A PROGRAMME OF LEGAL POLICY ON JUDGE-MADE LAW

BY

BERNHARD GOMARD

1. A fundamental feature of the form of government in Denmark, and in many other countries, is the separation of the legislature and the judiciary. Legislative power is vested in a popularly elected parliament and judiciary power in courts of justice to which are appointed independent and impartial judges who in the exercise of their judicial function shall be guided solely by the law.[1] This part of the doctrine of separation of powers dating from the Age of Enlightenment has been preserved even though the legislature and the executive have been drawn closer together through the introduction of parliamentary law.

It would be easy for judges to obey the command to be guided solely by the law in deciding legal disputes if in all cases before them the legal system provided concise and unambiguous answers to what existing law is. But this is not so. Questions keep arising on which the law is either silent or not perfectly clear, or on which there is no decided case and in particular no Supreme Court ruling to go by. Even in areas where court decisions have been made, doubt may arise as to the content or scope of previous decisions. Moreover, it is sometimes questioned whether the conception of law on which previous decisions were based should be maintained.

In Denmark as in other countries, the general conception is that in areas where no law exists, law courts should not ordinarily base their decisions on an appraisal of the merits of each specific case but, rather, endeavour to make rules. This applies also where a general standard has been established by law or custom. The discretion as to what fairness or good practice requires should not be exercised individually in each case, independently of previous decisions. The application of standards by the courts should, as far as possible, lead to the formulation of general guidelines.

Occasionally a legal decision is referred to as being specific, singular, unparalleled or the like. By such assertions is meant that the judge who made the decision felt that he could not or should not take a position on any question other than finding for the plaintiff or the defendant in the case before him. Even such a decision does, however, restrict the freedom in future decision-making. As it is, this restriction is not of a general validity but represents a point which could become a constituent of various possible future guidelines. Consideration for the rule of law and for equality before the law requires that the courts, as far as possible, direct their law-making activities towards devel-

[1] Constitution, art. 64.

oping general guidelines and do not confine themselves to exercising a discretion as to how the problems of a specific case can be solved.

This paper examines whether it would be feasible and useful to establish some guidelines or a programme for the significant law-making or legal policy activity of the courts. Such a programme could conceivably comprise both guidelines of a general character and more special indications of ways and means, with particular reference to some of the many areas which are not subject to regulation by law.

Academic lawyers often regard the judgment pronounced as the given material for their studies. Especially in a society where legislation, attitudes and opinions, way of life, and technology are undergoing substantial and rapid changes, academics should discuss with judges what attitudes and points of view should characterize tomorrow's decisions. Recognition of the courts' limited policy-making role should also lead to recognition that leadership in this area is needed. The courts and especially the Supreme Court have here an important role and should play it openly and clearly.

2. It is generally known and accepted that the courts exercise a law-making function. The need for judge-made law is particularly obvious in a country like Denmark which not even in the field of private law has a code of general validity and scope but only a number of Acts of Parliament, each confined to a particular subject. The Danish Code of Christian V, promulgated in 1683, lost its significance as a source of law long ago, and the legislature has not wanted or been able to bring about a modern code. The need for judge-made law is a consequence of the fact that not all areas are regulated by statute and that statute law is rarely or never exhaustive in scope. Legislators cannot foresee everything and so they often choose, quite deliberately, to leave it to the courts to find solutions to questions of detail, questions not of immediate concern, or questions on which agreement cannot be reached. A statutory text attempting to regulate any conceivable question would be very comprehensive, rich in detail, and would not lend itself to quick reference. If an Act, e.g. by a positive provision to that effect, were made exhaustive, an often-desired flexibility would be lost. However, the courts may choose to regard an Act as exhaustive, e.g. by demanding positive or explicit authority to impose restrictions or provide for arrangements of the nature envisaged in the Act.[2] The courts may also choose to conclude *e contrario* from the cases mentioned in the Act to other cases, always provided that the determinant in each case shall be whether or not the court considers an Act or a legislative rule to be exhaustive. The

[2] Cf. in this context 1977 UfR 1033 H on co-ownership flats and 1985 UfR 135 H on local government plans.

law-making role of the courts is not confined to the large areas in which no statute law exists, such as the law of compensation, the law of guarantees and suretyship, etc.

The people (the electorate) and the legislature have several good reasons to accept that the courts, to some extent, lay down the state of the law. Many of the problems of fundamental importance that have attracted much attention or given rise to differences of opinion have been solved by legislation. The Constitution requires legislation on a number of essential subjects. Tax, for example, can only be imposed by statute.[3] And the *Folketing* (parliament), bound only by the Constitution, can at any time and in any field—if a majority of its members agrees thereon—intervene by legislation and alter the results which the courts have reached on their own.

In several instances the state of law which formed the basis of a judgment delivered in a case of major importance and involving a matter of principle has been altered by legislation because the *Folketing* considered the judgment inappropriate. The reason for differing standpoints of courts and the legislature may be divergent conceptions of how an issue can best be settled; but the reason can also be, and most frequently is, that it is beyond the competence of the courts to alter clear rules of law, create new systems of rules or allow burdensome restrictions without support in legislation. In their law-making activity judges have, quite naturally, subjected themselves to a principle of restraint or caution.

A few examples

In *1975 UfR 1033* the Supreme Court stated that it is not in conflict with the Freehold Flats Act to establish co-ownership in a dwelling house containing several flats if the owners make an agreement to the effect that each of them, in addition to their parts, shall have the right of user of a flat in the house. Immediately after the judgment had been pronounced, the Minister for Housing introduced a Bill on housing societies.[4] The subsequent Act, which was passed by a broad parliamentary majority, prohibited the establishment of such co-ownership schemes in houses with more than two dwellings.[5]

In *1968 UfR 217 H* it was stated that liability for damage caused by fire to a house which is owned by the State and consequently not insured against fire could not lapse under the provision of sec. 25 of the Insurance Contracts Act then in force, according to which there is no general liability for simple negligence for damage to insured property.[6]

[3] Constitution, art. 43.

[4] Now the Cooperative Housing Associations and Other Housing Societies Act, Consolidated Act No. 361 of 25 July 1985.

[5] For further details, see Peter Blok, *Ejerlejligheder*, 2nd ed., Copenhagen 1982, pp. 653 ff.

[6] Now sec. 20 of the Compensation (Liability in Damages) Act 1984 provides that state-owned property is to be considered as insured property even if the State has chosen to stand normal insurable risks itself.

In *1982 UfR 24 H and 315 H,* the Supreme Court allowed public authorities to set off debts and balances in their favour regardless of the fact that the claimants were different authorities and the claims of varying nature. In these instances, too, the state of law was altered soon after the judgments had been pronounced, but in a peculiar manner. Administrative circulars indicated that in the future the State would not allow such claims or make use of the powers it enjoyed pursuant to the Supreme Court judgments.[7,8]

In the three last-mentioned judgments the Supreme Court stated that it had refrained from taking the standpoint later laid down by statute or circular, although it found this more reasonable and correct, because statutory law, in the Court's opinion, did not provide the necessary authority. The sympathy of the Supreme Court—or its appraisal of the nature of the issue or of the relevant pragmatic factors—is thus reflected in the decisions concerned, but this sympathy was not found to carry sufficient weight to justify a break with tradition and a natural linguistic interpretation of sec. 25 of the Insurance Contracts Act, or with a conception of law expressed in earlier decisions concerning the right of the State to set off claims.[9] In a case like the one concerning set-off it was not deemed appropriate to lay down desirable restrictions through case law. This problem calls for more detailed study and appraisal of what criteria might suitably be taken into consideration.[10] Too much caution was perhaps shown in the cases concerned.[11] At any rate the guidelines in the Circular of 22 November 1983 did not contain any criteria or precepts which could not have been developed through judge-made law.

Intervention by legislation to alter the state of law has also occurred in cases where courts or other law-applying authorities have indicated their inability to reach satisfactory results without new directions from the legislature.

An example of this, in addition to 1975 UfR 1033 H on co-ownership flats is the Petrol Dealer Contracts Act[12] pursuant to which future petrol dealer contracts must not exceed three years, after which they may be terminated at 12 months' notice. The Act alters the state of law as laid down as the basis for the decisions of the Restrictive Business Practices Appeal Board, of 18 November 1981 and 26 November 1982.[13] The Act was passed by a narrow parliamentary majority.

[7] Cf. re liability for compensation to the State, Circular No. 97 of 18 March 1981. The circular is mentioned by Jørgen Trolle in *UfR* 1971 B, pp. 141 f., and by Preben Lyngsø, *Forsikringsaftaleloven* (Insurance Agreements Act), 2nd ed., Copenhagen 1983, p. 198.

[8] Cf. re the right of the State to set off claims, Circular No. 186 of 22 November 1983. The set-off judgments are mentioned by Munch Andersen and Gomard in *Betænkning om Betalingsstandsning* (Report on Suspension of Payment) No. 983/1983, pp. 86 f., and by Gerda Rump Christensen in *UfR* 1984 B, pp. 105 ff.

[9] In particular 1955 UfR 13 H.

[10] Cf. Mogens Munch in *UfR* 1982 B, p. 313.

[11] Cf. Munch Andersen and Gomard in Report No. 983/1983, pp. 87 f.

[12] No. 234 of 6 June 1985.

[13] Published in *Meddelelser fra Monopoltilsynet* 1981, p. 558 and 1982, p. 779.—Decisions of the Appeals Tribunal can be brought before the High Court and the Supreme Court. The decisions

3. A need for judge-made law can be seen both as a sign that the legislation is deficient and as a manifestation that developments of the law are best made by the application of the law in practice by the courts and other bodies. It would have been easy to regard statute law that needs to be supplemented by judge-made law as deficient if the doctrine of separation of powers were taken to be an unbreakable principle or a strict rule of competence, or if, for example, private law were codified in an all-embracing, systematic code. If there is a need to supplement such a code by judge-made law, the code must be deficient or obsolete.

The phenomenon of legal rules created by court practice seems to be generally accepted in Denmark with no deliberation on questions of principle and with no general debate. In France, on the other hand, academics, at least, have felt a need to explain and justify the courts' not only deciding questions of proof, fixing sentences and costs but also making such adjustments of the legal system as are necessary to enable the judiciary to function satisfactorily—and also to set the limits for this creative element in the application of law. Some French writers have found the justification of judge-made law in the legislature's tacit acceptance thereof; others in the fact that judge-made law has become a custom through its acceptance by the citizens, "les justiciables", and still others in the fact that the creation of law in the process of applying law is a necessary link in a well-functioning legal system.[14]

The legislators of the period of the Revolution had originally imagined that judges should be forbidden to interpret the law, notwithstanding the fact that no one has ever been able to distinguish clearly between an unambiguous text and one requiring interpretation. However, this difficulty has not always prevented jurists from applying this criterion, cf., for illustration, the doctrine of Community law on *acte clair*.[15] In revolutionist opinion, questions of doubt on points of law should be referred to the legislature, *le référé législatif*, for decision. Contemporary French jurists realized, however, that a legal system cannot function if the courts do not have the opportunity of exercising some "*fonction créatrice*".[16] The prohibition of interpretation and *le référé législatif* were

concerning petrol dealer contracts were not appealed against, presumably because they were not expected to be altered.

