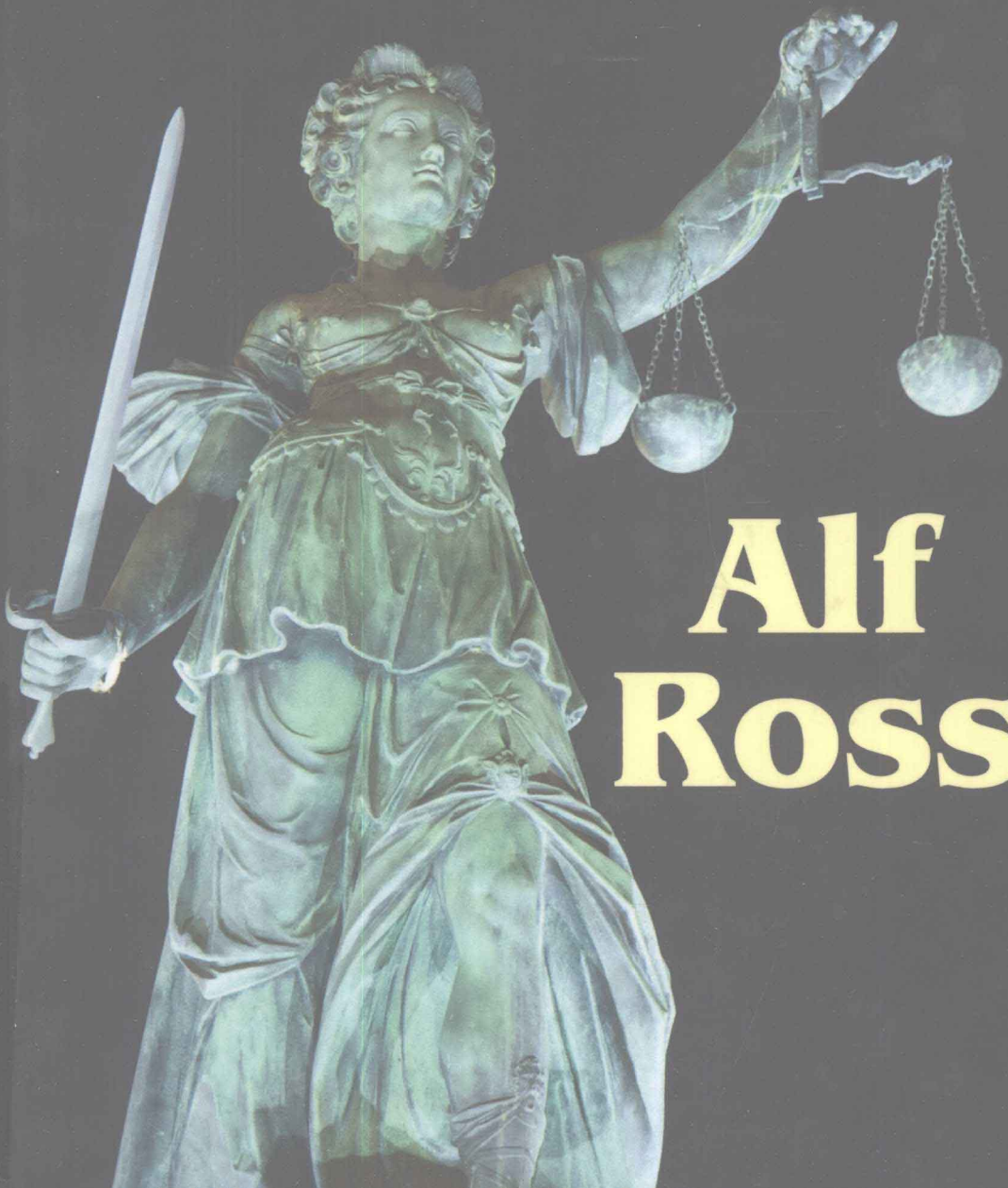
On Law and Justice



Alf Ross

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BY

ALF ROSS
PH.D.(Uppsala), JUR.D.(Copenhagen), JUR.D.(Oslo)
Professor of Law at the University of Copenhagen

