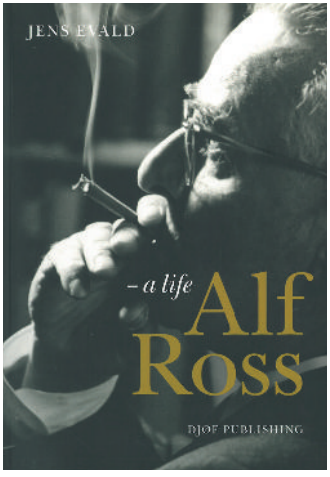

A scientific approach to life

On 14th July 1923 Alf Ross wrote a letter to his future wife, Else-Merete Helweg-Larsen, who was studying in Germany. The letter contained deliberations about the journey that he was about to undertake as part of his studies. His problem was his doctoral thesis. Alf Ross burned to study philosophy and philosophy of law, but found it difficult to get a handle on the subject.

'In a way I am tempted by a subject in the philosophy of law because it is there that great thoughts, a philosophy of life, can be found and one does not just suffocate in details. But such a study has never been written in Denmark. It would, literally speaking, be a new passion here. Will anybody read it? It does not "lead" to anything either. Do I dare? Can I? Am I strong enough?' wrote Alf Ross.

Else-Merete helped to focus Alf Ross' mind by assuring him that the philosophy of law was where he would best formulate a scientific philosophy of life. On 22nd July 1923 she wrote: 'Isn't a subject in the philosophy of law the best way for you to clarify your philosophy of life? So work for the idea and don't work because you want a result in the shape of a job at the university. Maybe you are better equipped for a detailed doctoral thesis, but if you really have some new, big, bold thoughts then you must also dare to present them. Strong enough Alf? Of course you are strong enough!' she wrote. It was more than a casual remark, for ever since the couple met on 27th January 1921 she had been the sounding-board for Alf Ross' detailed expositions of philosophical questions.

Alf Ross embarked on his journey in September 1923 and he and his wife would later stay in Paris, Vienna, London and Berlin. On 20th November 1923, while Alf Ross was still alone in Paris, he wrote to Else-Merete Helweg-Larsen: 'You once said something that has struck me as being very true and even though it was about myself it had not dawned on me. Namely that I, through the study of the philosophy of law, would work through my own philosophy of life. That is very true and it is that which presently gives me great satisfaction, even though the amount related to law is meagre. But how could you know? Is it something somebody told you or is it your own instinctive knowledge?'

This was the correspondence in which Alf Ross, for the first time, considered his scientific philosophy of life, which over the years developed into a mirror image of his academic philosophy, which, simply put, rested on a foundation of anti-metaphysics and a strong conviction that logic must be applied in all thinking.

The scientific philosophy of life is the source or the key for an understanding of Alf Ross' actions, both as an academic and as a husband and family man. The scientific philosophy of life was his fundamental norm, his existential starting-point, which provided direction in his life and upon which he based his views and his theories. The scientific philosophy of life became a fundamental trait in Alf Ross' life and it became his private 'normative ideology' and therefore also a yardstick for his life, both academically and privately.

Academically, it meant that Alf Ross signed himself over to science, like Dr. Faustus signed himself over to the devil. 'Up until now this has been the foundation: that I felt that whatever life sends my way I have loved one thing above all else on this earth, without deceit and without consideration, giving it all my effort and sacrificing my health to it – my science,' wrote Alf Ross in 1935.[1] 'It is an illusion to lay plans that presuppose that I have lots of time for comfy family life,' he added in 1957. Ross had an endless faith in the authority of science, its explanations and its infallibility. 'Throughout my studies I have felt this more and more behind all the detail: to penetrate and virtually face the very riddle of our life,' he wrote to Else-Merete Helweg-Larsen on 11th November 1923. Later in life this almost limitless respect for science as authority made some American reviewers characterise Alf Ross' philosophical thinking as 'scientism'.

Privately, it meant that throughout his life Alf Ross tried to solve even his marital and emotional problems through his scientific philosophy of life. He was not always successful. It also meant that it was often difficult for Else-Merete Ross and their children to discuss questions to which Alf Ross was convinced that he had the answer. And Else-Merete Ross, throughout her life, expressed the view that she felt intellectually inferior to, in her phrase, the 'brain man' Alf Ross. The scientific philosophy of life is therefore also one of the keys to understanding the marriage of Alf and Else-Merete Ross and why it periodically reached breaking-point. 'All happy families look alike, but the unhappy family is always unhappy in its own way,' wrote Tolstoy. The Ross family was not an unhappy family, but Alf and Else-Merete Ross were not always happy together.

Law student

Alf Ross was born 12th June 1899 in Copenhagen and his father Carl Christian Ross made a career for himself in the Ministry of Finance, firstly as an office assistant and later as a clerk. However he advanced no further, which made him very bitter. Alf Ross' father suffered with recurring depression, an illness that he passed on to his son.

Alf Ross graduated from school in July 1917 having specialised in maths and sciences, and he received top marks in all subjects. After school he enrolled as a student of engineering, but in 1918 he joined the university to study law. In 1922 Alf Ross finished his studies with an outstanding result, which astounded his fellow students. However he was not well liked: he was to condescending. Not only did Alf Ross smile when he did well but he also smiled when others performed badly. That upset his fellow students. In his diary Alf Ross wrote: 'There is something exciting about walking with growling hyenas'.

It was a common thing for law students at the Copenhagen Faculty of Law to travel to other European universities and most professors and other university lecturers had undertaken such journeys. In 1924-1926 Alf and his wife Else-Merete Ross travelled to Paris, Vienna, London and Berlin. Meeting the legal philosopher and professor of international law Hans Kelsen in Vienna in 1924 was a defining moment for Alf Ross. Another encounter in 1925 was also to be of great significance. The Rosses met the Swedes

Gunnar and Alva Myrdal in London in 1925. Gunnar Myrdal was later to become MP of the Swedish Parliament and professor of economy was to influence Alf Ross' academic approach in various ways, but his main impact was in guiding Ross towards a political alignment with the Social Democrat party. When Alf Ross returned to Denmark in early summer 1926 he brought with him his completed thesis. However, the Alf Ross who returned home was deeply plagued by illness. Alf Ross had been working so hard that he had developed a stomach ulcer. Things were to go from bad to worse when his thesis was rejected by the University of Copenhagen in 1927. One of the members of the evaluation committee was the conservative professor of law Frederik Vinding Kruse, and from that time onwards Alf Ross and Vinding Kruse were mortal enemies.

Struggling years and the World War

In the years 1927-1929 Alf Ross struggled to find his feet both academically and privately. When his thesis was rejected Alf Ross had a nervous breakdown and only gradually recovered.

With the help from Gunnar Myrdal Alf Ross got in contact with Axel Hägerström, the Professor of Philosophy at Uppsala University. In the autumn of 1928 Alf Ross went to Uppsala to study under the direction of Hägerström and to achieve a Swedish doctoral degree, which he achieved in 1929.

His Swedish doctorate only secured Alf Ross the job of teaching assistant at the Faculty of Law in Copenhagen. He had to begin again, and submitted his thesis in 1933. Once again, Frederik Vinding Kruse was part of the evaluation committee and, to tell the truth, it was a close-run thing whether the thesis would be accepted for defence. Gunnar Myrdal wrote to Copenhagen University complaining about the unacceptable treatment to which Alf Ross had been subject, in Myrdal's estimation. Myrdal's letter may have had little or no significance, but it demonstrated that the story could not be contained within the walls of the University of Copenhagen. In 1934 Alf Ross was given his doctorate and in 1935 he became a docent. He had now gained a foothold at the Faculty of Law.

In 1938 Alf Ross was appointed Professor of International Law and in this capacity he was involved indirectly in the legal aftermath of the war. There were petty and important scores to be settled and Alf Ross settled his score with professor Frederik Vinding Kruse, whom he accused of being a Nazi. Frederik Vinding Kruse was indeed very conservative and during the German occupation Nazi representatives asked him to form a government, but Vinding Kruse declined. In the end Alf Ross' action was more an expression of a personal vendetta. In the run-up to the October 1945 election for the Danish Parliament after the end of the German occupation, Alf Ross wrote an opinion piece in the newspaper Social-Demokraten in which he declared his intention to vote for the Social Democrat party, maintaining that it was the party best suited to look after democracy. In 1946 he published the book Why Democracy? and Alf Ross became a personality known outside academia.

Golden years

In 1950 Alf Ross took over the teaching of jurisprudence when Frederik Vinding Kruse retired and, aged 51, he had the first opportunity to expound his ideas to his students. This was the beginning of his golden years. Ross published On Law and Justice in 1953, which was to influence generations of law students at Copenhagen.

In 1953 and 1954 Frederik Vinding Kruse reviewed the book and characterised Alf Ross' work as a joust with windmills, arguing that the philosophical discussion had 'an amateurish tint'. Not only that, but the book was plagued by incorrect statements and by the fact that Ross now seemed to be leaving value-nihilism and to be moving 'towards my points of view'. The problem was a familiar one: Alf Ross did not reference his sources. Alf Ross reacted and called Vinding Kruse's review an offence. Disagreement between Vinding Kruse and Alf Ross was no longer news but was solely kept alive by a lifelong enmity. The new generation of law students did not know the background of the conflict, which had now been going on for more than two decades. It was, quite simply, tiresome to witness and in 1954 a young law student, Kjeld Rasmussen, spoke out and castigated the two combatants in an article entitled 'They ought to be ashamed' in the journal Stud. Jur. The feud between Frederik Vinding Kruse and Alf Ross had, from time to time, shaken the walls of the Faculty of Law since 1927. In 1954 Frederik Vinding Kruse was 74 years old and Alf Ross was 55 and their feud entered its 27th year. Both the feud and the enmity and the age of the combatants argued for a burial of their argument, but it never happened. It continued until Vinding Kruse died in 1963.

During 1950-1969, Alf Ross' name became indelibly connected with the Scandinavian school of realism, which in addition to Alf Ross included the Swedish law professors Vilhelm Lundstedt and Karl Olivecrona. Alf Ross' international network was now global and both the number of books and articles that were translated into the main languages of German, English or Spanish, and the fact that Alf Ross had been a part of the world of legal philosophy before the war meant that Ross was regarded as a senior scholar and treated with respect. In Denmark, Alf Ross was establishing his name both as an author and scholar and as a frequent contributor to newspapers, in which he commented on social and general issues. He was asked for legal opinions and helped draft several bills for the government and was also consulted by other lawyers. He was paid handsomely for this work. In 1959 Alf Ross was appointed as a judge at the European Court of Human Rights, a function that he undertook until 1971. In the 1960s Alf Ross had achieved what he had dreamed about as a young man: he was recognised, wealthy and famous, both within and without the country of Denmark. It was a golden time.

Autumn

Alf Ross retired in 1969, the year of the student revolt. The student revolt was directed against research, and it was in particular the positivist idea of investigation that was criticised. Positivism emphasised objective, empirically based research and the application of logic. This had meant that standpoints based on values and ideologies had been regarded as unscientific and had been rejected. From the 1930s until 1950 Frederik Vinding Kruse defended the opinion that ideology and morals were based on science. This was the idea that Alf Ross had so ferociously fought, but now this idea was once again celebrated as the true science, dressed in the clothes of the student revolt and Marxism. The idea of science that Alf Ross had subscribed to in the 1920s had been borne by socialist academics as part of a revolt against conservative trends. In this revolt, logical positivism had been one of the weapons used to fight conservative and ideological legal science. In 1968 positivism faced an equally ferocious onslaught by an equally value-oriented and ideologically inspired ideal of science like the one defended by Frederik Vinding Kruse. Without any insight into the way in which logical positivism had interacted with political life in the 1920s, students maintained in 1968 that positivism generally was conservative and bourgeois. In

the final analysis, the ideal science of the student revolt was more close to Frederik Vinding Kruse's ideas than to those of Alf Ross. The ideal of science proposed by the student revolt was based on a solid political foundation and it crystallised in the so-called materialist theory of law.

Alf Ross had an active life as a pensioner. He concerned himself with criminal law and he wrote numerous pieces. He also continued to travel, most frequently to Majorca, where he went walking in the mountains and enjoyed good Spanish wine. He corresponded with colleagues from all over the world and engaged in debate on a multitude of subjects. Else-Merete Ross' death in 1976 was a heavy blow for Alf Ross and the rest of the family. The most important thing for the couple was that they had finally become reconciled to each other. Like the elder academic lawyer that Alf Ross had become, he was honoured with both a festschrift in 1969 and Den Sandøe Ørstedske Prismedaille in 1971. Alf Ross had reached the final rung of the academic ladder, cursus honorum.

'That was it, thank you for your attention'

What did Alf Ross believe in? In other words, what was his credo?

