THE EXPRESSION "VALID RULE": A STUDY IN LEGAL TERMINOLOGY

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The Norwegian scholar Frede Castberg, in his *Forelesninger over Rettsfilosofi* (Lectures on the Philosophy of Law) opens the chapter on "Rettens gyldighet" (The Validity of Law) with the following statement: "This brings us to one of the central points in the discussion of the 'realism' of the Scandinavian school of legal philosophy."[1] In the Nordic countries discussion of the validity of law seems in fact to have no end. At the same time as the present paper was published in its Swedish version, the topic was treated by three other Scandinavian scholars, one Danish, one Norwegian and one Swedish.[2] Generally speaking, the meaning of "valid" in such expressions as "valid law" and "valid legal rule" seems to be one of the most intensely discussed problems in modern jurisprudence.[3] Practising lawyers have, on the other hand, shown little interest in the problem, a fact which may seem curious.

However, Julius Stone speaks in his work *Legal System and Lawyers' Reasonings* of the situation arising "when lawyers are confronted with the problem whether a given norm is a valid norm for the case in hand".[4] And the Norwegian writer Aubert, in his essay in the Papers dedicated to Frede Castberg, stresses that "the aim, both of scholars and decision-makers, is in the end to arrive at a conclusion of the form 'X is a valid rule of law'."[5] These statements seem to imply that it would, after all, be of

[1] Oslo 1965, p. 35.

[2] W. E. von Eyben, "Gældende ret" in *Festskrift til Alf Ross*, Copenhagen 1969, pp. 97 ff., Kristen Andersen, "Litt om begrepet gjeldende rett" in *Nordisk gjenklang. Festskrift til Carl Jacob Arnholm 18. desember 1969*, pp. 45 ff., and Stig Strömholm, "Till definitionen av begreppet rättsregel", *Sv.J.T.* 1969, pp. 168 ff.

[3] The latest monographic treatment of this subject is, so far as I am aware, Rupert Schreiber, *Die Geltung von Rechtsnormen*, Berlin 1966. Schreiber's views diverge in many respects from those expressed in the present paper. A critical review of his work is to be found in *A.R.S.P.* 1968, p. 159 (I. Hruschka).

[4] London 1964, p. 202.

[5] *Legal Essays. Festskrift til Frede Castberg*, Oslo 1964, p. 55.

great value to practising lawyers to know the distinction between a valid rule and one which is not valid. Stone says that the following constitutes another way of expressing the problem stated in the quotation above: "... whether that norm satisfies the requirements which would make it a norm of the legal order in question". Let us assume that the only point at issue in an action is one of law and that the judge is in doubt whether his decision should be based on rule X or on the different rule Y. Judging at any rate from Stone and Aubert as quoted above, the answer to the question confronting the judge depends on whether X or Y *satisfies the requirements which would make the rule valid law.* It is the signification of the phrase now emphasized in a situation such as the one just outlined that will be the subject of some scattered reflections in the present article.

I must first, however, touch upon the sense in which I use the expression "legal rule". In conformity with ordinary usage it is *statements* and not *facts* that I designate in this way. There is reason to stress this, as the expression "legal rule" has also been used to denote a factual regularity in the actions of public authorities—a view which, for instance, my compatriot Ingemar Hedenius has been thought to advocate in his work *Om rätt och moral* (On Law and Morals).[6] The *norms* which regulate the behaviour of the authorities he instead calls by the name of "provisions"; it is these latter ones which *I* designate as "legal rules". Provisions on the statute book are a kind of legal rules. But there are of course others, e.g. those embodied in judicial decisions.

A rule in the sense contemplated here is not a "theoretical" but a "practical" statement. It is not a proposition as to the nature of reality, it merely states that something shall or may happen in certain specified circumstances. It follows that the categories "truth" and "falsehood" are inapplicable to rules. They cannot, at any rate, be true in the same sense as propositions. This seems to be in accord with ordinary linguistic usage. We are not in the habit of saying that one rule is true and another false. But it may appear, at least at first sight, as if it were otherwise with regard to statements concerning the validity of such a rule. In an essay on "The Notion of Validity in Modern Jurisprudence" the American writer Christie points out that "Although legal norms cannot be said to be true or false, statements that a particular norm is

