ON A FUNDAMENTAL PROBLEM IN THE LEGAL THEORY OF PREDICTION

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1. Scandinavian realism is one of the leading schools in modern legal theory. The ideas and analysis associated with the founder of the so-called Uppsala School, the famous Swedish philosopher Axel Hägerström (1868–1939) and his disciples Vilhelm Lundstedt (1882–1955), Karl Olivecrona (born 1897), Alf Ross (born 1899) and to some extent the philosopher Ingemar Hedenius (born 1908) have, among the works of many other Scandinavian lawyers and philosophers, become well known not only in Scandinavia but also in the world at large and especially in Britain and America. Their treatment of the concept of "valid law" and of legal conceptions is likely to be familiar to many students all over the Western world.[1]

In this paper I deal only with some elements of the theory put forward by Alf Ross. This limitation requires no excuse. Rightly or wrongly Ross is probably today the most famous of Hägerström's disciples, at least in the jurisprudential world. His legal theory is the most developed, sophisticated and consistent of them all, and his output of articles and books, in many cases translated into other languages, is second to none. Moreover, Ross always writes in a clear, forthright and often racy style, and he has a keen eye for legal details. He may be less urbane than Olivecrona, for instance, but he is richer in legal details and examples; many a judge and many an advocate would do well to read his writings on interpretation before appearing in court.

2. We might say that Ross is a positivist as well as a realist in the common and commonplace sense that he believes law to be something man-made

[1] It is almost impossible and surely of little or no interest to try to give an account of the innumerable jurisprudential books and articles containing opinions and remarks on Scandinavian realism as well as other legal theories.

On legal realism, positivism, and natural law in general, see, for example, Hart, *The Concept of Law,* 1961, p. 7, pp. 35–6, pp. 121 ff., pp. 132–44, pp. 181 ff. and pp. 232 ff.; Ross, *Towards a Realistic Jurisprudence,* 1946, pp. 59 ff., and Ross, *On Law and Justice,* 1959, §§ 13 and 50–61. On the different jurisprudential concepts used in Scandinavia as well as in England and America, see Preben Stuer Lauridsen, *Studier i retspolitisk argumentation,* 1974, pp. 40 ff., pp. 120 ff. and pp. 127 ff. One of the newest and best analyses of Scandinavian realism has been given by Stig Strömholm and H. H. Vogel in "Le 'réalisme scandinave' dans la philosophie du droit", *Bibliothèque de philosophie du droit,* vol. XIX (1975), pp. 1–107. See also note 6 below and accompanying text.

On the understanding of the term "valid law", see note 5 below and accompanying text.

and made for men only, not by or for gods and invisible demons, and that consequently in his opinion the doctrines of natural law, be it in the scholastic form or in a more modern guise, must be rejected in any sensible legal theory.

To this extent Ross shares the view of English as well as American realists. Yet, notwithstanding this and many other similarities between the Scandinavian tradition as represented by Ross and its Anglo-American counterparts, we must realize that there are important differences. Ross does not in any way share the scepticism of some American realists about legal rules and concepts and the part they play in the administration of justice, and his approach to the problems of legal theory is rather more philosophical than is the approach made by English as well as American realism. It is probably fair to say that the close connection between legal theory and moral and linguistic philosophy has been argued more clearly and explicitly by Ross—and by Scandinavian realism as such—than by any of his English and American colleagues. This approach is of course not necessarily an advantage to jurisprudence and certainly does not *per se* constitute a convincing legal theory. Though, of course, also professedly sceptical in aim and empirical in method, Scandinavian realism is much more like a kind of philosophy; undoubtedly, however, it shares the general disbelief in the capacity of ethical systems to decide, or help man to decide, what law is or ought to be that we find in English and American realism.[2]

In so far as he regards law as a social phenomenon to be dealt with as such, i.e. without reference to anything but reality, Ross is a positivist. Like all other positivist writers he insists upon the separation of law from metaphysics and upon the necessity of finding a non-metaphysical, purely empirical, reference for legal propositions. But he is certainly not a positivist if that term is taken to mean that law is to be regarded as a closed system within which the judges and administrators are engaged in purely logical and derivational exercises; nor does he, like many other positivists, limit his horizon to the analysis of legal doctrine and nothing more. On the contrary, Ross clearly emphasizes the creative tasks of judges and other people engaged in the administration of justice, and as a student he goes beyond the limits of legal doctrine in the sense that in several articles and books he deals with and tries to analyse legal politics.

3. In my book *Studier i retspolitisk argumentation* ("Studies in legal politics"), Copenhagen 1974, I argue that, though Ross has admittedly

[2] On this point of view, see, for example, Hart, "Scandinavian realism" in 1959 *Cambridge Law Journal*, pp. 233–40.

brought jurisprudence many steps forward through his works and in the way described above, there seems nevertheless to be a fundamental flaw in his whole theory; a flaw which to some extent leads to contradictions in his treatment of legal doctrine and which in many ways makes his discussion of legal politics unsatisfactory.[3]

In what follows I propose to concentrate on some elements of the way in which Ross treats the problems of legal doctrine, especially with regard to his famous theory of prediction (or prognosis, as it is often called in Scandinavia). In order to avoid misunderstandings I wish to emphasize that the critical analysis set out below has as its object, and its only object, the theory of Ross. I do not suggest, or expect, that my arguments will be successful against each and every kind of realism and I do not wish to imply that all those who call themselves realists or are so considered by others have fallen into the same error as Ross has, in my opinion, made. Such a statement could not, in any case, be made without much further work and evidence and is indeed not even to be suggested lightly.[4]

Even more important: I think we have to admit that the traditional concepts of both realism and natural law are poorly defined. As the reader will probably already have noticed, the terms we have used are quite vague and not without ambiguity. Unless we are prepared to put up with a rather

[3] For a documentation of these points of view, see my book, chaps. IV and VI–X.

The translation into English of the Danish term "retspolitik" (German: *Rechtspolitik*) is rather difficult. The main problem is whether to render it as "legal *policy*" or as "legal *politics*". Certainly, the term "legal policy" may seem to be the best translation but, on the other hand, the term "legal politics" has been used by Ross for many years, for example in his book *On Law and Justice*, pp. 297 ff., pp. 327 ff., pp. 340 ff. and pp. 358 ff., and this translation seems to have been accepted by his English-speaking readers; see the reviews of his book by W. L. Morrison and Hart—the last writer, however, obviously with some doubt—mentioned in note 6 below. Consequently, I have used the same term in this treatise as well as in the summary of my book *Studier i retspolitisk argumentation*, pp. 661–8. And certainly I agree with Ross that legal politics is *not* a policy in the sense that its central task is to discover and argue in favour of certain aims or ends of law and society. It is no attempt to discover the best way of life and how to achieve this kind of life by means of legislation. Certainly, legal politics plays an important part in the administration of our political system; but, without denying this fact and its consequences, for example with regard to the moral responsibility of the lawyer engaged in the legal-political activity, I think that, from a jurisprudential point of view, we have to look upon legal politics as a discipline which forms a central part of jurisprudence as such just as much as does the traditional doctrinal study of law, which is a kind of technical-scientific activity although very close to political life, and which has its own demands regarding, for instance, correctness and rationality. See, for a further discussion of these points of view, my book, pp. 367 ff.