'Yes, what do I believe in? I am an old man, so I ought to know, but still the question is not so easy to answer because it is not easy to know what is asked.' Thus Alf Ross began his opinion piece 'Credo', which was published in the newspaper Weekendavisen on 21st June 1974. In matters religious, Ross had the same idea that he had always had: namely that 'all certitude in matters religious-metaphysical is foreign to me. To think that something is true without reason is meaningless to me. We have not the least reason to believe that there is a "God" and contemplating his being, whatever it might be, quickly leads to contradictions.' In Alf Ross' own words, he had 'shaken the veil of religious dreams' from his feet and had stepped into the world with open, unafraid eyes.

But what was the backbone of Alf Ross' being? What was he in his own words, 'willing to wager his life on'? Alf Ross believed in 'the creative power of thought, imagination and will, which is expressed in the individual's effort in science, art, philosophy and politics'. Each and every one shapes his own life, 'his own person in freedom and with responsibility,' opined Ross. 'When I say freedom I mean the inner freedom, our moral self-determination, which no one can take away from us,' explained Ross. For the same reason, he believed in democracy as a form of government and hated Nazism, Communism and any other kind of authoritarian government that subjected the individual's right to speak, believe and think freely. Alf Ross believed in man's moral freedom and responsibility. 'Every choice we make, every decision we make, is our own and the blame and responsibility for it is our own.' Alf Ross argued that it was a falsehood to blame everything on society and circumstance. He was a believer in liberal economics, but not without control by society. Control was necessary because of man's endless egotism. 'I believe in man's boundless egotism – not just something big and good but as something important, a reality behind all the phrases…. Love between human beings is part of the lofty ideals that are so far removed from all reality that one must be blind to believe in it as more than a pipe dream.' He also believed in human desire for power, that is 'egotism in its essence takes the form of the pursuit of power and that means the possibility of self-expression to demonstrate your superiority and to use it to command and control the destiny of yourself and others…. Therefore I believe as little in justice as I do in love – if justice is to be understood as some kind of ideal for "an equal share of evil and good amongst all men".'

Alf Ross had kept an ampoule of morphine at home for many years. He had been given this by his friend, the doctor Erik Begtrup. Alf Ross had 'acquired what was necessary' early in life.

Alf Ross' oldest son, Strange Ross (born 1928) tells us that Alf Ross got up on the morning of 16th August 1979, but that he was in such strong pain that he could almost not get dressed. Alf Ross was aware of the fact that the cancer he had suffered of for some years had spread. In the morning he called his sister Yrsa and said, 'I am going to say goodbye to you'. The same day he wrote goodbye letters to his family and his sister. He wrote 'It is difficult to say goodbye, easy to become sentimental. They wanted to admit me to hospital but I think that it is time to put down a final full-stop.' During the day his daughter, Lone Ross (born 1933) and Strange Ross visited Alf. Alf Ross´ son Ulrik Ross (born 1939) lived in USA. On the same day Alf Ross recorded a tape and wrote on the box that it was of possible use for a memorial celebration. Having read the poems, and after a short pause, Alf Ross said, 'That was it. Thank you for your attention'.

In the evening of 16th August 1979 Alf Ross injected himself with the morphine. Just as he had soberly analyzed his life, his illness and his death were carefully considered and his decision was made in accordance with his scientific approach to life.

If one were to search for Else-Merete Ross and Alf Ross' graves one would search in vain. Neither of them wished to be buried. Instead their ashes have been thrown to the winds.

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*Presentación**

Por Alessandro Serpe

Alf Ross (1899-1979) ha sido, sin duda, una de las figuras que ha dominado la cultura filosófico-jurídica en el Siglo XX. Discípulo de Hans Kelsen (1881-1973) en Viena y de Axel Hägerström (1868-1939) en Uppsala, es dentro de los realistas escandinavos quien, *con un original enfoque, ha influenciado la tradición jurídica europea, anglosajona y más allá del continente.* Vastísima fue su producción: más de cuarenta años de trabajo devoto y constante, una misión de la cual emerge, con toda fuerza, una apasionanda comparación entre asuntos que son contemporáneos de la Filosofía del Derecho, Filosofía Política, Derecho Penal, Derecho Internacional, Ciencia Política y Derecho Comparado. Las intrínsecas contribuciones de las reflexiones del Ross teórico y filósofo del derecho, resonaron también en las numerosas páginas que escribió en su rol de apreciado cronista y crítico social.

Desde el 1938 Ross fue Profesor de Derecho internacional, en la Universidad de Copenhagen y, por más de cuarenta años, desde el 1935 al 1977, desempeñó el cargo de *Sekretær for Provinshandelskammeret,* Secretario de la Cámara de Comercio, que también conpaginó con la de consultor jurídico para privados, además del realizado para el gobierno danés. En 1953, formó parte de la redacción de la Constitución danesa. Desde el 1959 al 1971, Ross asumió la función de Juez de la Corte Europea de los Derechos Humanos en Estrasburgo.

Los estudios sobre la obra de Ross no pueden dejar de tener cuenta las diversas etapas de su pensamiento. Inspirado en el rigor kelseniano y en el enfoque formalista neo-kantiano su primer trabajo, *Theorie der Rechtsquellen. Ein Beitrag zur Theorie des positiven Rechts auf Grundlage dogmenhistorisher Untersuchungen* (1926), escrito en los años vieneses bajo la guía de Kelsen, lo somete a la Comisión de la Universidad de Copenhagen para la obtención del título de *Doktor juris.* El trabajo será rechazado: la Comisión presidida por Frederik Vinding Kruse (1880-1963) lo declarará insoportablemente abstracto y extraño a la tradición de ciencia jurídica del pequeño ambiente danés, basado en las enseñanzas del Maestro de la Escuela del Realismo Nórdico, Anders Sandøe Ørsted (1778-1860). Será, entonces, el científico de la política y del socialismo sueco, Gunnar Myrdal (1898-1987) en introducir a Ross al realismo de Hägerström. En 1928 Ross llegará en Suecia, beberá de la fuente realista del Maestro de Uppsala y allí se hará Doctor. En 1933 se someterá nuevamente al juicio de la Universidad de Copenhagen, todavía una vez más precedida por Kruse, su rival en vida. En su segundo doctorado, *Virkelighed og Gyldighed i Retslæren*, aparece toda la relevancia que la teoría de Ross tiene en común con Hägerström. Esta vez, por una serie de vicisitudes académicas internas en la Universidad danesa y en algunas presiones externas provenientes del *milieu* sueco, será admitido para la discusión oral y así logrará conseguir el título doctoral.

El sorprendente asunto académico nos advierte, pronto, la complejidad de la figura de Ross. El realismo de Ross es fina y rigurosa construcción teórica en familiaridad, por un lado, con el neopositivismo; y, por el otro, en apertura con el *behaviourismo* de la cultura jurídica americana. Que Ross haya recuperado la normatividad, no como validez formal de la norma, sino como efectividad, y, por consiguiente, haya adquirido y reelaborado en clave del realismo psicológico los asuntos de la filosofía jurídica tradicional, es una opinión ratificada de los expertos. Que, a su vez, la teoría de Ross sea, en la estructura, no una variante extravagante del normativismo de derivación kelseniana, sino

* Traducción castellana realizada por la Dra. Flor Avila Hernández, de la Universidad del Zulia, Maracaibo. Venezuela

más bien una elaboración conceptual 'revolucionaria' que concilia de un modo original los asuntos del neopositivismo lógico con el estudio del derecho, constituye una alternativa igualmente interesante y complementaria en la tendencia prevalente en la literatura.

El debate sobre la obra de Ross en todas sus aspectos y en cuanto a los problemas tradicionales de la *jurisprudence*, ha ganado espacio dentro de la historia de la cultura filosófico-jurídica ocidental e ilustra,sin duda, la implícita profundidad de su esencia.

El presente número de *Utopia y Praxis Latinoamericana* aspira a reavivar la reflexión crítica sobre la filosofía jurídica del danés, a la luz de un suscitado interés por la obra de Ross que en los últimos años se ha manifestado en Europa. Son testimonios los trabajos importantes de Jens Evald y de Jakob v.H. Holtermann. En su *Alf Ross- a life,* Copenhagen 2014 (versión en lengua danés *Alf Ross – et liv,* Copenhagen 2010), Evald reconstruye con particular riqueza y extrayendo de la correspondencia epistolar con su mujer, Else-Merete Ross (1903-1976), de diarios privados y de artículos de periódicos, la complejidad de la vida privada, intelectual y académica de Ross, de sus estudios juveniles realizados en París, Viena, Londres y Berlín, a los sucesos y a las humillaciones sufridas, a propósito de sus dos tesis de Doctorado, en la pequeña Universidad de Copenhagen y las acciones de su enemigo en vida, Frederik Vinding Kruse. Las peripecias del joven Ross, entre Viena, Copenhagen y Uppsala, entre Kelsen, Kruse y Hägerström, tomaban cuerpo y se sucedían en los años entre las guerras hasta 1938 cuando Ross consiguió la Cátedra de Derecho Internacional en la Universidad de Copenhagen. Desde allí, las nubes empezaron a alejarse y el sol comenzó a resplandecer. Los años de oro, como Evald los bautiza, aquellos de los años cincuenta, de la revancha contra las hostilidades locales, fueron años que se abrían con su contribución a la enseñanza de la *Jurisprudence* y con la publicación de su obra magistral de fama mundial *On law and Justice* (1953). Son aquellos también los años de contactos fructíferos con la cultura jurídica americana y anglosajona, con los herederos del Maestro común Hägereström, Vilhelm Lundstedt (1882-1955) y Karl Olivecrona (1897-1980), los años de prolífera producción científica y de éxitos internacionales. Mientras los trabajos de Ross eran leídos, estudiados y traducidos en diversas lenguas, alemán, inglés, español, francés, italiano, sueco, noruego, la fortuna de Ross se sedimentaba en el tiempo y en la Historia de la Filosofía y de la Teoría del Derecho del último siglo.

Una vez jubilado de la vida académica en 1969 -particularmente en los años de revuelta estudiantil donde ferozmente se oponían a aquel modo 'positivista', neutral, objetivo y empíricamente orientado de hacer investigación a la cual había incondicionalmente creído,- su obra se convierte en una íntima reflexión sobre los grandes temas de la humanidad. Evald concluye su detallada reconstrucción con frases extraídas del *Credo,* ensayo rossiano que constituye un testamento moral de una vida entera.

En el 2013, Jakob v. H. Holtermann reedita, se ocupa e introduce la obra Magistral de Ross, *Om ret og retfærdighed (On Law and Justice)* y, sobre el influjo en un fuerte despertar por la obra del danés dentro de los países escandinavos y anglosajones, se ha sucesivamente involucrado en la reedición e introducción en lengua inglés, para la Oxford University Press, de *On Law and Justice*, obra re-traducida a cargo de Uta Bindreiter (2016). En su presente ensayo, *"This cannot be its meaning in the mouth of the judge",* Holtermann reflexiona con perspicacia sobre la abundancia de errores y omisiones en la nota y única traducción de *On Law and Justice,* 1958, errores y omisiones que han tenido el efecto negativo de equivocadas interpretaciones del pensamiento de Ross en el ámbito internacional. En complicida con ulteriores y afixiantes malentendidos, después, la lectura, en parte no generosa, y, en parte fundada sobre las ambiguedades de la traducción, por causa de su más reconocido representante de la Escuela de Oxford, el ilustre Herbert L.A. Hart. La recensión a cargo del entonces neo-Profesor

Hart de aquel *On Law and Justice* 1958, publicada en 1959, por el *The Cambridge Law Journal* contribuyó a infectar la recensión de aquella forma peculiar de realismo rossiano en los países de lengua anglosajona.

La negación de la existencia de la razón práctica es uno de los puntos centrales de la filosofía moral y jurídica de Ross. El trabajo juvenil dedicado al maestro Hägerström, *Kritik der Sogenannten Praktischen Erkenntnis. Zugleich Prolegomena zu Einar der Rechtswissenshaft* fue publicado en mayo de 1933. Fueron esos años, para Ross, de controvertidos sucesos académicos sufridos en Dinamarca y de acusaciones de plagio provenientes de Suecia, y el de 1933, el mismo año en el cual Ross proponía a juicio de la Comisión su segundo trabajo doctoral *Om Virkelighed og Gyldyghed i Retslæren.* Con vivacidad de ingenio, Wojciech Zaluski en su *Alf Ross on Pratical Reason,* enfatiza y analiza los dos significados que Ross, oscilando, atribuye a la razón práctica, aquella de ser, por un lado, capacidad peculiar de conocer y establecer las normas morales, fines y valores objetivamente existentes y, por el otro, mera capacidad de conocer normas morales, fines y valores objetivamente existentes. Una vez examinados el autor define los argumentos filosóficos, lógicos y psicológicos sobre los cuales Ross construye su crítica a la existencia de una razón práctica. El trabajo sigue revelando las inconsistencias de tales argumentos y las infelices implicaciones por cuanto constituyen un confinamiento de la Filosofía del Derecho a mero análisis lógico de afirmaciones empíricas.