[6] Ingemar Hedenius, *Om rätt och moral,* Stockholm 1941, pp. 117 f., and Tore Strömberg, *Inledning till den allmänna rättsläran* (offset), Lund 1970, pp. 13 f.

valid can be either true or false."[7] We shall return to this problem later on.[8]

In this paper I shall not deal more particularly with the nature of legal rules—a topic which has interested the Scandinavian scholars Karl Olivecrona and Alf Ross, among others. Nor shall I, consequently, treat of the problem concerning the difference between legal rules on the one hand and moral and conventional norms on the other. In primitive communities there is no difference between the two species, but the boundaries between them are more or less blurred on higher cultural levels too, no matter what criteria are used to ascertain that level. There might be mentioned, by way of example, the much-discussed question whether the rules of public international law are "rules in the strict sense" at the present time. When I hereafter speak of "rules" I shall confine myself to typical ones, whose character of elements of a legal system is altogether unquestionable.

When the quality of being "valid" is ascribed to a rule, it is implied that the validity of the rule is limited both territorially and in point of time.[9] Such a rule is only valid within a specific area, e.g. Norway but not Sweden. It is, further, only valid for a limited space of time. *Magnus Lagabøters lov,* from the 13th century, was once valid Norwegian law, but is so no more. When it is said that a rule *is* valid, it is implied that this is the case at the present time. It also seems as if nothing would be characterized as a legal rule unless it either once has been valid, or possesses that quality at present.[1] A proposed bill is not a statute and its clauses are not referred to as statutory provisions or legal rules. In the designation "valid law" we sum up all those rules which are valid at the present time. Finally, it may also be observed that the use of elliptical expressions is common; for instance, when someone speaks of "Norwegian law" or says that a particular norm is a "rule" the qualification "now valid" is almost always tacitly understood.

I shall now, in passing, touch upon a problem which concerns certain peculiarities of Scandinavian and German linguistic usage. The

[7] George C. Christie in 48 *Minnesota Law Review* (1964), p. 1050.

[8] See below, pp. 72 ff.

[9] Cf. the account in Schreiber, pp. 46 ff., of von Wright's theory of "generic propositions".

[1] Albert Fuchs (*Die Rechtsgeltung,* Vienna 1933, p. 10) says that the proposition *Dieser Rechtssatz gilt nicht mehr* is self-contradictory. This view must be due to his overlooking that the validity of a legal rule always is limited in point of time.

adjective normally used in Swedish for the English "valid" in "valid law" or "a valid rule" is *gällande,* which really means "in force", "current". The language does not, however, offer a corresponding noun, and one is accordingly thrown back on a word with a different (though related) stem, viz. *giltighet.* This word is associated with the adjective *giltig* which, perhaps more closely, corresponds to the English "valid". Now certain legal writers, probably influenced by the only noun available, use this word *giltig* as synonymous with *gällande,* which latter adjective is clearly the normal one in the present connection. These writers speak, for instance, of a *giltig* (valid) rule in absolutely the same sense as they do of a rule that is *gällande* (in force).[2] It is doubtful whether this usage is a happy one for Swedish conditions. At any rate a distinction, which could be useful, is lost. The terms *giltig* and its negation *ogiltig* ("invalid", "void") are mainly used in the law of contract. It should be added that there is no corresponding negation of *gällande.* A contract is *giltig* when there are no circumstances rendering it void, but is *ogiltig* if, e.g., one party has been guilty of fraud. But to say that a statute which is no longer in force is *ogiltig* (void) would sound strange to Swedish ears.

Suppose now, however, that a statutory instrument has been made by an administrative authority which lacks the necessary competence. Or take the case that the instrument was made by a competent authority but that its contents are *ultra vires* by being incompatible with rules of a higher hierarchical order. It may seem natural in such a case to characterize the instrument as *ogiltig* (void). This choice of language would thus seem acceptable when someone claims that a rule of law is in force at the present time whereas this is not so for some such special reason as has just been indicated. It is also quite possible, on the other hand, to say that the vitiating element has made the rule *ej gällande* (not in force).