My book has been reviewed by Mogens Koktvedgaard in *U.f.R.* 1975 B, pp. 87–92, by Ross in *U.f.R.* 1975 B, pp. 229–35, by Stig Strömholm in *Sv.J.T.* 1975, pp. 282–91, and by Preben Espersen in *Nordisk Administrativt Tidsskrift* 1975, pp. 97–8. The reader will find several critical points of view in these reviews; see also Peter Blume in *Cirkulære* 1975, pp. 6–12, Karl Olivecrona in *U.f.R.* 1975 B, pp. 346–7, and Frede Castberg in *Jussens Venner* 1975, pp. 304–35.

[4] I agree with Olivecrona on this matter, see *U.f.R.* 1975 B, p. 347, and I have never said otherwise; see, for instance, my book, p. 141, note 7, which Olivecrona has obviously overlooked.

naive and superficial understanding of terms like "metaphysical" and "empirical", I think we shall have in the future to try to deal with the problems of legal cognition in a way which is more satisfactory and sophisticated from a philosophical point of view than that offered by the common "realistic" legal theories. In so far as I believe law to be something purely man-made, nothing but a social phenomenon, I am myself a realist. Who is not? But, as we shall see below, I do not accept several of the foundations of, e.g., the realistic theory of Ross; consequently, if these foundations are considered to be fundamental to realism as such, I am not a realist in this sense of the word. Personally, I think that the following viewpoints will prove to be useful in our attempts to develop new and better concepts of legal realism, but it must be admitted that this problem will need much further consideration before it can be properly solved.

4. To Ross, one of the most important tasks of legal philosophy has always been to establish a theory on the truth and verification of the assertions made in the doctrinal study of law. For if such a theory cannot be constructed—and constructed within the framework of what Ross considers to be modern empirical science—there is, in his opinion, no alternative to a categorical disbelief in any kind of legal doctrine: it is metaphysical, can be neither true nor false and does not give us any information about anything. And with the fall of legal doctrine there also falls legal theory, philosophy and jurisprudence as such; for in Ross's eyes philosophy is neither deduction from principles of reason nor an extension of the sciences designed to discover the ultimate components of reality. It is simply the logic of science with its only subject in the language of science. All that can be developed from legal doctrines consisting of nothing but metaphysics is ethical jurisprudence—certainly no acceptable kind of legal philosophy.

It is Ross's basic idea that the doctrinal study of law must be recognized as an empirical science and that the statements of legal doctrine must therefore be interpreted as statements of social affairs. And since a statement of social affairs, like any other statement of facts, must imply certain verificatory procedures, it must, in Ross's opinion, be the task of legal philosophy to examine these verifiable implications of legal doctrine. As is well known, Ross solves the problem of the legal implications, as we may call them, through an examination of the concept "valid law". It is his conclusion that the concept (Danish, English, Swedish, etc.) valid law must be considered implied in any kind of (Danish, English, Swedish, etc.) legal doctrine, and that the real content of doctrinal propositions as such refers to the future actions of the courts under certain conditions. In other

words, the real content of a doctrinal proposition is the assertion that under certain conditions the courts will, in fact, act in the way described by the proposition.

In short, Ross's theory is based upon the following chain of reasoning. He first distinguishes between those linguistic utterances which have a representative meaning and those which have only expressive meaning. Legal rules, as expressed for example in sec. 62 of the Uniform Negotiable Instruments Act, do not assert a statement of affairs but are merely expressive of an intention to influence certain people. They are directives. But propositions in legal textbooks are not directives. They are assertions with a representative meaning and of the form "*D* (a directive) is valid law (in some countries)", in which, for example *D*=the Uniform Negotiable Instruments Act, sec. 62.[5] Secondly, Ross interprets all legal rules as directives to the courts. The real content of, for example, sec. 62 of the Uniform Negotiable Instruments Act is a directive to the judge regarding the exercise of his authority in a case to which the rule is applicable; it is, in short, a directive to the judge to order the drawee to pay the bill which he has accepted but failed to pay on the day it fell due. And by saying that a certain directive is valid law (in a certain country) a writer means that the directive is effectively followed by the courts because it is experienced as being and is felt to be binding by the judges. Consequently, the real content of, e.g., the proposition that sec. 62 of the Uniform Negotiable Instruments Act is valid law is the assertion that under certain conditions the court will, in fact, act in the way prescribed by that section: if a case in which the conditioning facts given in the section are considered to exist is brought to court, if in the meantime there have been no changes in the circumstances which form the basis of the section, and if no other legal rules must lead to any other conclusion, then the courts will order the drawee to pay the bill. The assertion that sec. 62 is valid law is, in other words, a prediction that the courts will act in the way prescribed by the section according to its meaning because the judges felt bound to do so.

[5] As will be known, this section is Ross's example in *On Law and Justice,* see pp. 32 ff. Valid American law is today no longer this section but Uniform Commercial Code, sec. 3–413, see Vern Countryman and Andrew L. Kaufman, *Commercial Law. Selected Statutes,* Boston–Toronto 1971, pp. 270 ff. In the following analysis I use Ross's example from *Om ret og retfærdighed* (the Danish edition, see note 6 below), namely the rather similar sec. 28 of the Danish Bills of Exchange Act.

The term "valid law" can give rise to misunderstandings. It is used by Ross—and also by me in this paper—to describe *existing* legal norms. Consequently, the term "valid law" means "existing law" or "law in force" (Danish: *Gældende ret,* German: *Geltendes Recht*), see Ross, *Directives and Norms,* p. 104 note 1. Whether the norm is or is not "valid" in the sense that it is just, acceptable and/or a result of correct legislation (see, for example, Hart, *The Concept of Law,* pp. 64 ff.) is not important for the question of its existence.

It is, however, important to understand that Ross's view is more sophisticated than the well-known and, to some extent, corresponding view we find in American jurisprudence. Ross presents his view as what he calls a synthesis of behaviouristic and psychological realism. As we shall see in the following analysis, Ross considers the concept "valid law"(or existing law or law in force) to be something more, and more complicated than the mere socio-legal phenomena. By saying that a directive is valid law, a writer means that it is one of an "abstract set of *normative* ideas which serve as a *scheme* of *interpretation* for the *phenomena* of law in action, which *again* means that these norms are *effectively* followed, and followed because they are experienced [as being] and felt to be socially binding" by the judge and other legal authorities applying the law (quoted from *On Law and Justice,* 1959, p. 18; italics added). "The concept of validity ... involves two elements. The one refers to the actual effectiveness of the rule which can be established by outside observation. The other refers to the way in which the rule is felt to be motivating, that is, socially binding" (*op. cit.*, p. 16). And the (valid) norms are the abstract idea content of a directive nature which make it possible as a scheme of interpretation to understand the socio-legal phenomena, the law in action, and, along with other factors, to predict their course within certain limits.

5. The following analysis is based on the contents of the Danish edition of Ross's book *Om ret og retfærdighed,* Copenhagen 1953—probably his most famous work—and on one of his latest books *Directives and Norms,* London–New York 1968. An English translation of the former book has been published in America under the title *On Law and Justice* (Berkeley–Los Angeles 1958). In what follows I use examples only from the Danish edition, since in it the thoughts of Ross have, in my opinion, been expressed more precisely than in the American edition; but naturally all the main points of view are quite similar in the two books, and English and American readers will certainly be familiar with Ross's theory as presented below.[6]

6. Let us, in order to introduce some of Ross's basic concepts and distinctions, use his own example from the book *Directives and Norms* (chaps. II and III):[7]

[6] Both editions have, of course, been reviewed or otherwise treated by many writers. Among the most interesting treatments are, from my point of view, Arnholm's comments on the Danish edition in "Some basic problems of jurisprudence", 1 *Sc.St.L.* pp. 9–50 (1957), and the reviews of the English edition written by Hart, "Scandinavian realism" in 1959 *Cambridge Law Journal,* pp. 233–40, W. L. Morrison in 60 *Yale Law Journal* (1959), pp. 1090–96, and Kelsen, "Eine 'realistische' und die reine Rechtslehre" in *Österreichische Zeitschrift für Öffentliches Recht* NF, 10, 1959, pp. 1–25.

