SOME REFLECTIONS ON THE METHOD OF LEGAL SCIENCE AND ON LEGAL REASONING

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The subject matter of legal science is the law; it is therefore imperative that legal writers should define clearly what they mean by "law". To avoid narrowing down the perspective, however, the definition must be so broad that it does not, by anticipation, restrict unduly the tasks of legal science. Modern realistic legal science has deep roots in American legal writing, where a narrow definition has firm traditions in its favour: the "law" is the body of rules administered by the courts. It is a definition which in itself implies a determination of the object of legal science, viz. to describe the operation of rules applied by courts. This determination has in fact exercised a fertile influence upon Scandinavian legal theory in many ways.

If the phenomenon called "law" is considered in its full scope, it seems obvious that it can be studied from many different points of view. In the first place, the operation of legal rules is not confined to the courts: the law determines human activities in a far more general way. Even a person who may never appear before a judge will meet the law throughout his life; and every time he submits to the commandments of the law, he adds, by his action, a new facet to the operation of legal rules; indeed, even a person who violates the law without incurring liability for it adds a particular feature to law as a social phenomenon. If that phenomenon is regarded as a pattern of behaviour adopted by courts and by the population at large, the operation of legal rules can be described in purely behaviouristic terms. This has been done, in a way which provokes much useful reflection, by Theodor Geiger in his "Vorstudien" to a sociology of law.[1]

The phenomenon called "law" also embodies a number of ideas about legal rules, which ideas constitute the explanation of such action as is founded upon legal rules. These ideas are the result of a process of historical development; in our days, legislation

[1] Theodor Geiger, *Vorstudien zu einer Soziologie des Rechts,* Copenhagen 1947.

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and precedents are regarded as the principal sources. Legal writing has also brought important contributions to the development of the legal system. On this point, however, an important evolution has taken place. In the 18th century, it was generally held that legal solutions ought to be found by applying logical criteria on the basis of existing enactments and the nature of the case at issue. Consequently, the ancient Regulations of the Danish Supreme Court prohibited any reference to precedents in the course of pleadings. Such reference would involve a risk that a decision of a new case would be influenced by past errors. Today, legal writers make a deep reverence before the courts, which are considered as sources of law. Legal science itself, they say, should stick to analysing facts and cannot, on principle, claim the position of a "source of law". What seems to be overlooked, on this point, is that in countries like Denmark courts do not have legislative powers. They possess a special power to decide the individual case at bar. If the decision of that case sets a precedent, it is less a consequence of the competence of the court than a result of the influence exercised, in actual fact, by the *ratio decidendi*. In the course of legal development, it is indeed possible to find numerous examples of cases where the criticism levelled at an unfortunate judicial decision has created new law just as much as precedents have.

Considered as a body of ideas about rules, the legal system has a highly particular ontological status. Theodor Geiger has used the term "cultural treasures" to denote similar phenomena, e.g. literary works. They exist, even if their contents are not present to the mind of any particular person. Nowhere is the legal system exhaustively described, and nobody can survey all of it at the same time. However, every corner of the system can be searched into with the aid of enactments, decisions, books or archives. It is a closed body of ideas, but the material is neither exhaustive nor free from contradiction. It frequently occurs that the sources offer no guidance, and legal rules can conflict with one another just as decisions and theoretical interpretations of the content of the law can be incompatible.

It is reasonable to require that legal science should make up its mind whether its proper aim is to describe the actual operation of legal rules or the body of ideas concerning such rules. And once the aim has been found, it should be pursued. Obviously the easiest solution for legal science would be to confine itself to describing the operation of legal rules in its historical

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development. Such an approach would—subject to important reservations—be in harmony with the style of Anglo-American legal writing, which excels in analysing existing precedents and largely abstains from attempting to eliminate contradictions and develop individual decisions into one system of rules. Many Scandinavian law books belonging to the category of "commentaries", i.e. analyses and explanations of enactments, have a similar character. Thus the construction of the law becomes a monopoly of the judges and of counsel in the individual cases. In other words, legal science is historical or retrospective. When this attitude is adopted, it is often difficult to determine whether legal science is concerned in the first place with ideas about legal rules or with the actual operation of such rules. That question, however, is not decisive for the way in which the problems should be attacked.