Let us now pass to the question as to the *criterion* of a valid rule. My reason for formulating the question in this fashion is that I wish to avoid speaking of the *meaning* of the word "valid" in the expression "a valid rule". I shall otherwise run the danger of being told that I am mistaken as to the meaning of "meaning". And I have concluded from previous controversies on these matters that I had better avoid getting involved in them. Nor is it necessary in order to answer the question put at the beginning of

[2] It appears to me that Ross must have overlooked this in *Directives and Norms,* Copenhagen 1968, p. 104. Ross's reflections seem to be bound up with the fact that the English "valid" corresponds to the word *gällande* as well as the word *giltig.* Cf. Ross's pronouncement in *On Law and Justice,* Copenhagen 1958, p. 36: "Fundamentally, validity is a quality ascribed to the system as a whole." See, too, Ross's criticism of Hart in 71 *Yale Law Journal* (1962), p. 1190.

this paper to ascertain the meaning of the expression referred to. A lawyer who is faced with an actual legal situation of some intricacy will be quite content if he knows what circumstances have the significance of rendering a particular rule a valid one.

Leaving out of account certain of the cases referred to above in which a statutory instrument is void, the criterion in question is evidently not to be sought in the content of the rule.[3] The relationship of one sort or another existing between the circumstances we are looking for and the rule must instead be a relationship wholly independent of the rule's content. The discussion in this matter has mainly revolved around two types of criteria, each totally distinct from the other, which I shall call the sociological type and the normative type.[4] According to the school that has propounded the first-mentioned type of criteria, a rule is valid if it is obeyed by those to whom it is addressed. It is more difficult to characterize briefly the normative criteria. As will be shown later on, however, we are here, *inter alia,* concerned with concrete circumstances existing before or at the time when the rule became valid. We shall return to the reason for labelling the criteria of this type "normative" ones.

To begin with the sociological type of criterion, it seems that this has generally been regarded as consisting in a requirement that the rule in question is in fact applied by the courts and administrative authorities. This is the view adopted by the Danish scholar Alf Ross in his well-known work *Om Ret og Retfærdighed* (On Law and Justice).[5] It is true that another possibility is offered by using the observance of the rule by the citizens as the criterion of validity. For at any rate the rules of civil and criminal law may be regarded as addressed to the public quite as much as to the courts.[6] But this latter view seems to have played a much less significant role in the theoretical discussion and I shall therefore refrain from dealing with it.[7]

[3] I also leave out of account here problems of natural law. As to the relation between positive and natural law, see the recent paper by R. E. Hill, "Legal validity and legal obligation" in *Yale Law Journal* 1970, pp. 47 ff.

[4] Ulrich Klug ("Rechtslücke und Rechtsgeltung" in *Festschrift für Hans Carl Nipperdey,* Munich 1965) uses instead the expressions "real" and "legal" validity. Schreiber speaks of "actual" and "constitutional" validity. To the recommendations of a legal writer as to how a statutory provision should be applied Schreiber ascribes "idealistic" validity.

[5] Copenhagen 1953, London 1958.

[6] See my essay "Förhållningsregler och domsregler" in *Festskrift tillägnad Karl Olivecrona,* Stockholm 1964, pp. 166 ff.

[7] Otto Brusiin (*Über die Objektivitet der Rechtssprechung,* Helsinki 1949, p. 16), however, employs a cumulative sociological criterion. To be valid, a

There can hardly be any doubt that Ross's definition may be useful in a work on legal sociology or legal history. As has often been pointed out,[8] however, the definition is not so well suited for the situation which is being considered here; nor, probably, was that Ross's intention. It may, of course, happen that a lawyer who is in doubt which of two rules is valid will ask himself which rule would be applied by a court of law if an action were brought on the matter. Counsel, in particular, are sometimes absorbed in such speculations. But in such cases it is usually a particular judge of first instance that the lawyer has in mind, a judge whose mode of applying the law he knows from previous cases. It is probably less common for a judge to act in a corresponding manner, and if he did timidly adapt his judicial work to the methods of his colleagues in similar cases he would probably not be regarded as a very good judge. In this connection I should also like to quote a rhetorical question put by the American scholar who has been quoted above: "Are we to have one notion of validity when it is judges who are endeavoring to find what is valid law and another when it is attorneys and legal scholars who are so endeavoring?"[9]

There is a further objection, however, to the use of the above-mentioned criterion in the present connection. Ross declares that "a rule may be valid to a greater or smaller extent depending on the degree of probability with which its use can be predicted."[1] And Castberg makes reference to the doctrine of *casus omissi* and says that such cases "concern questions to which the relevant system of law itself offers no unequivocal answer, ...".[2] It is difficult to reconcile these utterances with the use of the expression "valid rule" in the cases concerned. It is not thought proper for a judge to rely on a rule which is *probably* valid as a ground for his decision. Nor is he entitled to declare that no legal rule whatsoever is applicable to a case such as the one before him. The general view is that he is bound to base his judgment on a rule that is valid—whatever this may mean.