[7] On the important distinction between language, which is the linguistic *system* itself, and

If the father says to little Peter "Peter, shut the door", this sentence naturally constitutes a linguistic *phenomenon.* It is an utterance or a speech-act addressed by the father to Peter.

From this linguistic phenomenon, however, its logical or semantic meaning may be abstracted in the form of a directive, which may be formulated as follows:

(The shutting of the door by Peter) So it ought to be

in which "So it ought to be" constitutes the so-called directive *operator* indicating that the topic (the shutting of the door by Peter) is not thought of as real but suggested or ordered as a pattern of behaviour which ought to be complied with. The father suggests or orders "Peter's door-shutting".

The father may also say to his wife: "Look, Peter is shutting the door." Of course, this sentence in itself also constitutes a linguistic phenomenon, but it is more interesting that from this sentence a logical or semantic meaning content may likewise be abstracted in the form of a *proposition,* which may be formulated as follows:

(The shutting of the door by Peter) So it is

in which "So it is" constitutes a so-called indicative operator indicating that the topic (the shutting of the door by Peter) is now not being suggested as a pattern of behaviour, but is thought of as real. Whether the proposition is true or false has nothing to do with this.

If, for the purpose of our analysis, we now disregard the possibility that the father is putting on an act for the benefit of his wife with some special implicit point—Peter may be spending his holidays in Jutland at the moment—which, incidentally, would not change the semantic meaning of the sentence as a proposition, the father gives his wife a piece of information by telling her about Peter's door-shutting. He is not posing the proposition, but asserting that Peter is, *in fact,* shutting the door now or that Peter *in fact* goes about shutting doors. Such use of the proposition is called the *assertion* or the statement which is the informative use of the proposition depending on the property of its being true (or false).

7. Let us now try to apply these fundamental concepts to the corresponding legal situation, and let us choose an example often used by Ross, namely, the problem of the acceptor's liability to pay a bill of exchange:

speech, which is the social phenomenon, the *use* or the *actualizing* of the language (French: *la langue/la parole,* German: *Sprache/Rede* and Swedish: *språk/tal*), see Arne Thing Mortensen, *Perception og sprog,* 1972, pp. 19 ff., Bertil Malmberg, *Nya vägar inom språkforskningen,* 1959, pp. 45 ff., my book, pp. 24–5 with note 15, and Ross, *Directives and Norms,* p. 3.

Sec. 28 of the Danish Bills of Exchange Act provides (here the enactment is given in a simplified form): "The acceptor shall pay the bill of exchange on maturity."

Now according to Ross we must be able to abstract the semantic or logical meaning content of the said sentence, formulating a directive. The formulation of such a directive may, however, be a little doubtful. On the presumption that the directive is to apply to the citizens—the potential acceptors of bills of exchange—we can rephrase it as follows: *(Acceptor's payment) So it ought to be.*

According to the representation given in the book *Directives and Norms* and in that book alone, nothing would actually prevent us from so doing. The book has not been written with a special view to jurisprudence but with a view to the general concept of "norm" as a term common to social science as such and to deontic logic. When, however, we want to concentrate on the legal problem—and that is, of course, our aim—we must choose another formulation if the fundamental ideas of Ross's book *Om ret og retfærdighed* and his whole legal theory are to be adhered to; for, as is well known, it is Ross's opinion that any legal directive must be interpreted as being given especially to the *courts*. According to Ross's theory, legal directives are directives given not to the citizens but to the judges providing for legal sanctions by the courts against, for instance, acceptors reluctant to pay their bills, and the directive abstracted from sec. 28 of the Bills of Exchange Act must, therefore, be given as:

(Compulsory implementation of the acceptor's payment of a bill) So it ought to be.

For the sake of convenience, the formulation

(Payment of bill) So it ought to be

will be used below. Such a formulation may very well cover both relations (the citizens/the courts and other administrators of justice), and the reasoning may be asserted in the same manner in both relations. In view of the present analysis, here and in what follows only the relations to the law courts will be used.

Assuming that the judge will feel bound by the directive contained in sec. 28 of the Bills of Exchange Act and, in fact, will comply with it in practice, a legal norm has been created. The directive has become *effective*. The courts will—under certain conditions—*in fact*, pronounce judgments against any acceptors who do not pay their bills on maturity in pursuance of the provision contained in sec. 28 of the Bills of Exchange Act and they will do so because the judges feel bound to act in this way.

So far so good. However, we shall now see that when, applying Ross's thoughts and concepts, we analyse the statement corresponding to sec. 28

in the Danish writer Henry Ussing's book *Enkelte kontrakter* ("Elements of Contract Law"), Copenhagen 1946, p. 116 (and such analysis is obviously the whole point of Ross's reasoning) we soon get into serious difficulties.

Ussing's statement runs (in simplified form) as follows:

> The acceptor is liable to pay the bill on the day of maturity, cf. sec. 28 of the Bills of Exchange Act.

It is indisputable that the statements in a doctrinal study of law—*in casu* Ussing's book—are, in Ross's opinion, propositions or must be interpreted as propositions, i.e. asserted *propositions*. And, implicitly, Ussing naturally claims that his assertion is to be accepted as true.

Further, it is indisputable that statements in doctrinal studies of law *cannot* indiscriminately be applied as analogous with Peter's father's statement to his wife, namely: "Look, Peter is shutting the door."

This is of extreme importance.

Peter's father's proposition is *only* an assertion to the effect that Peter is, in fact, *shutting* the door (now), that Peter is performing the *act* of door-shutting. It says *nothing* about whether a door-shutting *norm* exists for, or is in force in relation to, Peter. Ross does not himself expressly emphasize this fundamental difference, but it will prove to be absolutely decisive to our analysis. Any assertion of the existence of a door-shutting norm in relation to Peter would, *if* we were to follow Ross's own basic theory and concepts, be a far more complicated affair. The assertion of Peter's shutting the door only says that such door-shutting acts are, in fact, being performed, exist, and are real. An assertion to the effect that a door-shutting norm is in force in relation to Peter would, on the other hand, say that Peter has accepted, and in action follows, a directive addressed to him and telling him that he must and *ought to* perform such acts. Another way of expressing this is to say that the door-shutting norm of Peter has acquired *existence;* the said directive has become effective. Peter does not comply with his father's request because today he feels like pleasing his father, because he fells a draught, or because he is against open doors in general. Peter is (now) shutting the door because he feels a general *obligation* to do so and, according to Ross, this is something quite different from the mere door-shutting acts.

In the *real world* a *factual* behaviour with accompanying emotional motivation can be observed, corresponding to the pattern of behaviour suggested in the directive. In fact, Peter does go about shutting doors, but he does so—and this, according to Ross, is the decisive point—because he fells he *ought to* do so, which is a different and much more complicated thing.

An assertion to the effect that, in fact, monkeys climb trees is not an assertion to the effect that a tree-climbing *norm* exists among monkeys.