Continental legal writing has mainly been systematic. It has considered its task to be to describe the legal system, as far as possible, as an exhaustive system, free from internal contradictions. Before the more realistic attitude of modern legal science was adopted, it was in fact held that the system did present these characteristics. More recently, it has generally been recognized that the legal system suffers from fundamental deficiencies in these respects. Legal rules may be opposed to one another. The words used in an enactment have no strictly determined sense. The construction of legal rules is not a mere application, under this view, of existing principles, but amounts to a continuous creation of new law. If this state of things was not understood in earlier legal writing, it was presumably because, after all, most facts can, without too much violence done to them, be classified under some legal concept, and the special cases at any rate are treated with reasoning which comes close to following the ordinary rules of logic.

It is quite conceivable that modern legal thinking would have given the death blow to systematic legal science. How can it be justifiable, the advocates of the modern school might well ask, to try to cast the law in a fixed pattern, when the activity in the course of which the law is created in the social process has not itself achieved such a pattern? Indeed, this problem has given rise to serious reflection in recent Scandinavian legal writing.

One idea which has found some support, particularly in Swedish writing, is to confine the tasks of legal science to the ascertainment of such rules as are certain. In those fields where such rules cannot be found, the writer should do no more than submit

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proposals for solutions. It is permissible to discuss *pro et contra*; but the solution finally proposed does not have the character of a scientific proposition and should not be presented as a description of the law actually in force.

Several objections can be raised against this attitude. In the first place, there is no means either of determining whether a legal rule is "certain" or of determining with certainty its field of application. Thus it is impossible to fix the boundaries between the scientific elements of legal writing and those elements which consist in the submission of mere proposals. There is, moreover, another objection, which goes deeper: the degree of "certainty" attributed to a legal rule must depend upon those elements of evaluation which are used in the analysis of doubtful cases. Whether a rule can be considered as "certain" or not will frequently hinge on whether or not it is held clearly rational. Thus a legal rule is presumably never "certain" in principle. Many rules which were considered as absolutely "certain" have, with the passage of time, been eliminated under the pressure of evolution, or have at least been changed or modified in the course of their application. A school of thought which imposes upon positive legal science a fundamental distinction between the "scientific" task of describing such legal rules as may be considered to be "certain" and the discussion of doubtful cases would seem to give rise to insurmountable difficulties.

A far more tempting attitude is that which implies that legal science shall remain a pure science by trying to predict the probable outcome of future litigation. This school of thought is in harmony with the pragmatic character of the science of positive law. What a person consulting a lawyer wants to know above all is whether his action will be sustained. And when the lawyer consults legal writing, he will be able to estimate the chances that his client's suit will be successful. In Denmark, it is particularly Professor Alf Ross who has advocated the view that the task of legal science should be defined as the study of the probable decisions of courts. Whereas it is for legal history to deal with the law in its earlier stages of development, the science of positive law must look into the future and survey the development of the law. Under this view, the author of a textbook or an article on legal problems is free to express his opinion concerning cases not foreseen by the legislator and concerning doubtful questions of construction. However, he must be well aware of the dangers of letting his personal conceptions of basic values inter-

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fere with the analysis. Evaluations, in this view, are not part of the tasks of science. The peace of the scientific conscience may be saved, however, if the task of legal science is defined as determining the probability of a given result. The notion of probability helps the legal writer to avoid the difficulties which arise whenever a distinction has to be made between "certain" and "uncertain" solutions. For the differences of degree which exist between a greater and a smaller probability are not sufficient to have an impact upon the task of legal science as defined in principle. And it becomes possible—at least in so far as it is practically feasible—to elaborate a system of legal science which is both exhaustive and free from contradiction. Writers do not go further than to point out the solutions they regard as probable and are prone to forget that the probability of the opposite solution must also be taken into account, even though it may amount to less than 50 per cent.

