"THE BINDING FORCE OF LAW"[1]

By RICHARD C. WARD.

THERE is but one way of completely overcoming a conflict of interests, although two other courses may suggest themselves and may even be adopted. To allow dominance to one interest to the exclusion of the other is no solution: if the second interest is legitimate it cannot remain suppressed. To decide on compromise is equally unsatisfying, for it needs only a matter of real importance to both interests and the problem will again arise. The only true solution is one of synthesis—the securing of an agreement which will merge both interests; only then will thesis and antithesis harmonize.

Any adequate theory of law, as of politics, must have its beginning in human personality; and implicit in human personality are the two elements of individuality and sociality. There is a sense in which each human being is isolated and different from his fellows; but just as surely as this is so, there is also a sense in which he and his interests are the same as his fellows and their interests—he cannot escape society altogether, and, indeed, must co-operate with his fellows to realize his separateness. Political or legal theory, therefore, basing itself on the fact of human personality, must take account of both these elements: must not emphasize human individuality or human sociality to the exclusion of the other; must not ask either to sacrifice some of its needs in the interests of a working compromise; but must, instead, achieve a synthesis of the two, a principle which will embrace both individuality and sociality. Only if it does so will it have achieved a lasting solution of so fundamental a problem.

It is with a problem of this nature that Professor H. Krabbe has concerned himself in his *Modern Idea of the State*. He is seeking to interpret the State, not in terms of power or force, but in terms of law. For him the State is based on law and draws its validity therefrom. If he can prove the binding force of law he will have solved the irksome problem of obedience to the State. "There is only one ruling power, the power of law. According to this view, the State is not coerced by law, but is rather endowed with authority of law. The law is not a superior and the State a subordinate power, but the authority inherent in the State and the authority of the law are identical, so that the basis of the rulership of the State is coincident with the binding force of the law."[2]

What is this "binding force of law"? and what is its basis? Krabbe realizes that the basis must be found in human personality, and realizes also that he must take account of both its aspects—it must be true for the individual and true for society. For this reason he rejects two theories[3] which have hitherto found favour, theories in which the authority of law has been derived either from the wills of men as individuals or from the will of a sovereign ruler. In the first

1. A consideration of H. Krabbe's *The Modern Idea of the State* (D. Appleton & Co., 1922), and more especially of his third chapter, "The Binding Force of Law."
2. *The Modern Idea of the State*, p. 2.
3. *Ibid.*, p. 41.

case "the foundation of law is sought in man; in the second it is sought outside him."[4] In other words, in one of these cases there is an objective validity for law but no connection with the spiritual life of the individual, and in the other no account is taken of society and its needs—the law is robbed of all its objectivity. Errors such as these must be avoided if a true basis is to be found for the binding force of law. Indeed, Krabbe deliberately and explicitly sets down the conditions to which his theory, if it is to be valid, must conform. "So far as the law is thought of as a rule, it must necessarily satisfy two conditions. In the first place, it must depend for its validity upon a power standing outside human will and thus possess objectivity with reference to this will. In the second place, since law has for its purpose the determination of conduct, the content of its rules must accord with the spiritual nature of the men to whom it is to be applied."[5] Krabbe has given a test by which to judge his own theory of law. He is seeking a basis for law which has its origin within the individual consciousness and yet which will be objective in the sense of applying to all individuals: the objective standard must be relatable to subjective experience. He has failed if it can be shown that he has erred in either direction.

Krabbe finds a basis for law in the *feeling or sense of right* of individual men. He draws a distinction between this sense and the will of men. The sense of right is akin to the moral, aesthetic and religious senses; it gives rise to values, standards and norms. The will of man, on the other hand, is the psychological force which stirs them and urges them to conduct. This conduct man will test by the standards supplied by the senses within him: by these standards he is able to judge whether his acts are right, good, beautiful or true. Further, the sense or feeling for right operates objectively in that it, "like the other feelings, in no sense owes its existence to the human will and in its operation it is independent of the will."[6] It is on this intrepretation of the human mind that Krabbe bases his theory of law. "The theory of the sovereignty of law . . . takes account only of that basis for authority which it finds in the spiritual life of man, and specifically in that part of this spiritual life which operates in us as a feeling or sense of right. The law which is in force, therefore, includes every general or special rule, whether written or unwritten, which springs from men's feeling or sense of right."[7] Krabbe believes that he has found the key to his problem and is exultant in flashes of rhetoric and in the confidence with which he suggests and answers criticisms. He believes now that he has found the seat of authority in law and communal life: he claims to have found a principle which supplies the objective and universal compulsiveness necessary for law, while still having its origin in individual human consciousness. "The objective character of the rule is directly implied in the fact that there is a standard in us which operates objectively."[8]

4. *Ibid.*, p. 43.
5. *Ibid.*, p. 45.
6. *Ibid.*, p. 46.
7. *Ibid.*, p. 39.
8. *Ibid.*, p. 85.

Law is binding on an individual if it does not conflict with his sense of right, so the solution is a satisfactory one if, as Krabbe would have us believe, the standard of right in man operates objectively. In considering the merits of Krabbe's theory we have to ask if the sense of right is sufficiently articulate in the institutions which decide what is and what is not law; ask, further, if at all times the objective legal standard is relatable with subjective experience.