In quite a similar way, the doctrinal, legal proposition is, according to Ross, not a proposition to the effect that, in fact, this or that judge acts in this or that way now or in numerous cases. The doctrinal assertion is not only an assertion of mere legal *acts;* on the contrary, it is an assertion of a certain legal directive having become effective in the sense that, in the real world, a certain pattern of behaviour can be observed among (Danish, Swedish, American, etc.) judges who follow this particular pattern of behaviour because they feel bound to do so.

As we shall see, inevitable contradictions lie hidden in these very thoughts.

We now revert to Ussing's statement.

Inasmuch as the doctrinal assertion *P* of the acceptor's obligation to pay his bill is a proposition, i.e. a proposition stated with the intention of informing the reader, it further follows from the concepts evolved by Ross in his book *Directives and Norms* that such a proposition might be rendered as a topic and an indicative operator, which indicates that the topic is thought of as real. Whether the proposition is true or false is immaterial in this connection.

According to the explicit representation in the book *Om ret og retfærdighed* (for instance on p. 51), which is by no means repudiated in *Directives and Norms,* in fact quite the contrary, the doctrinal proposition *P* always has the following form according to its semantic meaning content:

D is valid (Danish, Swedish, American, etc.) law or similar:

D is existing law (law in force) in Denmark, Sweden, America, etc.,

in which *D*=sec. 28 (1) of the Bills of Exchange Act.

The doctrinal proposition may, says Ross, be rendered as follows (cf. also the formula at p. 51 in *Om ret og retfærdighed*):

P=(D) is existing law (in ...)

But how are we now going to transcribe this doctrinal proposition into the formula from *Directives and Norms*? As far as I can see, there are three, and only three, possible solutions, namely:

(1) We just formulate the proposition as:

P=(Payment of bill) So it is. *But this will not do.* As we have just seen, the doctrinal proposition must, according to Ross, be something other and something more than the mere assertion that certain bill-paying acts are actually being performed or are actually enforced. There is a difference between stating that Peter is shutting the door and stating that a door-shutting norm is valid (exists) for Peter; this is, moreover, in conformity

with Ross's well-known and fundamental results within jurisprudence, according to which the doctrinal proposition is always something other and something more than an assertion of certain acts being performed. It is an assertion of a certain legal directive having become socially effective (cf., for example, Ross in *Om ret og retfærdighed,* pp. 45–6, p. 50, and pp. 88–9, and also the equation above from p. 51).

Consequently, we must instead retain the directive *D* as part of the equation.

According to the conceptual structure stated above, quoted from *Directives and Norms,* the directive *D* abstracted from sec. 28 of the Bills of Exchange Act must be formulated as follows: *(Payment of bill) So it ought to be.* As we have seen earlier, the meaning content of the provision in sec. 28 is a directive to the courts telling them how to act in a certain situation, namely when an acceptor has failed to pay the bill of exchange on maturity. When, in this situation, all the necessary conditions are fulfilled, the directive attempts to influence the judge to enforce the payment of the bill. Consequently, in the equation $P=(D)$ is existing law (in ...), we can replace (D) by *(Payment of bill) So it ought to be.*

Reverting now to the doctrinal proposition quoted above, we can formulate it in two ways:

(2) We can render the proposition by using the formula:

P[(D) is existing law (in ...)] So it is.

In other words, we insert the formula for *D*, and get:

[((Payment of bill) So it ought to be) is existing law (in ...)] So it is.

This will not do as, obviously, the proposition *P* contains in itself the contents of the square bracket, cf. the original quotation above. Thus we have, in reality, written: $P=(P)$ So it is. This seems to be devoid of meaning. Naturally, a proposition cannot constitute its own topic, and if such a formula were to be accepted, we should be led into an infinite procedure as, in such a case, we should be able to formulate the proposition in the brackets on the right-hand side of the equal sign in accordance with the formula given in *Directives and Norms.* What would such a formula look like? Maybe as follows: $P=$[(P) So it is] So it is?

(3) Thus, *only* the third, and last, solution is available to us, namely, to formulate the doctrinal proposition according to the formula $P=(D)$ So it is. Indeed, this seems to be in accordance with Ross's own assumption, i.e. that the assertion that a certain legal directive is valid (Danish) law is the same as asserting that the directive is no longer a mere proposal or a figment of the imagination but has now become effective, it has come into existence, and a socio-legal norm has been established in accordance with

the content of the directive.[8] Previously it was a purely "ought-to-be" category; now it has become an "is" category.

But now we are near the brink of the precipice.

For when we insert the previously found formula for the directive *D* in the equation $P=(D)$ So it is, we inevitably reach the following result in respect of the proposition of the acceptor's obligation to pay the bill on the day of maturity, namely:

$P=$[*(Payment of bill) So it ought to be*] *So it is*

As far as can be seen, we have now plunged headlong into the abyss.

The indicative operator "So it is" indicates that the topic attached to this operator is seen as something "real".

As will be seen, the topic is here expressed by *(Payment of bill) So it ought to be,* but it seems to be absolutely inconsistent with the formation of concepts and the conditions therefor as formulated in *Directives and Norms* to conceive of *such* a quantity as something *"real"*.

An explanation of the concept "topic" will hardly be found anywhere in the book. From the outline of the concept "directive" as well as the concept "proposition", however, it appears that, beside their operators, both of these concepts contain a constant called a topic in the proposition, and an action-idea in the directive, and these refer to certain acts or objects, about which it is indicated through the operator that they are either conceived of as real or are proposed as patterns of behaviour (cf., for instance, *Directives and Norms,* p. 10 and pp. 70 ff.), but that the proposition or the directive *as such* can hardly be a topic. This is, however, precisely what the directive has now become. The directive *D as such* must consequently now be considered as real; but this seems to be devoid of meaning as, at the same time, the directive must be a purely abstract, semantic quantity. "A directive is the meaning content of certain linguistic constructions; it is, consequently, an abstraction which lacks independent existence ..." (*op. cit.,* p. 80, see also p. 4).

Ross nowhere explains what he really means when stating that a certain topic is "conceived of" or "thought of" as "real". Reference can be made to *Directives and Norms,* pp. 12–13, where we are only told that there "... is a close connection ..." between "... the conditions under which a topic can legitimately be called real ... and the conditions under which the proposition corresponding to the topic may be called true". We can also refer to p. 35, where Ross seems inclined rather to maintain that there can be no

[8] Cf. Ross in *Directives and Norms,* § 21, *Om ret og retfærdighed,* § 2, *T.f.R.* 1969, pp. 395–6, and in his book *Skyld, ansvar og straf* ("Guilt, responsibility and punishment"), Copenhagen 1970, p. 60 with note 3, in connection with which see Preben Stuer Lauridsen, "Kommentarer til et normbegreb" ("On a certain concept of norms") in *T.f.R.* 1972, p. 106.

problems in connection with the understanding of the said terms, as "the thought of something as real corresponds to the thought of the proposition as true". I cannot see that this takes us any further, for our problem is still to get an explanation of what Ross means by this "thought" of something as "real", which, indeed, must be the decisive difference between, e.g., the directive and the proposition, an indication of this being attempted by the use of the two different operators, "So it ought to be" and "So it is". We have now been told that Ross means the same as the thought of the characteristic element of the proposition, namely, that it may be expressed as an assertion, i.e. as true, but this only gives us a reformulation of our problem in a different and not less inexact terminology.