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PREFACE

THIS study by a Scandinavian author is presented to an Anglo-American public in the hope that it will contribute to the strengthening of the ties between Nordic culture and the great traditions of the Anglo-Saxon world. American initiative and generous sponsorship, especially since the Second World War, have made possible a lively exchange of persons and ideas between the New and the Old World; I have felt that we, on this side of the ocean, have a continuous obligation to contribute all that we can to this communication.

Especially in the field of jurisprudence should the opportunities for a fertile co-operation and mutual stimulation be favourable. Since the work of John Austin and Oliver Wendell Holmes Anglo-American legal thinking has been directed toward a realistic interpretation of law, that is, an interpretation in accordance with the principles of an empirical philosophy. A similar empiricism has, since the days of Anders Sandöe Örsted (1778–1860) and Axel Hägerström (1868–1939), dominated Scandinavian jurisprudence. By this common trend the traditions in both parts of the world have been dissociated from the natural-law doctrines and other ramifications of the idealistic philosophy of law prevalent on the Continent.

The leading idea of this work is to carry, in the field of law, the empirical principles to their ultimate conclusions. From this idea springs the methodological demand that the study of law must follow the traditional patterns of observation and verification which animate all modern empirical science; and the analytical demand that the fundamental legal notions must be interpreted as conceptions of social reality, the behaviour of man in society, and as nothing else. For this reason, I reject the idea of a specific *a priori* "validity" which raises the law above the world of facts, and reinterpret validity in terms of social facts; I reject

the idea of an *a priori* principle of justice as a guide for legislation (legal politics), and discuss the problems of legal politics in a relativistic spirit, that is, in relation to hypothetical values accepted by influential groups in the society; and, finally, I reject the idea that legal cognition constitutes a specific normative cognition, expressed in *ought*-propositions, and interpret legal thinking formally in terms of the same logic as that on which other empirical sciences are based (*is*-propositions).

There are, in my opinion, no definite principles determining the province of jurisprudence—no inner criteria that determine where the doctrinal study of law ends and jurisprudence begins. Tradition and personal inclinations will largely decide the question. For my part I have regarded it important to treat not only problems on a high level of abstraction but also notions and questions with which the student of law is familiar from his work in the classroom, in the courts, or in the halls of legislation. In this way I hope to demonstrate that jurisprudence is not only a beautiful mental activity *per se*, but also an instrument which may benefit any lawyer who wants better to understand what he is doing, and why.

Through the more than thirty years that I have occupied myself with jurisprudential studies I have, of course, received guidance and inspiration from many quarters. Without them the writing of this book would not have been possible. Such debts are easily forgotten and I am not able to make a complete account. But I must mention two scholars who meant more to me than any others: Hans Kelsen, who initiated me in jurisprudence and taught me, above all, the importance of consistency; and Axel Hägerström, who opened my eyes to the emptiness of metaphysical speculations in law and morality.

The Danish edition of this book was published in 1953. The path through translation and editing to my publishers has been long and beset with many obstacles. It could not

have been trodden without the untiring assistance of the translator, Mrs. Margaret Dutton, London, and the editor, Mr. Max Knight of the University of California Press. Gratefully I will remember the interest they both took in my work and the diligence and conscientiousness with which they accomplished their job.

Finally, I want to express my gratitude to the two Danish foundations which made the translation economically possible, *Rask-Örsted Fondet* and *Statens almindelige Videnskabsfond.*

ALF ROSS.

COPENHAGEN,
September, 1958.

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Chapter 1

PROBLEMS OF JURISPRUDENCE

§ 1

Terminology and Tradition

Jurisprudence is a branch of legal knowledge which is distinguished from other branches by its problems, aims, purposes and methods. The term is used loosely to designate various general studies of law different from the main subject of teaching at law schools, where ordinary doctrinal studies are pursued aiming at presenting the legal rules in force in a certain society and at a certain time.