El tema del no-cognitivismo como posición peculiar dentro de la Filosofía moral, o sea, de la imposibilidad del conocer los valores en cuanto que no individualizados en las coordenadas espacio-temporales, es la base de la teoría de Ross. Tal cuestión es sometida a prueba en la reciente contribución de Torben Spaak. En su *Ross on the Dualism of Reality and Validity*, el autor, una vez examinado con maestría los dominios y los confines de naturalismo y no-cognitivismo, profundiza la crítica al dualismo realidad y validez, dualismo que Ross considera ser la espina dorsal del pensamiento jurídico tradicional y en particular de las doctrinas del Derecho natural. Con el trabajo del 1946, *Towards a Realistic Jurisprudence,* Ross entendía reabrir la confrontación intelectual, interrumpida en los años de la guerra, entre la cultura filosófico-jurídica escandinava y aquella anglosajona, y explorar las posibilidades de una condividida y fructífera síntesis realista en el estudio del Derecho entendido cual conjunto de hechos sociales, caracterizados por la combinación de determinados comportamientos humanos e ideas y actitudes para ello.

A una perspectiva psicológica de clara derivación hägeströmaniana para los que la ciencia jurídica no es más que una rama de la psicología social, Ross acompañaba una perspectiva histórica destinada a denunciar las ideologías que estaban alrededor del Derecho y a los conceptos jurídicos fundamentales, tales como las fuentes del Derecho y el concepto de Derecho subjetivo. Spaak, a partir de ese trabajo, y de las elaboraciones sucesivas en *On Law and Justice,* vuelve a trazar los dualismos, expresión de kelseniana memoria, y con ellos la necesidad de Ross de eliminar el concepto de validez de las teorías del Derecho, para después interrogarse sobre si un tal dualismo de realidad y validez, como el diseñado por Ross, está de hecho presente en el concepto del Derecho y en qué medida tal dualismo puede repercutir en los conceptos de fuentes del Derecho y en el Derecho subjetivo.

El trabajo continúa con una comparación fructífera entre la crítica rossiana y la naturaleza dual de la teoría jurídica de Robert Alexy *(Dual nature theory of law).* Terreno, este último, que permite al autor proponer críticas detalladas de importancia en cuanto a las críticas a los dualismos y a la disolución de las antinomias en la identificación del concepto de Derecho, antinomias que Ross había, por su parte, atribuido al dogmatismo jurídico y a las teorías sociales del Derecho.

Ross, en línea con el neopositivismo, sostiene el principio básico según el cual una declaración para que sea válida debe ser verificable empíricamente, en el campo de la ciencia jurídica. Resultará que la ciencia jurídica, por su parte, no podrá sino entenderse como una ciencia empírica,

de forma tal que sus proposiciones sobre el Derecho serán válidas y no podrán que ser interpretadas con referencia a los hechos psicológicos y sociales. Ulterior resultado de este asunto, es el vaciado del contenido de los conceptos jurídicos: si el único contenido de las proposiciones de las ciencias jurídicas son los hechos sociales, los conceptos jurídicos fundamentales se ven privados de toda la realidad, es decir, están desprovistos de contenido semántico.

Esta última cuestión es investigada en la contribución de Bartosz Brozek. En *On tû tû*, el bien conocido y discutido ensayo del 1951, Ross, analizando el alcance de los conceptos jurídicos, mostró su completa falta de referente semántico, a pesar de que ellos ejercían una función útil en la presentación de las normas jurídicas. Con peculiar rareza, él había comparado los conceptos con palabras imaginarias de un lenguaje imaginario hablado por las tribus *Noît-cif-tribe,* habitantes de una isla en el Pacífico.

Al igual que las palabras imaginarias, también los conceptos jurídicos (por ejemplo, el de "propiedad") son semánticamente vacíos; sin embargo, todavía constituyen métodos eficientes de presentación y estructuración de las normas jurídicas. Brozek, en su ingeniosa contribución, argumenta la importante significación de los conceptos intermediarios tanto en la génesis de los conceptos como en la construcción del conocimiento jurídico y, poniéndose un frente crítico, supone ser la mera función de presentación del material jurídico excesivamente restrictivo.

La teoría de la validez jurídica y del rol que la misma validez juega papel importante al interior del proceso decisional del Juez, es lo investigado en el artículo de Katarzyna Eliasz sobre la teoría de Alf Ross: *Theory of legal validity in the context of current research on the judicial decision making.* Es bien sabido que el *behaviourismo,* cargado de elementos psicológicos es, con Ross, el puente de unión entre los asuntos psicológicos del Realismo escandinavo de la Escuela Sueca y el análisis del comportamiento del realismo americano. Los dominios del Juez, cual intérprete y aplicador del Derecho y del jurista cual experto en derecho, son conisderados por Ross como indisolublemente juntos. En la *Law and Justice,* Ross había sostenido que las proposiciones doctrinales no eran sino que predicciones sobre el futuro comportamiento de los jueces y que la aserción de validez de una norma jurídica era "medible" en base al grado de probabilidad con el cual el juez habría usado la norma como base para sus futuras decisiones. La razón justificativa de tales predicciones, se encuentra toda en el asunto por el cual, además de la aplicación del Derecho, el Derecho se funda en la experiencia, por parte de los jueces, de sentirse obligados con las normas jurídicas y animados, en su vida interior, por una ideología normativa compartida con otros jueces.

Tal ideología normativa no es más que la doctrina de las fuentes del Derecho estrictamente basada en criterios jerárquicos y no en factores individuales. En su contribución enigmática, Eliasz investiga, por un lado, *la interplay* de la teoría de la validez de las normas jurídicas y la *prediction theory* y, por el otro, los aspectos más profundos y complicados que se relacionan con el proceso de decisión. La cuestión que se plantea es sí una teoría, como la de Ross, basada en la jerarquía objetiva y completa de los factores que dispone el juez en el proceso de toma de decisiones, responde más o menos a las investigaciones actuales y empíricas en la psicología sobre el papel que los factores individuales desempeñan en procesos de motivación y en la toma de decisiones.

Que la Filosofía Jurídica de Alf Ross haya formado generaciones de juristas, es un asunto que no requiere demostración alguna. Los estudios de Alf Ross entraron a formar parte del *milieu* filosófico - jurídico italiano, desde los años cincuenta. Sin embargo, todavía, Bobbio, en 1937, dio la primera noticia de la obra de Ross al público italiano, la revisión crítica *Kritik der sogenannten praktischen Erkenntnis, Zugleich Prolegomena zu einer Kritik der Rechtswissenschaft.* En el ensayo aquí presentado de Alessandro Serpe, *Counteracting with healing antidotes.Beyond Kelsen, towards*

Ross, el autor pretende presentar no una comparación del pensamiento de Alf Ross con aquella de Norberto Bobbio, en todos los frentes, sino más bien examinar aquellas áreas de investigación que puedan proporcionar razonablemente evidencias a favor de intersecciones importantes.

La comparación es especialmente interesante con referencia a los trabajos que Bobbio tuvo que escribir, a partir de los años sesenta, años en los cuales, el gran jurista se apartó de las posiciones de fuerte formalismo kelseniano y origina una ruptura con los enfoques aparentemente neutrales y avalorativos, abriéndose a nuevos enfoques más allá de los Alpes. La necesidad de cientificidad y de adhesión a la realidad que Bobbio, desde los años cuarenta profesaba contra las doctrinas del Derecho natural y metafísico, y por los cuales había utilizado los antídotos del kelsenismo, insertado en el tronco de la filosofía analítica y del positivismo lógico, se mantenía sólida.

Aunque el positivismo jurídico de la derivación Kelseniana había jugado un papel crucial en el pensamiento jurídico de Bobbio, más allá de los años de su manifiesto kelsenismo, sus apasionadas reflexiones sobre el significado del positivismo jurídico, sobre la relación entre normas primarias y normas secundarias y, no menos importante, en las relaciones mutuas entre Derecho y fuerza y sobre la coacción del Derecho, pueden presentar, con razón, muchas afinidades con los supuestos del realismo jurídico rossiano y la Filosofía del Derecho anglosajona. Por supuesto, a conclusiones similares a las de Bobbio Ross había llegado en formas y por razones y sensibilidad diversas. Sin embargo, el estudio sobre los criterios de identificación del Derecho, la insistencia en el rechazo del formalismo en el Derecho y la apertura a la realidad del Derecho, no son intentos infundados de comparación. Sin embargo, en aquella nueva conversión, ellas representan, como había sido así el kelsenismo de los años cincuenta contra la doctrina de la ley natural, los nuevos antídotos para contrarrestar y cuidar la cultura filosófica y jurídica italiana de nuevos males.

La obra de Ross ha tenido efectos positivos también en la cultura filosófico- jurídica sudamericana suscitando nuevas sensibilidades y enfoques originales. En *Un Aporte de Alf Ross, a la Estrategia de la doctrina jurídica,* Miguel Ángel Ciuro Caldani investiga los métodos y la doctrina jurídica de Ross, a la luz de nuestro tiempo para desarrollar estrategias legales para el estudio y la verificación de la doctrina y del pensamiento jurídico en su generalidad. Propósito, y de particular importancia, es el requisito de la verificación, uno dentro de los temas centrales de la filosofía jurídica de Ross. En el enfoque original de su obra, y para la construcción de un modelo jurídico, Ciuro presenta el verificacionismo rossiano, teniendo en cuenta el tridimensionalismo integrativista de la teoría trialista del mundo jurídico de Werner Godschmidt. El "positivismo" realista de Ross se coloca con relación a la perspectiva del integrativismo tanto en cuanto a la dimensión normológica, como en la sociológica y axiológica.

La contribución de Hermann Petzold, *Algunas notas sobre la noción de Interpretación Jurídica de Alf Ross,* cierra esta edición especial dedicado al pensamiento iusfilosófico de Ross. La discusión que se genera en la interpretación de la norma no debe quedar reducida a una comprensión puramente fáctica y procedimental de las acciones de los ciudadanos, pues, entonces, el positivismo jurídico no supera la esfera de la deducción lógica. Se trata de hacer una interpretación subjetiva que pueda contextualizar el sentido de las normas en el espacio de la vivencia de los actores, en referencia con su cultura e historia. Le corresponde al juez esta tarea hermenéutica a favor del desarrollo socio-político de un ejercicio del Derecho más justo y humanitario.

No puedo dejar de agradecer al Director-Editor de la Revista, al Profesor Dr. Álvaro Márquez-Fernández, por haber creído, acogido y sostenido, con entusiasmo, generosidad y confianza, el presente proyecto.

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"This cannot be its meaning in the mouth of the judge"

(The case for the new English language translation of Alf Ross's On Law and Justice forthcoming on Oxford University Press)

"Esto no puede ser su significado en la boca del Juez"
(El caso de la nueva traducción al inglés de Sobre la Ley y la Justicia de Alf Ross editado por Oxford University Press).

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Resumen

La segunda edición en inglés de la obra principal de Alf Ross Sobre el derecho y la justicia será próximamente publicada por Oxford University Press. En lugar de simplemente volver a imprimir la traducción existente al inglés de 1958, la nueva edición contiene una nueva traducción completa. Este artículo del editor de la nueva edición desarrolla el argumento a favor de esta decisión. Este argumento se centra en el papel altamente negativo de la influencia crítica de H.L.A. Hart para la recepción de la obra de Ross sobre la filosofía del derecho anglo-americano. Se afirma, en primer lugar, que la crítica de Hart pierde esencialmente su validez, y que en última instancia es un hombre de paja. Sostiene además que, a pesar de que Hart fue, al menos en parte, responsable de esta mala interpretación, la traducción al inglés de 1958, ciertamente no ayudó. Debido a una serie de errores, omisiones y decisiones terminológicas problemáticas, de la primera traducción se puede decir, al menos, que invita al lector poco atento o menos caritativo a incurrir en el tipo de lectura errónea en la que el propio Hart incurrió.

Palabras clave: Alf Ros; realismo jurídico escandinavo; H.L.A. Hart; sobre el derecho y la justicia; ley válida; traducción.

Abstract

The second English edition of Alf Ross's main work On Law and Justice is forthcoming on the Oxford University Press. Instead of simply reprinting the existing English language translation from 1958 the new edition contains a full new translation. This article by the editor of the new edition unfolds the argument for this choice. This argument focuses on the highly negative role of H.L.A. Hart's influential critique for the reception of Ross's work in Anglo American legal philosophy. It claims, first of all, that Hart's critique essentially misses the mark, and that it is ultimately a straw man. It further argues that even though Hart was at least partly responsible for this misreading the 1958 English translation certainly did not help. Due to a number of errors, omissions and problematic terminological choices the first translation can be said to at least invite the inattentive or uncharitable reader to arrive at the kind of misreadings Hart arrived at.

Keywords: Alf Ross; scandinavian legal realism; H.L.A. Hart; On Law and Justice; valid law; translation.