Upon closer examination it appears to me a somewhat strange idea that the principal task of legal writing should be to predict the decisions of courts. When a judge is preparing his judgment, he will more often than not consult legal writing before delivering it. It is certain that he does so because he wants to find arguments in support of the decisions he *ought* to render, not in order to find out what decision he *is likely* to make. In Denmark legal writers are frequently asked to give opinions on actual cases of some difficulty. And in so doing, they often use the same technique as when writing their articles and books. If the opinion of a professor of law is supposed to be of importance, it must be because it is hoped that his reasoning will influence the court. It cannot be proper that the expert should have the task of predicting the result of the case with more or less certainty. The purpose of submitting an expert opinion must in any case be to help the judge to find his own "better self"; but this is something quite different from the task of predicting the issue of the case.

Those writers, particularly in Denmark and Sweden, who have assigned to the science of positive law the task of predicting the decisions of courts have not provided that science with the means of carrying it out. However, when modern theoreticians launch violent attacks upon earlier conceptions and place fundamentally new demands on legal science, it should be their duty to create the necessary means of meeting these demands. The present writer's experience, after more than thirty years in the service of the law, is that it is relatively easy to take up a position on how a doubtful

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case should be solved. The most serious risk would indeed seem to be that a position is taken up too rapidly and without considering all sides of the matter, either because the lawyer makes up his mind under the influence of some interest which he represents or because of fortuitous circumstances. For the judge in particular, it is dangerous to yield to the temptation to decide the matter by himself before he has penetrated all its aspects. However, nothing is so difficult as to predict the outcome of a legal issue which is going to be decided by others. The parties to a litigation are particularly anxious to know, before bringing an action, what their chances of success are. To such questions my usual reply is that I can tell the party whether in my opinion he *ought* to be successful, but cannot tell him what the court will think about the matter. Obviously, anyone who gives an opinion on points of law should assert his own view on the correct construction of positive law. He must take into consideration not only enactments actually in force, but also precedents and the prevailing general approach to matters of construction.

In the present writer's opinion, those modern Scandinavian theoreticians who claim that courts and legal writers have entirely different tasks are making a mistake. The tasks are certainly different to the extent that the judges apply the system of rules to individual cases, whereas legal writers are concerned to expose the system in its general aspects. Some of the more subtle parts of legal rules as applied in real life will not be distinguishable until the problems concerned have arisen in a court. Therefore, legal theory will remain meagre and empty if it does not seek support in actual cases. But those who administer the law cannot perform their tasks without the support of legal theory, if logic and consistency are to prevail in the activity of courts. And both legal writers and courts have the task of making clear the contents and precise meaning of those legal rules which, put together, make up the sphere of ideas and principles in which lawyers have to move. Neither of the two need follow the other slavishly. The judge may have an opinion on the contents of legal rules which differs from that of legal writers; and on such points, the judge is in the strongest position, since he can carry his opinion into effect. On the other hand, it is not for legal writers to surrender unconditionally to decisions which are not in harmony with the principles that prevail in the law on other points; such decisions may indeed be expected to be overruled.

Whether or not it is right, on the strength of what has now

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been said, to call legal theory a science is a matter of minor importance. Legal writing embraces a number of elements of a theoretical and descriptive character. In addition, however, it is an indispensable task for legal science to pass judgment upon the material examined and to apply, in that process, standards which are proper to legal thinking and therefore tend to give construction the character of an art.

The present writer's conclusion is that the realistic trend in modern Scandinavian legal philosophy, which has proved eminently fertile in many respects, has gone too far on some points. This is true of the view generally held about the object of legal science. It is also true, however, with regard to the methods of reasoning which are claimed to be necessary in the discussion of legal problems. Some writers reject not only the idea that the *ratio* of legal rules may be found in general principles, but also any reference to what is reasonable and equitable as justification of a legal rule. Instead, they lay emphasis upon a method of reasoning which implies merely demonstrating the various consequences this or that solution of a legal problem would produce. In Denmark, the most radical expression of these ideas is to be found in the writings of Professor Ross; in Sweden, it is probably to be sought in A. W. Lundstedt's works. Thus, the latter once stated that use should be made of "social utility as a criterion of interpretation", whereas any reference to reasonableness or justice is purely chimerical. "Reasonable" and "just" are non-objective concepts, and consequently cannot be used in a scientific discussion.