Uncertainty as to how far legal rules satisfy a sociological criterion can sometimes be removed by inquiries with the methods

rule must be both applied by the courts and on the whole observed by the public.

[8] See, e.g., Aubert in *T.f.R.* 1954, p. 393, Strahl in *Sv.J.T.* 1955, p. 302, Andernaes in *Juristen* 1962, p. 354, and Strömholm, *op. cit.*, p. 186.

[9] Christie, *op. cit.*, p. 1071.

[1] Ross, *On Law and Justice* (see above note 5 p. 63), p. 45; von Eyben, *op. cit.*, pp. 98 ff.

[2] Castberg, *op. cit.*, pp. 39 f.

of sociology. A few years ago I sent out a questionnaire to judges of first-instance courts and to public prosecutors in Sweden as to the practical application of certain provisions of the Procedural Code. One important question received one reply from fifty per cent of those approached and an exactly contrary reply from the others.[3] What is valid law in such a case if the sociological criterion now under discussion is made use of? Can it be said of a legal rule that it is fifty per cent valid? Its efficacy may be thus limited, but it seems strange to say that this is the case with regard to its validity. And how is a judge who turns for guidance to "valid law" in the present sense supposed to act in such a case? At the same time, however, it does seem reasonable to say that one group of the functionaries approached must have been mistaken as to what constitutes valid law on the point in question.

The efficacy of a rule is not, however, wholly without significance as regards the question whether it is valid or not. The following pronouncement by Hans Kelsen seems to me to be correct: "Although validity and efficacy are two entirely different concepts, there is nevertheless a very important relationship between the two. A norm is considered to be valid only on the condition that it belongs to a *system*[4] of norms, to an order which, on the whole, is efficacious. Thus, efficacy is a condition of validity; a condition, not the reason of validity. A norm is not valid *because* it is efficacious; it is valid *if* the order to which it belongs is, *on the whole*,[5] efficacious."[6] A condition of the validity of a rule is, not that the particular rule is efficacious, but that the legal system to which the rule belongs on the whole penetrates the life of the community. It may be mentioned, by way of example, that a rule of descent of Tsarist Russia cannot be valid at the present time, even though one or two exiled Russians may maintain the opposite for reasons of propaganda.[7] As regards the word "system" in the quoted passage, it need not be taken in the special sense be-

[3] von Eyben maintains (*op. cit.*, p. 105) "that a forecast of the result of an action is dependent on an *historical* investigation of the material which can be drawn from the ordinary sources of law". This is, in my opinion, an entirely impossible method if the point of law in the case is complicated. The only reasonable approach is to base any forecast on an investigation of a large population, in this case as to how a substantial number of judges would deal with the question.

[4] Italics supplied.

[5] Italics supplied.

[6] Hans Kelsen, *General Theory of Law and State*, Cambridge, Mass., 1945, pp. 41 f.

[7] Cf. H. L. A. Hart, *The Concept of Law*, Oxford 1961, p. 100.

stowed on it by Kelsen's pure theory of law. It might be considered sufficient that the rules in question, in some way or other, are related to the same community.

But even at this stage a reservation must be made. A legal rule is said to be no longer valid if it has become obsolete (*desuetudo*). Of this there is hardly any fixed criterion, but there must evidently be a requirement of extensive non-observance. Take, for instance, the situation that practically all courts have entirely ceased to apply a particular statutory provision and that this circumstance has not given rise to criticism from any quarter.[8] In such a case the courts have overstepped the boundaries of their judicial function and are trespassing on a territory which, as a matter of principle, is reserved for the legislature. There will be occasion to return to this situation below.[9]