[14] Jacques Ghestin, *Traité de Droit Civil*, Vol. 1, 2nd ed., Paris 1983, Nos. 440–443.

[15] Isi Foighel *et al.*, *EF ret* (EC Law), 3rd ed., Copenhagen 1985, pp. 265 f. and 269.

[16] The members of the commission which drew up the final draft of the *Code civil* were agreed that not everything is predictable and that positive rules can never render entirely superfluous an independent assessment of the justification of the claims set up by the parties to a dispute. This appears from, *inter alia*, this often quoted statement by Portalis: "Le cours de la justice serait interrompu, s'il n'était permis au juge de prononcer que lorsque la loi a parlé. Peu de causes sont susceptibles d'être decidées d'après un texte précis: c'est par les principes généraux, par la doctrine, par la science du droit, qu'on a toujours prononcé sur la plupart des contestations. Le Code civil ne dispense pas de ces connaissances, au contraire il les suppose." See P. Fenet, *Recueil complet des travaux préparatoires du Code Civil*, Vol. VI, 1836, p. 20.

replaced by the rule in art. 5 of the Code Civil, which provides that "il est défendu aux juges de prononcer par voi de disposition générale et réglementaire sur les causes qui leur sont soumises". This wording of art. 5 is directed towards prerevolutionary judge-made law.[17] Had a rule like art. 5 existed in Denmark it could have been interpreted as follows: judge-made law, like other law, consists of general precepts, rules, guidelines and standards. These general statements appear as parts of the courts' decisions. Neither precepts nor rules are binding on future decisions.[18] The force of *res judicata* attaches only to the conclusion deciding the dispute. In this manner judge-made law and precedent law preserve greater flexibility than statute law does. The element of judge-made law is reflected only in a premise on the state of the law and may be phrased in such cautious language as is compatible with the requirements that court decisions shall be an outcome of the application of law and be accompanied by a statement of grounds or reasons,[19] and these requirements are spacious enough to avoid forcing a formulation upon the court which it cannot vouch for.

The French practice-oriented lawyers succeeded in having *le référé législatif* repealed. Experience soon proved that postponement of court proceedings pending the passage of necessary legislation was inexpedient. In the Code Civil the repeal was referred to indirectly by forbidding judges to declare themselves unable to reach a decision in cases raising points of dispute on which the Code is silent. Art. 4 says threateningly that "Le juge qui refusera de juger, sous prétexte du silence, de l'obscurité ou de l'insuffisance de la loi, pourra être poursuivi comme coupable de déni de justice".

In post-war France the flood of regulations, often hastily framed and difficult to understand, led to a move to revive *les arrêts de réglement* (general precepts issued by the courts of the *ancien régime*). A proposal to that effect was not adopted, however. In Denmark, meetings of judges have proved to be a practical forum for adopting advisory guidelines on certain questions, e.g. —prior to the Compensation (Liability in Damages) Act—rates applicable to the award of damages for pain and suffering.[20]

[17] The narrowing-down of the tasks of the Cour de Cassation to annulment (*cassation*) of judgments applying the rules of law incorrectly or rejection (*rejet*) of appeal of judgments applying the law correctly was in consonance with the view held by *le référé législatif* on the relationship between law and judgment. Cf. Ghestin, *op.cit.*, Nos. 320 and 408. See also Alf Ross, *Theorie der Rechtsquellen*, Leipzig 1929, pp. 34 ff.

[18] Judge-made law in jurisdictions where precedents are regarded as binding is here left out of account.

[19] Administration of Justice Act, sec. 218.

[20] General statements of the Association of Judges and of the Ministry of Justice after consultation with the Association do sometimes—for all practical purposes—have binding effect. A few of the amplifying comments on Supreme Court judgments contain a broader statement of grounds

In France it has also been considered whether to empower courts to bring legal questions before the Cour de Cassation—in the same manner as questions relating to Community law can be brought before the Courts of Justice in Luxembourg, and state courts in the United States can request advice on federal law by addressing a certified question to a federal court.

Adoption of proposals like the French ones would underline the position of the court of highest instance as assistant legislator. The proposals were not adopted because "Détachée des procès qui lui servent de support et de guides, l'interprétation judicaire, fût-elle celle de la Cour de cassation, perd sa justification essentielle et ses qualités spécifiques".[21]

Later theorists have also dealt with the importance of a legal system being silent on a given question. While the case-law-oriented answer in art. 4 of the Code Civil is that the courts shall remedy inadequacies of the legal system by judge-made law, theorists have grappled with the question whether silence in the legal system should be ascribed to lack of a satisfactory rule or total absence of a rule. Some theorists hold—from strict positivism or norms of logic—that lacunae cannot occur in a legal system: they are conceptually impossible. The argumentation of these theorists seems to be of no value for the reason alone that it is based on the presupposition that every legal code contains a rule like that embodied in art. 4 of the Code Civil. The argument, however, goes like this: a claim is either authorized or unauthorized in the system. Lack of authority does not lead to a *non liquet* but to dismissal of the plaintiff's claim.[22] This postulate is in good keeping with judicial practice in areas which are dominated by legislation. If, in criminal proceedings, it is ascertained that commission of an act like that charged is not punishable under the Penal Code, the accused shall be acquitted.[23] The postulate also passes muster in cases where the question is clearly to accept or reject a claim pursuant to subsidiary sources of law. A person who unintentionally caused damage during a social gathering cannot be held responsible for any injury or loss sustained and, consequently, shall not be liable in damages. The rules of

than the judgments themselves. As an example: The comment on 1984 UfR 1098 H points to or presents a general formula applicable to compensation for personal injury—prior to the entry into force of the Compensation (Liability in Damages) Act. The formula was subsequently affirmed in a resolution adopted at a meeting of judges, cf. Bernhard Gomard and Ditlev Wad, *Erstatning og godtgørelse* (Computation of Damages), Copenhagen 1985, p. 173.

[21] See Ghestin, *op.cit.*, No. 459.

[22] Alf Ross, *Lærebog i Folkeret* (Textbook of International Law), 5th ed., Copenhagen 1976, pp. 312 f., with references to the same author's earlier works. To this can be added the more realistic description in *Om ret og retfærdighed* (On Law and Justice), Copenhagen 1953 (and 1966), pp. 118 f. Among other writers having given an opinion on the subject can be mentioned Stig Strömholm, *Rätt, rättskällor och rättstillämpning* (Law, Sources of Law and Application of Law), 2nd ed., Stockholm 1984, pp. 362 ff., and in conjunction therewith Gram Jensen, *Hvad er retfaerdighed?* (What is Justice?), Copenhagen 1983, pp. 75

[23] Penal Code, sec. 1.

the law of compensation, which are not laid down by law, do not admit compensation for damage caused accidentally in ordinary, everyday relations between persons or groups of persons. On the other hand, the reasoning and the postulate do not hold in disputes which cannot be said to involve acceptance or rejection of a specific claim. For example, shall judgment be given for the plaintiff or for the defendant in a dispute as to whether central government authorities may withhold a contractor's bill against unpaid tax by way of set-off or as to whether an arrangement similar to, but not identical with, the legislative provisions relating to freehold flats comes within the restrictions imposed by the Freehold Flats Act concerning parcelling out of freehold flats in a dwelling house? The courts cannot refuse to deal with such disputes on the excuse that they are insoluble under the law in force (*non liquet*). The simple theoretical reasoning does not apply to disputes where it cannot be said in advance which of the opposite claims of the parties requires special authority or which is in consonance with a natural state and thus to be upheld if not opposed by any specific legal provision.[24] Is special authority required for permitting or ruling out set-off where the creditors/debtors are different public authorities, the companies of a group, or closely related persons? It would not be a workable solution to require courts, in cases raising serious or far-reaching problems, to postpone their decisions pending new legislation or, possibly, some other indication from the legislature.[25] This result is not the necessary consequence of reasoning based on norms of logic but of a consideration of expediency. If life is to go on without too long interruptions, a rule like that embodied in art. 4 of the Code Civil must be followed.[26] The courts must reach decisions, even where this requires the creation of law in the process of applying law.

The legislature has greater freedom. It can for example decide to intervene by providing aid to the victims of a disaster such as a flood or the loss of a ship, even though the victims, in the opinion of the courts, have no claim to compensation under existing law, including judge-made adjustments and sup-

[24] This criticism is actually of general scope. As is common knowledge, punishment and liability in damages require authority, but this knowledge depends on the content of our legal system. Where the choice between conviction and acquittal is free, the reason why the judge is able to arrive at a conclusion can only be sought in the fact that he is duty-bound pursuant to art. 4 or a corresponding Danish rule to come up with a result. Theoretical reasoning makes no contribution to the practice-oriented recommendation of Portalis and his colleagues to apply a rule like that embodied in art. 4.

[25] Cf. footnote 33 below.

[26] The Administration of Justice Act. sec. 345, recognizes postponement pending an administrative or judicial decision, e.g. according to art. 177 of the EEC Treaty, which could influence the outcome of the case. Sec. 345 does not mention postponement pending new legislation. A new Act does not generally have retroactive effect and is therefore without significance as regards decisions made prior to its passage.

plements. Obviously, purely charitable aid granted with retroactive effect has to be financed, but this does not offend the ideology of law.[27]

4. The texts of Acts and Codes represent the insight and foresight of their authors. But over time, unforeseen changes occur in matters which are subject to regulation. The understanding and assessment of relevant factors also undergo change. The contents of Acts on the same subject drafted years later would not be identical. Any Act is likely to be amended if and when it comes up for revision. In 1904 when the centenary of the Code Civil was celebrated, the then president of the Cour de Cassation, M. Ballot-Beaupré, said in his keynote address that the judge, when the Code is not clear, "a les pouvoirs d'interprétation les plus étendus; il ne doit pas s'attarder à rechercher obstinément quelle a été, il y a cent ans, la pensée des auteurs du Code en rédigeant tel ou tel articles: *il doit se demander ce qu'elle serait si le même article était aujourd'hui rédigé par eux*: il doit se dire qu'en présence de tous les changements qui, depuis un siècle, se sont opérés dans les idées, dans les moeurs, dans les institutions, dans l'état économique & social de la France, la justice & la raison commandent d'adapter libéralement, humainement, le texte aux réalités & aux exigences de la vie moderne".[28] One might almost presume that those who, in accordance with the French *école de l'exégèse*, see it as the natural task of interpretation to bring to light the legislator's will,[29] find that the will of the present legislator is ever so much more interesting than that of previous ones, and should be obeyed if ascertainable. Such a line of thinking carries special weight in the interpretation of old statutory texts, and was thus relevant on the celebration of the centenary of a code.