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"The task of making more exact a vague or not quite exact concept used in everyday life or in an earlier stage of scientific or logical development, or rather of replacing it by a newly constructed, more exact concept, belongs among the most important tasks of logical analysis and logical construction".

CARNAP, R. (1947). *Meaning and Necessity: A Study in Semantics and Modal Logic.* Chicago, Illinois: The University of Chicago Press, pp.7-8.

1. INTRODUCTION

Recent years have seen a strong revival of interest in Scandinavian Legal Realism generally and in Alf Ross's legal philosophy in particular. Prestigious journals publish articles on or by Scandinavian Realists[2], entire special issues are devoted to the topic[3], and a few years ago the Oxford University Press decided that the time was ripe for a new translation of Alf Ross's *On Law and Justice*[4].

One driving factor in this development has been the increasing realization that the Scandinavians may, philosophically speaking, be more modern and topical than commonly thought. Originally, Scandinavian Realism was conceived on the basis of very austere empiricist general philosophical theories from the first half of the 20th century – in Alf Ross's case on the basis of logical positivism as originally conceived in the Vienna Circle. However, since logical positivism is largely moribund today and more or less has been thus considered since the middle of the 20th century, legal philosophers seemed in many years to be in the habit of drawing the conclusion that Scandinavian Realism was moribund too[5].

Within roughly the last decade, however, this perception seems to have changed, and it seems to have done so as a result of a development in relation to *American* Legal Realism initiated a few years earlier by Brian Leiter. Thus, in 1997 Leiter launched a convincing and soon to become hugely influential argument that the American Realists could be read as a kind of philosophical naturalists in the sense attributed to that term by W. V. Quine in his seminal article "Epistemology Naturalized".[6] A decade

2 Cf. e.g. ENG, S (2011). "Lost in the System or Lost in Translation? The Exchanges between Hart and Ross". *Ratio Juris*, 24 (2 June), pp.194-246. doi:10.1111/j.1467-9337.2011.00482.x; HOLTERMANN, J v H (2015). "Getting Real or Staying Positive-Legal Realism(s), Legal Positivism and the Prospects of Naturalism in Jurisprudence". *Ratio Juris-An International Journal of Jurisprudence and Philosophy of Law.* doi:1111/raju.12071; ROSS, A (2011 [1936]). *The 25th Anniversary of the Pure Theory of Law.* Paper presented at the Oxford Journal of Legal Studies.

3 Cf. e.g. this issue and BRUNET, P; ERIC, M & MERCIER, J (Ed.) (2014). *Scandinavian Realism in All of Its Forms.* Special issue of Revus: *Journal for constitutional theory and legal philosophy,* Vol. 24.

4 ROSS, A (Forthcoming 2016). *On Law and Justice.* Trans. U. Bindreiter &. J. v. H. Holtermann Ed. Rev. Ed. /and a new introduction for this edition by J.v.H. Holtermann (Ed.). Oxford, Oxford University Press.

5 Thus e.g., the following passage: "Scandinavian Realism [survives] only in the museums of jurisprudential archaeology". SCHAUER, F & WISE, VJ (1997). "Legal Positivism as Legal Information". *Cornell Law Review*, 82, p. 1081.

6 Cf. LEITER, B (1997). "Rethinking Legal Realism: Toward a Naturalized Jurisprudence". *Texas Law Review,* 76, 2, December, pp. 267-315; QUINE, WVO (1969). "Epistemology Naturalized", in: QUINE, WVO (Ed.) (1969). *Ontological Relativity and Other Essays.* New York, Columbia University Press, pp.69-90. Leiter has later expanded and refined the argument in several articles. A collection of the most important are found in: LEITER, B (2007b). *Naturalizing jurisprudence: essays on American legal realism and naturalism in legal philosophy.* Oxford, Oxford University Press.

later, in an interview replying to the question: "To which problem, issue or broad area of legal philosophy would you most like to see more attention paid in the future?", Leiter suggested that perhaps this whole philosophical maneuver of naturalizing the American Realists could also, *mutatis mutandis*, be carried out with the Scandinavian Realists:

> Scandinavian Realism deserves a sympathetic reconsideration, along the lines of what I have tried to do for its (distant!) American cousin. It is true that the Scandinavians suffer from the vice of being motivated almost exclusively by logical positivist doctrines in semantics, epistemology, and ontology, doctrines which are largely moribund (for good reasons) in philosophy. Yet the general naturalistic conception of the world that animated their theoretical writings is not moribund, and the question of how to accomodate norms within such a world view is very much a live one. Perhaps the Scandinavians still have something to teach us? Certainly they have not yet received sympathetic scrutiny within Anglophone jurisprudence[7].

Unbeknown to Leiter the first modest steps in this direction had in fact already been taken at the time, although they had been taken in ignorance of the highway laid out by him a decade earlier.[8] Soon, however, more works would follow that would directly engage with and build on the thoughts developed by Leiter.[9]

Focusing for current purposes on Alf Ross, it is quite likely that the actual feasibility of this exercise – i.e. of dismounting the central tenets of his realistic legal theory from their commitment to logical positivism and reinserting them into a fundamentally different, but modern and viable philosophical framework – has been conducive to the present growth of interest in his work.

One tangible result of this interest has been the abovementioned decision of the Oxford University Press to publish a new, 2nd edition of Alf Ross's main work *On Law and Justice.* Instead, however, of merely basing this edition on a reprint of the first English edition published in 1958 it was further decided to devise a full new English language translation of the first Danish language edition *Om ret og retfærdighed* from 1953[10]. Comprising a total of 472 pages in the Danish original this decision calls for an explanation and the present contribution is devoted to this task.

As we shall see in the following, the main reason for the decision has to do with the fact that it was not only Alf Ross's original philosophical allegiance to the waning philosophy of logical positivism that impacted negatively on the reception of his work in the English speaking countries. The quite problematic character of the existing translation also played a central role. In order to see how, I shall proceed in three steps. First, I take a step back and briefly follow the Anglo American reception history of *On Law and Justice* a little closer focusing in particular on the role played by H.L.A. Hart's influential critique; second, I explain why this critique can be said to be based on a straw man; and third and finally,

7 LEITER, B (2007a). "Brian Leiter: Interview about legal philosophy", in: NIELSEN, ME (Ed.), *Legal Philosophy: 5 Questions*. Automatic Press / VIP., pp. 143-151.

8 HOLTERMANN, J v H (2006). "Ross og erkendelsesteorien", in: HOLTERMANN, J v H & RYBERG, J (Eds.). *Alf Ross - kritiske gensyn.* København: Jurist- og Økonomforbundet., pp. 37-62.

9 HOLTERMANN, J v H (2014). "Naturalizing Alf Ross's Legal Realism:A Philosophical Reconstruction". *Revus. Journal for constitutional theory and philosophy of law,* 24, pp. 165-186; HOLTERMANN, J v H (2015). *Op. cit.*; MAUTNER, T (2010). "Some Myth about Realism". *Ratio Juris*, 23, 3, pp. 411-427; SPAAK, T (2009). "Naturalism in Scandinavian and American Realism: Similarities and Differences", in: DAHLBERG, M (Ed.) (2009). *De lege. Uppsala-Minnesota Colloquium: Law, Culture and Values.* Uppsala, Iustus förlag, pp. 33-83.

10 ROSS, A (1953). *Om ret og retfærdighed : En indførelse i den analytiske retsfilosofi.* 1. ed.. Kbh: Nyt Nordisk Forlag. Arnold Busck A/S. After having been out of print in his home country for a couple of decades, a second edition of *Om ret og retfærdighed* was published in: ROSS, A (2013). *Om ret og retfærdighed: En indførelse i den analytiske retsfilosofi*. HOLTERMANN, J v H (Ed.,), 2. ed. / and a new introduction for this edition by J.v.H. Holtermann(Ed.). København: Hans Reitzels Forlag.

I illustrate why, even if based on a straw man, the English translation in the first edition can nevertheless be said to be at least partly responsible for inviting misunderstandings of Ross's Realism and hence for the actual success of Hart's critique. This concludes the argument for devising a new translation of *On Law and Justice* instead of merely reprinting the existing version.

2. THE ANGLO SAXON CRUSADE, HART´S CRITIQUE AND THE PERMANENT SETBACK

During the 1950s in what Alf Ross's biographer Jens Evald has described as "the golden time"[11], Ross had largely conquered the Nordic countries with his particular logical positivism-based version of Scandinavian Realism. As witnessed by the optimistic and confident preface to the 1958 edition of *On Law and Justice* the English translation was meant to be the first step on the way to, if not conquer then at least exert a considerable influence also on Anglo Saxon jurisprudence[12].

Unfortunately for Ross, however, things would not go quite that way. Even though he clearly managed to exert some influence, this influence was in the end undoubtedly less than he had hoped for and expected when he first embarked on his Anglo Saxon crusade. One very significant factor in this regard was to be a review of *On Law and Justice* published in 1959 in *The Cambridge Law Journal* by another shooting star in legal philosophy, the newly appointed Professor of Jurisprudence at Oxford University, H.L.A. Hart.[13] Hart's review was, to be sure, fundamentally respectful and it also contained (measured) praise of Ross's work – as well as of Scandinavian Realism more generally. Indeed, the fact that it was written in the first place by a professor of Hart's stature instead of *On Law and Justice* simply being passed by in silence testifies to the importance of Scandinavian Realism at the time, and it probably also contributed further to consolidating the school's position on the map of jurisprudence for future generations[14].

On one particular – and particularly important point, however, Hart expressed clear and unremitting critique. He flatly rejected Ross's predictive analysis of statements of valid law. This critique is well known, and I shall not go deep into the details of the contents here but only give a rough outline. In *On Law and Justice* using an arbitrary article from the Danish Bill of Exchange Act, Ross gives the following predictive definition of expressions of valid law in any given jurisdiction:

The real content of

P = (§ 28 of the Danish Bill of Exchange Act) is currently valid Danish law is a prediction that if an action in which the conditioning facts, given in § 28 of the Danish Bill of Exchange Act, are considered to exist, is brought before a court; and if in the meanwhile there have been no alterations in the circumstances which motivate P, the directive to the judge contained in § 28 of the Danish Bill of

11 EVALD, J (2014). *Alf Ross - a life.* Chap. 10. Copenhagen, DJØF Publishing.

12 ROSS, A (1958). *On law and justice.* London, Stevens, pp. x-ix

13 HART, HLA (1959). "Scandinavian Realism". *The Cambridge Law Journal,* 17, pp. 233-240.

14 Most respectable historical accounts of jurisprudence contain a chapter on Scandinavian Realism. Thus, a reference text book like *Lloyd's Introduction to Jurisprudence* devotes around 50 pages to an account of Scandinavian Realism and a selection of extracts of their writings (FREEMAN, MDA (2008). *Lloyd's introduction to jurisprudence* (8. ed.). London, Sweet & Maxwell, three of these extracts are written by Ross, one by Hägerström and one by Olivecrona thus testifying to Ross's prominent role in the school).

Exchange Act will form an integral part of the reasons for the court's decision[1516].

In his review, Hart objected to this analysis stating in a memorable passage that:

> […] this cannot be its meaning in the mouth of a judge who is not engaged in predicting his own or others' behaviour or feelings. 'This is a valid rule of law' said by a judge is an act of recognition; in saying it he recognises the rule in question as one satisfying certain accepted general criteria for admission as a rule of the system and so a legal standard of behaviour[17].

Hart would later develop further and elaborate this critique in some of the most celebrated passages of *The Concept of Law*. In a nutshell, Hart found Ross guilty of the same sin which he attributed to the American Realists, i.e. of providing an analysis of valid law that made it impossible to differentiate between two distinct social phenomena: habit-based convergent behavior (like going to the cinema on Saturday nights) and rule-governed behavior (like men taking their hats off when entering a church). Hart further attributed this failure to Ross's alleged failure to acknowledge an internal aspect of social rules in addition to their external aspect in terms of observable regular behavior.

This critique was to become hugely influential and it undoubtedly had a strong adverse effect on the reception of Ross's work in the UK and the United States. Indeed, one gets an apt impression of the long-term impact of Hart's review on the perception of Ross's analysis of valid law from the *Stanford Encyclopedia of Philosophy's* entry on "Naturalism in Legal Philosophy" laconic conclusion on the matter: "Hart famously demolished this analysis."[18] To be sure, this does not mean that Ross disappeared completely. But on the big scene he was for several decades effectively reduced to the ungrateful role of being an extra in the great H.L.A. Hart show – or, as Schauer so aptly expresses the point in relation to the effect of Hart's work on Realism generally: "In Great Britain and much of the rest of the common law world, Legal Realism is taught mostly as a joke, or at least as a convenient foil for demonstrating the wisdom of H.L.A. Hart"[19].