The present writer would be the last to deny the great value of the contribution of the realistic school to legal thinking. It must not be concluded, however, that this contribution is a fruit of modern legal philosophy. It is deeply rooted in early legal thinking, in Denmark, this is true, above all, in the extensive and highly important writings of A. S. Ørsted (1778–1860). This realism was in fact already permeating Scandinavian legal theory before the Swedish philosophers of law acquired decisive influence. That school of philosophy—particularly as developed by Lundstedt—has considerably overshot its mark. In the present writer's view, one of the reasons for this is that the advocates of the "realistic" school are under the delusion that, by trying to find answers to legal problems through references to the factual consequences of possible solutions, they have been able to free legal writing from subjective evaluations. This is by no means true.

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What they achieve is simply the removal of the evaluations from the actual case to be decided; but the evaluations crop up again in respect of the more distant consequences of the decision. It is often useful to apply the method under discussion; indeed it is frequently indispensable in order to enable people to reach their objectives. Knowledge of the effect of human conduct is certainly something worth striving for in all fields of life. New insight on such points can often modify earlier evaluations. Thus, in Denmark, the negative consequences which experience proved to attend flogging resulted in its abolition. In Finland, attempts were made to prohibit dealing in liquor, but knowledge of the very serious drawbacks attached to the prohibition led to its being revoked.

It must be remembered, however, that arguments based upon such an analysis of facts inevitably conceal an evaluative judgment passed at a different stage in the sequence of arguments. The "realists" do not admit the use of the formula: "I prefer solution X, because it is reasonable". Yet they accept solution X when it can be justified by a reference to consequence Y, which follows from it; in so doing, they overlook the identity of structure between the two solutions: in the latter one, it is because consequence Y is found reasonable that solution X should be adopted. If a situation is so clear that all consequences are discerned without difficulty, one might just as well discard the reasoning based upon "fact arguments" as being trivial and superfluous. A more important objection, however, is that it is more difficult to be certain when one is passing an evaluative judgment on the consequences of an action than in passing such a judgment on the action itself. In so far as this is true, it is wrong to believe that an analysis of consequences can provide any guidance for legal reasoning. An example from history will make this point clear. Both Galileo and Giordano Bruno were persecuted because they defended the results of their research as against the official philosophy of the Church. Galileo forswore his opinions; his aberration was forgiven and he was able to carry on his research both to his own gratification and to the great benefit of science. Giordano Bruno, one of the great martyrs of science, refused to recant and was burnt at the stake. Which course of action was "right", and what should *we* have done in the same situation? Can we get a better insight into this by basing our reasoning upon facts? The same question is relevant to numerous situations in daily life. What liability should be imposed upon the dealer in

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second-hand cars for deficiencies in the vehicles he sells? To draw the limits round the vendor's responsibility on the basis of considerations of advantages and disadvantages is difficult. However, it is not utterly impossible to find a test of some reliability whereby to measure what is a reasonable standard. The question whether the limits drawn in this way constitute the most rational solution must be left unanswered.

The test of utility for the general public has been proposed by the Danish scholar H. Ussing as decisive for the construction and framing of legal rules in the law of contracts. It has also been advocated more generally by Swedish writers, in particular A. W. Lundstedt, who had social utility as his general goal. These ideas have their roots in utilitarian philosophy, where the test of utility was formulated as the greatest possible happiness for the greatest possible number. Nobody can state with certainty whether such a utilitarian ideal actually prevails in moral and legal conflicts. At any rate, there is an eternal conflict between those who put the emphasis on the consideration due to society as a whole and those who put the individual in the foreground. Moreover, a legal system, if it is to work with reasonable safety, must be given the form of a scheme of abstract rules; and it cannot be demanded that each of these rules shall produce, in individual cases, those results which would have been preferred if the case had been decided solely on its own merits, independently of any legal system. But it is hardly possible to take a stand, *a priori*, with regard to the question what importance should be attached, when legal rules are being framed, to the interests of individuals and what weight should be given to legal security and the public good. There can be no doubt that, e.g., the law of contract has undergone, in the present century, an evolution characterized by a considerable narrowing of the freedom of contract, and that the cases where contracts are invalidated for one reason or another have become much more numerous. Generally speaking, the prevailing tendency, in this field of law, is marked by attempts to achieve greater justice in individual contracts. In the present writer's view, however, it does not make sense to say that this reform of the law of contract is based upon considerations of social utility. There is, on the contrary, a latent tension between the demands of social utility and the claim of the individual, and this tension must be released by a compromise. The question whether the trend is to emphasize social utility or to put the accent on the individual's interests is one that has to be answered