Let us now leave the sociological criteria and turn to the normative ones.[1] It might seem appropriate, in discussing the latter, to begin by considering Kelsen's doctrine of *Stufenbau und Grundnorm*. This would, however, carry us too far; moreover, Kelsen's constructions do not, in my opinion, contribute to the clarification of the problem we are dealing with here. I shall instead start with a quotation from the Mexican legal philosopher Máynez in his essay "The Philosophical–Juridical Problem of the Validity of Law": "Ordinarily a statute is said to be valid when it has been duly promulgated, and its validity continues as long as there is no supervening act of derogation."[2] A statute would accordingly be valid if and only if, first, it has been promulgated, secondly, the time appointed for its coming into force has arrived[3] and, finally, it has not subsequently been repealed.[4]

[8] This criterion can also be regarded as a normative one. The fact that a provision is obsolete will then entail the same legal consequences as its repeal. Cf. Hart, *op. cit.*, p. 100.

[9] See below, p. 73.

[1] A fundamental idea in Schreiber's work is that certain learned writers have confused the two kinds of validity.

[2] *The 20th Century Legal Philosophy Series*, III, Cambridge, Mass., 1948, p. 461.

[3] Cf. Ross in *T.f.R.* 1967, p. 289.

[4] Dennis Lloyd asserts in his *Jurisprudence*, New York 1959, p. 51, that a distinction must be made between "a definition and a criterion of validity". "A criterion of validity is necessarily relative to the particular legal system. It may of course be the case that two legal systems employ the same criterion of validity, but this would be coincidental.—A definition is relative to a language, a criterion of validity is relative to a legal system."—Lloyd here overlooks the possibility that the criteria of statutory validity according to different legal systems may exhibit such similarities as to admit of the introduction of a general conception based on these similarities. In order to

It is true that the criterion now described fits no other legal rules than statutory ones, but let us for the present confine our investigation to the latter. So far as they are concerned, the criterion seems to be exactly what lawyers make use of in their work. But there are reasons for looking more closely into the nature of the criterion. In doing this I shall set out from H. L. A. Hart's exposition in his well-known work *The Concept of Law* of what he calls "rules of recognition".

"A rule of recognition provides the criteria by which the validity of other rules of the system is assessed."[5] If I understand Hart correctly, his notion of the matter is as follows. He considers, to a certain extent in conformity with Kelsen, that a legal system is made up of rules which are, as it were, on different levels in relation to one another. "Rules of recognition" are on a "higher" level than ordinary legal rules. They provide no patterns to which the authorities and ordinary citizens can accommodate their actions; they merely specify some criterion to be met by the said patterns. The rule that promulgated statutes must be obeyed unless they have been repealed would consequently be a "rule of recognition". Evidently, the material facts to which this rule makes reference constitute the criterion of the validity of statutes. It is this way of looking at the matter which has induced me to characterize such criteria as are now in question as "normative" ones.

The fact that a rule of this nature is applied in legal arguments seems, however, to presuppose that it, too, can be "valid" in the same sense as ordinary rules.[6] But in regard to this, Hart makes the following statement: "No such question can arise as to the

elucidate this a little, the following observation may be made. Property in Norwegian law is not the same as property in Swedish law. But this does not prevent us from using, for the purposes of comparative law, a conception of property which can be employed in describing, in a summary form, the notions of property in a number of legal systems. (Cf. the exposition in Lloyd, *op. cit.*, at p. 52.)

[5] Hart, *op. cit.*, p. 102 (somewhat freely quoted).

[6] G. H. von Wright (*Norm and Action*, London 1963) does not deal with this problem. He says: "The words 'valid' and 'validity', when applied to a norm, sometimes refer to the *existence*, as such, of the norm and sometimes to the *legality* of the act as a result of which this norm came to be." To this I should like to attach the reflection that the promulgation of a statute by the proper authority does not warrant any conclusion as to the legal consequences of the act of promulgation.—The criteria of the "existence" of a statutory provision are, according to von Wright, those mentioned in the text together with the fact that the provision is not obsolete. But he makes the following comment as to this linguistic usage: "To say of a norm that it 'exists' is not ordinary usage, but philosophical jargon, invented for special purposes."

