to define love; nevertheless it is a reality one must take into consideration. If we do not want to restrict the sum of our knowledge to *"cogito ergo sum"* we should not forget that it is not our knowledge which creates realities, but—if everything goes well—realities which create our knowledge.

7. Normally, the Supreme Court of a state has more than one justice—also in the sense that more than one justice participates in the judging of each case.

In a court composed of more judges than one it happens, as we know, that the judges may arrive at different results. With us, in Norway, this is quite common. And with us, the rule is also that any dissenting opinion shall be expressed in the judgement.

With reasonable certainty, we may state that a judge whose opinion differs from that of the majority considers it his duty to dissent. When he does so, I do not believe it is in order to have a line of retreat open if the Supreme Court should be charged under the Constitution with having given a wrong decision.

If, like Ross, one reserves the characterization "predictions" for statements made by legal theory, there is evidently no sense in including the relationship of the courts to "valid law" in this characterization. Here we pass to a different level. The dogmatist tells us about norms, the judge acts "in norms". But to those who would maintain that valid law from the point of view of the judge also consists of predictions of what the courts will do, the dissenting Supreme Court justice must be the problem child of law. Is he not apparently deciding against valid law? And is this not reprehensible when done by a Supreme Court judge?

Certainly, it may occur that the dissenting judge wins in the course of legal development and that subsequent decisions follow the opinion of the minority in the first case. This is not very common; the cases in which the courts depart from precedents are carefully recorded. However, it does happen. If so, the minority in the first case has made its decision according to valid law, and that is surely gratifying—for the minority. But the logical conse-

quence must be that the majority has decided contrary to valid law; and that is definitely not gratifying.

Furthermore, there may be cases where the minority believes—or, at least, hopes—that its standpoint will prevail "at the next crossroad". Then the minority can have the consolation that the dissent was made in good faith; and that is better than if the minority votes with eyes open against valid law.

But in some cases, it is quite obvious that the dissenting judge has no chance at all to make his standpoint prevail. In the actual case he knows, after the conference between the judges, that he is in the minority—perhaps even that he is alone in his opinion. He often states this in his opinion. Thus he must have been relying upon future decisions. Does anybody really believe this to be the truth?

Allow me to give just one example from Norwegian court practice; personally I think it speaks for itself. In a judgement pronounced in 1939, the Supreme Court had decided by a majority decision that a divorced spouse had no right to visit his (or her) child who, according to the terms of the divorce, was to stay with the other spouse. The decision aroused much dispute, and the next year a parallel case was decided *in pleno* where the Supreme Court, by a majority of 19 to 2 votes, passed judgement to the contrary effect. Nobody doubts that future decisions will be based upon the latter judgement. Nor did the two dissenting judges doubt this—I have not asked them, and I would consider such a question somewhat tactless. They followed their conviction and they undoubtedly intended to fulfil their duties as judges in doing so; I am sure they believed that they were voting according to valid law. I think most judges would consider this matter in the same way. To suggest that they dissented because they counted upon having the future on their side, would be to ascribe to them more self-confidence than discernment.

If we do not wish to maintain that the dissenting judge in such cases consciously votes against "valid law"—an accusation which in fact would be quite serious, even if it would not perhaps be taken in earnest—we end in great difficulties. One may say that the legal rule which the majority establishes is not valid law until the moment when the judgement is pronounced (and thus also by virtue of it). Therefore, the dissenting judges express what they think *ought to be* valid law—in principle in the same way as the minority in parliament votes in accordance with its ideals, fully aware that what the majority asserts will become law. But

I am quite sure that the dissenting Supreme Court judge himself does not see the matter in this way, and I think the whole interpretation is somewhat far-fetched. At least, it does not explain the few cases where a minority repeatedly adheres to its opinion. And what about the situation (which certainly is quite uncommon, but which may happen), where we can predict that the opinion of the minority will prevail in due course?