The average life-time of Acts seems to be fairly short in Denmark compared with many other countries. However, the Danish Constitution contains several old provisions, and constitutional provisions are not amended as easily as other legislative provisions. Ernst Andersen[30] stressed the necessity of "re-interpreting" provisions of the Constitution to adjust them to modern wishes and needs.[31] Danish writers of constitutional law and the courts seem to agree that there should be greater flexibility in the interpretation of the provisions of the Constitution so that they do not, or only exceptionally, constitute a bar to legislation which a parliamentary majority wishes to carry through.

The interpretation of the provisions of the Constitution and of other Acts which are many years old cannot be restricted to uncovering a historical truth

[27] Cf. footnote 91 below.
[28] *Livre du Centenaire*, Paris 1904, Vol. 2, p. 27.
[29] Re *l'école de l'exégèse*, see e.g. Ghestin, *op.cit.*, No. 144.
[30] See Ernst Andersen, *Forfatning og Sædvane*, Copenhagen 1947.
[31] Cf. in this context Alf Ross, *Dansk Statsforfatningsret* (Danish Constitutional Law) I, 3rd ed., Copenhagen, pp. 52 ff.

or an original intent; they must also take account of contemporary conditions and conceptions. However, this is not tantamount to concluding that the opinion of the existing parliamentary majority should be taken as a basis whenever that opinion is known from statements made or rests on a safe presumption.[32] The rule of law requires that established law shall be obeyed until altered by new legislation or—but only in special circumstances—by new judicial practice.[33]

For the courts to rectify the legislation according to what nowadays might be found desirable would create considerable uncertainty. Generally it is difficult to carry through even measures which are designed solely to bring about badly-needed updating or to rectify obvious inconsistencies. "Present-day conception" is not an invariable system which like EC law or international law can be squeezed into existing law using a clause of interpretation and presumption. A few cases in point:

A public limited company which has entered into liquidation can only have a resolution for discontinuation of winding-up proceedings registered if its intact equity is not less than DKK 300,000, cf. the Public Companies Act, sec. 126. A public limited company having filed a petition in bankruptcy is allowed, regardless of the size of its intact share capital, to resume business operations if it has obtained compulsory composition or the consent of all notified creditors, cf. the Bankruptcy Act, sec. 144. The discrepancy between the two provisions can presumably be ascribed to lack of coordination in the drafting of the two Acts.[34] But to extend the requirement as to capital set out in sec. 126 of the Companies Act to cover also the Bankruptcy Act would hardly be advisable. The provisions of both Acts are clear. Adjustment would require that a position be taken as to which of the two Acts represents the legislator's real intention and production of evidence that the discrepancy arose from an oversight in the drafting of the Acts. Even if these requirements were satisfied, such a far-reaching adjustment would, as borne out also by the following example, create uncertainty as to the rule of law.

[32] There is far from always a historical truth about the questions to which answers are needed for application of law. Guesses as to what our ancestors would have done if faced with our problems are uncertain and without significance when it comes to application of law. It serves no purpose to try to guess what Grundtvig's opinion would have been on extending the provisions of the Constitution relating to freedom of expression to cover also radio and TV (Constitution, art. 77) if he had foreseen the invention of these devices.

[33] A resolution by the *Folketing* stating that it wishes to have brought before it a Bill of this or that content does not immediately have the effect of law. The National Licensing Board set up pursuant to the Restaurant and Hotel Keepers Act recently had to take a position on whether the *de facto* acceptance by government and parliament of the conditions prevailing in the Christiania area can be taken as a valid ground for condoning non-observance of the requirements prescribed for obtaining a licence to sell wines and spirits. Cf. on this subject, Ross, *Dansk Statsforfatningsret* I, p. 43, note 10, and Ole Espersen in *Fuldmægtigen* 1985, pp. 116 ff.

[34] Cf. Græsvænge *et al.*, *Aktielovskommentar* (Comment on the Companies Act), 3rd ed., Copenhagen 1985, p. 370.

Entry into the land register of a writ of summons relating to real property presupposes that "the case is set down for trial".[35] To retain, in some few Acts, a provision to the effect that a case shall be set down for trial is generally not well founded since such a provision has been deleted from legislation on court procedure and since the service of writs is arranged for by the court.[36] In spite of that, the High Court, Eastern Division, in 1985 UfR 865, relative to deliberations of the registering judge referred only to the wording of sec. 12, subsec. 4. The Ministry of Justice later promised to take the provision under consideration on a suitable occasion.[37]

Continued reliance, as in both examples, on the clear and unambiguous language of a statutory text which might well deserve renewed consideration on a suitable occasion, may sometimes lead to inexpedient or unreasonable conclusions. In a few cases judges have allowed themselves greater freedom in re-interpretation of a completely obsolete and unreasonable statutory provision and have thus averted an unreasonable conclusion. A case in point is 1980 UfR 84 H in which the issue was whether a widow was liable under sec. 5(a) of the Inheritance Tax Act to pay death duty on a pension. The said provision does not cover civil servants' pensions, and according to administrative practice introduced in 1953, death duty is not levied on pensions under general private pension schemes either. Following this practice the only problem which remains unresolved is that of individual pensions. In 1980 UfR 84 H a majority upheld a widow—and future widows—in retaining possession of the spouses' undivided estate, through a shrewd interpretation of the rules relating to the subject matter of an undivided estate. A minority agreed that the conclusion of the majority in the case concerned was more reasonable than that previously accepted, but nevertheless it wished to follow the arrangement provided for in the Inheritance Tax Act because the majority's decision would require an amendment of the Act and furthermore because "an expedient arrangement for the status of pensions with respect to inheritance can only be brought about by an amendment of existing legislation which on this point is completely out of date". This is true insofar as the majority's action does not help a widow or widower who holds a separate estate or does not want to retain possession of the undivided estate. In such cases help through creative interpretation is hardly feasible—and another outstanding problem is that of having to distinguish between pension and life insurance.[38]

[35] Cf. sec. 12, subsec. 4, of the Registration of Real Property Act.
[36] Administration of Justice Act, sec. 350.
[37] Cf. *FOB* 1984, p. 71.
[38] Report No. 1014/1984, pp. 70 and 136, recommends exemptions from death duty on inheritance from one's spouse, a solution which though attractive is definitely outside the competence of the courts.

A solution through application of law could be to provide for equality of individual and collective pension schemes. Such a solution, although perhaps audacious, might be possible. If, on the basis of the catalogue of freedoms contained in the Constitution, we followed other countries which traditionally, or in an awakening active spirit, apply the principle of equality (the European Convention on Human Rights, art. 14, and the German *Grundgesetz*, art. 3) liberally, it might, however, be possible to justify a conclusion to that effect (see section 11 below).[39]

5. Most scholars of jurisprudence seem, judging by their choice of illustrative examples, to have had particularly private law in mind. This obscures the truth that law is not created in exactly the same manner within all spheres or branches of the legal system. In the classical fields of civil law the steering instrument of the legislature has been Acts containing general principles. Moreover, the subject matters of this legislation bear the mark of long discussion of juridical theory and practice and of being practically non-controversial. (Examples: Sale of Goods Act, Contracts Act, Commissions Act, Instruments of Debt Act.) Consequently, creation of supplementary law by court practice does not give rise to appreciable difficulties or misgivings. In the area of administrative law the situation is different. Changes in the structure of public bodies and administrative systems can be effected only on the basis of positive rules. The contents of these rules are not a continuation in statute form of handed-down legal principles. The same is true of many rules relating to substantive aspects of administrative law. Tax law for example must necessarily build on comprehensive and very detailed legislation which does not leave much room for independent creation of law on the basis of other sources. All the courts can do is to adapt the legislative rules to make them applicable in practice. Here the requirements as to formal authority are stricter than in e.g. the law of property. Creative interpretation of administrative law is thus rendered difficult, both because of the character of the rules and because opinions differ as to what is reasonable. Furthermore, cases of this nature which come before the courts are too few to make court decisions applicable, as they should be as guidelines in a large number of similar cases. New Acts and amendments to Acts are frequent in administrative law. All this indicates that the courts should adopt a style of literal interpretation, realize that legislative intervention is normally a precondition for adjusting previous practice, and in

[39] The Inheritance Tax Act, sec. 5, is mentioned in Report No. 1014/1984, pp. 112 ff., the judgment in 1980 UfR 84 H, and the change in practice by letters Nos. 344 and 345 of 30 December 1983 are mentioned on p. 128.

their practice normally refrain from altering course.[40] Such a cautious line of approach is in particular recommendable where it is difficult to gauge the consequences of attempts to improve the state of law by altering judicial practice. The Supreme Court (1980 UfR 566 H) held to the wording of sec. 15 of the Tax Assessment Act relating to bankruptcy even though it did not consider the conclusion to be reasonable. It should be borne in mind that an adjustment which would seem to be reasonable in a pending case can do more harm than good by the uncertainty it generates. Interesting in this connection are the cases in 1982 UfR 443 H[41] and 1983 UfR 318 H.[42] In the 1982 case the Supreme Court imposed a restriction on past practice by which members of a partnership, for taxation purposes, shall be regarded as part-owners of the assets of the partnership. Changes in these shares as a consequence of purchase or sale, deposits or allotment shall be regarded as transfers. As early as a year later, in the 1983 case, the Supreme Court had to climb down. Allotment of the assets of a partnership to its part-owners was then regarded as transfer as far as it concerned the shares attributable to any other part-owner. This goes to show that it is difficult to devise a new system for taxation of members of a partnership by court decisions in individual cases. With changes in judicial practice by which the weight attached to the element of equity varies from one specific case to another, there is no prospect of attaining an acceptable, general solution in this area.

6. Jurisprudential theories on sources and method of law deal with rules of law, not with practical aspects of handling court cases. However, the organization of practical work and court procedure is often guided by rules contained in instructions, orders and statutes. The provisions of the Administration of Justice Act relating to internal or technical case work are to some extent regarded as directions of an instructive nature. The courts have often taken a pragmatic or relaxed attitude to questions such as the use of complaint or appeal in cases before bailiffs; elaboration, in subsequent comments, on the statement of grounds in cases involving matters of principle; the extensive use of "indications" as to what the judgment would be if the parties failed to come to terms, and organization of the procedure for deliberation on judgment. Technical rules of procedure should be an adjuvant to reaching reasonable decisions but not pitfalls to those who merely exhibit normal caution and

[40] Attempts to alter the state of law can easily lead to a zigzag course and uncertainty about the rule of law as illustrated *inter alia* by the judgments on taxation of profits derived from increases in share prices, published in *TfS* 1984, p. 445 (Rechnagel), *TfS* 1984, p. 977 (Sønder) and *TfS* 1985, p. 701 (Reintoft).