3. THE STRAW MAN CHARACTER OF HART'S CRITIQUE

Already in his return review of *The Concept of Law* in 1962 Ross objected strongly to Hart's critique, claiming that it was based on a distorted reading of his realist theory[20]. A close study of *On Law and Justice* reveals that he was probably right. Hart's critique does indeed seem to be based on rather grave misunderstandings and although undeniably effective it ultimately amounts to a straw man fallacy. Ross on his part did not hold it against Hart but blamed the translation instead. There is a risk of

15 ROSS, A (Forthcoming 2016). *Op. cit.*, § 9 / 1953, p. 55 / 1958, p. 42). In order to make my argument I shall be making a number of references to passages from *On Law and Justice/Om ret og retfærdighed* that Ross for unknown reasons decided to exclude from the 1958 English translation (cf. below). Since most readers presumably do not read Danish I have chosen to quote from the new translation of the forthcoming 2nd edition. For consistency, I have further chosen to do so throughout the article, i.e. even when quoting passages that Ross *did* include in the 1958 edition. Since the forthcoming edition has not yet been typeset this means that I can only refer to Ross's § numbers. For ease of reference, I shall therefore include the Danish 1953 reference and also, when available, the 1958 English reference. As shown in the reference in this footnote, I use the forward slash ("/") to indicate references to the 1953 and 1958 editions respectively.

16 § 28 of the Danish Bill of Exchange Act reads as follows: "By accepting, the drawee undertakes to pay the bill of exchange on the due day for payment."

17 HART, HLA (1959). *Op. cit.,* p. 237.

18 LEITER, B (2014). "Naturalism in Legal Philosophy", in: ZALTA, EN (Ed.), *The Stanford Encyclopedia of Philosophy,* Fall 2014 Edition ed.).

19 SCHAUER, F (2011). "Editor's Introduction", in: LLEWELLYN, KN & SCHAUER, F (Eds.) (2011). *The Theory of Rules.* Chicago, The University of Chicago Press, p. 4, n 14.

20 ROSS, A. (1962). *Review of The Concept of Law.* By H.L.A. HART: *The Yale Law Journal*, 71, 6, pp. 1185-1190.

overstating this point. Hart could surely have been more attentive in his reading. A close study even of the existing translation of *On Law and Justice* arguably makes it difficult to uphold Hart's interpretation in good faith. That said it is undeniable that the existing translation is highly problematic. Due to a number of quite blatant errors and omissions and problematic terminological choices the first translation can be said to at least invite the inattentive or uncharitable reader to arrive at much the kind of misreadings that Hart did.

I shall get back to the unfortunate role of the existing translation in this regard in section 4 below. In this section, I shall focus on explaining why Hart's critique can be said to miss its mark. The fundamental mistake in Hart's critique is that Ross simply never intended his predictive analysis of statements of valid law the way Hart thought. Hart's remark that "this cannot be its meaning in the mouth of a judge who is not engaged in predicting his own or others' behaviour or feelings" cannot be a critique of Ross's predictive analysis for the simple reason that Ross never intended it as an analysis of the meaning *in the mouth of a judge* in this particular situation.

To adequately capture this point it is necessary to understand the fundamental character of Ross's philosophical project, and, in particular, to see how it differs crucially from the philosophical project Hart was engaged in. Before becoming a professor of jurisprudence, Hart had taught philosophy at Oxford, and there he had become acquainted with and greatly inspired by the so-called "linguistic philosophy" or "ordinary language philosophy", which was the fashion philosophy of the day, and which was developed with some differences of emphasis at Oxford under J.L. Austin and at Cambridge under L. Wittgenstein. At the center of attention for ordinary language philosophy, especially in the Austin variant which exerted the greatest influence on Hart, was conceptual analysis based on a study of the actual uses of language. Thus, Hart articulated his perception of the philosophical project as follows in the preface, *The Concept of Law:*

> Many important distinctions, which are not immediately obvious, between types of social situation or relationships may best be brought to light by an examination of the standard uses of the relevant expressions and of the way in which these depend on a social context, itself often left unstated[21].

This contrasts sharply with the philosophical project with which Alf Ross identified, and which underlies the realist legal theory that is laid out in *On Law and Justice*. As already mentioned, Alf Ross originally based his entire theory on the philosophical program developed in logical positivism. In contrast to the agenda of ordinary language philosophy, the primary questions in logical positivism were epistemological.[22] They were deeply concerned with the demarcation problem in philosophy of science and focused, in this connection, on identifying the possibility conditions of knowledge. It is this project that Ross refers to in the preface to the Danish edition when he describes the fundamental philosophical position underlying his work:

> This fundamental position is an *anti-metaphysical* one. It expresses the programmatic demand for legal science to be established and constructed as an empirical science, in the same relativistic spirit and after the same methodological pattern that applies to all modern science which is not purely formal-logical in nature[23].

21 HART, HLA; RAZ, J & BULLOCH, PA (2012). *The concept of law.* 3rd ed. Introduction by Leslie Green (Ed.). Oxford, Oxford University Press, p.vi. On the influence of ordinary language philosophy on his work, see also Hart's introduction to his *Essays in Jurisprudence and Philosophy,* Oxford, Clarendon, p. 2.

22 Quine expresses the difference in attitude thus: "Wittgenstein and his followers, mainly at Oxford, found a residual vocation in therapy: in curing philosophers of the delusion that there were epistemological problems." (QUINE, WVO (1969). *Op. cit.*, p. 82)

23 ROSS, A (Forthcoming 2016). *Op.cit.,* ROSS, A (1953). *Op. cit.*, "Preface", p. 3.

Of particular importance in the present context is that these very different conceptions of the fundamental philosophical project have a significant impact on Hart's and Ross's respective approaches to and analyses of the meaning of statements about valid law. To Hart as an ordinary language philosopher, it is crucial that his analysis of the concept of law adequately captures the actual standard uses of this concept in various contexts. In this sense (though not in others), ordinary language philosophy aims to provide *lexical definitions* of the terms they study.

As a logical positivist, Ross on the other hand is not really engaged in an attempt to correctly capture anything like *the* concept of law. Ross does not care about what valid law means, in and of itself, to the proverbial man on the Clapham omnibus – or to the average member of the judiciary for that matter. Precisely because Ross's project was epistemological having to do with laying down the foundations of a proper science of law, he was interested in what a legal scientist *should mean* by statements about e.g. valid law *if she wanted these statements to be able to count as science.*

Thus, where, as we have seen, Hart tests the soundness of a suggested analysis against the actual use in particular real-life situations (e.g. by a judge passing judgment in a court of law) Ross's benchmark is a completely different one:

> Our analysis of the concept "valid Danish law" has purported to interpret the real content of sentences *which, according to their meaning and intention, have the character of scientific assertions that a certain rule is valid Danish law*[24].

The latter half of the sentence emphasizes the scope of the analysis. He is only trying to determine the meaning which the concept should have for those who claim to be engaged in doing legal science, in making scientific assertions. And Ross clearly does not think that this includes judges engaged in passing judgement. What is more, Ross emphasizes that his predictive analysis may not even correspond to what ordinary academics whom we would normally expect to be doing science mean by statements about valid law:

> Whether legal doctrine in the form it actually exists in current scholarly work concerning Danish law actually purports (according to its own meaning and intention) to present and explain assertions of this kind, is quite another question. It is *the question whether legal doctrine is, and wants to be, a science* of valid law in the sense previously defined[25].

On the basis of these considerations alone, it is clear that Hart's critique misses the mark in one obvious way. Ross is simply not engaged in doing lexicography. He is not providing lexical definitions of central concepts like the concept of valid law. Ross is engaged in a reformist endeavor trying to show how legal scholarship can become a philosophically respectable science if it decides to follow his realist program. And to this purpose he is therefore rather suggesting a so-called *stipulative* definition in the meaning ascribed to that term by the prominent member of the Vienna Circle Rudolph Carnap (cf. the introductory quote to this article above)[26].

In light of these considerations, one might try to rephrase Hart's objection along the following lines: Ross's analysis fails nonetheless because it leaves no conceptual room for the kind of meaning that ostensibly does attach in real life to statements about valid law in the mouths of judges engaged in passing judgement. Expressed in this way, Hart's objection refers back to the previously expressed concern about Ross overlooking the internal aspect of law, the internal point of view:

24 ROSS, A (Forthcoming 2016). *Op. cit.,* § 9; ROSS, A (1953). *Op. cit.*, p. 59; ROSS, A (1958). *Op. cit*., p. 45 (emphasis added).

25 Ibíd., (Forthcoming 2016). *Op cit.*, § 9; *Ibid*.,(1953). *Op.cit.,* p. 59; *Ibid*., (1958). *Op. cit.*, p. 46).

26 CARNAP, R (1947). *Op. cit*., pp. 7-8. For a further development of this argument, see: HOLTERMANN, J v H & OLSEN, HP (2013). "En definitionssandhed med modifikationer - kommentar til Jens Ravnkildes retskildebegreb". *Ugeskrift for Retsvæsen*, 34, pp. 293-310.

> One of the difficulties facing any legal theory anxious to do justice to the complexity of the facts is to remember the presence of both these points of view and not to define one of them out of existence[27].

The problem with this approach, however, is that only on a very uncharitable reading of *On Law and Justice* can Ross be said thus to define the internal point of view out of existence. Probably understood, it is quite clear that Ross is very clearly aware that valid law in the mouth of a judge engaged in passing judgment does indeed mean something else than what it ought to mean in the mouth of a legal scientist according to Ross's stipulative definition. In fact, his entire analysis can even be said *to presuppose* the very fact that such statements mean something different – and even something very close to what Hart claims they mean – in the mouths of judges.

I have unfolded this argument elsewhere, and intend to do so in further detail in future research, but I shall try to briefly outline the main idea here.[28] First, if we presuppose that the above interpretation is right, and Ross really did mean his definition of valid law as a stipulative definition, then it follows straightforwardly from Carnap, that there must, on Ross's view, still exist another "vague or not quite exact concept *of valid law* used in everyday life or in an earlier stage of scientific or logical development." We can call this concept valid$_2$ in order to differentiate it from Ross's stipulated concept valid1. Let us further presuppose that this concept, valid$_2$, means something along the lines of *true or correct*, and is a term that is specifically applied to norms, e.g. like the norms we find in legal rules like § 28 of the Danish Bill of Exchange Act.

Thus described, it seems that this specific concept of valid$_2$ law not only comes remarkably close to the concept of valid law in the mouths of judges which Hart claims that Ross's predictive analysis "defines out of existence". Indeed, on closer inspection it becomes clear that Ross's analysis of valid$_1$ law is in fact not only perfectly consistent with the parallel existence and widespread use in different legal contexts of such a concept of valid$_2$ law; it can in fact be said to *presuppose* the existence of valid$_2$ in addition to valid$_1$. This is so because closer analysis reveals that a statement that a given legal norm like § 28 of the Danish Bill of Exchange Act is valid$_1$ is, on Ross's account, really just a convoluted way of saying that *Danish judges think that § 28 is valid$_2$*. Danish judges think that § 28 is valid in the sense of *true or correct*, and this, in a nutshell, is the reason why we in fact have reason to make the prediction that they will act upon it. It is precisely because *they* (the judges) find it valid$_2$, that *we* (the legal scientists) find it valid$_1$, i.e. that we find it probable that it will "form an integral part of the reasons for their decision"[29].

The only real difference between Hart and Ross on this point would seem to be that Ross, unlike Hart, would claim that the judges who use this concept of valid$_2$ in relation to legal rules would be wrong. While they would undoubtedly believe, when calling a legal rule valid$_2$, that the rule is in some way *true* or *correct,* they would in fact be wrong. But this difference is not a genuine semantic difference relating to the *meaning* of valid$_2$ in the mouth of the judge. It is an epistemological difference relating to *the potential justifiability* of the judges' belief.

27 HART, DLA et al (2012). *Op. cit.*, p. 91.

28 Cf. e.g. HOLTERMANN, J v H (2014). *Op. cit.;* ROSS, A (Forthcoming 2016). *Op.cit.*

29 A technical way of expressing the same point is to say that statements of valid$_1$ law are in fact concealed *propositional attitude reports.* Stating that a given norm is valid1 is in fact a statement not only about the norm but about the relation between a given human subject, *in casu* the judges in a given jurisdiction, and the legal norm (i.e. *they think that it* is valid$_2$), cf. e.g. HOLTERMANN, J v H (2014). *Op. cit.*.

4. THE UNFORTUNATE ROLE OF THE ORIGINAL ENGLISH TRANSLATION

As already mentioned, it is not unfair to place some of the blame for the misunderstandings on Hart's own shoulders. Had he been a bit more attentive or even charitable in his reading of Ross one might have hoped that he would have rephrased his critique. And perhaps he would even have realized that, as I have argued elsewhere, Ross had essentially anticipated what has since been celebrated as Hart's great discovery in *The Concept of Law*, i.e. the importance of the distinction between of internal and external aspects of social rules[30].