8. Ross and I agree that a court decision—even a decision by the Supreme Court—can be wrong. But we hardly agree about *when* a decision is wrong, and not at all about *what makes* a decision wrong.[8]

Of course, I completely accept the statement that the doctrine, in its presentation of "valid law", must capitulate before a fixed court practice as well as before a new statute. But, as I have already hinted (under 6), I do not agree that "the judgement on a judgement" must absolutely depend upon whether it may be presumed to be followed in the future, and only upon this (with due consideration both to the decision itself and to the criticism it may evoke). I will not even unconditionally shrink back from characterizing a decision as wrong even if I must admit it to be the basis for something which today is firm and solid law. Sometimes the continuation may be just, even if the start was not.

My own experience as a judge is limited. But I have sat as a member of the Norwegian Supreme Court in a few cases. And two of them are worth considering in this connection. The first one was a criminal case against a mother who had killed her illegitimate child. The extenuating circumstances of the case were typical and such as the Penal Code has already considered, when fixing the minimum punishment much lower than for ordinary homicide. The court below had sentenced the mother to one year's imprisonment, which was the minimum permitted by the Code. By four votes against three the Supreme Court gave her a probationary sentence; as far as I understand this was contrary to earlier practice. I belonged to the majority, and I have not at any time doubted the justice of voting as I did. I remember I felt a certain pride in the fact that I had participated in changing the practice of the choice of punishment—i.e. "valid law"—in this field. I did

[8] I shall exclude the cases where a decision may be wrong as to its content because it is built upon a conception of facts which is not in agreement with reality. It is the relation between the decision and the legal rules I want to illustrate.

count upon the sentence being followed in future decisions. But I can assure that this was not the reason why I voted as I did. I believed that the decision would be followed because it was a good one, not that it was a good one because it would be followed.

However, another decision makes me feel a little worried. The decision was adopted unanimously; and what is worrying me is that I did *not* dissent. During the deliberations I expressed my doubts, but I found the opinion of the justice who was to vote first so convincing that I agreed. If I had dissented I would not have had the slightest chance of bringing about another result; after the deliberations I knew that I would have been left standing alone with my opinion. Nor do I believe a dissenting opinion would have had any consequences for future decisions—the case was so specific that a parallel one will probably never occur. Therefore, my worries were not in this direction; if the decision would have had any influence on future decisions, it would even have increased my feeling of uncertainty about my opinion in the case. And I am in no doubt about the source of this uncertainty; the reason is, that I am neither quite sure whether the decision was "right" according to the legal rules upon which I based my opinion, nor whether the solution was a happy one from the point of view of legal policy.

Now let me give another example in which I was not personally concerned.

In the old Danish Code of 1683 and its close relation, the Norwegian Code of 1687, there was a provision concerning the duty of a creditor to give a receipt when the debtor paid a debt recorded in a promissory note. In the course of time, this rule was understood as establishing what we now call negotiability, i.e. that the debtor will risk having to pay once more to a third person who in good faith later obtains the document, if this does not show that payment has taken place. There is much in favour of the view that this interpretation is not the correct one historically, but it was established by a Supreme Court decision in the year 1766. Thirty years later, in 1796, the problem was solved by the same court in the opposite way, with the result that the rule of negotiability was established by a statute of 1798.

Without the slightest doubt, I would characterize the decision of 1766 as correct, but the reason for this is the fact that at that time a practice had already been established to the effect that a person who in good faith obtained a promissory note could not be

met with an objection to payment if it was not written on the document itself; otherwise I would have taken a different view of the matter. On the same premises, I would characterize the decision of 1796 as absolutely wrong—regardless of whether it would probably have been followed in the future if the act had not appeared. We do not know very much about this. What we know is that the rule was passed in order to prevent that the decision would be followed in the future. If we say that a decision is right if it can be expected to be followed in the future, we must probably accept the following statement: The Act was dictated by a fear of the possibility that the Supreme Court had made a right decision. And if in 1795 a decision had been made which was based upon the principles of 1766, I suppose we should have to say: By virtue of the judgement of 1796 the decision of 1795 became wrong. I suppose it is possible to build a logically consistent system along these lines. But to me such a system seems artificial. Perhaps a reference to the "rules of the game" would be appropriate here? Ross himself requires "that the concrete legal decision shall be a correct application of the norms of valid law" (p. 369).

9. If we now turn to a discussion of what "valid law" means to the common man who is himself submitted to the law, the picture becomes quite obscure. I suppose the calculation of what the courts will do plays an important rôle. But I do not think this is the only thing that matters.