validity of the very rule of recognition which provides the criteria [of the validity of ordinary legal rules]; it can neither be valid nor invalid but is simply accepted as appropriate for use in this way."[7] This view may be explained by the fact that Hart here confines the expression "rule of recognition" to what he also calls "the ultimate rule", which seems to be a notion having some similarity to Kelsen's "basic norm". But I find this terminology inappropriate in the present connection and shall instead use the expression "rule of recognition" to denote each separate rule for testing the validity of other rules.[8] Ordinary rules and their rules of recognition will be found on different levels (or, in other words, the latter are "meta-rules" in relation to the former). But if the validity of an ordinary rule is tested by reference to a rule of recognition in the sense here adopted, there may well exist a rule of recognition on an even higher level—one which might be termed a rule of recognition of the second degree—designed to test the validity of the rule of the first degree. Thus a particular rule addressed to the citizens may be tested by asking whether the organ that issued the rule was competent to do so. It may be found that it had such competence on the strength of a mandate from a higher organ; but then the competence of that higher organ might be queried, and so forth. Regarded in this light, the question of validity is pertinent with respect to rules of recognition on each separate level and there may indeed be statutory provisions on this matter, promulgated according to the procedure laid down for ordinary statutes. It is another matter that perhaps no one may be interested in a never-ceasing search for criteria of validity on still higher levels. Ultimately, each legal system is based on some past act of a political nature, in respect of which no legal foundation whatsoever can be established, e.g. an act of a revolutionary power.

It may seem as if we had now succeeded in explaining what a lawyer, faced with the task of determining what the law is in a concrete case, means by the statement that a statutory provision is "valid". As Hart points out, a rule of recognition is necessarily presupposed when a point of law in, e.g., a lawsuit is decided.[9] As we have seen, the substantive facts to which such a rule makes

[7] Hart, *op. cit.*, pp. 105 f. See, too, pp. 107, 113 and 245 f.

[8] Hart in fact sometimes appears to use the expression in this sense, see Hart, *op. cit.*, pp. 92, 93 and 103 f. A third, and possibly the main, sense employed by Hart seems to be that of the entire complex of rules on different levels determining the validity of ordinary legal rules (pp. 97, 98).

[9] *Op. cit.*, p. 102.

reference serve as the criterion whether an ordinary legal rule is valid or not. And since this criterion consists in the existence of certain concrete circumstances coupled with the absence of others, a statement as to the validity of a provision may be said to be true or false—a view which we assumed to be correct at the beginning of this paper.

To a lawyer, however, what has been said above must appear to be a rather meaningless conceptual drill. What lawyers can be expected to take an interest in is, above all, that the criteria in question should help them *in cases of doubt* to find the applicable rule.[1] The ascertainment whether a statutory provision is valid or not hardly ever gives rise to any difficulty. And it is certainly obvious in most cases, as a result of a purely intuitive reasoning, whether the provision is applicable or not to the case under consideration. But sometimes the situation is not as simple as that and the criteria of validity should be capable of serving as guides in such difficult cases, too.

It must first be observed that it is not the statute as a conglomeration of letters, but its meaning, that is of importance in the present connection. Already the determination of this meaning can cause difficulties. Legislative texts contain, of course, words of everyday usage and expressions which are often vague or ambiguous. It is therefore sometimes impossible to determine with certainty whether or not the situation whose legal significance is being tested is covered by the provision. Let us assume, next, that it is clear to the interpreter that the case before him is not covered by the provision correctly construed. He must then nevertheless reckon with the possibility that the rule is applicable, namely by way of analogy. A final possibility is that the situation in question is obviously covered by the provision as construed, but that the latter should not, after all, be applied to cases of the particular type under consideration, and that the problem should instead be solved by analogy with another provision.

In any of the three situations outlined in the preceding paragraph—borderline case, analogy and exception—the lawyer may obviously be applying a rule which cannot simply be looked up in the statute book.[2] The latter only provides the material from

[1] Andersen (*op. cit.*, p. 48), however, seems to be of the opinion that the consideration of a concrete point of law is based on "valid law" only when the point in question is beyond controversy.