However, as also mentioned, it is undeniable that the 1958 English translation is highly problematic at a number of points, and that it can be said to at least invite the inattentive or uncharitable reader to arrive at some of the same misinterpretations as Hart did. On a more stylistic note it has been observed that the English is substandard.[31] The real problems, however, have to do with i) problematic terminological choices; and ii) outright omissions – both within sentences and of entire passages, sometimes quite lengthy.

The problems relating to terminology in the original translation are presumably the most well-known, and they have to do precisely with the failure to distinguish terminologically between two different meanings of valid. As already observed above, Ross's realist theory can be said to operate with two different meanings of valid law – here called $valid_1$ and $valid_2$. As a matter of fact, this conceptual difference can be clearly expressed in the Danish language which contains two different inflections of the same root: *gældende* (corresponding to $valid_1$) and *gyldig* (corresponding to $valid_2$). Ross even uses exactly these two terms interchangeably precisely in a way that is generally consistent with the reading above of the significance of the difference between them. Thus, he generally uses *gyldig* when he refers to the "meaning in the mouth of a judge" ($valid_2$), and *gældende* when he refers to the (stipulative) meaning in the mouth of the legal scientist (valid1). In the 1958 English translation, however, Ross only uses valid, and thus has no linguistic tool to express the difference between the two different conceptions applied in the text. This clearly invites the mistake Hart made of believing that one prominent instance of a different meaning of valid in ordinary use can provide a counterexample to the stipulative definition suggested by Ross.

As also pointed out in other studies, this terminological issue is indeed a problematic aspect of the 1958 translation[32]. It is perhaps less well-known, however, that the old translation also contains a number of seemingly inexplicable omissions that play an equally unfortunate role. It falls outside this study to go through all these omissions and discuss their significance. I shall therefore limit myself to a couple of central examples that serve to illustrate how these omissions have had the effect that the 1958 edition has failed i) to state correctly Ross's central philosophical project, and thus to express the character and scope of his analysis; and ii) to adequately represent the core thesis behind his predictive analysis of valid law.

30 HOLTERMANN, J v H (2013). "Introduktion", in: ROSS, A (Ed.). *Om ret og retfærdighed: En indførelse i den analytiske retsfilosofi*. 2 ed. København: Hans Reitzels Forlag, pp. 9-42. ROSS, A (Forthcoming 2016). *Op. cit.*,. For an argument that Ross, in turn, was essentially preceded on this point by Max Weber (WEBER, M (1977). *Critique of Stammler.* New York, Free Press), see: HOLTERMANN, J v H & MADSEN, MR (2015). "European New Legal Realism and International Law: How to Make International Law Intelligibl". *Leiden Journal of International Law,* 28, 2, pp. 211-230.

31 Interestingly, this is contradicted by Hart who actually praise the translation in one point: "He writes in a clear, interesting and at times racy style; though these felicities may be in part due to the great skill of the translator." (HART, DLA (1959). *Op. cit.*, p. 233).

32 Ross observed this problem already in his 1962 review of Hart's *The Concept of Law* (ROSS, A (1962). *Op. cit.*. Also, Svein Eng has written a very comprehensive and recommendable treatment of the problem – and of the debate between Ross and Hart more generally (ENG, S (2011). *Op cit)*. Unfortunately it is not easily mended in the new translation. English, unlike Danish and German, simply does not have the words to express this distinction. As a result, the forthcoming edition shall presumably have to indicate the difference in the same way as done here, i.e. using $valid_1$ for *gældende* and $valid_2$ for *gyldig.*

As mentioned above, in accordance with the fundamental tenets of logical positivism, Ross's overall philosophical project was epistemological having to do with the possibility conditions of a legal science. The existence of this ambition is very clearly present in some of the key passages of the original Danish language edition. Looking to the 1958 translation, however, these same passages are, inexplicably altered and abbreviated to an extent where the real meaning is distorted or lost entirely.

The following table illustrates this problem in relation to two passages which we have already quoted. This table makes it very clear how on the one hand Ross's analysis of valid law was originally intended as a stipulative definition suggested with a view to reforming legal scholarship and paving the way for a true legal science. It simultaneously shows how the 1958 edition by no means rules out Hart's reading, i.e. that what Ross is suggesting in this analysis of valid law at least could have been intended as a lexical definition of the concept in actual use.

Table 1.
Omissions of and changes to words and parts of sentences in the 1958 translation

1953 Danish original:	1958 English translation	Forthcoming new English translation
"Den foretagne analyse af begrebet 'gældende dansk ret' har taget sigte på at tyde realindholdet af sætninger der efter deres mening og intention har karakter af videnskabelige påstande om, at en vis regel er gældende dansk ret."	"The foregoing analysis [of the concept of 'valid Danish law'] has aimed at interpreting the real content of propositions which [according to their meaning and intention] have the character of [scientific] assertions that a certain rule is valid Danish law.	"Our analysis of the concept 'valid$_1$ Danish law' has purported to interpret the real content of sentences which, according to their meaning and intention, have the character of scientific assertions that a certain rule is valid$_1$ Danish law."
"Et andet spørgsmål er, om den juridiske doktrin således som den faktisk foreligger i gængse fremstillinger og behandlinger af dansk ret efter sin egen mening og intention går ud på at fremstille og begrunde påstande af denne art. Det er *spørgsmålet om, hvorvidt doktrinen er og vil være videnskab* om gældende dansk ret i den i det foregående definerede forstand."	"Another question is the extent to which the doctrinal study of law in the form in which it exists in current expositions of national law systems does in fact consist of assertions of this kind. It is the question of the extent to which the doctrinal study is and will be a cognition of [/a science about] valid law in the sense in which it has been defined in the foregoing analysis."	"Whether legal doctrine in the form it actually exists in current scholarly work concerning Danish law actually purports (according to its own meaning and intention) to present and explain assertions of this kind, is quite another question. It is the *question whether legal doctrine is, and wants to be, a science* of valid$_1$ law in the sense previously defined."
(ROSS, A (1953). *Op. cit., p.* 59, italics in the original)	(ROSS, A (1958). *Op. cit.,* pp. 45-46, passages in grey are completely omitted; furthermore, observe that also the italics from the Danish original are omitted in this version)	(ROOS, A (Forthcoming 2016). *Op. cit.,* § 9, italics in original)

While highly important, these omissions are still relatively modest in the sense that they occur at the level of single words or parts of sentences. However, as a final example of the shortcomings of the 1958 translation this edition also contains a surprisingly large number of omissions of entire passages. Not all of these passages are equally important but some are arguably very important for a full appreciation of the central tenets of his realist theory. The following table from § 2 gives a particularly grave example of this (even though this excerpt only shows a small sample of the omitted passages in § 2!). The table illustrates how, in the Danish original, Ross meticulously illustrates through several examples how, unlike in other scientific disciplines, the assertions of legal scholars cannot be read at face value. These passages thereby provide key premises in Ross's argument that, if a legal science is to be possible, its statements require reconstruction as propositional attitude reports through a stipulative definition. In other words, the table illustrates some of the premises in Ross's argument, and English language readers have previously had to live without these premises.

Table 2. Omissions of full passages in the 1958 translation.

1953 Danish original:	1958 English translation:	Forthcoming new English translation:
Hvorfor stiller forholdet sig anderledes for ret og retsvidenskab?	Why is the position so different with respect to law [and legal science]?	Why are things different with respect to law and legal science?
Hvorfor er rettens »natur« et problem der ligger udenfor den egentlige retsvidenskabs område?	Why is the problem of the nature of law one that lies outside the province of the doctrinal study of law, strictly speaking?	Why is the "nature" of law a problem outside the realm of legal science proper?
Hvad kan der siges om de retlige fænomeners »natur« ud over hvad der fremgår af den videnskab, retsvidenskaben i snævrere forstand, der har disse fænomener som sin genstand?	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?	What can possibly be said about the "nature" of legal phenomena, apart from what emerges from the science – legal science in the narrower sense – whose object of study are these very phenomena?
Et udgangspunkt t il besvarelse af disse spørgsmål opnås ved en sammenligning af typiske sætninger, der tilhører henholdsvis retsvidenskaben og de andre nævnte videnskaber.	[Lacking]	In order to answer these questions one might, by way of a starting point, compare typical sentences belonging to the realms of legal science and the sciences named above.
Lad os fx betragte en fysisk sætning som denne:	[Lacking]	For example, let us look at the following sentence, belonging to the realm of physics:
En i en beholder indelukket luftarts tryk og rumfang", omvendt proportionale;	[Lacking]	*Pressure and volume of a given mass of confined gas are inversely proportional.*
eller en psykologisk sætning som denne:	[Lacking]	Or let us look at the following sentence, belonging to the realm of psychology:
Ved indlæring af et stof gennem et antal læsninger opnås det bedste resultat, når læsningerne finder sted med passende mellemrum.	[Lacking]	*The memorising of certain material through a number of readings achieves the best results when the perusals take place at suitable intervals.*
Vi behøver da ikke at vide noget om de fysiske eller psykiske fænomeners »natur« for at forstå disse udsagns videnskabelige mening.	[Lacking]	We need not know anything about the "nature" of these physical or psychical phenomena in order to understand the scientific meaning of these statements.
Vi er nemlig klar over, hvilken erfaring disse sætninger refererer til, d. v. s. på hvilken måde vi skal gå frem for at efterprøve deres sandhed.	[Lacking]	The fact is that we are aware of what experiences these sentences are referring to, that is, how we should proceed in order to verify their truth.
Anderledes med hensyn til en typisk retsvidenskabelig sætning, fx denne hentet fra Ussing, Enkelte Kontrakter, s. 116:	[Lacking]	The situation is different as regards a typical juridico-scientific sentence, such as, for example, this sentence from Ussing's book Individual Contracts [in Danish: Enkelte Kontrakter], p. 116:
Acceptanten er forpligtet til at betale vekslen på forfaldsdagen, jfr. vxl. § 28. 1°.	[Lacking]	*The acceptor is bound to pay the bill of exchange on the due day for payment, cf. § 28 (1) Danish Bill of Exchange Act.*
(ROSS, A (1953). *Op. cit.*, p. 15)	(ROSS, A (1958). *Op. cit.*, p. 6)	(ROSS, A (forthcoming 2016) *Op. cit.*, § 2)

5. CONCLUSION

As already mentioned, there are quite a large number of such errors and omissions in the existing English language edition of Alf Ross's *On Law and Justice*; errors and omissions which, as illustrated by Hart's hugely influential but demonstratively mistaken reading, have quite possibly had an adverse effect on the reception of Ross's particular version of Scandinavian Realism on the international scene of legal philosophy.

As we have seen, some of the errors are the result merely of unfortunate responses to the difficulties inherently attached to the very act of translation. Others however, in particular the omissions, seem to stem from editorial choices that are simply wrong and should have been avoided. It is not easy to speculate what reasons Ross might have had for making these quite radical changes to the 1958 English translation. One possible explanation points to the fact that Ross was here addressing an entirely different audience. While the Danish 1953 edition was (at least formally) intended as a textbook for law students at the University of Copenhagen, the English 1958 edition was a work respectfully addressed to Ross's Anglo-American peers. This may have led him to omit certain passages in an attempt not to sound too didactive which may explain table 2. Another consideration regards the possible temptation to try to follow the *Zeitgeist.* By the late 1950s it must have have been clear to Ross that the influence of logical positivism was gradually waning and that ordinary language philosophy was the new philosophy *du jour.* This may have led him to attempt to gloss over the more scientistic sounding passages and attempt to give the whole work the appearance of closer resemblance and congeniality with the tenets of the then trending ordinary language philosophy.

Either way, the result remains highly unfortunate as it has only served to create frustrating ambiguity about Ross's work. One of the clear strengths of his philosophy can be aptly expressed with the following quote originally written about W.V. Quine:

His greatest philosophical contribution has probably been to develop in a consistent and rigorous fashion, the consequences of a set of assumptions whose appeal cannot be denied even by those who reject them[33].

This is precisely where we find Ross's greatest philosophical contribution. In his work, especially in his mature defense of Legal Realism in *On Law and Justice,* we find a moderate and sophisticated articulation of the consequences for legal science of a consistent and rigorous development of a set of empiristic assumptions that, especially through the reframing in naturalized epistemology, maintains its philosophical appeal to this day.

This of course does not mean that Ross's legal theory is without flaws. It surely has many limitations, some of them precisely because of the fundamental assumptions on which it rests. But if we are to make a sober and balanced assessment of these assumptions and their implications for legal philosophy and science, it is of the utmost importance that we do not consider Ross's theory in a suboptimal version that makes it vulnerable to irrelevant objections. The new translation forthcoming on Oxford University Press intends to ensure this and thus to contribute to the continuing fruitful debate in legal philosophy.

33 HOOKWAY, C (1988). *Quine: language, experience and reality.* Cambridge, Polity, p. 3.

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ESTUDIOS

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Alf Ross on Practical Reason

Alf Ross en la Razón Práctica.