What we must investigate is certainly not how the common man will *formulate* his view—if ever he formulates it. The point is, how the legal rules affect his *process of motivation*.

Here the difficulties are both many and great.

First, we must try to isolate the *legal* process of motivation. The circumstance which makes A perform something in favour of B, can also be a reason lying on the *moral* or *conventional* level, or perhaps even on other levels: A is aware of the fact that neither law nor morality nor convention orders him to perform anything, but he does it just because he likes B and wants to do him a favour. Fortunately, law, morality and convention often lead to the same results, but it is all the more difficult to analyze the process of motivation. In order to isolate the purely legal motives I imagine that A and B have been partners, and that B has behaved in such a way that A finds it necessary to break up the partnership. A does not feel inclined to give B more than he has a claim to, nor does he want to take advantage of the fact that

B, owing to his conduct or for other reasons, would hardly be able to get a judgement in his favour. In other words, A wishes to give B "what is right".

What does he mean by this? In order to give a proper answer to this question, we might have to make a public opinion poll. And it would probably not be very easy to carry this out—if possible at all. The man in the street would most likely not be able to give a precise answer. And even if we only asked people of more than average education, I imagine the difficulties would be very great. We wish to reach the unreflecting ideas, because they are probably what primarily determine people's behaviour. But I do not think many persons could state their reasons without a thorough consideration of the question. And then it is no longer the unreflecting attitude that we have caught. In most cases we would probably get what the informants remembered of theories about the matter. And I wonder whether the questioner would not quite often get his own theory confirmed.

Consequently, here it might be necessary to operate with conjectures, with hypotheses which are not verified and perhaps cannot be verified, but which are launched in the hope that others will feel just as satisfied with them as one is oneself. Accordingly, I will also present my creed.

Probably we will end with the idea of a set of imperatives which we obey and "must" obey and which lie on a different level from morals and conventions. This idea is probably based on a very complicated mechanism of learning, where the sanctions certainly play a rôle—perhaps even an important one—but they are by no means decisive; about this Ross and I indeed agree. There are certainly situations where the question of disobedience or obedience is solved by means of an intellectual calculation of the chances of risk and gain—one analyzes the consequence of being caught and assesses the probability of being detected. But in my opinion the general obedience to law—how far it reaches is another question—does not depend upon estimations in which the thought of the possible legal sanction is conclusive. Within very wide limits people probably act according to "law", although they never give a thought to any sanctions connected with the disobedience and still less to the character of these sanctions. Further, I think most people have such strong ideas about "law" that they would follow the "commandment" even if they were told that, in an actual case, the breach of law would not be subject to sanctions. They would probably not do so if exposed to a serious con-

flict of interests—but then, as we know, not even fear of possible sanctions will deter them. There may also be instances where people reject a legal rule which they know, because they do not think it has a moral basis—perhaps even when their own interests are not concerned, but quite certainly when they are. It may be that the common respect for the rule of law can be maintained only when what are presented as legal rules are generally upheld by sanctions. With these reservations, I think that the unsanctioned legal rule enters into people's motivations in much the same way as the "real" legal rule, the breach of which has tangible legal consequences.

Therefore, if we return to A who is going to dissolve his partnership with B, I think he has something of this sort in mind when he asks "what the law is". He has quite often exaggerated ideas of the firmness and certainty of the law—he wants to know "what the law says". If it is explained to him that certainly there are legal provisions, but that they are obsolete and that the courts today consider the problem in such and such a way, he will probably understand that today this is "the law". And perhaps he will to a certain degree even understand that "law" is not always such that it can be said with certainty whether one thing or another is right. But I do not think the lawyer whom A consults would answer him: "My personal opinion about this matter is quite immaterial. I consider it most likely that with the present composition of the Supreme Court the majority will be in favour of the result X; therefore, X is valid law. But probably the court will consist of other judges when your case appears, and then it is possible the result will be Y; if so, Y is valid law."[9] If, contrary to expectation, A got that answer, I think that he would—perhaps politely, but in all likelihood quite firmly—explain to the lawyer that this was no answer to his question.