[41] *UfR* 1982 B, p. 325.

[42] *UfR* 1983 B, p. 259.

care.[43] The legal system consists not only of substantive and procedural rules, but of rules of evidence as well. Assessment of evidence is of direct and great importance for the outcome of many disputes. It is not clear whether, and to what extent, the courts also when setting requirements as to evidence (onus of proof) and assessing evidence, should be, or consider themselves to be, bound by rules.

Evidently, people's legal status, *de facto* or for all practical purposes, depends on substantive and procedural rules as well as on rules and practice relating to assessment of evidence. In some instances such rules favour now a person in one position, and now a person in another position. This is true of e.g. rules of evidence based on presumption of a usual course of events or on scepticism as to whether an oral agreement of major scope was really concluded. Contrariwise, other rules of evidence favour a person in a specific position, e.g. the injured party. The rule on negligence for example, in content and scope, is of dual applicability: one where damages are awardable only if there is conclusive evidence of negligence, and one where damages are awardable unless there is (conclusive) evidence that no blame attaches to the tortfeasor. In Danish law the point of departure is that the onus of proof of negligence lies with the injured party, but latterly this rule has been altered by a number of decisions in cases where the damage was due to defects in products or installations whose manufacture or operation requires considerable technical or other skill, or to errors committed by persons providing professionally qualified services.

In recent years the courts have decided questions of evidence in some actions for liability in damages on the presumption that the damage was caused by defects or negligence for which, according to the respondent superior rule in III-19-2 of the Danish Code of 1683 or on another basis, either the producer or the supplier or the user can be held responsible.[44] Other decisions have imposed liability on the basis of a tenet which is less far-reaching since it relates only to causality. If a product or installation is defective and the defect may give rise to damage, the producer or the supplier or the user is liable in damages to person(s) sustaining injury in connection with the use of the product or installation unless it can be substantiated that the injury was not caused by the proved defect.[45] A similar rule is followed, as circumstances

[43] Cf. Bernhard Gomard, *Civilprocessen* (Civil Procedure), 2nd ed., Copenhagen 1984, p. 25, and, for illustration, 1984 UfR 969 H. See also Erik Riis in *UfR* 1985 B, p. 260. The ground for weakening the requirement as to formal authority (or as to *Gesetztreue*) is entirely different in rules of procedure relating to technical and practical aspects of judicial functions and in rules of essential importance in the assessment of evidence. By applying the same yardstick to all aspects of the "law of procedure", the comment in *UfR* 1984 B, p. 289, to 1984 UfR 81 H on anonymous witnesses becomes less convincing. For further details, see footnote 51 below.

[44] Cf. 1982 UfR 1111 H.

[45] Cf. 1974 UfR 1014 H, 1982 UfR 50 H and 1983 UfR 801 Ø.—In a case concerning administration of a drug (the Leo Case) the Supreme Court of Sweden took a different standpoint. The following is an English version of the Swedish text: "In such a context, the courts have to take

require, with regard to professionally qualified services, e.g. medical treatment. In favour of following such a rule is, besides the wish to protect the injured party, the simple empirical tenet that accidents never happen without cause and rarely without someone having made an error. A modification or refinement of this "statistical ground" seems to have provided motivation for the introduction of an escape clause. A producer or supplier of an installation which has been in use for some time is not held liable in damages if damage occurs because of a defect in the installation, if the defect could have been (probably was) ascribable to ordinary wear and tear, and in any case if the defect ought to have been detected and remedied in connection with regular inspection or maintenance.[46] In such cases the question of evidence is not decided by a concrete assessment of the evidence produced ("on evidence produced it is held to have been sufficiently substantiated that ...") but by subjecting situations of a specific type to a general rule.

It is remarkable that the Supreme Court, while abstaining from establishing objective liability without more explicit authority in law, has considered itself to have greater freedom in questions of evidence and has thus largely been able to arrive at the same conclusion as would have resulted from a substantive rule under which the criteria for establishment of liability are strictly defined. The arguments in favour of tightening the criteria for establishing liability, be it through altering the rules of evidence or the substantive rules, are practically the same: by far the largest number of accidents are due to negligence. Many people are insured against third-party risks; coverage of damage suffered in a few more cases will not lead to any drastic rise in premium rates; the need of injured persons for help is often great, and this need is independent of whether the accident was caused by negligence or *casus*.

With regard to road traffic casualties, liability shall be presumptive according to the wording of sec. 101 of the Road Traffic Act. This liability is a well-known and, in practice, important example which goes to show that where a substantive rule of law, through development in judicial practice of the

a position on questions with regard to which conclusive evidence, in the accepted sense of the term, has not been produced and on which it is in fact impossible to produce conclusive evidence. This enhances the difficulties that the parties and the courts may encounter. As regards the onus of proof the main rule is that it is encumbent on the injured party to produce evidence of the relationship of damage and cause. However, it is reasonable that the requirement as to proof should not be so strict that the injured party's possibility of being awarded damages becomes illusory. In cases of this nature and in comparable contexts it is therefore reasonable to ease the requirements as to evidence. As the Supreme Court has previously stated (see 1977 NJA 176 and 1981 NJA 622), the injured party must be considered to have fulfilled his obligations under the onus of proof by asserting that there was a relationship between *causa* and *casus*, if this clearly appears to be more likely than any evidence to the contrary produced by the opposite party, and moreover if, in the light of the facts of the case before the court, the injured party's assertion seems to be even more likely." See 1982 NJA 421 at pp. 482 f. The premises seem to reflect application of a more-likely-than-not principle, cf. Gomard, *Civilprocessen*, 2nd ed., pp. 33 ff.

[46] Cf. 1983 UfR 55 H, and now the directive on product liability (84/374 (EEC), art. 7(b)).

requirement as to evidence, has been given a content differing from that of the wording of the rule, the reader gets the impression that according to the Road Traffic Act the onus of proof of negligence lies only with the owner or user of the vehicle. In the absence of a direction to the contrary it is easy to believe that only the rules as to evidence laid down by statute are applicable. True, the assessment of evidence in the individual case is free according to sec. 344 of the Administration of Justice Act. But the requirement as to the strength of the evidence cannot vary freely from case to case. Following the decisions in 1942 UfR 355 H and 1976 UfR 376 H it is hard to imagine any case in which the owner or user of the vehicle can avoid liability under sec. 101 of the Road Traffic Act by stating in evidence that the damage done or injury sustained could not have been averted by keeping the vehicle in good repair or by cautious driving.[47] As a result, sec. 101 has gradually been amended to prescribe strict liability. This change from negligence presumption to strict liability, which was effected through amendment of the relevant provision of the Road Traffic Act, could not have been brought about through judicial practice. The rules governing road traffic liability have been discussed and revised several times. By Act No. 495 of 27 November 1985, objective liability was eventually introduced on the basis of a recommendation in Report no. 1036/1985.

Denmark is not the only country in which the courts treat rules of evidence with greater freedom than substantive rules. In the Federal Republic of Germany it has often been stressed that the courts have no possibility of introducing objective product liability without legislative authority, but that the courts may alter their practice regarding the onus of proof in such cases. The German Supreme Court made use of this possibility in 51 BGHZ 91.[48] The judgment is thus summarized in the law reports: "Wird bei bestimmungsgemässer Verwendung eines Industrierzeugnisses eine Person oder eine Sache dadurch geschädigt, dass das Produkt fehlerhaft hergestellt war, so muss der Hersteller beweisen, dass ihn hinsichtlich des Fehlers kein Verschulden trifft".[49] A rule of negligence under which the onus of proof is shifted will often lead to such a strict assessment of the evidence that there will be little difference between presumptive liability and strict liability for damage caused by a defective (*fehlerhaft*) product.

[47] See Bernhard Gomard and Lise Skovby, *Vejtransport af farligt gods* (Road Transport of Dangerous Goods), Copenhagen 1982, pp. 70 ff., and Report No. 1036/1985, pp. 31 ff.

[48] Report of civil cases from the Bundesgerichtshof.

[49] The decision, called "Hühnerpestfall", is mentioned in a number of German expositions of the law of compensation, e.g. by Karl Larenz in *Lehrbuch des Schuldrechts*, *Band* II, *Besonderer Teil*, 12th ed., Munich 1979–81, and by Dieter Medicus in *Burgerliches Recht*, 12th ed., Munich 1984, No. 650.

The development that has taken place in the law relating to tort liability in damages has had advantages. But it should not be overlooked that rules shifting the onus of proof from plaintiff to defendant sometimes prove to be less satisfactory. Award of damages under a rule placing the onus of proof on the defendant contains an assumption that the defendant or someone on whose behalf he is liable in damage might have committed an error. If it has not been proved that an error has been committed, or if there is no likelihood or proof of negligence, the judge has lent an ear to an incriminating suspicion that may be wrong. The content of a rule placing the onus of proof on the defendant varies with the strictness of the requirement as to evidence. If access to evidence in rebuttal is not totally barred, an element of happenstance is unavoidable. A practice which easily accepts excuses of all kinds and explanations of the reasons why a product or an installation was defective, or of the causal relationship between defect and damage, could hardly avoid leading to a zigzag course or ending up in casual guesswork.[50] This is perhaps the reason why French law, among others, has preferred a rule of *force majeure* liability to presumptive liability. On the other hand, a rule imposing a burden of proof which no one can lift would create a contrast beteween the legal principle and the statistical fact, which could lead to uncertainty about the rule of law and to dissatisfaction.

Apparently, the question has not been raised whether courts in Denmark and in other countries have felt that with regard to rules of evidence, as in the matter of deciding punishments and costs, they could permit themselves greater freedom than with regard to substantive rules. One reason might be that judges, since many questions concerning assessment of evidence must of necessity lie in their hands, find that questions of evidence on the whole—in the absence of positive rules to the contrary—must come within the domain of the judiciary, even where changes in the state of the law are concerned.

Positive rules of evidence are few in number. The principal provision is that of free assessment of evidence embodied in sec. 344 of the Administration of Justice Act, which relates both to assessment of evidence and to requirements as to evidence. Such a general tenet as the only guide in such a wide field can be seen as a legitimation of and an encouragement to creation of law in the application of law. However, the tenet came into being as a memorandum directed towards the fact that the past has broken away from ancient rules, and is, it seems, neutral relative to the choice of future legal policy in the sphere of evidence. The tenet is not a manifestation that assessment of the requirements as to evidence (onus of proof)—in contrast to substantive questions of law

[50] This risk is hardly unavoidable e.g. by a rule as to evidence like that set out in the decision in 1982 NJA 421, referred to in footnote 45 above.