Nor does Ross in his essay "Retlige fiktioner" ("Legal fictions") in *Festskrift till Ingemar Hedenius,* Stockholm 1968, pp. 255 ff., give any further explanation of what is meant by "thinking of something as real". It is merely emphasized that this is not the same as holding the proposition to be true (p. 263), but this hardly amounts to anything more than an underlining of the difference between the semantic and the pragmatic levels as fundamentally adopted in theory. According to Ross, the topic is, of course, "thought of" as "real" even in a proposition held to be false. In *Philosophy Forum,* 8 (1970), p. 38, Ross only says "... that there is *some connection* between the conditions under which a topic can be called real and the conditions under which the corresponding proposition may be called true; and again that there is a connection between the truth-condition and various established verification procedures" (my italics).

Ross's failure to give an explanation of what is meant by "thinking of" or "conceiving of" something as "real" is, of course, all the more regrettable in that it is evidently in this very concept that the whole problem resides.[9]

With reference to the foregoing discussion of the question whether the directive *D* itself can be "thought of" or "conceived of" as "real", there seem to be two possibilities:

(1) Against the criticism expressed and in order to evade the problem raised, Ross may maintain that, in the last resort, his opinion is that concepts as such may "exist", that the concept "Arne" or the concept "directive" or "proposition" may exist as such and as a sort of realization of a world of mental phenomena and that, consequently, such concepts may also be "thought of" or "conceived of" as "real". As will be seen, such an interpretation would probably serve to repudiate the criticism stated above; but at the same time it is incompatible with the conditions laid down by Ross himself, according to which it is not the directive *as such* that can

[9] See presumably similar ideas of the Norwegian lawyers Ole Rømer Sandberg and Nils Kr. Sundby in *T.f.R.* 1970, pp. 396–7.

attain "existence" but, at most, the *acts,* etc., brought about by the directive as action-*idea*—suggested to be executed as "a pattern of behaviour". And, likewise, such an evasion seems to be a child of natural law and certainly contrary to Ross's general view of concepts as technical means of representation (see, for instance, *Om ret og retfærdighed,* chaps. V, VI).

(2) Or, Ross may maintain that what can "exist" and, consequently, can be "thought of", or "conceived of", as "real" is *only* the individual cases and the acts by which the *topic* or the action-*idea* are, so to speak, being *realized.* But, if so, the criticism we are concerned with will be quite conclusive, for in such a case the directive as such cannot be said to be "thought of" or "conceived of" as "real", as having "existence", either. And, further, such a solution seems to be contrary to the condition that there must be a decisive difference between the assertion that Peter is shutting the door and the assertion that there is a door-shutting norm for Peter to comply with. A distinction of this nature has, for Ross, been one of the main points in the discussions with, for instance, the Danish sociologist Theodor Geiger.[1] Evidently, the train of thought will soon lead one into a primitive behaviourism, the very thing Ross wants to avoid.

We shall revert below to some other aspects of the problems raised in paragraphs (1) and (2) above.

However, it will get still worse, for now we can also *conversely* turn a proposition into the topic-part of a directive. Let us, for instance, assume that an expert committee makes a recommendation to the effect that a certain rule in the law in force should not be changed. Thus the Danish Commission Report no. 585/1970 concerning the introduction of a purchaser's right to cancel any contract made at his home, runs as follows (at p. 28): "A solution ... might ... be ... obtained by an amendment of sec. 11 (1) of the Trace Act [whereby the prohibition against unwanted applications by door-to-door salesmen, or 'canvassing', would be extended to comprise all subscription contracts] .... However, such a mode of procedure would not be expedient ..." The semantic meaning of such a proposal would, according to the concept defined by Ross in *Directives and Norms,* be a directive, which could be rendered under the formula: (an idea) + an operator. The formula would then be as follows:

D=[(No canvassing) So it is] So it ought to be

The action-idea *(No canvassing) So it is,* is, as will be seen here, in itself a proposition consisting of a topic (no canvassing) with an operator: "So it is." According to the formula above, however, this proposition becomes, at

[1] Cf. *Directives and Norms,* pp. 81 ff., see also Ross in *T.f.R.* 1950, pp. 244 ff.; cf. in this connection Preben Stuer Lauridsen in *T.f.R.* 1972, pp. 109–11.

the same time, *identical* with the "pattern of behaviour" proposed in the directive *D*, since such a pattern of behaviour must, as we know, generally be a characteristic of the application of the action-idea of the directive, as previously pointed out. This seems to be without any meaning.

Indeed, it seems possible for us to carry the process even further, the results being even less meaningful. The recommendations *de lege ferenda* should, according to Ross's theory, properly be regarded as recommendations to the legislature to formulate directives to the courts. Thus, the recommendations are directives for the formulation of directives or—if we take it one step further and emphasize that the recommendations are made to the Government, who will again submit bills to the legislature, to Parliament—directives for the formulation of directives for the formulation of directives. Thus, the original recommendation should by rights be formulated as follows:

D=[[*(Topic 1) So it ought to be*] *So it ought to be*] *So it ought to be,*

in which the last sentence, "So it ought to be", constitutes the operator, whereas the others refer to the topic, which consists of the following parts. The inner square brackets give the final act, the provision, which, in itself, is a directive to the law courts: So you shall act. The outer square brackets give the directive from the Government to Parliament: Such directive to the courts should be passed by you. Finally, we have the whole directive from the committee to the Government: Such bill (directive) to be passed for a directive to the courts should be submitted by you to Parliament. The recommendation is a proposal to the Government to submit a bill to Parliament containing a directive to the courts.

This seems to illustrate how the formation of concepts used by Ross may be excellent as long as the examples are quite simple, such as: "Peter, shut the door", etc. But it also shows how quite ordinary legal examples bring about a complete breakdown of the system.

Incidentally, the same thing would happen if we make the simple linguistic example a little more complicated. The sentence: "Anders, tell Peter to shut the door" contains, according to its semantic meaning, a directive to Anders to formulate a directive to Peter, ordering him to shut the door, and it is not possible to evade the difficulty by assuming that the directive to Anders is "in reality" an indirect directive to Peter in the form: "Peter, shut the door." The person speaking may know that Peter is completely impervious to any directive from him, but that Peter will often obey Anders and, consequently, the directive to Anders is, according to its meaning, a directive to Anders himself, and to no other person, to use his influence on Peter.

Such situations are familiar in daily life as well as in jurisprudence. For instance, an administrative department will often have to obtain the opinion of an expert body, or the latter may even have to give a recommendation before any decision can be made; cf. Poul Andersen, *Dansk forvaltningsret* ("Public Administration in Danish Law"), Copenhagen 1965, pp. 336 ff. To the extent to which the expert body gives an opinion as to what the decision should be, such an opinion is, according to its meaning, an actual directive to the deciding authority (Anders) to formulate a definite directive to the citizen (Peter); at the same time, however, it is evident that the body asked for its opinion is not competent to make a decision in the matter, and therefore its directive cannot be understood as an indirect directive to the citizen (Peter).

8. Finally, we may consider whether it is possible to explain why Ross has come to grief in this way. I think we may be able to find an explanation, and I believe it is to be found in what, in my opinion, is a radical philosophical error committed by him. Space forbids a detailed, thorough discussion of this question and, of course, I make no claim to say the last word on the subject. However, I want to comment briefly on it as follows:

If, in the first place, we consider what we might call a rather primitive variant of the theory of prediction—a variant held by quite a few Scandinavian authors[2]—and if for instance, we ask how it is determined according to such a theory whether theft under, for example, Danish law is punishable, then, in accordance with the fundamental idea of the theory of prediction, this question is to be answered on the basis of an investigation of the conditions under which the assertion that theft is punishable is true; further, this must be tantamount to propounding a hypothesis to the effect that if such a case of theft should be brought before the court, the judge would—other things being equal, i.e. any other rules to the contrary being disregarded—*in fact* sentence the thief for the theft committed. The hypothesis is now confirmed if, and *only* if, the course of events is like that assumed in the hypothesis, i.e. if, in fact, the courts act in conformity with the hypothesis. Consequently, the assertion that according to Danish law theft is punishable is only true if, *in fact,* the courts punish the offender.