In the first place, we still have the "wills" of men to contend with: even if we admit that there is the same standard of right in all men, we yet have to consider their individual reactions to it. There is no doubt that men have different opinions as to what is right in particular circumstances, to which Krabbe replies that "diversity enters into our opinion as to what is right, not on account of the standard which ought to be applied, but because the subject-matter of legal evaluation is reflected differently in our consciousness. . . . If we could adequately conceive these objects, there would be no variety in our convictions as to what is right. But in the first place the reality penetrates our consciousnesses only partially, and in the second place, in so far as it does get into our minds, it affects us differently because of our innate or acquired tendencies. Hence it follows that the object of legal evaluation is differently conceived by different men, and this difference of conception gives rise to different convictions as to what is right."[9]

Here is difficulty. On page sixty-nine Krabbe has declared that "a common conviction of what is right must lie at the basis of the legal rules which are valid"; and now, on page seventy, he admits that the reactions of individuals to their senses of right vary greatly. Remember, too, that these different reactions must not be ignored, inasmuch as they are the expressions of the *individual* element in human personalities. How, then, is he to reconcile these statements? How can law possibly be valid for all?

Krabbe's solution is clever and ingenious. He falls back, as Rousseau and others have done, on the concept of majority rule, weaving into the warp and woof of this rather mundane concept his inspiring theory of the sense of right and spiritual validity. In the case of those people who agree with the content of a particular law there is no difficulty, but what of those who feel their sense of right—or rather their individual reaction to that sense of right—revolt? Here Krabbe distinguishes agreeing with a particular rule because that rule is felt to be right from agreeing with a rule because it is felt that the security of the legal system is worth retaining. The minority accepts as valid and binding any rule to which the majority has agreed, in spite of the fact that to the minority the actual content of the rule is not acceptable, because the minority sees that "the purpose of a community can be realized only if there is a single rule. The value of having a single rule is therefore fundamental. This is the *highest legal value,* a higher value than that belonging to the *content* of the rule, since

9. *Ibid.*, p. 70.

having a single rule is an indispensable condition for attaining the end of the community. This end can be attained more or less completely in a variety of ways, but it cannot be attained at all without a single rule. Hence our sense of right attaches the highest value to having a single rule and sacrifices, if necessary, a particular content which might otherwise be preferred."[10] Again, "our sense of right expresses itself first and foremost in the value which we attribute to order in the community, whatever the content of this order may be, and order is impossible unless there is a single rule."[11]

It is here that Krabbe errs. Remembering the tests decided on earlier, we cannot fail to notice that the individual aspect of human personality has been sacrificed to the social. Krabbe criticizes Schuppe's theory[12] of customary law on the ground that "one makes no progress by setting up an obligation to have an obligation," yet is that not what he himself does here? He sets up an obligation on men to feel an obligation to the maintenance of a particular rule, regardless of whether that rule has or has not the content they individually desire, if the content is acceptable to and desired by the majority. In other words, men must place the social aspect of human personality *above* the individual aspect. How can this espousal of majority rule ignore the principles that Krabbe has laid down? There is no question now of securing an objective standard which will be relatable with subjective experience, unless all men have the subjective experience that it is an objective standard at any cost that really matters. Krabbe is denying himself, for earlier he declared that "when one asks for *stability* in a rule regardless of its content as a principle of right, one is demanding something that can be secured only at the cost of its legal character. The degree of its stability is subordinate to its being based upon a principle of right. Whoever asked for a greater stability denies this basis." Krabbe denies this basis. Majority rule may be a commendable working principle but it does not secure an objective standard relatable with subjective experience. It does not do so, that is, unless subjective experience demands order at any cost and on all occasions, and it cannot be said to do so. Those people who refuse to obey a particular rule though it be sanctioned by the majority do not oppose order of every kind, are not denying society altogether; instead, they are denying order with one particular content in the interests of order with another content, an order which they conceive to be a better order and to have a better content. Their very sense of right urges them to rebel; the content *does* matter if it appears repulsive to what they, individually, feel to be of true worth. Moreover, it may be that accepting majority rule means that they are always on the side of the minority, and it would prove extremely irksome to agree to rules always in the interests of order—a particular form of order, not the only form of order—and always regardless of its content.

10. *Ibid.*, p. 74.
11. *Ibid.*, p. 82.
12. *Ibid.*, p. 73.

It is true that Krabbe admits, when he turns to actual legal and parliamentary institutions, that here the sense of right is not fully articulate. His criticisms of existing institutions are of the utmost value. Time and again he points out that we must so decentralize and reorganize our institutions that the sense of right of all will be made effective. This will mean, among other things, that our judges will have to abandon in part the theory of precedent, and that the whole electoral system will need overhauling, since at present parliamentary members do not re-*present* the sense of right of the electorate but rather, at election time, impose a choice between two or three party platforms on the electorate. There is something noble in the ambition to make the sense of right more articulate.

Krabbe began his third chapter by remarking[14] that the theory of the sovereignty of law may be taken either as a description of an actually existing condition or as a principle the realization of which ought to be striven for. We conclude the chapter with the feeling that it can only be the latter, if it can be either. Krabbe defaults on the main issue in not clearly declaring that the individual who deems that the test of his sense of right has not been satisfied may need to revolt in the interests of a better order. Imposing an obligation to maintain an existing order is imposing an objective standard which is not necessarily relatable with subjective experience, and is to ignore the tests of validity originally accepted. Krabbe seems never at the one time to have secured for law a validity which is both objective and subjective. He is like a man pursuing two objects but unable to secure them both at the same time. Really challenge him about the one, and the other slips from his hands; deny that he has that other, and he will pursue it, regain it and hold it before your eyes, regardless of the fact that in the pursuit he has lost the first. At no one time does Krabbe retain for his theory of law both the characteristic of an objective standard and that of relation to subjective experience. His hands are not large enough to embrace both the individual and the social needs of human personality: but has any philosopher yet had hands large enough?

14. *Ibid.*, p. 47.