But does not this indicate that a certain dualism exists in what the common man understands as valid law? The first component is "law" (in its widest sense) and this is independent of any sanction connected with the breach, if only the legal rule in question has not been set aside by judicial process. The second is the judicial process (and the process of other official enforcing authorities) where the law itself does not offer any solution. In the first instance the main stress lies upon the authority which is attached

[9] I do not mean that Ross looks at it in this way. The model example I have used in designing the lawyer's answer is from Jerome Frank, *Law and the Modern Mind*, 2nd ed., New York, 1949, pp. 42–47.

to the imperative, in the second on the enforcement itself and the authority it gives.

I presume that those who view the problem in the same way as Ross does, will find it quite immaterial how the common man looks at it, and underline the clearness of the limitation found in the factual enforcement, in preference to the clearly ideological differentiation I have used above—and which I have used because I believe the common man in fact uses it. But Ross himself stresses the ideological components, and he should, in my opinion, have credit for doing so. The differentiation between reprimanding and non-reprimanding sanctions (Ross, § 54) is based upon this, and plenty of examples can be given: a person who earns a certain amount of money and pays a certain tax on it, risks having to pay a further sum x in two cases, viz. if his income increases by the sum y and he conceals this fact but is detected, *or* if he earns the further sum z and states this in his income-tax return; the two reactions are considered to be quite different. If we can—and even must—refer to the ideology of validity to be able to fix certain limits within the rules enforced by the instruments of power of the state, is it then so unreasonable to refer to the same ideology to point out a connection transcending the limits of enforcement?

10. When we return to what Ross directly aims at, namely, what "valid law" is to mean to *legal science,* new difficulties arise.

First, much diffuseness and emotional tension are connected with the concept "science". If one takes the view that a presentation of legal rules has the character of science only when it limits itself to describing those norms which in fact are enforced by the authorities of the state, it seems quite indisputable that the object of the description must be the solutions which may be presumed to be accepted by these authorities. But this statement is probably just analytical.

If, like Ross and many others, one holds the view that the legal doctrine ought to cover both the policy of law and a "real" theoretical account, we are met by the difficulty, which Ross also stresses, that the different branches are firmly interlocked.

Personally, I consider it a principal part of the task of the legal doctrine to give guidance in what I prefer to call the *legal art:* to offer "recommendations" to, among others, those who have to maintain the legal order.

What, then, does "valid law" in this connection mean to the dogmatist? I do not want to appear as a self-appointed spokesman

for the body of dogmatists—we are many, and to a certain degree one may say it is our professional duty to represent different points of view. I must limit myself to explaining what I for my part mean when I try to give a presentation of "valid law". Because the question has quite recently become a burning one to me I am quite prepared to be told that on this point different standpoints and much confusion can be pointed out in my own works. Here my better self will do the talking.

My first attempt to give a formulation ended in the following suggestion: When I—explicitly or implicitly—present a certain sentence as "valid Norwegian law", I aim at the rule I would have followed as a judge or, more precisely, as a judge sitting alone in a court of arbitration, cf. *supra* 6 (*e*).

The objections to this formulation are easily found. Is not this to exchange the gown of the scholar for that of the preacher? Is a scientific discussion possible at all in such circumstances? My statement will then be reduced to "Arnholm means". Such information may be more or less interesting, but it cannot be the subject of a discussion. If a person held another opinion, he could not say "Arnholm is wrong", because this would signify "Arnholm does not mean what he says he means"—or, more exactly, "As a judge, Arnholm would not decide in the same way as he has here said he would decide".

Well, situations may occur where my better self must agree to the correctness of this. Everyone who writes a textbook may have the bad luck to write things he cannot maintain when the opposite arguments start coming in. It has even happened that I have overlooked a statute. As a judge, I should probably have been made aware of the statute in good time, and then I would have decided differently.