[2] See, for example, W. E. v. Eyben, "Gældende ret" in *Festskrift til Alf Ross,* Copenhagen 1969, pp. 97 ff., with reference to other Scandinavian writers. The same point of view is well known from American realism, too, and was formulated as early as 1897 by Oliver Wendell Holmes: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." An excellent account of these viewpoints is given by Ross in *On Law and Justice,* pp. 68 ff. See also Per Olof Ekelöf, "Uttrycket 'gällande rättsregel'. En studie i juridisk terminologi", and Kristen Andersen, "Litt om begrepet gjeldende rett", both in *Nordisk Gjenklang. Festskrift til Arnholm,* 1969, pp. 109–24 and pp. 45–51.

This can be illustrated in the following way:

Doctrinal legal *description* (the assertion) ↓ ↑ legal *reality* (law in action)	*D* is valid (Danish) law ↓ ↑ The factual acts of the courts	Truth or correctness is established through *correspondence* between the doctrinal description and the legal reality described

The figure illustrates that, according to the theory of prediction, one so to speak passes from the description to reality, from proposition to fact, to see whether the object of the description is to be found in the world of fact in which such objects are supposed to be found. If this is so, the description is true. We have described objects that actually exist; if it is not so, it is false; such objects do not exist at all. The problem of truth must be solved in the same manner under the theory of prediction with regard to the description, which asserts that a certain legal directive *D* is valid law, which again means that it is effective, i.e. it has existence and can be observed in actual legal life, law in action, as a norm containing *D*, experienced by the courts as binding and, consequently, actually complied with in their outward acts. If, in fact, the courts act as asserted in the description, this description is true, for thereby we have indeed established that such legal directives/norms can be observed as existing in life. If they do not so act, it is false. No such directives/norms can be observed at all.

In my opinion, however, the theory of prediction disregards—with epistemological consequences—the simple fact that in the same way as the original doctrinal assertion that a certain directive *D* (for instance that theft ought to be punished) is valid law must, naturally, be formulated in a *description,* so the *subsequent* identification, too, of the constituents of the assertion with those of legal reality, which is accentuated in the theory of prediction as the decisive phase of the establishment of correspondence, can only be formulated through the language, by giving a *description* of facts, namely a description of the topic we call "the factual acts of the courts".

Apparently, realistic jurisprudence has never seriously considered the consequences of this simple fact. The realists have never seriously tried to solve the main problem, namely the explanation of the *nature* of the *relation* of correspondence between the doctrinal description and the corresponding legal facts.[3] If they had, they would presumably also have realized that, logically, the process of new descriptions required to establish the truth of the first assertion can be carried on *ad infinitum.* For we must now ask how

[3] On the problem of distinguishing between the *nature* of (doctrinal) truth (or correctness) and the *tests* for truth in relation to Ross's theory, see note 7 below.

the nature of the correctness of the *new* description is to be established. Under the theory of prediction this must necessarily be effected through a confrontation with the legal reality, but, in this case, with which part of reality? It could not possibly be the same acts performed by the court again, we must suppose; but if not, then what? The practice followed by the Ministry of Justice or, maybe, the flimsies filed in the Ministry of Commerce? And in any case the observations, if any, of such novel legal practice must, of course, *in turn* be formulated through yet *another* description, and how is this (so far the third) description then thought to be verified?

The conclusion is that, irrespective of what "reality experiment" we may resort to under the theory of prediction for the purpose of establishing correspondence between the doctrinal legal description and the legal facts, such an experiment will, as mentioned, involve certain *new* descriptions; naturally we must then ask how to decide whether such *new* descriptions are correct, or, in the terms used in connection with the theory of prediction, how the truth of the assertions contained in the new descriptions is thought to be established.

The assertion that theft is punishable under Danish law is, in accordance with the theory of prediction, true if, and only *if,* thieves are, in fact, punished by the courts. But whether this is the case—whether theft is "in fact punishable by the courts"—is something we cannot establish by closing our eyes, listening to the chirping of birds, or by perceiving, intuitively and once and for all, the "character" of the reactions of the legal system, whatever that may mean. Unless we are willing to postulate the possibility of an intuitive, *a priori* cognition which need not be expressed in any language—and what realist would agree to that?—the relation between the assertion and the fact can only be established by the making of a *new* assertion; in fact, this is how the courts act in such cases. But how is it then decided whether the courts "in fact" act like that in such cases? Well, if we suppose that, as for instance within psychology, we could set up an experiment, catch a thief, bring him before the court, bring the proper charges, and then see what might happen, the proof obtained in this way of whether the assertion is true or false would again presuppose a *new* description containing assertions about the course of the experiment and what is proved thereby. Again, how is the correctness of such a *new* description thought to be verified? According to the theory of prediction, the answer will permanently and for ever be hidden in a future series of events and in the confrontation of description with this future reality, and presumably we should then, for instance, have to carry through a new experiment for the purpose of verifying the description of the first exper-

iment, and this new experiment would, of course, have to be described, too ..., etc., etc.

Thus, the answer given by the theory of prediction to the question whether theft is punishable seems inevitably to lead us into an endless chain of descriptions. All things considered, the answer to the question may be formulated as follows: Theft is punishable if, and only if, theft is punishable—and it will only be so if theft is punishable. This is no more than a tautological expression of an inane platitude.

Consequently, we must correct the theory of prediction in the following manner:

Description 1:	*D* is valid Danish law
Description 2:	The factual acts of the courts (1);
Description 3:	The factual acts of the courts (2);
Description 4:	The factual acts of the courts (3);
Description *n*:	The factual acts of the courts $(n-1)$;
.	.
.	.
.	.
.	.

As previously mentioned, Ross's theory of prediction is a good deal more complicated than the primitive variant dealt with above. Among other things, Ross has introduced the concept of *norm* as part of his theory of prediction.

In my opinion, it is possible to prove through a detailed analysis that Ross's concept of legal validity and the corresponding jurisprudiential concept of the existence of the norm also contains a concealed contradiction similar in character to that established in connection with the formulations propounded in *Directives and Norms*. This is, however, not the place for an exhaustive analysis of the problem.[4]

In the present connection, what is important is that the above-mentioned problem of the *endless chain of doctrinal legal descriptions* is also not resolved in Ross's own variant of the theory of prediction.