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differently at different times and places. The never-ceasing antagonism between the interests of the individual and the needs of society may often be particularly acute in those rules which concern the relations between the individual and the state. Therefore, social utility is not a suitable concept to be consulted, as the exclusive *ratio,* for legislative policy or for the purposes of construction.

Whereas modern legal science has taken, as pointed out above, a very benevolent attitude to legal arguments based upon facts, recent writers have largely rejected reference to general principles of law as a *ratio* for decisions or legislative action. The "conceptualistic jurisprudence" (*Begriffsjurisprudenz*) of the old days is spoken of with contempt. Characteristic of that earlier school of thought was the idea that legal rules as well as judicial decisions were expressions of highly abstract principles, which were applicable to all other cases where the same abstract criteria could be found. It is natural that "conceptualistic jurisprudence" should have had its heyday in the 18th century: the task facing legal writers in that period was to create a firmly built theoretical system on the basis of the primitive legal systems then in existence. The material which could be used for this construction, i.e. legislation and judicial decisions, was scarce, and only admitted the creation of an abstract system with few nuances; yet Scandinavia had had much recourse to the far more developed Roman legal system. A perfectly natural development has taken place in the course of the last 150 years; Scandinavian law is more supple and better adapted to the particularities of the field of human activity to which they are to be applied. There can be no doubt, therefore, that general principles should not have the same decisive importance for legal thinking as they had 200 years ago.

Nevertheless, I submit that the modern critics of legal methodology have been too rash in indicating how legal reasoning should be framed. It would be better to stick somewhat more closely to the task of studying the actual process of legal thinking. A system of rules cannot possibly be administered without using general principles. In the field of ethics, each individual has his principles, which make it possible for him to avoid conflicts of conscience and rational considerations each time he faces situations which are known and have been analysed before. Personally I follow the principle of not allowing my relations with my friends and acquaintances to be influenced by events belonging to their matrimonial life. In such matters I do not take sides; I try, as

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far as possible, to avoid being involved. It is sometimes said that principles exist only so that they may be broken. This is true to some extent, but not as a general proposition. The normal course of action is to follow a principle without further reflection each time a situation covered by the principle arises.

The legal system has numerous principles of this kind. The general rule on liability for damage caused by negligence—the *culpa* rule as it is called in Scandinavian legal writing—belongs to this group. So does the rule on remoteness of damage. Many principles of the same type apply in the determination of the punishment to be inflicted upon a criminal, e.g. in the choice between conditional and unconditional punishment and between prison and pecuniary fines. It is certainly a matter of some difficulty to distinguish such principles from legal rules in the proper sense. As a general proposition, however, it may be stated that principles are more flexible and changeable than legal rules are. They cover both well-established and well-defined legal maxims and such vague formulae as frequently assume importance in judicial decisions or are held to find support in statutory law.

In the present writer's opinion, a principle which is found to be upheld in a given legal system implies in itself an argument which frequently has more weight than the unravelling of the facts which may be quoted in favour of the final solution that is to be justified. Facts can justify any result. And such facts as can be quoted assume importance for judges and other lawyers only in the light of the set of general evaluations which have been made and are generally made in the legal system concerned. The statement that a certain solution is founded upon certain facts often has slenderer foundations than are supposed. Just as often, the facts referred to are merely arguments which are quoted, *ex post,* in support of a choice which has already been made. In legal writing from the last century, one can find highly plausible justifications for the indissolubility of marriage. In our days, it is equally easy to find convincing factual arguments in support of the relatively liberal access to divorce instituted by the Danish matrimonial legislation of the present century. Even if changes in the underlying sociological patterns may have modified the possibility of realizing the dissolution of a marriage, the new attitude respecting the dissolubility of matrimony is certainly just as much the result of a modification of basic principles, as of the applicable set of evaluations.