However, the objection that the statement has a one-sided subjective form is still left. I have been immodest enough to place my own insignificant self where I ought to have placed "the good judge", he who conscientiously and skilfully follows "the rules of the game". Therefore, what I mean when I say that I think a statement is "valid law", is what I think lies in the norms themselves; what I think would represent a "just" decision. In most cases this will naturally be identical with the result I am sure our courts would arrive at. But it does not always come true. I do not want to present as "valid law" anything else than what I myself as a judge would give my vote for, no matter whether I belonged to the majority or the minority. But as a judge I would

certainly also give due consideration to the practice of the courts (cf. *supra* 8). On this premise I entirely agree with the view that a theory is at fault if it limits itself to a deduction from statutes and neglects the contribution to the legal order which the practice of the courts represents.

Thus, like Ross, I aim to *tell about* the norms (so long as I do not change to legal policy). The practice of the courts is among my sources of knowledge. And my supposition of what the courts will do in the future becomes an important instrument when I weigh in my mind several possible opinions against each other. But I cannot regard this as a conclusive criterion. In practice there will be no great difference between Ross and myself; but my formulation of the concept "valid law" must be different from his.

But there will still be a certain difference between the dogmatist's and the judge's conceptions of "valid law". As I just mentioned, the judge has the advantage of making his decision after having heard the arguments of both parties. When a question is among the great controversial issues, the jurist is to a certain degree in the same position. But he does not have the arguments delivered to him in the same way as the judge—he must orientate himself in a debate which may not always be easy to survey. And in many questions he must be satisfied with what he himself is able to discover in the way of arguments and counter-arguments. If the question is not among the more important ones, he seldom has time and energy enough to argue the case in the same way as two attorneys would have done. Therefore, the jurist will often have a feeling of being on unsafe ground, and then he ought to express his doubt—here also I agree in principle with Ross. In return, the jurist has the advantage over the judge in that he can end his treatment of the topic *without* launching any specific solution as "valid law".

The jurist also knows that his presentation will be assigned a certain authority—unfortunately often more than it deserves. This gives him a special responsibility—but in two directions. In so far as he will in this way influence the views of lawyers—from those of the judge to those of the student—it gives him, in my opinion, a special duty to fight for the rule he considers as "right" in relation to "valid law". On the other hand, his presentation will also be read as an orientation about the legal consequences which await the single individual if he behaves in this or that way. As I see it, this gives the jurist a duty to speak out if he

thinks the courts will use as their base another view of valid law than the one which he personally considers to be right.

One of the tasks of the jurist is to study critically the work of the courts. But this criticism can in principle be of different types. Sometimes it is due to the fact that the judgement, in the opinion of the critic, is not up to standard as an expression of "valid law" —e.g. because a legal rule has been misinterpreted. Sometimes the reason is that the judgement is considered undesirable from the standpoint of legal policy. However, here we are outside the question of "valid law".

As Ross also points out, the position of doctrine may be a deciding factor for the lines the courts will follow. Unfortunately, this happens even when doctrine is on a wrong track. Usually it happens when doctrine shows its best qualities. But then I consider the matter in this way: The view of doctrine on valid law is followed because it is right; it is not (or does not become) right because it is followed.

11. Now I come to a point where I definitely disagree with Ross, and this is when he looks on the norms—also the norms of conduct —as directives *given to the courts*. The norm directed to the citizens is, according to Ross, only derived; the directive to the courts is the real legal norm. I call to mind the statement by Ross, previously quoted, that the rule in the penal law about murder "does not say anything about whether the citizens are forbidden to commit murder, but only gives the judge a direction how he shall decide in such a case" (Ross, p. 45).

If, in fact, a legal rule influences the activities both of the citizens and of the courts, and if (so far as it has any purpose at all) it aims at both, we may ask if there is any sense at all in discussing whether one or the other is the real or the derived one. At least, I think we need to define further the content of our assertion.

(*a*) One might look at the *form* of the legal rule. Can we say that *it* is "directed" to the courts?

On this point there are probably differences from one country to another. This in itself should indeed be an objection against choosing this criterion—for then we might run the risk that the answer to a question of the character of the legal rules would be different within countries belonging to the same culture.