As we have already briefly mentioned, it is not difficult to see that the chain of descriptions in the theory of prediction can only be brought to an end if we are willing to postulate that the truth of doctrinal legal assertions can be established either through an *a priori* insight into higher *rational* concepts as, for instance, into the doctrines of natural law, or through spontaneous external observations of acts pertaining to legal practice, as in

[4] For a further discussion of the problem, see my book *Studier i retspolitisk argumentation*, pp. 153–60.

primitive behaviourism, and that, consequently, the relation between sentences and facts need not be expressed in any language, need not be formulated in any description. The verification is thought to be completed when a true description has been given, and whether this is the case is decided either by pure reasoning or by spontaneous observation, whereby the result will be immediately apprehended in the same manner by all (good) lawyers. As is now universally known, both solutions are clearly incompatible with the fundamental views held by Ross. If, like Ross, we now try, as it were, to make the general theory of prediction more sophisticated by inserting between the legal reality and the doctrinal description thereof the concept of legal norms as a *scheme of interpretation,*[5] which is not identical with legal practice as such but which should constitute the "*abstract meaning-content*" of these legal phenomena, which only suffers itself to be fully analysed through *ratiocination* and which invests legal practice with its very character of a legal phenomenon (in contrast to so many other existing social phenomena), and if, finally, the doctrinal study of law is turned into a (kind of social) science of *these* norms, not of the phenomena, it is true that, in the first instance, one is saved from the manifest dangers of both natural law and primitive behaviourism. For now it is no longer asserted that it is possible as a matter of course simply and directly to compare the doctrinal assertion with the legal phenomena, with legal reality. The doctrinal assertion is now an assertion *about* the *norm,* and it is that *norm,* not the phenomena, which can be valid. And the norm is *not* identical with the legal phenomena, it is to a certain degree, as maintained by Hans Kelsen, the meaning-content of these phenomena. All this does not, however, solve the problem of the endless chain of descriptions.

Ross's train of thought may be illustrated as follows:

Doctrinal legal description (the assertion):	*D* is (Danish) law in force	Truth or correctness established through *correspondence*
↓ ↑	↓ ↑	
Legal norm:	The directive *D* (socially effective)	
↓ ↑	↓ ↑	
Legal reality:	The factual court-acts with emotional motivation (the legal phenomena)	

It will probably be quite evident that the flaw pointed out above has not been corrected in this version of the theory of prediction either, for if the

[5] Ross's concept of the valid norm as a so-called scheme of interpretation or a reference scheme—see, for example, *On Law and Justice,* pp. 16, 17, 19, 29 and 34—remains unexplained by him. The term is obviously adopted from Kelsen, see *Reine Rechtslehre,* 1934, pp. 4 ff. As argued in my book, pp. 158 ff., the concept seems to lead to contradictions. In Ross's later works he does not use this concept, see for example *Directives and Norms.*

doctrinal description is no longer a direct description of legal reality, but of the legal norm, naturally the truth of the description must, in the last instance, still be established through confrontation with reality in the form of legal phenomena, i.e. the factual court-acts with emotional motivation. This reality must, of course, be described, and again we must ask how we are going to verify the correctness of the *new* descriptions of the said acts as phenomena actually existing; and these new descriptions will still be necessary unless we believe in the possibility of intuitive perception, which need not be expressed in any language, but will materialize spontaneously and in the same manner to everybody.

We cannot solve the problem by saying that we must imagine a kind of *parallelism,* but at different and mutually independent levels between, on the one hand, the doctrinal description of the legal norm to which the criterion of truth is attached, and, on the other, the legal norm as connected with the legal practice (phenomena) to which the concept of validity and social effectiveness are attached. Such a theory might be illustrated as follows:

Doctrinal legal description →	*legal norm*	↕	Truth or correctness established through *correspondence*
legal norm →	*legal reality* (the legal practice, phenomena)		

From this, however, it will be seen that, in the last instance, some form of confrontation between the two levels must be established (for this reason the vertical arrow has been inserted), and so we can say that it holds good under all circumstances that the *correspondence* between the different levels—an essential part of the very idea of verfication through (future) social courses of events—still remains unexplained in details, and that the legal practice, which allegedly constitutes the very criterion of truth, has, of course, still to be described. Again we must ask how the truth of such a *new* description, which is intended to determine the truth of the original description, is thought to be established; and so the process could go on again *ad infinitum.* The postulated psycho-physical motivation of the judge, his alleged perception of the validity of the various aspects of the case and the consequent official acts have still to be described, and thus they cannot in themselves—norm concept or no norm concept—be turned into the criterion of the correctness of such a description but must again be verified through a new description, etc. The introduction of the norm concept thus gives us no solution, but only defers the problem by one or several stages.[6]

[6] The discussion between Ross and myself in *U.f.R.* 1975 B, pp. 229 ff. and pp. 236 ff., has brought no answer to this critical point of view.

9. Now, it is not difficult to see that this part of my criticism of Ross involves rather profound philosophical problems. Ross's theory of prediction is quite plainly—and this is not disputed by him—a special case of what, in a more generalizing and philosophical language, might be called a *theory of correspondence,* which may be briefly explained as a theory on the *nature* of truth[7] or, as I prefer to put it in this connection, of correctness, according to which the truth of an assertion, or better the correctness of a description, depends on whether there is a *fact* to which it *corresponds*—whether it expresses what is the *case.* Consequently, [the description must] according to the correspondence theory [–] be compared with the object it is supposed to describe and with which it corresponds. In other words, the correspondence theory involves the basic idea that truth or correctness is established by comparing words and objects. All theories of correspondence are based on the presupposition that describing an object is to bring to notice already existing characteristics of such object and that therefore the truth or correctness of such description depends on whether the object has, in fact, the characteristics alleged in the description. In exactly the same way, Ross's theory of legal validity is based on the presupposition (1) that any assertion of valid law is equivalent to describing the legal system that already exists and is independent of language and cognition; (2) that, further, this is to point out qualities of this existing legal system, and (3) that, consequently, the correctness of the description depends exclusively on its correspondence with that legal system. If the

[7] It is customary to distinguish between the *nature* of truth and the *tests* for truth, a distinction rather similar to the distinction between "begrebsindhold" and "begrebsomfang" which we know from Scandinavian philosophy. See, in general, Arne Naess, *Interpretation and Preciseness,* 1953, especially in chap. IV, and, with special regard to some problems in Ross's concept of a legal rule, Harald Ofstad in *Filosofiske Problemer,* 13–15, 1949–50, pp. 1–83, cf. Ofstad in *T.f.R.* 1952, pp. 38 ff. There are three traditional theories as to the nature of truth, namely the correspondence, the coherence and the pragmatic theory; see, on these theories and on the problem in general, Runes, *Dictionary of Philosophy,* 6th ed. London 1964, pp. 321–2, cf. p. 68.

This distinction is not used explicitly by Ross and it seems difficult to decide whether he accepts it or not. In all the central parts of his most important works on the legal problems, his theory of prediction is clearly a theory both of the truth of and of the tests for (doctrinal) truth within jurisprudence; see *Om ret og retfærdighed,* pp. 52–3 and 55 ff., and *On Law and Justice,* pp. 39–40 and 41 ff. But in other parts of these works we find sentences and viewpoints which perhaps may be interpreted in favour of the understanding of his predictive theory as a theory of only the nature of (doctrinal) truth; see, for example, the Danish edition, pp. 62 ff., and the English edition, pp. 49 ff. I consider my critique to be valid no matter how Ross's thoughts are interpreted.

It should, finally, be mentioned that a profound analysis of the concept of a norm from a jurisprudential as well as a philosophical and to some extent also a sociological and psychological point of view has been made by Nils Kr. Sundby in his great work *Om normer* ("On Norms"), Oslo 1974. I am not suggesting that my critical viewpoints will be successful against the ideas of Sundby. This is something that only the future will decide. Sundby's work has been reviewed by Strömholm in *Sv.J.T.* 1975, pp. 87–92. See also my review in *U.f.R.* 1975 B, pp. 379–80.

system really possesses the qualities described, the description is correct (or the assertion is true), otherwise it is not (cf. my book *Studier i retspolitisk argumentation,* pp. 141–2, 144 and 149–50).