Wojciech ZALUSKI
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Resumen

En uno de sus primeros trabajos, *Kritik der Sogenannten praktischen Erkenntnis. Zugleich Prolegómenos zu Einer der Kritik Rechtswissenschaft*, el eminente filósofo del derecho danés Alf Ross pretendió proporcionar las bases filosóficas para la construcción de su Teoría de la ley. El elemento central de estas bases es su crítica de la razón práctica (cognición práctica). El propósito de este trabajo es evaluar esta crítica. Se argumenta que en su análisis Ross oscila entre dos concepciones diferentes de la razón práctica. De acuerdo con la primera, la razón práctica es una capacidad especial de conocer y establecer las normas morales objetivamente existentes (valores, o fines); de acuerdo con la segunda, es una capacidad especial para meramente conocer las normas morales objetivamente existentes (valores, o fines). Se ha discutido que sus argumentos más interesantes y plausibles (señalando hacia inconsistencias lógicas) en contra de la razón práctica aplican solamente para la comprensión anterior de la misma, no a las subsecuentes. En consecuencia, su trabajo no proporciona razones concluyentes para rechazar el concepto de la razón práctica como una capacidad especial para la cognición de las normas morales objetivamente existentes (valores, o fines).

Palabras clave: ética formal; ética material; duplicación metafísica; razón práctica; teleología; valores.

Abstract

In his early work *Kritik der Sogenannten Praktischen Erkenntnis. Zugleich Prolegomena zu Einer Kritik der Rechtswissenschaft* the eminent Danish legal philosopher Alf Ross intended to provide the philosophical foundations for the construction of his theory of law. The central element of these foundations is his critique of practical reason (practical cognition). The purpose of this paper is to evaluate this critique. It is argued that in his analysis Ross oscillates between two different understandings of practical reason. According to the first one, practical reason is a special capacity to cognize and establish the objectively existing moral norms (values, or ends); according to the second one, it is a special capacity just to cognize the objectively existing moral norms (values, or ends). It is argued that his most interesting and plausible arguments (pointing at logical inconsistencies) against practical reason apply only to the former understanding thereof, not to the latter. Accordingly, his work fails to provide conclusive reasons for rejecting the concept of practical reason as a special capacity for the cognition of the objectively existing moral norms (values, or ends).

Keywords: formal ethics; material ethics; metaphysical doubling; practical reason; teleology; values.

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1. INTRODUCTION

The attitude to practical reason, i.e., a special capacity guaranteeing an access to the objectively existing moral norms (values, or ends), is a useful criterion for classifying the views of moral and legal philosophers. Roughly speaking, the existence of practical reason is denied by the naturalistic and the non-naturalistic-intuitionist moral and legal philosophers, whereas its existence is affirmed by the non-naturalistic-rationalist ones. The basic argument of naturalists for the rejection of practical reason is that it is a metaphysical concept and thereby incompatible with their scientific outlook, implying that only those entities can be accepted as existent which are postulated by (thus far un-falsified) scientific theories. However, this general argument for the non-existence of practical reason is relatively uninteresting and also unimpressive for those who accept a different – non-naturalistic – philosophical outlook. The more interesting arguments are those which can be called 'internal', i.e., which do not appeal to strong philosophical assumptions but point at some 'internal' problems connected with the very concept of practical reason. In the present paper we shall present and analyze the arguments of this kind advanced by the eminent 20th century Danish legal philosopher Alf Ross. His critique of practical reason appears in virtually every book he wrote but is most explicit in his early treatise (from 1933) *Kritik der Sogenannten Praktischen Erkenntnis. Zugleich Prolegomena zu Einer Kritik der Rechtswissenschaft.* The very title is meaningful: it attests Ross's deep conviction that prior to constructing a theory of law, one must tackle the 'perennial' philosophical problem of the existence of practical reason. As we shall see hereafter, Ross questions the existence of practical reason in the strict or proper sense, i.e., as a special capacity guaranteeing an access to the objectively existing moral norms (values, or ends), but, as should be stressed, he does not question the existence of practical reason if it is understood weakly, i.e., either as the reason's capacity to find means for given ends (the first variant of the weak understanding) or as the reason's capacity to know what in fact determines our will (the second variant of the weak understanding). But, as Ross himself notices, this first variant of weak understanding of practical reason is misleading, as it blurs the very distinction between practical and theoretical reason, since virtually every kind of knowledge (even purely theoretical, e.g., theoretical physics) can in some circumstances be helpful in attaining given ends and thereby become practical. As for the second variant, he aptly remarks those philosophers who accept the existence of practical reason tend to treat it not as a capacity for knowing what actually determines the will of human beings but as a capacity for knowing what *ought to determine* their will. In consequence, Ross concludes that practical reason, properly so called, is neither a capacity to select means for realizing given ends, nor the capacity to know what people take to be those ends. This conclusion regarding what practical reason *is not* is very convincing: most philosophers agree that neither instrumental reason (the first variant of the weak understanding) nor the empirical knowledge of what moves the human will (the second variant) can plausibly count as practical reason; to given one example: John Rawls[1], while analyzing Hume's moral philosophy, wrote that Hume does not have a conception of practical reason, even though Hume admits of the instrumental role of reason. The question we have to answer in the next stage of our analysis is how Ross *exactly* understands the concept of practical reason. As we shall see, the answer is not straightforward because Ross oscillates between two different accounts of practical reason.

2. ROSS' ACCOUNT OF PRACTICAL REASON

Ross's basic definition of practical reason (cognition) is as follows:

> The practical cognition is the kind of cognition which, by virtue of the fact that it is the knowledge of the final end constituting the unconditional ground of the will, simultaneously either establishes

1 RAWLS, J. (2001). *Lectures on the History of Moral Philosophy,* Harvard University Press, Cambridge Mass., London, England, pp. 21-101.

> this ground for the will or is itself this ground (*Die praktische Erkenntnis is eine Erkenntnis, die dadurch, dass sie Wissen von den letzten Zweck, dem unbedingten Grunde des Willens ist, zugleich diesen Zweck für den Willen setzt oder dieser Grund selber darstellt*)[2].

In this definition Ross demands from practical reason not just discovering the a priori valid moral norms (values, or ends), but *establishing these norms (values, or ends);* practical cognition (i.e., cognition by practical reason) must therefore be at the same time "a direct request or demand imposed upon the will (*unmittelbare Forderung oder Aufforderung an den Willen*)"[3]. This definition, as we shall see in more detail in the next section, enables Ross to criticize on logical grounds the very idea of practical reason as exhibiting "dialectical nature", i.e., as being two incompatible things at the same time: a cognition and a basis for the determination of the will[4]. But this definition of practical reasons is not the only admissible one. On a different account of practical reason the a priori validity of moral norms (values, or ends) is a *prerequisite of practical cognition, not its product.* In fact, in his *opus magnum, On Law and Justice,* Ross, while discussing idealism and realism in legal philos ophy, puts forward this definition of practical reason: he writes that idealism is the view which assumes that there exists "a world of ideas or validity, comprising a set of absolutely valid, normative ideas which are apprehended immediately by our reason", and this cognition is a priori, i.e. "independent of our senses"[5]. In his *Kritik der Sogenannten Praktischen Erkenntnis* Ross draws a distinction between 'formal ethics' (a paradigmatic example of which is Kant's ethics of duty) and 'material ethics' (embracing value ethics and teleological ethics) and writes explicitly that the former is based on the concept of will establishing the norms, while the latter – on the concept of norms (values, or ends) lying outside the will and cognized by reason. This implies that already in this early work he in fact uses two different accounts of practical reason, corresponding, respectively, to formal ethics and material ethics, though he does not consistently distinguish these two accounts in his critique of practical reason. By way of summary of the hitherto considerations let us define these two accounts in a more precise manner:

> ***Account 1.*** The claim about the existence of practical reason implies that there is an ideal world of moral norms (values, or ends) and these norms (values, ends) are established by reason and thereby can be apprehended *a priori,* i.e., solely by reason, independent of senses.
>
> ***Account 2.*** The claim about the existence of practical reason implies that there is an ideal world of moral norms (values, or ends) and these norms can be apprehended *a priori,* i.e., solely by reason, independent of senses.

As we shall argue in section 4, Ross arguments against practical reason are efficient only with respect to *Account 1.*

3. ROSS'S CRITIQUE OF PRACTICAL REASON

The arguments of Ross against practical reason can be divided into the philosophical, the logical, and the psychological. The distinction between the philosophical and logical arguments is of course conventional: the logical arguments are also philosophical. But, for the purposes of this paper, by 'philosophical' we shall mean those arguments which *are not empirical and do not aim at revealing some inner logical inconsistencies in the analyzed concept (of practical reason).*

2 ROSS, A (1933). *Kritik der Sogenannten Praktischen Erkenntnis. Zugleich Prolegomena zu Einer Kritik der Rechtswissenschaft,* trans. H. Winkler, G. Leistikow, Felix Meiner, Leipzig, p.19.

3 *Ibidem.*

4 *Ibid*., p. 432.

5 ROSS, A (1958). *On Law and Justice,* University of California Press, Berkeley, p.65.

(The philosophical arguments) The first philosophical argument can be put this way: the concept of practical reason is in a twofold manner incompatible with the naturalistic outlook. It is inconsistent 'on the side' of practical reason's *object of cognition*: the object are moral norms (values, or ends) existing in the 'world of ideas' – which are, for naturalists, "queer entities", to use John Mackie's celebrated phrase[6]. It is also inconsistent 'on the side' of practical reason's very mechanism of cognition: the cognition is supposed to be a priori, independent of the senses, and this kind of cognition is unacceptable for all (*ex definitione* empirically-minded) naturalists. The second argument is in fact similar to the first one but more specific. It says that the concept of practical reason implies the "queer" concept of metaphysical will as distinct from the empirical will. This is so because the 'final end' which is to direct the empirical will can be established only by the will which is not empirical, and thereby is metaphysical (otherwise, i.e., if the 'final end' were determined by the empirical will, there would be no reason to treat this end as a distinguished one, i.e. imposing on human beings unconditional moral duties). These two arguments are in fact variants of the 'general' argument from naturalism mentioned in Introduction. They are not original and do not constitute Ross's special contribution to the debate about practical reason. The third argument casts a shadow of doubt on the belief in the existence of a coherent ideal world of norms by pointing out that those who assumed its existence proposed their mutually incoherent sets. As Ross put it in a memorable, though (as shall be argued hereafter), quite superficial remark:

> Like a harlot, natural law is at the disposal of everyone. The ideology does not exist that cannot be defended by an appeal to the law of nature. Evidence as the criterion of truth explains the literally arbitrary character of the metaphysical assertions. The historical variability of natural law supports the interpretation that metaphysical postulates are merely constructions to buttress emotional attitudes and the fulfillment of certain needs"[7].

This third argument is different from the previous ones, as it does not rely on the general naturalistic assumptions of Ross's philosophy; though, similarly to them, it is not original either. Ross's main contribution to the debate are his logical arguments.

(The logical arguments) According to Ross, the very concept of practical reason (cognition) contains a logical contradiction: practical reason is supposed to simultaneously *cognize* (as reason) the final end of the human will and *establish* this end (as *practical* reason)[8]. But, as Ross says, it is a contradiction, since these two activities – cognition and establishing (i.e., in fact creating) – are incompatible, and thereby cannot be performed at the same time. The contradiction which Ross means can be made more manifest by putting it this way. The cognitive function of practical reason implies that its object exists independently of the human mind, and the 'establishing' (i.e., creative) function of practical reason implies that its object arises as a result of the activity of the human mind. But, and here is the contradiction, the object cannot at the same time exist independently of the human mind and be its creation. Ross attaches much importance to this argument, saying, in the context of its presentation, that the judgments of practical reason are not real judgments but the masked expressions of emotional experiences. In the concept of practical reason Ross sees also a different contradiction. As was mentioned before, Ross maintains that this concept implies the idea of the metaphysical will. Now, he criticizes the latter concept not only on the ground that it is 'metaphysical', i.e., referring to metaphysical entities, and thereby not fitting into his naturalistic outlook, but also, on the ground that it leads to the "metaphysical doubling (*metaphysische Verdoppelung*)", i.e., to the contradiction consisting in treating different – the empirical and the metaphysical – entities as identical, or more precisely, as treating the empirical will as a manifestation (*Offenbarung*) of the metaphysical will. Ross calls this mistake the

6 MACKIE, JL (1991). *Ethics: Inventing Right and Wrong,* Penguin Books, London, pp. 38-41.

7 Cfr. ROSS, A (1958). *Op. cit.*, p. 248.

8 Cfr. ROSS, A (1933). *Op. cit.*, p. 30.

"identity of the different (*Identität des Verschiedenen*)"[9]. This is a contradiction, since, according to Ross, the empirical will is not identical with the metaphysical will, for the simple reason that the former is 'empirical', and thereby individual and located in the spatio-temporal continuum, while the latter is 'metaphysical', and thereby supraindividual and transcending the spatio-temporal continuum. But, as Ross[10] remarks, they have to be treated as identical by the adherents of the formal ethics since otherwise it would be impossible to understand how human beings may gain access to the 'verdicts' of the metaphysical will (we may have such access only if we treat the verdicts of our empirical will as the 'verdicts' of the metaphysical will); on the other hand, we must treat them as different since there are no reasons to treat the verdicts of individual, empirical will as formulating valid moral norms. This argument seems very insightful and convincing. One may only reflect on whether the name Ross gave to the mistake which this argument is intended to disclose (the mistake of "identity of the different") is an apt one. Perhaps it would be more apt to say that the mistake consists in treating the different things (the metaphysical and the empirical will) as simultaneously identical and different, rather than in treating them as simply identical (Ross writes explicitly that the adherents of practical reason tend to treat the two different kinds of wills as *both* identical and different).