—should be carried out in the form of a concrete appraisal and not according to general guidelines. The principle of reasonable equality before the law applies also in this respect.

On the other hand, assessment of the value of the evidence produced by the parties, of the pieces of evidence used and of other evidence available to the court is not normally regulated by rules. The rules governing the administration of criminal law, especially those which relate to lay judges and jurors, must be seen, among other things, as expressing the belief that assessments based on common sense result in the best conclusions in this area. Another —and better—reason for handling evidence and substantive rules separately is that it is easier to adjust and modify requirements as to evidence than to alter the contents of the substantive rules without having to accept unpredictable consequences of the requirement for equal assessment in other actions, including actions in which the new tendency does not prove to be reasonable. A change of course in substantive law would make for greater certainty about the rule of law than variations in the assessment of evidence. But it would also pose a greater risk of judges being forced to accept unforeseen consequences. If for example the rules of evidence relating to negligence and causality were adapted to favour the injured party, the adaptation would appear in the form of application of a general rule and not as the result of a concrete appraisal suitable for a specific case. In this manner greater flexibility would be preserved through changing course with regard to the rules of evidence than through altering the substantive rules. A third reason for the separation might be the assumption that changes, which would not be easy for the parties and interested circles to accept if they happened abruptly, could become palatable if they were the result of a gradual, continuous development. Rules of evidence would lend themselves to continuous development more easily than substantive rules. Finally, a fourth reason might be that judges have greater possibilities than others of gaining experience in assessment of evidence. As already mentioned, questions of evidence are regulated by law to only a modest extent.

Nor has juridical theory made much progress in shaping rules of evidence. The Anglo-Saxon countries, presumably under influence of the special requirements of the jury process, have developed detailed rules concerning admissible evidence. In Denmark, the state of the law is different. The parties are not debarred from presenting evidence by means which might be of dubious value, or the value of which is hard to assess. Nor has presentation been denied of evidence which has been obtained by means contrary to the Administration of Justice Act or other statute law.[51] These questions are of particular importance

[51] Cf., *inter alia*, 1971 UfR 280 H, in which the accused had been incorrectly interrogated as a witness, and 1978 UfR 367 H. However, unilaterally requested statements in evidence are normally—in civil proceedings—rejected as inadmissible.

in the administration of criminal law. The reason why judges have omitted to debar the parties from using evidence whose importance might be difficult to assess in the prevailing circumstances, or evidence illegally procured, is presumably that they have seen elucidation of all the facts as the paramount goal and have consequently found that even evidence of an unusual nature may contribute to this. Most judges presumably feel certain that they are able to assess what weight, if any, individual pieces of evidence carry in the overall assessment of whether the accused is guilty. An uncertain piece of evidence can be left out of account. There is no basis for generally rebutting certain classes of evidence (hearsay evidence, evidence given by close relatives, etc.) as being without importance. Such thinking and confidence in experience of assessment of evidence are perhaps the factors underlying the decision in 1984 UfR 81 H.[52] In this case 5 judges against 2 found it acceptable to call an "anonymous witness" in special instances where it is necessary to protect the witness and where it is difficult to dispense with the evidence of the witness.[53] The decision has been criticized in many quarters, *inter alia* in a statement by three High Court judges.[54] The criticism raises questions of statutory authority and refers to traditions in the administration of law. But it does not throw any light on the fundamental question: are judges in a position to assess whether it is justified, taking into account among other things the evidence of others and the accused person's possibilities of defending himself, to attach importance to an unusual piece of evidence such as that of an anonymous witness in deciding the question of guilt? Another essential question is whether this would apply also to a trial by jury where the professional judge and his judicial experience can intervene solely through the summing up and exercise of subsequent control (double guarantee). The problem of anonymous witnesses and statements in evidence was discussed in Report No. 1056/1985, and Act No. 32 of 4 June 1986 has now forbidden the hearing of anonymous witnesses.

Opinions on difficult questions of which no certain knowledge can be had differs among judges as well as among others. It is only natural that opinion may vary because of different notions as to what goals should be pursued and what means are suitable. Various critics believe that to uphold certain requirements concerning evidence is valuable in itself, regardless of whether or not a reasonable assessment is possible in some cases; and that judges who agree with the majority in 1984 UfR 81 H overrate their ability to assess evidence in

[52] *UfR* 1984 B, p. 259.

[53] Report No. 1056/1985, p. 19, and *Juristen* 1985, p. 279, Note 1, state that the accused in the case concerned, in an application to the Human Rights Commission, asserted that the anonymization of witnesses was in violation of his right under art. 6 of the Convention on Human Rights to be given a fair trial. The Human Rights Commission declared the application inadmissible on the ground that it was manifestly ill-founded.

[54] Cf. *Juristen* 1985, p. 273, with quotations of interventions in a previous debate.

unusual and difficult situations. The majority of the judges in 1984 UfR 81 H must have felt sure that the arrangement could be administered in a reasonable manner, reasons being that it is not applied where it is deemed impossible to make a safe assessment and that it has so far been the general opinion that judges—*in casu* the Supreme Court—represent the nearest and best forum for making decisions in a legal policy framework on problems of evidence of the nature concerned.[55]

7. The factors at play in the genesis of man's opinion and attitudes cannot be identified with certainty. About the origin of judgments some experienced judges have said, apparently based upon introspection, that the judge first draws a sensible conclusion and then thinks out suitable grounds. Presumably they had in mind only the cases in which the existing system does not provide an obvious answer.[56] This philosophy enunciated by practicians is described in other terms by the theorists of jurisprudence. The tenets on sources of law leave some scope for deliberation as to what conclusion would best conform to the natural and just solution. Pragmatic factors and sentiment or ideology of justice play a role in the interpretation of the method of law as a whole.[57] Theorists have emphatically denounced the conception that it is always possible to draw "unambiguous"—in this context meaning logical—conclusions from the sources of law. There has perhaps been a need, notably on the theoretical plane, for a showdown with the exaggerated belief in the perfection of statute law and the juridical apparatus of concepts which characterized the French *école de l'exégèse*[58] and the German concept of jurisprudence. However, this battle has now been fought out.

[55] Cf. also J.P. Andersen in *UfR* 1985 B, p. 164.

[56] Knud Illum, in *Lov og Ret* 1945, pp. 147–149, took a favourable view—like Viggo Bentzon—on the intuitive procedures of experienced judges. But later, in *UfR* 1970 B, p. 256, after reviewing a number of cases, he called for caution in relying on one's immediate impression of a case. See also Ross, *Om ret og retfærdighed*, p. 57, footnote 4: To get closer to an answer it is necessary to distinguish. Many problems are solved by analysis and rational deliberation. Some deliberations result in an immediate judgment. Juridical schooling and experience can often refine that judgment by ensuring that the relevant factors are singled out and assessed before an irreductible judgment of reasonableness is brought into play.

[57] Interpretation, as the present author understands it, is the act of finding out or fixing the precise meaning of a text. Not all sources of law consist in interpretation of texts. Juridical method, as the present author understands it, means the processes involved in finding out what existing law is. Ross, in *Om ret og retfærdighed*, p. 127, defines juridical method as the principles and rules which, in fact, guide the courts in that part of their activities which consists in getting from the general rule to the concrete decision. This definition is not very well suited for application in areas where no recognized rules exist. Moreover, the definition leaves out of account that now and then "pioneering decisions" are made which provisionally are perhaps of a specific or singular character. It is inexpedient to reduce the concepts of existing law and juridical method to registration of decisions made. In that case the concepts would not leave room for the activity displayed in devising guidelines in areas which have not been the subject of legal dispute. See also Ross, *Om ret og retfærdighed*, pp. 168 ff. Stig Strömholm, in *Rätt, rättskällor och rättstillämpning* (see footnote 22 above), 2nd ed., pp. 263 ff., discusses whether there is one or several juridical methods.

[58] Ghestin, *op.cit.*, p. 99.

Expositions of jurisprudence have often confined themselves to a presentation of a catalogue of sources of law. There seem to be two reasons for this. The first and best is that in-depth expositions of the use of sources of law in the countless individual—existing and known, future and hypothetical—questions of doubt do in fact constitute an essential part of legal dogmatics in the proper sense. Useful and good *jus* requires insight into the subject matter and problems of each case. Each question of doubt must be treated separately: the interplay of sources varies from situation to situation. However true this is, the significance of the distinctive characteristics of each case does not rule out the fact that general views or guidelines may carry weight. From this follows that guidelines of a general nature for creation of law in practice come within the domain of jurisprudence. The other reason is less creditable: a call from some theorists for scientific exposition of the tenets of jurisprudence and the debate on pure jurisprudence. These have been valuable challenges in the pursuit of clarity and stringency, but they have tended to restrict jurisprudential interest to the creation and analysis of concepts.

Another significant and interesting task for jurisprudence is, however, to examine and set guidelines for the decision-making processes underlying practical use of the legal system. It is inexpedient to take an axiom on the demands to be met by science as a point of departure for requiring of jurisprudence that the contents of key concepts of sources of law and existing law shall be verifiable and that the sphere of jurisprudential interest must therefore be confined to descriptions of ascertainable facts.[59] Study of pure legal dogmatics in jurisprudence—dogmatics without value judgments or deliberations on expediency—is of limited interest. To reach a conclusion, and a conclusion which can be accepted as satisfactory, the application of law must, of necessity, take into account what is reasonable and expedient. In that sense such

[59] To Ross it seems to have been an axiom that jurisprudence and juridical dogmatics shall be a science analogous with natural science and that jurisprudence must therefore be subjected to the same requirements as to universal validity, demonstrability and verification which, as a matter of course, have to be met in studies within the realm of natural science. See e.g. Alf Ross, *Virkelighed og gyldighed i retslæren* (Reality and Validity in Jurisprudence), Copenhagen 1934, pp. 135–9, and *Om ret og retfærdighed, inter alia* pp. 19 f. and 462.—A deliberation as to whether this viewpoint is tenable might lead to a more spacious concept. Verification is a natural criterion in basic science on rules of law as a sociological phenomenon, but ability to function is a more relevant criterion in applied science relating to the rule of law as a working system. A comparison with humanistic subjects would be more relevant than a comparison with natural science pursuits. There is a similarity between linguistics and jurisprudence in the sense that developments (standpoints) which are maintained and accepted are, or will become, correct use of language. Historical expositions of the development of e.g. modern Danish language, literature and law are interesting. Ascertainment of facts plays a prominent role in such expositions and these facts are actually verifiable. But seen in relation to other subjects, jurisprudence has its own distinctive feature, viz. that the focus of attention is on what guidelines will be followed in the future. The content of non-existent decisions cannot be ascertained, but it is meaningful to examine both what trend of development can be expected and, on the basis of certain presuppositions, what approaches would be recommendable.

deliberations are also sources of law. However, deliberations do not always—as evidenced by the dissentient opinions advanced in a considerable number of judgments—lead to the same conclusions. Juridical arguments defining the contents of existing law are generally not unambiguous as a logical conclusion is.