Another reason contributing to the neglect of which modern

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Scandinavian jurisprudential writing has been guilty with regard to such aspects of a lawyer's work as imply evaluation and assessment is, in the present writer's opinion, an incorrect use of an extremely important discovery of modern philosophy (particularly emphasized in Swedish jurisprudence), namely that evaluation as such cannot be theoretically true or untrue. This has given rise to the idea that evaluation is essentially a subjective activity: precisely because statements based upon evaluation are neither true nor false, anyone is free to state what he likes in this field.

Nothing could be more erroneous. Evaluation, both in the domain of ethics and in that of the law, is the result of a given culture and thus subject to general laws of causation; it can be observed, and its contents and consequences can be described. Therefore, a legal system can be built upon prevailing evaluations. However, there is little advantage in drawing up the system from the point of view of a mere onlooker, without personal commitment. The writer dealing with positive law should not—even if he can—keep his evaluations out of his writings. The value of these evaluations, however, depends upon whether they coincide with a general or common opinion.

In the books on Danish law which I have produced in the course of the years, I have tried to realize this programme. My writings have aimed at describing the contents of a category of ideas, namely legal rules framed in the manner I would apply them if I were a judge. I have attributed far more weight to evaluation and assessment than is usually done in legal writing. And formal logic holds a far less important place than it does in the works of most modern writers. From reasoning there is no straight road to decision. Arguments based upon observation of facts are like signposts: they tell us where various roads will take us. But whether this or that destination should be chosen is something that cannot be found out from the reasoning itself.

Whether such a method is correct or is to some extent based upon an illusion is closely connected with a problem which, in my view, has not been sufficiently elucidated in jurisprudential writing, namely to what extent the application of legal rules may be considered as the exercise of "bound discretion" or admits more or less free decisions. According to the school of thought which considered the law as an exhaustive and rigidly coherent system, the judge had not even the possibility of a choice. If the sources of law were correctly consulted, the well-informed judge could arrive at only one result. It was presumably realized

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that legal reasoning used many sources: statutory law, usage, legal writing, general principles of law, the "nature of things". In order to secure unambiguous results, however, the sources of law were ranged in a consistent hierarchy where they were labelled "principal" or "subsidiary". Where this attitude is adopted, the best judge is the learned judge, who knows the legal system from one end to the other and will never render an incorrect decision. According to this school of thought, legal writers can also make use of the system in the same way, and, since the principle of *stare decisis* is not acknowledged in Scandinavian law, there is no reason to concede to judicial decisions a clear superiority over legal writing. Endeavours to find a solution to each conflict by means of a deduction from known applicable principles will undoubtedly tend to give legal reasoning a somewhat stiff and formalistic character which seems to have given German legal thinking, in particular, its distinctive features.

Awareness that the legal system is not an exhaustive and coherent system has been promoted particularly by the *Freirechtsbewegung*—the "free law movement" which flourished at the beginning of the present century. On one point, the way in which the advocates of this school of thought formulated their problems was quite clear, and probably it is generally acknowledged to be correct. The law is undoubtedly completed by decisions passed in the course of its application. In modern times, all countries have had to face the question whether appropriation of electric power could be punished as larceny. The answers given have varied, but whether they were affirmative or negative, it would be purely fictitious to hold that the question could be answered on the basis of the criminal enactments then in force. The construction adopted in this case was not derived from, but put into, the applicable statutory text.