For my part, I venture only to answer for the formulation of the Norwegian statutes—but I do not believe they differ very

much from those of Ross's country. In fact, I think the most striking thing in this field is the absence of system. Some statutes have the form of norms directed to the enforcing authorities; this is so especially in penal law, law of procedure and administrative law. However, it is not uncommon in private law either. Others are formed as rules concerning the acts permitted or forbidden to the individual; more recent penal provisions, especially in the law of commerce, are often modelled on such a pattern, and in private law the same pattern is very common (as far as one can judge without having counted the instances). Others again have a clearly descriptive form ("the lease expires, if . . .", "the purchaser has the risk, when . . .").

Therefore, we should obviously not use the wording of the act as a basis if we want to maintain that the real legal norm is addressed to the enforcing authorities. Ross is fully aware of this (p. 188).

(*b*) Next, it seems evident to me that so far as a legal rule is the result of an intention of the legislator, this intention is primarily aimed at directing the activities of the citizens. When—directly or indirectly—instructions are given to the courts this is the means, not the end. The legislator's wish would probably be that the statute was observed so effectively that the courts never had anything to do with it.

Suppose that during a time of scarcity a statute is enacted which says that a certain group of farmers shall grow a certain quantity of potatoes. Here I think the wording of the law will as a rule be clearly addressed to those who are to grow the potatoes. But the ultimate purpose of the act must certainly be to get the potatoes grown, not to let the courts take care of the farmers who refuse to grow them.

I believe statutes are usually understood in this way, though I am not able to prove this point.

On the other hand, we may be able to say something about how legal rules actually work. Let us think of the common citizen in his daily life. Legal rules follow him throughout his life—he shall do this, he may do this, he may not do that. Only a minority of the citizens experience the influence of court action in their legal relations; most people probably have their contact with legal action through the administration, but this is not very common, either. Is it not our own life that is directed by the rules we follow?

Naturally, legal rules usually *also* contain directives to the en-

forcing authorities of the society (including the courts)—but admittedly in some instances rules of quite a hypothetical character, namely when the directives to the citizens are followed so effectively that no force is necessary on the part of the community. To the enforcing authorities the whole matter may perhaps look like a dispassionate game of chess. To us the game is of a different character; this is demonstrated, *inter alia,* by the fact that the possibility of upsetting the game is a more serious affair than when we are playing a game of chess. It seems to me to be more realistic to look at the real rules as being directed first and foremost to each one of us individually. It is *our* game they direct, and often they lead us to where we do not want to go.

(*c*) The possibility remains, to be sure, that someone will say: A rule ought to be counted as a legal rule only when it concerns the use of official force. Therefore, we can say that it is in principle directed to the enforcing authorities: This is what makes it a legal rule, in contrast to so many norms of behaviour which the citizens actually follow to a greater or less extent—often to a greater extent than the legal rules (conventional rules about the conduct of attorneys before the Supreme Court are probably more carefully observed than legal rules about speed limits for cars). In that case the statement is correct by definition. However, I think it is more to the point to say: The norms of conduct are primarily directed to the persons submitted to the legal rules[1]—the penal rule concerning murder is primarily a prohibition against killing, secondarily a rule about how the courts shall act when this rule is not observed—but only in so far as they are enforced by the authorities of the society and are in this way *also* directed to them should they be characterized as legal norms. Whether in this way we get a natural *frame* for the concept "legal rule" is a different question—personally I do not think so, but naturally opinions may be divided here. But as a *description* of the norms this seems to be more satisfactory than the description Ross gives.

12. If I am to draw a conclusion from the doubts I have now presented, it must unfortunately be a rather negative one. I do not think it is any gain to consider the legal rules as directives

[1] To say that the rules are directed to the *public* is inaccurate because many rules only affect a limited group of persons—the rules about age limits and pensions for Supreme Court judges are "norms" which concern a very small part of the Norwegian people.