However, the fact that juridical arguments frequently are not unambiguous does not mean that creation of law by application of law follows no established general guidelines and that tenets on sources of law or a juridical method can therefore only be descriptive, consist of an up-to-date list of judgments or hold up a mirror to the decision-makers. Jurisprudence becomes of special interest when it examines whether general guidelines can or should be established for the choice of solution in the application of law where the choice is not given by legislation, established practice or tradition. It should be a principal task for jurisprudence to examine whether general guidelines can be established for the legal activity which is carried out by the authorities applying law in the exercise of their functions. In the concluding part of his book *Om ret og retfærdighed* (On Law and Justice), Alf Ross deals with this question.

However, a large part of the book is devoted to ascertaining—or postulating—that discussion and pinpointing of ways and means by which legal policy can be used in the application of law are not a scientific exercise.[60] This is perhaps the reason why Ross on the way through the book changes his descriptions of the factors which are of significance in the creation of law in practice. But he does not undertake the task of classifying or explaining in detail what these "factors" are: an ideology which lives in the minds of jurists—pragmatic aspects—societal utility—sense of justice—fairness? In reality there are many factors, and they represent phenomena of such varying character that they cannot be classified under the same heading.[61] Some refinement would seem to be possible, for instance by weighting real grounds in utilitarian reasoning, confrontating a sentiment of justice and a desire for justice. Incidentally, it is not always easy to determine whether Ross, by sharply disassociating himself from e.g. those who, like Knud Illum,[62] have attached major importance to the sense of justice, disassociates himself also from the view that sense of justice is really of importance in the creation of law, or from the view that sentiment can be the subject of scientific study. According to Ross the sense of justice as a guide for what the law ought to be falls by definition outside jurisprudence and science. Phenomena that cannot be veri-

[60] See *Om ret og retfærdighed, inter alia* p. 421 and pp. 428 ff.

[61] An attempt to give a precise definition of the concept of justice is made by Dag Victor in *Förhandlingarna vid Det 29 nordiska juristmötet* (Deliberations of the 29th Meeting of Nordic Jurists) 1981, Part II, Stockholm 1982, pp. 151 ff.

[62] See Knud Illum in *Lov og Ret* 1945.

fied cannot be dealt with scientifically.[63] Thus the reader is left in a dilemma. The exposition of what the concept of existing law stands for is in the form of predictions of the outcome of hypothetical or actual legal disputes—or perhaps rather of the contents of the rules which may be assumed to be included in the legal premises of the decisions.[64]

The application of law is creative. Hence, predictions require insight into the creative element or into the application of legal policy in the creation of law. However, despite its importance, this element is left out of account since—as Ross puts it—"that requires studies of quite another nature than studies of jurisprudence".[65] Ross concludes by asserting that the jurist's only role as a legal politician is that he, like other technologists, places his knowledge and skill at the disposal of others.[66] This is true, at best, only of jurists performing judicial and administrative functions. The axiom in scientific exposition of the tenets of jurisprudence has—like the proponents of pure jurisprudence—excluded from this sphere the most interesting question of the creation of law.

8. Jurisprudence classifies sources of law according to the form in which they appear: general rules set out in statute law and administrative orders; precedents;[67] usage and custom; deliberations on and recommendations as to what, according to the nature of things, will be the best solution. Sources of law are the foundation for setting out the tenet or tenets necessary for a reasoned decision.

The incentive, appeal or argument by which a source of law serves to bring about a specific solution is of varying nature. A rule set out in a statute or in an administrative order, a decision in a similar case, plus usage or custom, are guides which with more or less authority require, or provide an inducement to, observance. Contrariwise, the term "the nature of things" covers deliberations which do not result in references to commands laid down in law or practice but in argumentation which favours a specific solution or demonstrates that it is good or optimal because it promotes the application of appropriate means or the realization of desirable goals. Unequivocal law, practice and usage represent a command or strong incentive which builds on authority. The "nature of things" is a source of law of an entirely different character. Its leverage does not depend on authority but on whether the arguments carry sufficient weight to convince those to whom it is addressed of the correctness of or the advan-

[63] Ross, *Om ret og retfærdighed*, p. 472.
[64] The exposition given by Ross in *Om ret og retfærdighed*, pp. 55–58, equalizes premise and conclusion. "If we can predict the legal premises we can also predict the conclusions."
[65] P. 58.
[66] P. 472.
[67] In this context "precedent" does not mean force of *res judicata* but *praemissis praemittendis*.

tages inherent in the given solution. The decision-making process differs entirely according to whether the source of law represents a command founded on authority or a recommendation of a specific, desirable solution. Recommendation of a result as desirable may build on a rational, utilitarian argument (pragmatic factors or real grounds), on the sense of justice developed through schooling in juridical practice, or—something quite different—on a spontaneous desire for justice. Recommendation of a specific solution can well be combined with authority-founded sources of law since it is accompanied by for example a statement in terms such as "this has been done before in similar cases" or "this is the best way in which to attain consistency and harmony in the legal system".

Classification of sources of law is useful and necessary for clarification of thought and as a point of departure for a study of the details of various sources of law. However, classification of sources of law must not obscure the frequent interplay of several sources of law in the decision-making process underlying the law-creating decisions in cases concerning matters of principle, at any rate in the manner that the legislature establishes a framework within which the application of law is required to function. Legal policy shall not set its own new and independent goals.

It is only natural that the creative element of judicial practice should attract great interest—but actions involving matters of principle constitute a minority. In the broad stream of decisions within the established framework, application of law and practice is normally quite simple. Numerous actions in road traffic offences, collection of bad debts, etc., can be decided by simple syllogism once the facts have been elucidated.

9. Jurisprudence constitutes a general part of the learning on rules and guidelines. It deals with legal questions of a general character, with the general factors which can be put outside brackets. One of its most interesting aspects is what policy or what guidelines are actually being followed or should be followed where the state of law is not laid down by statute or common law. A policy is based on a programme, i.e. a specification of the ways and means which its adherents themselves follow and want others to follow. Programmes of political parties can advocate far-reaching reforms and breaks with the past, whereby they differ in nature from a legal policy programme. Legal policy is a means of making existing law as represented in legislation and past practice function as well as possible by adjusting rules and viewpoints and by adopting new postures which are in keeping with, or an extension of, legislation and legal tradition. The programme of legal policy is neither conservative nor revolutionary in the party policy sense. Legal policy pursues, within its domain, the paramount goals of general policy. Cases in point are the expansion

of the social security which was brought about by adjustment of the law of torts,[68] and the softening of the constitutional protection of property rights which paved the way to general legislation introducing reforms such as rent control, nature conservancy and zoning laws.

In a programme of judicial legal policy the result-oriented sources of law are of particular interest. The programme can point to certain results or means as being attractive. It can also refer to general principles for selecting ways and means, e.g. a programme of caution as will be mentioned below.[69]

10. Even though, as a part of their functions, the courts engage in creation of law, their role in law-making differs essentially from that of the *Folketing*. The legislature is vested in the *Folketing*. Its members are popularly elected to exercise this power. The judiciary is vested in the courts which exercise this power on the basis of law. Creation of law is a judicial function only to the extent where this is necessary to make the administration of justice function in a satisfactory manner. Creation of law through decisions in individual cases has the advantage over legislation of being close to actual facts. It does, however, also entail some restrictions in that this law-creating function is exercised in the context of deciding individual cases. These aspects are discussed more thoroughly in what follows.[70]

Under the arrangement laid down in the Constitution for the separation, functioning and organization of the powers of the State, it is natural to restrict juridical legal policy to supplementing inadequate rules and filling lacunae in the legal system. The courts have no political mandate and should therefore in their decisions avoid as far as possible taking positions on questions which can and should be decided by the legislature. What the consequent degree of restraint should be depends on whether the legislature or the politicians have dealt with or taken an interest in the subject concerned, and on whether subjects such as evidence [71] and technical aspects of administration of justice must be regarded as suitable for regulation by case law, or not suitable because a satisfactory solution is obtainable only by means of precise technical rules,

[68] Judgments delivered in countries where reasoned statements are couched in more straightforward language than those of Danish courts have frequently and clearly expressed this view. Thus, 1977 NJA 538, which—as an innovation—held that an importer/dealer should share in the manufacturer's product liability, contains this statement (English version of Swedish text): "At any rate in a case like this one where it is a question of a disposable product it seems obvious that a dealer who imports a product from abroad and brings it on the Swedish market shall be held liable for any damage caused by defects in product safety for which, according to what has just been stated, the manufacturer shall be liable in damages. Such an arrangement is in good keeping with recent developments in the law relating to consumer protection and compensation for damage."

[69] See section 10.

[70] See section 12.

[71] Cf. section 6.

through overall, extensive regulation or through development of administrative machinery.[72]

Generally, the courts should not prejudice developments in areas where preparation of innovative legislation is under way. The Swedish Supreme Court said in a case from 1982 on this point:

> Particularly regarding the area of personal injury, a development towards strict product liability may certainly be discerned. However, since questions of strict product liability are now being deliberated within the legislature, no decisions of court practice in the area of property damage, at least concerning relations between entrepreneurs, should be taken that could anticipate what legislation in the area may be expected to contain.[73]

Considerable restraint—or an emphatic demand for authority in law—is indicated where restrictions on the liberty and property rights of citizens are concerned.[74] In a number of cases the view is clearly expressed that the administrative authorities cannot impose major restrictions on the legal status of citizens except where authorized by statute, and that the necessary authority should not in general be expanded or replaced by judge-made law. An example of such a judgment is 1985 UfR 125 H, on the question whether local government can prevent future use of business premises for a business purpose other than that for which they were previously used. The Supreme Court held that such a restriction is outside the scope of sec. 45 of the Local Government Planning Act and stated that the exercise of such far-reaching powers on the part of a local government board requires legislative support, i.e. authority in statute law.[75] Where such decisions are concerned it makes no difference—except in emergencies—whether the court finds that the desired restriction is well founded, *in casu* whether a local government board should or should not be in a position to forbid changes in the type of business conducted on business premises. No equally emphatic demand for authority in law can be made with regard to disputes in the sphere of private law. Tightening of rules relating to liability in damages or easing of the requirements as to extinction of rights in

[72] Cf. the discussion in section 2 re 1982 UfR 24 H on set-off in cases where public authorities are involved.