These various general studies described as "jurisprudence" have not enough in common to make it possible to arrange them like twigs of the same branch of learning—they deal with very different subjects and reflect widely differing philosophical outlooks.

The term jurisprudence is not generally used on the Continent. Instead, such terms as philosophy of law, general science of law, legal encyclopedia, and general theory of law are used.

Within the heterogeneous studies lumped together under the heading "jurisprudence" three spheres of inquiry may be discerned; and correspondingly three schools of inquiry may be distinguished. These are:

(1) *The problem of the concept or nature of law.* This sphere includes other fundamental concepts considered as essentially involved in the concept of law, for example, the source of law, the subject of law, legal duty, legal norm, legal sanction; and possibly also such, not necessarily "essential," concepts as property, rights *in personam* and rights *in rem*, punishment, intention, guilt and so forth.

That school in "jurisprudence" (to use this term for the time being as a general designation for the works under discussion) which concerns itself mainly with this group of problems is known as the analytical, for it seeks to analyse and define concepts such as those mentioned above. The analytical school was founded by the Englishman John Austin, who gave a course of lectures at University College, London, in 1828–32. These were later published under

the title *The Province of Jurisprudence Determined.*[1] Austin did not achieve much fame in his lifetime. He was forced for financial reasons to give up his work as a lecturer, and at the time of his death was almost unknown. Soon afterwards the tide turned. In 1861–63 his widow published a new and complete edition of the lectures, which later had to be reprinted several times. Austin's analytical method has left its mark on such a large number of English and American scholars up to the present day—for example, W. Markby,[2] S. Amos,[3] I. E. Holland,[4] E. C. Clark,[5] E. E. Hearn,[6] J. Salmond,[7] J. C. Gray[8] and G. W. Paton[9]—that one may speak of an analytical school.

It was not until the twentieth century that Austin influenced Continental scholars, notably the Hungarian Felix Somlo[10] and the Swiss Ernest Roguin.[11]

The Pure Theory of Law of Hans Kelsen,[12] the most important contribution of the century to legal philosophy, belongs also to the analytical school. Historically, however, there is no connection between the Pure Theory of Law and the school of Austin.

Taken as a whole the analytical school bears the stamp of a methodical formalism. The law is regarded as a system of positive, that is, actually effective, norms. The "science of law" seeks only to establish the existence of these norms in actual law regardless of ethical values or political considerations. Nor does the analytical school raise any question relating to social circumstances into which the law enters—the social factors which determine the creation of law and its development and the social effects which are produced or intended to be produced by the rules of law. This formalism has found a striking expression in the works of Kelsen. The "purity" which he demands of the science of law has a twofold

[1] For an account of Austin and his doctrine and influence, see Alf Ross, *Theorie der Rechtsquellen* (1929), Chap. IV with Appendix A, particularly pp. 83–87.
[2] *Elements of Law* (1871).
[3] *Science of Jurisprudence* (1872).
[4] *Jurisprudence* (1880).
[5] *Practical Jurisprudence* (1883).
[6] *Theory of Legal Duties and Rights* (1883).
[7] *Jurisprudence* (1902).
[8] *Nature and Sources of Law* (1909).
[9] *Jurisprudence* (1946).
[10] *Juristische Grundlehre* (1917).
[11] *La science juridique pure* (1923).
[12] The latest complete presentation by Kelsen is his *General Theory of Law and State* (1946). A concise and easily read survey of the fundamental principles underlying his system is to be found in his *Théorie pure du droit* (1953).

aim: on the one hand to free the science of law from any moral or political ideology; on the other hand to free it from all traces of sociology, that is to say, considerations referring to the actual course of events. According to Kelsen, the science of law is neither moral philosophy nor social theory, but specific dogmatic theory in normative terms.