In his book *Perception og sprog* ("Perception and Language. A Philosophical Essay"), Copenhagen 1972, a philosophical thesis containing no reference to juridical problems, the Danish philosopher Arne Thing Mortensen argues in favour of the view that *any* theory of correspondence is either trite or wrong (p. 64), and can be traced back to a fundamental metaphysical mistake, the so-called ontological flaw, according to which description and existence are linked up in such a manner that the description—the true description—is considered as being projected into the object, as being inherent in the object, so that the object is a kind of physical manifestation of its own description. When applied to language, this ontological postulate leads us to the very apprehension presupposed in the theories of correspondence, namely, that the linguistic system is considered to be derived from a non-linguistic reality. But any such apprehension must be subject to an inevitable circularity, for it is, of course, impossible to describe the nature of the surrounding world except through the use of language (*op. cit.,* pp. 57, 59).

To express the matter in plain juridical language as elaborated here: When one maintains, like Ross, that it is correct to describe theft as punishable in the doctrinal sense of this word *only* if theft is, in fact, punishable, i.e. the thief will be punished, such a concept is based on the presupposition that certain acts done in our world can, as a matter of course and without any use of language, be apprehended as the very acts of punishable theft against which the authorities will use sanctions. But, of course, there is no act which, *in itself,* is a theft, and there is no sanction administered by the authorities which, *in itself,* constitutes a punishment for theft. Conversely, there are, of course, no doctrinal descriptions which, *in themselves,* are better suited to some legal phenomena than to others. Therefore, the answer given by Ross is either trite or wrong. Trite, if it merely says that a description is correct if, and only if, it is correct. Wrong, if it postulates that certain facts in themselves contain certain descriptions, and vice versa.

Obviously we cannot, in this context, deal at length with such a *general* philosophical criticism of a theory of truth and verification that has so many followers within the social sciences. I must confine myself to declaring that I, for one, find the criticism to be cogent and that—so far at any rate—I feel that, in the foregoing and, in more detail, in chap. IV of my book, I have shown that the theory is not applicable in *jurisprudence.* It constitutes the basis of the realistic theory of prediction, and this theory

suffers from the fundamental flaw mentioned above, which seemingly may derive from the very assumption of truth and verification established through a one-to-one correspondence with reality. In its specifically jurisprudential formulation this assumption may be expressed as follows: A doctrinal assertion is true if, and only if, it is possible to demonstrate in *social* reality an existing or valid *norm* answering, or corresponding to the content of the assertion. The *existence* of legal norms is *the same* as *the quality of validity* of such norms, which again is an expression of a "certain social *effectiveness*". Consequently, the existence of legal norms depends on the "*real*" or "*social substratum*" of these norms, namely, the so-called "*application* thereof by the *courts*". To recognize law is to recognize this reality. "There is but *one* world and *one* cognition. In the last instance, science as a whole bears on the *same* internal connection of *facts,* and all scientific factual statements ... are subject to verification by experience" (cf. Ross, *Om ret og retfærdighed,* pp. 42, 47 and 82 (my italics)).

On the basis of such fundamental, realistic views, one might feel inclined to *reject* the above-stated criticism of the theory of prediction as misleading. One might argue that although it is, of course, true that the observations made within legal doctrine of the factual acts of the courts can be imparted to others only through a (doctrinal) description, this does not eliminate the real point of the theory of prediction, for it is still the case that some descriptions are obviously true simply because they correspond completely to reality, while, conversely, others are false for the very reason that they do not so correspond, and this implies that the chain of descriptions outlined above, which the criticism maintains, in principle, to be endless, is not so at all. The chain will, of course, end when such undeniably true description has been given. The fact that it may be necessary to formulate three or four, or even more, mutually coherent descriptions before the legal situation is formulated in a form as clarified as possible is well known to any lawyer who has worked on legal problems of even a modest degree of complexity, and this does not eliminate the essential point of the theory of prediction, namely, that the truth of the description is established through a direct confrontation with reality. This is, indeed, in agreement with the fact, which is evident to everybody, that the legal system works no matter whether it is described by legal writing or not. The description cannot add a jot to, or subtract a jot from, the legal system in force, which exists and functions independently of dogmatic law and jurisprudence.

The criticism put forward seems to presuppose that any description, whether it be no. 1, 2, 3, or *n,* may, as it were, be freely chosen by the lawyer, thus presupposing the absurdity that the person working out a description can, through that description, turn, for instance, the factual

acts of the courts into anything he chooses if only he displays sufficient imagination and doctrinal acumen. For without such a presupposition the critic of the theory of prediction must admit that, of course, the verificatory process can, and must, end when a true description is obtained, and thereby, as already mentioned, the very foundation of the criticism would collapse. And, it is a fact that the presupposition is false. For we might very well try to describe a conviction as an acquittal—it is still a case of sentencing unless one chooses to put forward the absurd postulate that, through our descriptions, we should be able to produce valid rules of law and judgments delivered by the court. This is, of course, impossible.

The *answer* to such objections is, in the first place, that they evade the decisive problem, still leaving unanswered the question *how* the followers of the theory of prediction have really imagined the prescribed confrontation between description and reality to take place. They have never explained in detail what they mean when maintaining that it is possible, in actual legal life, to "*ascertain*" legal phenomena "*answering to*" or "corresponding to" the contents of the prediction. Presumably, the reason is that the idea of establishing truth and securing verification through (direct) confrontation with legal reality seems to fit in entirely with our most ordinary, everyday experience, and in its commonplace triteness it will usually not be subjected to any serious consideration. The fact that theft is a punishable offence may presumably be ascertained through a brief look into the practice of the law in everyday legal life.

Obviously, it is a difficult problem—which we shall not discuss fully here—to formulate a legal theory of doctrinal truth and verification to replace the theory of prediction. I have tried in my book to suggest some fundamental features of such a theory on the basis of what we might, with some simplification, call a *theory of coherence,* i.e. a theory according to which a proposition is true in so far as it is a necessary constituent of a systematically coherent whole; see, for a further explanation, chap. V of the book.

Such legal theories of coherence presuppose that any doctrinal description of what we call the law in force implies a *choice* of description, and when a large number of doctrinal descriptions seem, according to our experience, to be immediately correct, the reason is not that they correspond completely to certain socio-legal phenomena but, on the contrary, that the number of choices forming integral parts of the description will, according to doctrinal and jurisprudential tradition as such, be so cogent to any lawyer that they are rarely noticed at all. In accordance with this fact it must still be asserted that, unless the followers of the theory of prediction imagine that legal practice and the so-called judicial phenomena are being

perceived intuitively and in an identical manner by anybody having sufficient jridical insight and understood by everybody in absolutely the same way—by listening to the chirping of birds or maybe by way of a revelation—and therefore, will need no inter-subjective communication, any explanation of any observations made and the communication thereof to others must, under *all* circumstances, be made by way of a new doctrinal *description.* And so we start again on the chain of descriptions under the endless procedure of verification characteristic of the theory of prediction, in quest of a legal reality which will never manifest itself but will constantly move further away *ad infinitum. Further,* the objection now put forward derives from a misapprehension of my criticism.

It is evident that a description cannot, of course, bring about anything at all, cannot bring about a judgment or, for instance, turn a conviction into an acquittal, but this constitutes no objection to the criticism in question. If, as is undoubtedly the case, it is erroneous to describe a conviction as an acquittal, this is, indeed, not because the "acquitting" description is "contrary to reality". The result is only a commonplace consequence of the general view that, if it is correct to describe a certain judgment as a conviction for theft, it is, of course, implied that it is not correct to describe it as, for instance, an acquittal, even though some person or other might take it into his head to do so.