to the judge; however, this part of the conclusion at the same time becomes positive: I think it gives a better understanding of legal rules to consider them as directives to the public or that part of the public whose activities are affected by the rules—"to whom it may concern" (some of the rules have a limited address; cf. *supra* 11). Nor do I think that it is practical to form a concept "valid law" in such a way that the enforcement takes such a central position as it is given by Ross. I entirely agree that a rule should not be characterized as a legal one if it is systematically disregarded by the authorities that have to enforce it; even at this point, however, I think we may meet borderline cases. I would characterize a rule as a legal rule if it is expressed in a statute and has a motivating effect upon the behaviour of people, even if it is not enforced by the authorities. Therefore, I shall give greater weight to the ideology of law itself than Ross does (and his standpoint is here less radical than that of the extreme realists). To me the connecting link is the ideology of law and the motivation which is tied up with it. But behind this ideology there are phenomena which I do not think are quite homogeneous. Sometimes we have both a norm expressed in authoritative forms (the formal law) and a legal enforcement (or a high probability that the norm will be enforced). Sometimes we have only the enforcement, sometimes only the authoritatively expressed norm. In the end one might say that my disagreement with Ross on this point only concerns a very small border area, and that even here it only refers to how these borderline cases ought to be *denominated*.

Even with my view of these matters, the courts and the administrative enforcement authorities get an important place in the picture—negatively in the cases where the enforcement authorities refuse to follow those norms which, according to their contents, should require their cooperation, positively by creating norms within what has been called "the space empty of law"; when older norms are transformed through the enforcement of law probably both something negative and something positive takes place—an old norm is dismissed and something new put in its place. But I do not think the enforcement of law quantitatively plays a dominating rôle as far as the *creation* of the norms is concerned. This is specially obvious during such intense activity on the part of the legislator as we experience in our time. To a certain degree we may, of course, say that neither is it the legislature which decides the contents of the norms—they are directed by interests, habits, moral and political ideas etc. As it has been expressed in

a remarkable but quite unknown Norwegian work on legal philosophy: "The legislator, who works the loom of social life (or thinks he does), usually treads the treadle and shifts the shuttle in the same manner as those who were before him did and as those around him do; he can usually acknowledge rather than create the laws according to which the loom is built and the weaving shaped, he is more a law-sayer than a law-maker."[2] However, here we are at the border where the lawyer must give place to the sociologist and the social psychologist.

From the standpoint of Ross, part of statutory law is excluded, namely those rules which are not sanctioned. This part is neither large nor important, but it seems to me unnatural to exclude it, because it both has the same origin and appears in the same forms as other statutory law, and because it is, as far as I understand, included in the same ideology and the same process of motivation. If one wanted to be consistent, one could not, after all, confine oneself to studying the courts, but would have to take into account the enforcement of judgements also. Normally, there is no flaw here—the executive authorities in civil cases very seldom make any independent contributions. But in some cases the judgement gives no directions for the use of force. Certainly, I have not in mind the cases where the judgement itself leaves nothing to fulfil—B's suit is dismissed without costs being awarded to A. But we have the cases in which the state is ordered to pay—as mentioned above, enforcement of judgement against the state is not possible according to Norwegian law. And we have others. I have already mentioned the Norwegian judgements concerning the right of one divorced spouse to visit the children of the marriage who, according to the divorce terms, are to be in the custody of the other spouse (*supra*, 7). It is commonly asserted that such a judgement cannot be enforced in any way. According to the theory which reduces a statute to a warning if it does not give any instructions as to how it can be officially enforced, I suppose a judgement of this kind must look somewhat foolish. And the Norwegian Supreme Court *in pleno* would have participated in this foolishness! I do not think such an idea very realistic.

We also have a peculiar situation when an established practice of pardoning is present in criminal cases. In Norway the death penalty (except in time of war) has been abolished since January 1, 1905. However, by then it had already long been quite certain

[2] Einar Solheim, *Ret og uret*, Oslo 1915, p. 73.

that every death penalty would be commuted to imprisonment. Nevertheless, the courts—including the Supreme Court—did pronounce death sentences. It was discussed with great care whether death penalty or imprisonment for life was the right sentence in each case, and it happened that there were dissents about this in the Supreme Court. When it was evident that a death penalty would be commuted, one must—if one wants to follow the realists—probably say that this dissent moves within the province of preachment. And generally the authorities which enforce penalties have a very wide latitude. From a strictly realistic point of view the sentences in criminal cases can only be an intermediate station between the law and what really represents the use of force of the community.

To draw definitive boundaries around the concept "valid law" is not a main concern for me. May we not profitably look at the problem in the same way as we do when discussing single legal concepts? Around any centre there is a border area where it is more important to see connections than to put up boundaries.