(2) *The problem of the purpose or idea of the law.* This sphere of inquiry concerns itself with the rational principle which gives to law its specific "validity" or "binding force," and which is the criterion for the "rightness" of a rule of law. In general, the idea of law is taken to be justice. There then arise fundamental questions of the content and argument of the principle of justice; the relationship between justice and positive law; the part played by the principle of justice in legislation, administration of law, and the like.

That branch of jurisprudence which considers mainly problems of this kind is known as ethical jurisprudence or the philosophy of natural law. In modern times the term "philosophy of law" is frequently reserved exclusively for this particular branch.

This school of thought, which is closely connected with the religious or metaphysical-philosophical approach, has a long history. Philosophy of natural law extends from the time of the earliest Greek philosophers down to our own day. This philosophy reached its classical peak in the great rationalistic systems of the seventeenth and eighteenth centuries. Following the historical and positivist reaction of the nineteenth century, the philosophy of natural law has gained ground once more in the present century. It is spoken of as a renascence of natural law. Its philosophical basis is first and foremost the Catholic scholastic philosophy which is perpetuated in the natural law of Thomism; and various developments of the systems of Kant and Hegel which have found adherents particularly in Germany and Italy. Theories of natural law have also found a basis in other philosophical schools (utilitarianism, the philosophy of solidarity, Bergson's intuitionism, Husserl's phenomenologism, and others). The history of natural law is discussed in Chapter 10.

(3) *The problem of the interaction of law and society.* This sphere of inquiry includes questions relating to the historical origin and development of law; to the social factors which in our own days determine the variable content of the law; to its dependence

and influence on economics and popular legal consciousness; to the social effects of certain legal rules or institutions; to the legislator's power of directing social development; to the relationship between the "living" law (*i.e.*, the law as it actually develops in community life) and theoretical or book law; and to the forces which in fact motivate the application of law in contrast to the rationalised reasons in opinions.

This school in jurisprudence is known as historical-sociological. It can again be divided into two branches, one predominantly historical and the other predominantly sociological and psychological. Like analytical jurisprudence it is of relatively recent date. Following a few precursors in the eighteenth century (Vico, Montesquieu), an historical approach to law emerged with the German romantic school (Savigny and Puchta), discussed later in §§ 56 and 81.

In England H. Maine [13] founded a school of historical jurisprudence which studied the correlation of law and society in ancient times. He was followed by J. Bryce,[14] D. Vinogradoff,[15] C. K. Allen [16] and others. The sociological approach represented by such scholars as Emile Durkheim,[17] Léon Duguit,[18] Roscoe Pound,[19] N. S. Timasheff [20] and Karl Llewellyn [21] has been dominant in France and the United States. Psychological interpretations are found in the works of Jerome Frank,[22] Edward Robinson [23] and others.

There are many special studies on the sociology of law which are of considerable interest, particularly in the field of criminology. Reports of commissions and similar practical studies often make valuable contributions toward better understanding of the facts of

[13] *Ancient Law* (1861), and *Early History of Institutions* (1875).
[14] *Studies in History and Jurisprudence* (1901).
[15] *Historical Jurisprudence* (1923).
[16] *Law in the Making* (1927).
[17] *De la division du travail social* (1893).
[18] *Les transformations générales du droit privé* (1912); *Les transformations du droit public* (1913).
[19] For a summary of Pound's doctrines on social lines of development in modern English and American law (with full bibliographical references), see his *Outlines of Lectures on Jurisprudence* (5th ed., 1943), 43–49. See also Pound, *Social Control through Law* (1942); *Interpretations of Legal History* (1923); "Scope and Purpose of Sociological Jurisprudence," *Harv.L.Rev.* 24 (1911), 591.
[20] *Introduction to the Sociology of Law* (1939).
[21] K. N. Llewellyn and E. A. Hoebel, *The Cheyenne Way* (1942).
[22] *Law and the Modern Mind* (1930).
[23] *Law and the Lawyers* (1935).