Irrespective of the recognition which the "free law movement" has met with, there is no doubt that it has everywhere given more room for arguments based upon considerations of purposiveness in legal reasoning. Such considerations have imperceptibly crept into the process of construction and determined the views upon the sense of words. They open wider possibilities for broad or restrictive interpretations. The "free law" school has also given lawyers more respect for judicial decisions as such, for the judge is not only a man who must know and apply the law; he creates law himself. That task is given to him and to nobody else. The very ideal of a judge is transformed accordingly. The learned

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judge, who is familiar with the whole labyrinth of legal rules, is replaced by the wise judge, who administers his office in the manner most useful to society as a whole.

Particularly in the writings of scholars who put emphasis on the freedom of legal decisions, as did Jerome Frank, one can find expressions of the view that the issue of an action depends upon a personal decision made by the judge (and embodied in the "decision" in another sense). The idea that the judge holds legal development in his hands gives him a predominant position in the evolution of legal systems; this is one of the reasons why American legal theory, in particular, considers "the law" to be constituted by the decisions made by the courts.

Without committing oneself with respect to the problem of determinism or indeterminism, one may state that it is characteristic of the situation of a person faced with the necessity of reaching a decision that he has to make a choice. A person can make up his mind on the question whether he will spend his holidays in England or in Italy. It is possible to discuss the appropriateness of the choice in the light of the season, of earlier journeys to one or both countries, etc. The choice may not be fortuitous. A single woman may prefer to go to England because there is less risk of being annoyed by strange men in the street. Nevertheless, the person making the decision feels and believes that he is the master of different alternatives and that his choice depends upon his own discretion.

Statements about evaluations are certainly quite different. You cannot determine by way of a "rational" choice—at least not without putting pressure to bear upon your personality—your attitude in respect of current controversial issues, such as voluntary abortion or the legislation on obscene books and pictures. There is no doubt that in a great number of cases a choice is actually made. When doing so, however, you weight the scales in favour of a friend or against an opponent. This is sometimes done consciously and sometimes unconsciously. I often say to myself that there are two kinds of faults: pardonable and unpardonable; the former are those of my friends. In the domain of æsthetics, the same observation remains true. You may choose to say that a female friend's dress is enchanting because you regard it as a conventional duty to do so. But whether a dress is beautiful or not is not a matter for *decision*.

When I have to make up my mind on a legal question, whether in the course of the professional debate, in my teaching, or when

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acting as an arbitrator in labour-management conflicts concerning the interpretation of collective agreements, I do not see the situation as one where a choice might be made. After reflecting on the matter from various angles, the solution emerges, necessarily, as a result of the legal insight which a lawyer has acquired through his habit of making legal evaluations in general. The way in which the decision is reached is similar to the taking up of a position in the fields of ethics, social conventions, or æsthetics: you do not choose to think that something is right, socially acceptable, or beautiful. Just as an art expert can evaluate a picture with far more precision than can an inexperienced layman, so the lawyer's familiarity with the world of legal ideas will enable him to appreciate legal arguments with considerable precision and in accordance with the attitude generally taken by lawyers. It is a feature common to the law and to social conventions that they give little room for the display of subjective points of view. From the very beginning, a person reasoning within these domains has his eyes upon general points of view: the general ideas of the public, the thoughts of other observers.

It seems obvious, however, that modern legal thinking, which has a pragmatic character and is less closely tied to the patterns of formal logic than was earlier the case, leaves a broader margin for individual differences in legal appreciations. In particular, it is difficult, e.g. when construing statutes, to find guiding principles for the choice between a literal interpretation and a solution in better harmony with the purpose of the enactment. The mere fact that there is an increasingly widespread acceptance of the idea that legal arguments which are incompatible in principle may be invoked, not in a determined order—some being considered as principal and others as subsidiary—but as all being juxtaposed, would seem likely to create uncertainty in respect of the results. A study of recent Danish case law leaves the general impression that the issue of an action is less easy to foresee than it used to be. This may be a lasting effect of the "free law" theories. In a long-term perspective, this would seem to produce the inevitable result that the actual administration of the law will assume dominating importance in the efforts towards a continuous development of the legal system. There is undoubtedly a connection between this fact and the disillusioned spirit of modern Scandinavian legal science, which tends unreservedly to accept judicial decisions as expressions of correct legal reasoning merely because the courts are competent to decide actual disputes.

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