This brings me back to a matter I have already touched upon (*supra*, 9): Fortunately, it is usual that legal and moral motivations support each other. When moral norms of a higher order do not interfere, people usually consider it their moral duty to follow the rules of law ("render unto Caesar the things which are Caesar's"). This makes it difficult to draw the line between different spheres of motivation. On the other hand, there is no need to try to draw clear-cut boundaries. Law, morality and convention have fields in common, where the motivation cannot without difficulty be traced back to a specific group, and where it is also quite often futile to break up the motivation into its component parts; our reflections are not so concise as the analysis then would make them.

There is much more in Ross's presentation which I should have liked to discuss; however, this is to be an essay and not a book, so I must limit myself to a few remarks.

In my opinion a particularly interesting section in Ross's book is that in which he discusses the concept of rights.* In stressing that the concept of subjective right is from its starting point a technical aid in the presentation, he has brought into the discussion a clarity which has hitherto been conspicuously lacking. On

* *Editor's note:* Cf. the essay by Ross, published *infra*, pp. 137 ff.

the one hand no mysticism will be attached to the concept. But on the other hand no risk will be attached to it either; we can use it without the slightest doubt of our salvation, and we can even save the precaution—which some authors carefully observe—of placing it between quotation-marks in order to avoid being infected when we have discovered that it is necessary to use the concept. Another thing is that the concept of rights has also been used in situations where it does not clarify matters at all but merely serves as a decoration; I have some sad memories from my years as a student when discussing who is entitled to the "claim of criminal law". But the fact that a technical tool cannot be used in all situations is no reason for not using it at all. If things go wrong when we use the tool in the wrong places we must surely take the blame ourselves: we must not blame the fork if we have unfortunate experiences when trying to use it for eating soup.

About other matters I am more doubtful.

We have for instance the natural law—which has over and over again been put to death, but nevertheless is impertinently alive among us. Concerning the many proclamations of a typical natural-law character in some recent constitutions and international conventions, we must certainly be aware that they are there to serve as political manifestations rather than as legal rules in the stricter sense. But natural law pervades the common legislation and the common legal thought—often that which aims to be ultramodern. In the free law theory we even meet the two conflicting lines of thought in the classical natural law—the one which wants to carry on "free law-finding" unrestrained by legislation, and the one which wants to keep within the framework of positive law. Just when one wants to give a realistic presentation of legal phenomena one has to keep in mind the impact of natural law on thought. So far Ross and I agree; but I am not quite so sure as he is that we are here only dealing with superstitions.

On the Day of Judgement—*dies magna et amara*—even the concept of justice will perish. The little which is left to the judge has hardly any relation to what in every-day speech is called justice. I must confess that this, too, gives me some trouble—

quid sum miser tunc dicturus
quem patronum rogaturus
cum vix iustus sit securus?

However, the hardest thing of all is to hear that the legal concept must be formed without the use "of words, the use of which is determined by their emotional content" (p. 70). On my bookshelf stands a book with the title "Norway's Fight for Justice", written by a Norwegian Supreme Court judge. When the Norwegian Supreme Court reassembled for the first time after the German occupation, Chief Justice Berg said: "For all these long years the Norwegian state as based on the rule of law has been lying in ruins. But the hard times have now come to an end. We are again a law-governed community of free citizens." And I believe that many of those who fought the fight in a small way really felt something when they thought that is was justice they struggled for. "Vanity of vanities", says Ecclesiastes. "Vanity of vanities. Everything is vanity."

Well—maybe I am so strongly engaged emotionally here that I am not able to see clearly. But I have a feeling that realism is not always very realistic. If we explain a kiss as a sucking motion caused by an artificial vacuum in the cavity of the mouth, finishing with a peculiar smacking sound, we have probably included everything except the real point. And is not an important social reality present in the emotional content itself? During the German occupation of Norway the provisions of the Quisling government were neglected and resisted until one felt the force bodily and even further, and it was unusual to allow private disputes to be decided by the Nazi courts. Is not this very different from the conceptions we usually connect with a legal order, and are not the social consequences different? Or is it only a difference in degree which meets us here?

However, I must leave these matters for the present; I hope to be able to return to them another time.