[2] On this topic, see my paper "Teleological Construction of Statutes" in 2 *Sc.St.L.*, pp. 75 ff. (1958).

which a new rule is constructed, to be applied to the situation which is being considered. But what rules of recognition are relevant in such cases? Well, in a case of analogy the rule in question must surely specify the criteria of a correct analogism. *Certain rules of recognition would thus be identical with some of the principles for application of the law.* This opinion, expressed in a slightly different way, is found in Schreiber: "Soll die Lehre der Rechtsgeltung nicht zur Spekulation werden, so muss sie in ihren Erklärungen den ganzen Weg von der Rechtsnorm bis zur Rechtsanwendung einbeziehen. Andernfalls könnte jedes System von Rechtsnormen, das sich an der Lehre der Rechtsgeltung orientiert hätte, durch Hinzunahme geeigneter Auslegungsmethoden verändert werden . . ."[3]

But where, then, should the criteria for determining the validity of a rule of application of law be looked for? Legislatures have rarely ventured to pass laws on the subject. And when this has exceptionally been done, the outcome has been directives that are so vague that all attention has been focused on the principles for applying them. Nor can any *opinio communis* be said to exist in this field among lawyers and scholars.[4] Certain lawyers always manage, by means which are mysterious at any rate to a layman, to make the result reached stand out as being in complete agreement with the plain meaning of the statute in question. Others scrutinize the *travaux préparatoires* and attribute to the authors of the statute intentions of a depth which one would hardly expect them to be capable of penetrating to, while yet others employ a so-called objective teleological method. An account of the various principles of statutory interpretation and application would be outside the compass of this paper, but there is one thing I should like to lay stress on because of its importance in the present connection. Whatever method a lawyer maintains that he is using, his arguments will be based not only on valid rules and assertions as to facts but also—openly or covertly—on value judgments. It is true that the freedom in this respect is far more restricted as regards arguments concerning the current law than when possible

[3] P. 159. Note also the following statement by Strömholm, *op. cit.*, p. 179: "And even the problem of validity can, as soon as we leave the simple cases—e.g. those of provisions formally repealed—, be regarded as a question of interpretation." By "interpretation" Strömholm means what I have referred to as "application of the law"; see further Strömholm's essay at pp. 180 and 189.

[4] Strömholm (*op. cit.*, p. 194), however, takes it for granted that there exists "among the judges an accepted technique of reasoning".

reforms are discussed.[5] But the restrictions, however defined, cannot wholly eliminate all subjective elements from the construction of statutes, unless this activity is to have the character of a purely literal interpretation bordering on imbecility.

But the situation is worse still. In ascertaining the law in concrete cases all modern legal systems make use of precedents as an important complement to statutes and other pieces of legislation. The fact that a decided case is a precedent can be said to imply that it is "valid"—not in exactly the same sense as a statutory provision, but something of the kind. But the criteria of validity in relation to precedents are not as simple and clear as those applicable to statutes. Let us assume that with regard to Swedish law it is contended that those decisions constitute precedents that have been made by the Supreme Court and are reported in the yearly "Part I" of the *Nytt Juridiskt Arkiv* (the semi-official law report). The first thing to keep in mind, then, is the fact that by Swedish law precedents are not "binding" in the same way as valid statutory law. In what circumstances a court should take advantage of its power wholly to disregard a relevant precedent is, however, a question as to which opinions are probably divided. Moreover, the authority of a precedent diminishes with the passing of time, and new legislation can overrule it completely. Either of these matters may be difficult to evaluate in a concrete case. Finally, opinions also seem to be divided on the question whether a decision of a Court of Appeals against which no appeal has been lodged and which is reported in the *Svensk Juristtidning* (the leading Swedish law journal) has the character of a precedent or not.

But now suppose that a lawyer is considering how to apply a previous decision, which *admittedly* is a precedent, to the case before him. He will then often be faced with problems of greater difficulty than when applying statute law. It is true that this need not be so, if a general rule of law is enunciated in the *ratio decidendi*. But that is not always the case. Frequently the court simply enumerates as grounds for the decision certain circumstances, some of them indisputably pertinent, others more peripheral, possibly on account of an unwillingness to decide whether all of them constitute *necessary* conditions for the conclusion reached. In such cases the lawyer must determine whether the situation before him is analogous to the one which was con-

[5] Arnholm in *Sv.J.T.* 1952, p. 511.

sidered in the precedent. My experience is that often this task is more difficult than where it is a question of an analogous application of a statutory rule.

I shall now attempt to sum up the exposition above, however rhapsodical it may have been, to see whether any conclusions can be drawn. It has not been possible to propound any criterion of a valid rule for the use of lawyers in doubtful cases. Normative criteria have turned out to be quite as unsatisfactory as the sociological ones. True enough, as to problems which the lawyers regard as simple, it is possible to say both how the courts ought to, and how they will, decide. The rules then in question satisfy both the normative and the sociological criteria dealt with above. But no criterion at all can be laid down with regard to the difficult cases.