the legal life and their correlations. Works of a general character going by the name of sociology of law [24] sometimes tend to go no further than stating general programmes, or to reveal themselves as natural law philosophies in disguise. This latter tendency is the result of the fact that sociology is in origin a political philosophy in disguise (§ 56). Georges Gurvitch [25] is a typical example; his sociology of law has little to do with empirical science, but is more of the nature of a metaphysical-spiritualistic interpretation of the concepts of law and justice rooted in the intuitionism of Bergson and the phenomenology of Husserl.

This summary of the subjects and tendencies of the existing literature of "jurisprudence" leads to the question of how this branch of the study of law rationally ought to be defined. It seems that this question can be answered only on the basis of a general survey of the various approaches through which a study of legal phenomena might be attempted, choosing from among them the one that can, in our opinion, reasonably be described as "jurisprudence."

At this point, however, a difficulty presents itself. On the one hand it is not possible to form a well-founded opinion of the various ramifications of the study of law in its entirety until one has decided on the nature of the legal phenomena. On the other hand, the problem of the concept or nature of law is undoubtedly one of the principal problems of jurisprudence. There is no disagreement on this point. Both those who focus their attention mainly on the ideal validity of the law and those who concern themselves with the existence of law in the community must of necessity base their theories on a concept of the general nature of law. It would seem therefore that it is not possible to indicate the proper subject of jurisprudence until a solution of one of its principal problems has been found.

This difficulty can be overcome by giving at first no more than a tentative orientation of the nature of legal phenomena; a more thorough inquiry will then be presented in a later chapter.

[24] One of the best known is E. Ehrlich, *Grundlegung der Soziologie des Rechts* (1913). In addition the following may be mentioned: N. S. Timasheff, *Introduction to the Sociology of Law* (1939); B. Horváth, *Rechtssoziologie* (1934); G. Gurvitch, *Sociology of the Law* (1942); H. Cairns, *Theory of Legal Science* (1941).

[25] See previous note and *cf.* my critical account of Gurvitch in *Towards a Realistic Jurisprudence* (1946), Chap. II, 8.

§ 2

The Nature of Law

The question of the "nature" of law constitutes one of the permanent main problems of any jurisprudence. Strangely enough no one ever seems to have thought it remarkable that such a question has to be posited, nor pondered over the reason for it and its import. And yet, when we come to think of it, this question is rather odd. Who would consider referring the problem of the "nature" of psychic phenomena for separate treatment in any science other than psychology? Or the problem of the "nature" of nature to any science other than the natural sciences? What more could possibly be said about the "nature" of psychic phenomena beyond what emerges from the description and explanation given of them in psychology? Or about the phenomena of nature beyond what emerges from the various natural sciences?

Why is the position so different with respect to law? Why is the problem of the nature of law one that lies outside the province of the doctrinal study of law, strictly speaking? What is there to be said about the "nature" of legal phenomena beyond that which emerges from the doctrinal study of law, which has these very phenomena as its subject? To answer these questions a brief linguistic digression will be expedient.

By linguistic utterance I understand a conscious arrangement of language in actual use, oral or written.

Distinct from the utterance itself as a linguistic phenomenon is its meaning. This distinction has to be made, since different utterances can have the same meaning, just as the same utterance can according to circumstances have a variety of meanings.

Meaning can be of two types, namely, expressive or symptomatic, and representative or semantic.

Every linguistic utterance has an expressive meaning, is the expression or symptom of something. This signifies that as a link in a psycho-physical whole it refers to that experience which has given rise to the utterance. No matter what I say, my utterance must have been caused by emotional-volitive circumstances which have moved me to express myself, an urge to communicate ideas to others or an emotion which spontaneously demands expression.

Certain linguistic utterances have in addition a representative meaning, that is to say, the utterance "indicates," "symbolises" or