[73] 1982 NJA 380.—In the Federal Republic of Germany, on the other hand, BGH has in several instances relied on Bills which (at the time in question) had not been tabled and passed, cf. as an example 1980 WM 589 which held that where a member of a private company whose contribution represents a major share of the company's capital, extends a loan to his no-longer-credit-worthy private company (GmbH) that loan shall yield to other debt in bankruptcy. The judgment anticipated the rules on this subject which are now embodied in sec. 32(a) and (b) of the GmbHG.

[74] The development with respect to the criteria on freedom and property described by Ross in *Dansk Statsforfatningsret*, pp. 219 ff., has in mind only the competence of the legislature.

[75] Incidentally, the requirement as to explicit authority depends to a high degree on the character and impact of the "intervention", cf. 1985 UfR 1000 H and Bent Christensen, *Hjemmelsspørgsmål* (Questions of Authority), Copenhagen 1980, *inter alia* pp. 228 f. and 232 f.

favour of bona fide purchasers leads to interference in property rights. But the development of law is much less dependent on authority by statute in private law than in administrative law.[76]

A high degree of restraint or caution may be appropriate in deciding disputes on questions which have been in the focus of public attention and on which opinion differs, but which are not regulated by law. In such cases, absence of statutory rules which, as mentioned, often debar administrative authorities from intervening may lead to custom (*status quo*, usage or tradition), regardless of its merit, being maintained in relations between citizens. An example of this is found in 1967 UfR 46 H on contributions to political parties. Gifts from individuals, trade unions, associations or enterprises play an essential role in financing party activities. Minorities in trade unions, associations and companies are not exempt from contributing to parties to which they do not belong.[77] This is a well-known fact and has often been debated, but the legislature has not intervened. Thus the ruling of 1967 refused to allow a trade union member to reduce his membership contribution by an amount equal to the trade union's contribution per member to the Social Democratic Party. A shareholder's criticism that the company—directly or indirectly through an organization—contributes to political work will probably also be rejected.[78] A proper regulation of contributions to political activity must be broad and consistent. This area is, therefore, in accordance with the view taken in 1982 UfR 24 H,[79] unsuited for regulation by decisions in individual cases.

11. In Denmark, restraint or the principle of caution[80] has also been followed when interpreting the Constitution. The exercise of restraint is indeed natural in assessing whether the supreme authorities of State have observed the provisions of the Constitution relating to their organizations and manner of functioning. Another question is whether it is desirable to continue to follow existing case law according to which the provisions governing civil or human rights are regarded as flexible standards which are not generally taken into consideration by the courts in their interpretation or creation of law, and which therefore it is hard to conceive could be violated by any legislation

[76] Cf. section 5 above.

[77] The scope of sec. 68 of the Constitution relating to contribution "to any denomination other than the one to which he adheres" has not attracted great attention, cf., however, Poul Andersen, *Dansk Statsforfatningsret* (Danish Constitutional Law), Copenhagen 1954, p. 638, and Alf Ross, *Dansk Statsforfatningsret* II, 3rd ed., Copenhagen 1980, pp. 759 f. It is undoubtedly lawful for associations and firms to make donations to the Danish State Church as well as to other religious communities.

[78] Presumably, such activity covers objectives within the meaning of sec. 114 of the Companies Act; interpreted otherwise by Græsvænge *et al, op.cit.* (footnote 34 above), p. 335.

[79] Cf. *UfR* 1982 B, p. 313.

[80] Mentioned in section 10 above.

supported by a parliamentary majority. The protection of individuals and minorities is largely dependent on the good will of the majority.

Developments in the conception of constitutional provisions have been influenced by a fear of the Constitution as an obstacle to regulating property rights by statute. The provision (art. 73) protecting property rights has often been invoked, sometimes with effect on the preparation of new legislation, but not as a basis for setting aside existing legislation. The convenient doctrines on historical re-interpretation and flexible standards have proved suitable, particularly as regards the provision contained in art. 73, as means of avoiding undesirable collision of an old text, unchanged since 1849, with the present economic order. There are no reasons of equal weight for reducing the constitutional provisions protecting rights other than property rights to vague and elastic standards. Constitutional provisions play a considerable role in the legal systems of several other countries, even[81] in contexts other than examining whether Acts of Parliament are in accord with constitutional provisions. The European Convention on Human Rights, ratified by Denmark as early as 1953,[82] has now been embodied in EC law in order among other things to avoid collision with the very active application of constitutional provisions in some member states, among them the Federal Republic of Germany.[83] This convention is not interpreted less restrictively by the Human Rights Court of Justice than perhaps was to be expected from a Danish point of view. The style of interpretation is reflected in two of the most recent judgments delivered by the Human Rights Court.[84] In *Rasmussen* v. *Denmark*[85] it seems that the Court (with dissenting opinion of the Danish judge) tends to interpret art. 8 on protection of privacy in a similarly extensive manner to the interpretation of the provision of the German Constitution regarding protection of personal rights.[86] And in *Barthold* v. *Germany*[87] the Court goes a long way towards

[81] As suggested in section 4 on 1980 UfR 84 H.

[82] On this question, see Eilschou Holm, *En sag for Menneskerettighedsdomstolen* (A Case before the Human Rights Court), Copenhagen 1980, pp. 128 ff., and Torkel Opsahl in *Det 28. nordiske juristmøde* (The 28th Meeting of Nordic Jurists) 1978, Copenhagen 1979, Annexe 10.

[83] Cf. EC Commission memorandum of 4 April 1979, Bulletin Supplement 279, and Isi Foighel *et al.*, *op.cit.* (footnote 15 above), pp. 172 ff.

[84] Cf. Eilschou Holm, *op.cit.*, pp. 117 ff., *Nordisk Tidsskrift for International Ret* 1981, pp. 118 ff., and Lehmann and Bernhard, *Menneskerettighedskonventionen* (The Convention on Human Rights), Copenhagen 1985, pp. 21 ff.

[85] 7 EHRR 371.

[86] Art. 8 of the Convention on Human Rights is worded as follows:

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Art. 2(1) of the German *Grundgesetz* of 1949 is worded as follows:

protecting the freedom of expression against restrictions on advertising founded on traditional professional and marketing ethics. A development towards increased safeguarding of freedom of expression has perhaps already been initiated in a few Danish decisions. In 1980 UfR 1037 H[88] the Supreme Court went a long way towards admitting free speech for criticism of the conduct of business activities.[89] As a consequence, considerable freedom should also be allowed for verbal defence against such criticism. For normally, as these cases also illustrate, the only effective means of defence against attack is rebuttal, not judicial awards of a penalty. Nor perhaps should it always be required, in collision with legislation, that a tenet on restrictive interpretation of art. 77 of the Constitution—or of art. 10 of the Human Rights Convention—be observed. Is it for example worth preserving a dogma according to which art. 77 is of no significance relative to the most effective media: radio and TV?[90] Seeing that historical re-interpretation has made it feasible to reduce art. 73, why then should it not be possible to update art. 77?

The Danish Constitution—contrary to the Norwegian Constitution—does not explicitly prohibit the passage of Acts with retroactive effect.[91] But if a creative interpretation of the Constitution should ever gain a foothold, a prohibition of considerable scope could find support in arts. 22 and 73. In this area there is a need for legal protection. It is e.g. unacceptable that the provisions of sec. 16 B of the Tax Assessment Act relating to the sale of shares to holding companies, introduced by Act No. 615 of 19 December 1984, were made effective from the beginning of that year.[92]

There are degrees to both restraint and audacity. It is possible to derive benefit from principles and ideas inspired by the Constitution without landing

"Jeder hat das Recht auf die freie Entfaltung seiner Persönlichkeit soweit er nicht die Rechte anderer verletzt und nicht gegen die verfassungsmässige Ordnung oder das Sittengesetz verstösst."

[87] 7 EHRR 383.

[88] Commented on by Torben Jensen in *UfR* 1981 B, pp. 25 ff., and 1982 UfR 761 H.

[89] In 1982 UfR 750 H on the Freemasons' Order, two fundamental civil rights collided. The Supreme Court gave protection of privacy priority over freedom of expression.

[90] On theatre and film censorship, see Max Sørensen, *Statsforfatningsret* (Constitutional Law), 2nd ed., Copenhagen 1973, pp. 379 ff., and on the history of sec. 77, Munch in *UfR* 1982 B, pp. 61 ff. The question of the importance of art. 10 relative to modern media is discussed by Peter Germer, *TV-reklame i retlig belysning* (TV Advertising Illustrated in Legal Context), Copenhagen 1984.—Ross, in *Dansk Statsforfatningsret* II, 3rd ed., Copenhagen 1980, defended the traditional conception but recognized that the conception collided with "the ideas underlying sec. 77 of the Constitution", cf. p. 711, note 16. In 1960 UfR 33 H the question was raised whether minority political parties have a claim to be given access to radio and TV.

[91] Johs. Andenæs, *Statsforfatningen i Norge* (The Norwegian Constitution), 3rd ed. Oslo 1981, pp. 464 ff., and Per Odberg, *Beskytter Grundlovens § 97 bestående rettigheter?* (Does Section 97 of the Constitution Protect Existing Rights?), Oslo 1982. The provision contained in art. 7 of the Human Rights Convention covers only criminal law, cf. Ross, *Dansk Statsforfatningsret*, p. 341, note 43.

[92] A statement on this point by the Council of Advocates and the Association of State Authorized Accountants is reproduced in *Advokaten* 1985, pp. 21 ff. See also Aage Spang-Hanssen in *Advokaten* 1985, p. 289.

in the opposite ditch by building into the Constitution—in which are embodied the fundamental principles according to which the State is governed and whose provisions are (almost) unchangeable—far-reaching prohibitions which could be troublesome barriers to legislation supported by a parliamentary majority and acceptable to the majority of the people.

12. The pleadings of the parties serve, together with the general knowledge and experience of the judges, as the basis for court decisions. Judgment should be rendered as soon as possible after the case has been presented. The judges have little possibility of making further investigations. The procedural rules set narrow limits for providing a broader basis for assessment than that envisaged by the parties. The courts cannot go beyond the claims of the parties; they can take account only of their allegations.[93] While the court can call upon a party to produce evidence, it cannot of its own accord seek to provide additional data in elucidation of facts.[94] As a natural consequence, a judgment is binding as *res judicata* only on the parties.