It is striking how seldom lawyers and scholars characterize the conclusions of their reasonings by asserting that a particular rule is "valid law". One reason for this may be that such an assertion would create the impression that the problem solved had been one of pure knowledge. This description may indeed, as we have seen, be regarded as correct when the only question has been whether a statute or statutory provision is valid or not. But take the case of a lawyer who, after having taken stock of the reasons for and against, concludes that such a provision should be applied by analogy to situations of a certain type. If he classifies as "valid law" the rule arrived at in this manner, he will then give the impression that the categories "truth" and "falsehood" are applicable to his conclusion. But this, as we have seen, is an illusion.

The analysis and explication of such expressions as "valid law" and "valid rule" have, as I pointed out by way of introduction, been regarded as central tasks of jurisprudence. I cannot share this view, at any rate with respect to the present situation. An important factor in the measure of legal security enjoyed by a community is the degree to which the decisions of the courts on points of law can be foreseen. This need is met as regards typical cases by legislation, and with respect to doubtful cases by the creation of precedents. The case law cannot, however, be said to fulfil its purpose particularly well. Too often one searches the reports in vain for guidance on difficult points of law.[6] Foresee-

[6] "There is a difference between saying that it is characteristic of a legal system that its judicial decisions are predictable and that it is characteristic of a legal system that all particular decisions are predictable." (Christie, *op. cit.*, p. 1073.)

ability would at least be increased if greater unity than at present could be established as to the principles of interpretation and application of the law. This is the first aim. When it has been achieved, *then* it will stand out as an urgent task for jurisprudence to analyse closely and to explicate those criteria of valid legal rules as to which unity has been achieved.

Such rules of recognition as I am now contemplating—i.e. essentially rules designed to tackle problems of validity in relation to the process of application—would have the further advantage of clarifying the boundary between the activities of the courts in, on the one hand, applying the law and, on the other, creating law *contra legem* as when they, for instance, entirely cease to apply a statutory provision.[7] The criteria of a valid rule are, of course, intended for the former and not for the latter case. The present situation entails a certain risk that the courts will not confine themselves to deciding *contra legem* in those rare cases where the current state of the law appears untenable and yet the legislature does nothing about it.[8] This risk is increased by the fact that "considerations of legal policy" are regarded as appropriate in both cases[9]—a theory which pays no attention to the view expressed above that totally different considerations may be relevant when dealing with a problem of law in force and when possible reforms are being discussed.[1]

Alf Ross says in his *On Law and Justice:* "Any ... normative doctrine of the sources of law, which does not square with facts, is nonsensical if it pretends to be anything else than a project for

[7] This distinction is, in my opinion, far more important than the one made by Ross, *On Law and Justice* (see above note 5 p. 63), p. 46, between the activity of the courts *de lege lata* and *de sententia ferenda*. It is a characteristic of the latter, according to Ross, that the application of law is to some extent based on value judgments. Strictly speaking, however, this is also the case when the judge is basing his decision on the wording of a statute, since he must always, even if he finds the wording inapplicable, *prima facie* count with the possibility that the provision should be applied by analogy to cases of the kind before him or (if he finds the wording applicable) that an exception should, after all, be made from the scope of the provision.

[8] P. O. Bolding (*Juridik och samhällsdebatt,* Stockholm 1968, pp. 100 f.) seems to be of the opinion that the courts ought to enjoy a far greater freedom in this respect than has been assumed in this paper.—The fact, touched on in the text, that precedents are not "binding" to the same extent as statutes, can be said to imply that the courts have a greater liberty to make decisions *contra praejudicium* than *contra legem*.

[9] See, e.g., Hans Kelsen, *Reine Rechtslehre,* Vienna 1960, p. 350.

[1] Schreiber (*op. cit.,* pp. 195 f.) regards application of the law *ex analogia* as a case of *Rechtsschöpfung* (*contra legem*). See, in particular, p. 198 at note 391.

a different and better state of law."[2] I am in agreement with this. But at the same time I should like to stress for my own part that the "project" referred to by Ross appears to me to be a matter of the greatest importance. And to accomplish it three things are needed: research, research and yet again research.

[2] *On Law and Justice* (see above note 5 p. 63), p. 76.