A judgment, however, shall be accompanied by a statement of grounds,[95] and this statement must include a reference to the law applied. The requirement as to equality before the law,[96] entails that the interpretion of the law shall be based on general rules and guidelines. A judgment confined to a statement of fact and result leaves open to guesses which rule or rules were applied, and the contribution of such a judgment to the development or clarification of the state of the law will be but modest. Choice of a concrete ground (e.g. "at least in the light of the circumstances then prevailing, held ...") has the advantage that the court, where the state of the law has not been clarified, avoids the risk of establishing a rule or guideline which subsequently proves to be untenable. Caution to the point of omitting to give a general guideline as a ground for a decision, however, means that the state of the law remains unclarified.

There is another drawback in completely concrete decisions, which at one time appealed to the sense of fairness and justice of the judges. Such decisions might turn out to be incompatible with the general rules which become (and usually or always will become) the result of a thorough analysis. The concrete fairness of the results which a rule leads to within the scope of its applicability may vary widely. This is a drawback which is inevitable within a legal system consisting of general rules.

[93] Administration of Justice Act, sec. 338.
[94] Sec. 339(3).
[95] Sec. 318.
[96] Cf. in this context e.g. Thorstein Eckhoff, *Retferdighet* (Justice), Oslo 1971, especially pp. 43 ff.

One of the difficulties of devising a good, generally applicable rule or ground is, as mentioned, that the ground may have been developed in a case which perhaps illustrates only a few relevant features and which may be marked by peculiar circumstances which will not often be present. Such a situation existed in 1985 UfR 183 H where a minority of the shareholders in a limited liability company quoted on the stock exchange contested the company's policy of dividend restraint. The decision had to be based on an assessment of equity under sec. 80 of the Public Companies Act and, in that context, whether the shareholders had obtained a yield on their investment compensating them for the low rate of dividend through rising quotations of their shares.[97] Another factor of major importance in the case was whether all shareholders had been treated equally. The main shareholder was a fund established in favour of the employees. The shareholders bringing the action owned about 10 per cent of the shares, the fund 70 per cent. Assuming that the unusually low dividend had kept down the price quoted on the stock exchange to facilitate further buying-up by the fund, the Court could in these circumstances, it would seem, find authority in the general clause set out in sec. 80 for a finding that the dividend policy of the company was unlawful.[98] There was no precedent which could help to identify the relevant factors or to indicate how wide fluctuations in dividend would be acceptable in any circumstances.

Another difficulty in cases of this kind is that the court can hardly react in any other manner than by finding the declared dividend too low. Where this is not satisfactory, a judgment ordering the main shareholder(s) to redeem the shares of the minority pursuant to sec. 142 would presumably often be a suitable penalty preferable to awarding the plaintiff(s) a, somewhat arbitrarily fixed, higher rate of dividend. However, redemption requires that a claim to that effect is made. The Supreme Court gave judgment in favour of the company. An essential element of the court's reasoning was that the plaintiffs (two shareholders) "when they brought the action were perfectly well aware of this policy [of dividend restraint] and its possible impact on the price of the shares". This ground is unsuitable as an element of a general rule protecting a minority against being "starved" by a company quoted on the stock exchange. It is not practicable to make differing decisions according to whether the

[97] An estimate of the value of the shares was not submitted to the court.

[98] The company's share capital was DKK 1 million, unchanged since 1912. At the time in question, the rate of dividend was 15 %. The paid-up capital was about DKK 17 million. A rule like that contained in ch. 12, sec. 3, of the Swedish Companies Act and in ch. 12, sec. 6, of the Norwegian Companies Act, according to which a claim shall be honoured by up to 5 % of the paid-up capital, could have offered ground for claiming an aggregate dividend of up to DKK 850,000 or up to 85 % of the share capital. The annual profit was well over DKK 2 million after setting aside DKK 1.4 million to the Fund. The dividend was thus substantially lower than 10 % of the said amount.

investors are expert buyers, old shareholders or inexperienced persons representing a minority, regardless that the provision of sec. 81(4) of the Public Companies Act on *res judicata erga omnes*—as expressly stated in the corresponding provision of the Swedish Act[99]—applies only to a judgment for invalidation or alteration of a resolution passed by the company in general meeting. Plausible grounds for giving judgment in favour of the company could have been, if they existed, that the court found that the company's consolidation was reasonable, that its buying-up of shares at the price quoted on the stock exchange was justifiable or that the shareholders had been compensated by rising prices of the shares. The omission to make a clear decision left the state of the law even more uncertain than it was before.[100]

Another example which goes to show that confrontation with, and position-taking in principle on, a problem may be necessary to attain a clear and satisfactory state of law is 1984 UfR 30 H on the last moment for a drawee bank's refusal to cash customers' cheques. After a decision to honour the check has been made, a refusal is no longer possible. A study of the concrete circumstances and accentuation of details of the—constantly changing—technique does not lead to a workable rule.

13. In some few cases the Supreme Court has clearly and abruptly changed the understanding of law on which its decisions were previously based, solely because of re-assessment of the expediency of the results. French doctrine points out that a changed conception of law, if introduced into judicial practice without being prescribed in new legislation, must necessarily have retroactive effect, and that this militates against changes of practice.[101] This may sometimes be a difficulty which should be taken into account. However, the tenet on equality is not completely precise, and the time factor plays an essential role. The legal system contains many mechanisms for preserving *status quo* in legal matters of older date.

Two cases in which the Supreme Court changed its conception of law are 1979 UfR 300 H and 537 H. These decisions assume that notice of the assignment of title to a debt not to the debtor but to an earlier assignor secures the title of the assignee against other assignees, regardless of whether the debtor, as required under sec. 31 of the Instruments of Debt Act, had been notified, provided that the notification debarred the assignor from receiving

[99] ABL, ch. 9, sec. 17.

[100] The question of maintaining the price quoted on the stock exchange under unusual circumstances had earlier been before the Supreme Court, viz. in 1977 UfR 61 H concerning the rule of redemption in the now repealed sec. 136 of the Companies Act. The judgment in 1985 UfR 183 H is mentioned by Erik Werlauff in *UfR* 1985 B, pp. 193 ff., and by Graesvaenge *et al.*, *op.cit.* (footnote 34 above), p. 332.

[101] Ghestin, *op.cit.*, Nos. 370 ff.

payment of the debt. These two judgments derogated from previous decisions which, in accordance with the text of sec. 31, stated that only notification given to the debtor himself has such effect. This new line of approach will undoubtedly be followed in future cases concerning mutable transfers. The ground given in the judgments takes the form of a general correction of or an addendum to sec. 31. But Torben Jensen, one of the judges who took part in the cases, has stated in a comment on the judgment[102] that the Supreme Court by these new judgments did not want to take a position on sec. 31, subsec. 1, of the Instruments of Debt Act in any other spheres of law than assignments in connection with building contracts.[103] This means that the Court, in this respect and possibly in general, wished to take as non-committal a stand as possible. Authority to take different stands in different areas could be found in (i) the fact that sec. 31 applies directly only to instruments of debt and is applied only by analogy in other claims; and (ii) that other general statutes in the field of the law of contract contain a positive provision to the effect that the statutory rules shall yield if in conflict with "commercial or other usage" (Sales of Goods Act, sec. 1). However, the new line from the two Supreme Court cases was followed in two subsequent cases[104] on secondary security in titles of debt against customers, which had been assigned with due notification to the customers to a factoring company. The assignment of secondary security was, however, only notified to the factoring company and not to the customers. The ground in these cases, as in the 1979 cases, was that the assignor was by notifying the factoring company debarred from receiving payment or otherwise to dispose of the title of debt with respect to the secondary security, i.e. the title of the assignee was secured in relation to the assignor as well as to the holder of first security. The Court also stated that the latter—the factoring company—shall not be entitled, after receiving full payment, to settle any outstanding proceeds or to retransfer any outstanding claims back to the assignor.[105]

The ground given for this change of practice leaves several problems unsolved, especially: (i) does notice of a secondary assignment to the first assignee generally debar that assignee from settlement with the assignor?; (ii) does notice to the debtor have effect under sec. 31, regardless of the fact that notice according to the new practice could be given to the first assignee?; and (iii) is notice to the debtor himself effective as hedging even though it is not binding on him in the sense that he can obtain discharge, e.g. by agreement

[102] See *UfR* 1979 B, p. 217.

[103] Cf. Krag Jespersen, *Byggeritransporter* (Assignments in Connection with Building Contracts), Copenhagen 1979, pp. 241 ff.

[104] 1979 UfR 919 Ø and 1980 UfR 261 Ø.

[105] Cf. in this context, Henning Skovgaard in *UfR* 1980 B, pp. 319 ff., and Thor Falkanger in *Forhandlingerne på det 30. nordiske juristmøde* (Deliberations of the 30th Meeting of Nordic Jurists) 1984, Oslo 1985, Part 1, pp. 325 f.

with the assignor, to the effect that the debt is invalid, or by set-off (according to the *travaux préparatoires* to the Instrument of Debts Act and to legal writings this is the case). This example illustrates that a change of practice may be needed, that a change on one point could easily raise a number of other questions that have not been raised, and, apparently also, that while a judgment should state on what law it is based, the court would most often be well advised to leave the problems involved in fitting the new rule into the legal system to legal writing and to future cases in which the question of consequential changes is of immediate interest.[106]

The three questions ought to be answered in the affirmative. An affirmative answer to the third question should at least be adhered to in cases where the debtor is not bound because he is entitled to pay the assignor or others for safeguarding his own interests, but also where the ground is merely lack of documentary evidence of the acquisition. On the other hand, notification given to persons other than the debtor is only effective as hedging if such notification deprives the assignor of the right to dispose of the claim without respect of the denunciated right.

14. To sum up the developments described in the foregoing thirteen sections, just these brief observations will be made:

- jurisprudence should not refrain from studying the creation of law in judicial practice whenever such law-making does not become a uniform process. On the contrary, jurisprudence should seek to develop guidelines for creation of law which allow of the necessary flexibility; recognizing that
- no sharp line of distinction can be drawn between legal dogmatics and legal policy. Jurisprudence should endeavour to be constructive and creative rather than to adapt itself to—as it seems arbitrarily chosen—standards of themes and methods
- the foregoing has only attempted, in the various sections, to outline some tenets belonging to a programme of judge-made law.

[106] 1979 UfR 300 H differs from the examples in section 12 in giving a clear rule as its lodestar. See Ussing-Dybdal, *Kommentar til Gældsbevisloven* (Comment on the Instrument of Debt Act), 2nd ed., Copenhagen 1940, pp. 80 f. See also Bernhard Gomard, *Obligationsret* (Law of Contracts and Torts), Fascicle 3, Copenhagen 1973, p. 253, and W.E. v. Eyben, *Panterettigheder* (Mortgages and Pledges), 7th ed., Copenhagen 1984, p. 491.