(*The psychological arguments*) As was mentioned before, Ross criticizes the idea of practical reason by claiming that its object – the world of moral norms (values, or ends) – is merely a projection of our emotional attitudes and needs. But he does not provide any good arguments for this claim; the claim seems to be rather an expression of his neo-positivist ***credo***. A more interesting version of psychological argument is connected with his critique of one of the variants of material ethics, viz. teleological ethics, called by Ross also "ethics of potentiality" (*Potenzethik*) because of its Aristotelian pedigree. Now, according to Ross, the concept of the 'final end', fundamental for this ethic, is a testimony to our anthropomorphic tendency to see nature, including human nature, as endowed with 'ends', which have to be attained if a given entity is to fully realize its 'potential'. Ross elegantly develops this critique, describing in much detail the very mechanism of this anthropomorphic generation of the concept of the 'final end'. He claims that the view of nature as endowed with the "power, tendency, striving (*Kraft, Tendenz, Streben*)" to realize its "end" is a result of the two processes: injection and projection. First, human beings take these notions (power, tendency, striving) from the simple observations of behavior of animals in order to express or understand their own subjective experiences (*Injection*). Then, they apply these notions back to nature in order to make sense of it as striving towards the realization of some immanent ends, as realizing their inner "longing (*Sehnen)*" for ontological fulfillment (*Projection*)[11]. By doing projection, man therefore perceives nature in analogy to himself. The result is a "primitive – animalistic, teleological – view of nature *(primitive – animistiche – teleologische Naturanschauung")*, which found its most sophisticated and pure form in the Aristotelian philosophy. This view of nature permeated also the Medieval philosophy, within which it was supplemented with additional – theological - assumptions; this philosophy assumed that: "the course of the world is completely determined by the fact that things strive towards their 'purposes' assigned to them by God *(der Gang der Welt is gänzlich dadurch bestimmt, dass die Dinge vorwärts zu ihrer göttlichen 'Bestimmung' streben)"*[12].

4. WHAT IS WRONG WITH ROSS'S CRITIQUE OF PRACTICAL REASON?

A quick answer to the question from the title of this section is that the main part of this critique seems to be efficient only with regard to the first account of the concept of practical reason. As was mentioned

9 *Ibíd.*, pp. 23-24..
10 *Ibíd.,* pp. 431-434.
11 *Ibíd.*, p. 197.
12 *Ibídem.*

in section 2, Ross uses in fact two accounts of practical reason. According to the first one, practical reason *cognizes and establishes* moral norms (values, or ends), and according to the second one, it just *cognizes* moral norms (values, or ends). The common point of the two accounts is that there exist objective moral norms (values, or ends), but while the former assumes that they are established by reason, the latter assumes that they exist prior to any activity of reason, and thereby are not established by it. Now, the most interesting arguments of Ross against practical reason, i.e., those arguments which do not appeal directly to the naturalistic assumptions, are efficient only with respect to the first account. The arguments in question are the logical ones: they point at two serious problems of those ethical views, viz. formal ethics and also some variants of teleological ethics, which imply that practical reason simultaneously cognizes and establishes moral norms (or ends), and thereby rely on the concept of the metaphysical will which is supposed to perform the task of 'establishing' these norms (or ends). Let us recall that the first problem is a logical contradiction involved in the postulate that practical reason cognizes and establishes norms; the second problem is connected with treating two different types of will – the empirical and the metaphysical – as identical (or rather, as we have argued, as simultaneously identical and different). These logical arguments do not apply to those variants of material ethics (viz. to value ethics and to those versions of teleological ethics which dispense with the concept of the metaphysical will), which imply that moral norms (values, or ends) are not established by practical reason, and thereby do not require the concept of the metaphysical will as part of the concept of practical reason. Accordingly, the efficiency of Ross's critique of the second account of practical reason (which is implied by value ethics and teleological ethics not appealing to the concept of metaphysical will) depends on the strength of the philosophical and psychological arguments. The strength must, in turn, be assessed separately for these two variants of material ethics, viz. value ethics and teleological ethics. There is undoubtedly much too be said in favour of Ross's psychological claim that the very idea of the 'final end', lying at the centre of teleological ethics, is a manifestation of anthropomorphism, i.e., of reading the idea of the 'ends' taken from our psychological experience "into" the nature. This psychological claim proves to be all the more convincing if one takes into account the achievements of modern science, which eliminated from the description of nature the ancient and medieval idea of *causa finalis*, and thereby, indirectly, undermined the idea of the 'final end' of *human nature*. Thus, even though material ethics in its teleological variant (in so far as it is free from the commitment to the idea of the metaphysical will) is unaffected by the logical arguments, it is strongly undermined by the psychological ones. *But neither logical nor psychological arguments apply to material ethics in its axiological variant (i.e. value ethics), because it does not imply either that practical reason simultaneously cognizes and establishes moral values (and thereby does not commit its adherents to accept the concept of the metaphysical will) or that there exists the 'final end' of human nature*. What it implies is that there exist objective moral values which can be discovered by (practical) reason (it should be mentioned, though, that some of its variants, e.g. Max Scheler's, dispense with the concept of practical reason, and rely instead on the concept of intuition or emotional sensitivity as capacities for cognizing moral values). The only arguments that are relevant for it are two philosophical arguments: from the truthfulness of naturalism, and from the historical variability of moral systems. The first of these two arguments is the weakest one of all the arguments formulated by Ross against practical reason, because the claim about the truthfulness of naturalism is highly debatable: which general philosophical outlook – naturalistic or non-naturalistic – one chooses is to a large extent or even entirely (given the current state of philosophical and scientific knowledge) a matter of personal choice. Accordingly, only the argument from the historical variability of the purportedly objective and immutable moral systems remains. But this argument is much overestimated by Ross. It is true that different philosophers often treated as objective different moral norms (values, or ends), but this does not *ipso facto* mean that the very concept of objective moral norms (values, or ends), implied by the concept of practical reason as its correlate, is a fiction – an expression of our emotional experiences. It does not have

to be fiction for two reasons. *First*, one may argue, as many philosopher did (e.g. Nicolai Hartmann), that what really changes are not the objective moral norms (values, or ends) themselves (which are thereby not pseudo-objective) but only our cognition thereof: this cognition may become more or less clear, depending on various social and psychological factors. The optimistic view is that, with the historical development, the picture that human beings develop of the realm of objective moral norms (values, or ends) asymptotically approaches its real picture. *Secondly*, one may argue that the historical variability of moral norms (values, or ends) tends to be exaggerated by the critics of objective morality. As was plausibly demonstrated, e.g., by Clive Staples Lewis in his insightful work *The Abolition of Man*, human beings, throughout their history, accepted very similar values; the only real differences between their value systems, as was in turn noticed by Gilbert Keith Chesterton[13] lay not in their content but in their ranking; for instance, for the Chinese people, as Chesterton claims, the norm "Honour thy father and thy mother" stands above the norm "Thou shalt not kill", while for the European people the ranking of these two norms is reverse.

Let us conclude this section by tracing the consequences of Ross's view of practical reason for his definition of the task of moral philosophy. The straightforward consequence is the narrowing down of the field of moral philosophy to, as Ross calls it, 'moral science', i.e., an empirical science of morals[14].

Its task is to describe the moral ethos assumed by people in a given society, i.e., to discover the rules people actually accept, and its method for the realization of this task is the "tentative induction from concrete, real reactions *(versuchsweise Induktion as den realen Einzelreaktionen)*"[15]. Ross makes a (very plausible) conjecture that the rules actually accepted by people, to be discovered while pursuing his 'moral science', will prove to be complex, detailed, and conditional, and thereby quite dissimilar to the simple, general, and unconditional rules of traditional doctrine of natural law. But, the plausibility of these claims notwithstanding, Ross, in our view, unjustifiably confines the limits of moral reflection to *non-normative issues:* the problem – crucial for most moralists from the pre-neo-positivist era – of which moral norms are the right ones, is treated by Ross, with a strange intellectual nonchalance and a barely disguised feeling of superiority, as a pseudo-problem, based on metaphysical prejudices, and purportedly testifying to our "metaphysical hunger" and the fearful attitude to life[16]. This nonchalance and the feeling of superiority are easy to detect especially in the following passage:

The driving force of metaphysics in the field of moral and religion is the fear of the vicissitudes of life, the transitoriness of all things, the inexorability of death, or, conversely, the desire for the absolute, the eternally immutable which defies the law of corruption. This fear, in moral matters, is associated with the fear of having to make choices and decisions under changing circumstances and on one's own responsibility. Therefore, by seeking justification for our actions in immutable principles outside ourselves, we try to relieve ourselves of the burden of responsibili[17].

This passage is intellectually nonchalant because Ross, for all his brilliance, does not seem to notice the fact that in the absence of any objective moral criteria for making ethical choices, we could never treat those choices with due seriousness: the adequate attitude in this situation would be that of carelessness, since if all options are equally good (or more precisely, since there are not and cannot be any criteria for ascertaining whether a given option is morally better than another), there is no reason to ponder over which of them to choose; the very concepts of moral choice and moral responsibility dissolve as a result. And the feeling of superiority is by no means justified: the claim that people believe in objective moral norms because

13 CHESTERTON, GK (2008). *Obrona człowieka.* Trans. J. Rydzewska, Zabki, Warsaw, p. 173.

14 Cfr. ROSS, A (1933). *Op. cit.*, pp. 445-456.

15 *Ibid.,* p. 446.

16 *Ibid.,* p. 434. ROSS, A (1958). *Op. cit.*, p. 263.

17 ROSS, A (1958). *Op. cit.,* p. 262.

it helps them to dispel their fear of death and of the unpredictability of life is a piece of idiosyncratic and poor psychology; it is difficult to discern any connection between the acceptance or non-acceptance of objective moral norms and the 'level' of this fear. More generally, in our view, the impoverishment of moral reflection (its confinement to purely descriptive tasks), which is a direct consequence of the assumption of the consistently naturalistic outlook, can be most plausibly interpreted as an argument against this outlook.

In summary: Ross's most insightful arguments against practical reason (the logical ones and one of the psychological ones) apply only to Account 1 of practical reason and to *Account 2* in so far as it is connected with teleological ethics; they do not undermine *Account 2* in so far as it is connected with axiological ethics.

5. IMPLICATIONS FOR LEGAL PHILOSOPHY

The rejection of practical reason has indeed, as Ross claimed, direct consequences for legal philosophy, viz. it leads to the rejection of the dualistic accounts of legal validity, which assume the distinction between the factual and non-factual aspect of law, the former referring to law's being embedded in factual – social – reality, the latter – to its being valid in the realm of ideas[18]. In fact, the rejection of practical reason has also further legal-philosophical implications (e.g., for his views of democracy, freedom and justice[19]; but their examination lies beyond the scope of this paper; we can formulate here only several brief remarks on the problem of legal validity. Now, Ross argumentation against its dualistic accounts is complex and sophisticated. But undoubtedly one strand of this argumentation is directly connected to his critique of practical reason: he believed that given that the dualistic conceptions of legal validity assume the existence of practical reason, and that practical reason cannot exist, the dualistic conceptions are wrong. This argument is correct, since the concepts of dualism and practical reason (with its object: objectively existing moral norms, values or ends) are connected to each other by their non-naturalistic background and relations of mutual entailment. He also tried to psychologically "unmask" the dualistic accounts of legal validity, writing that "like most other metaphysical constructions, the construction of the immanent validity of positive law rests on a misinterpretation of certain experiences – the experience that the law is not merely a factual, customary order, but an order which is experience as being socially binding"[20]. This psychological argument resembles the psychological arguments, discussed in section 2, which he formulated against practical reason. The conception of legal validity he finally proposed, starting from his critique of practical reason, is based on his central, naturalistic assumption that "fundamental legal notions must be interpreted as conceptions of social reality, the behavior of man in society, and as nothing else"[21]. This conception is well summarized in the following passage:

> valid law means the abstract set of normative ideas which serve as a scheme of interpretation for the phenomenon of law in action, which again means that these norms are effectively followed, and followed because they are experienced and felt to be socially binding"[22]; [and in the same vein - WZ]: "All propositions about law refer, in the last analysis, to a social reality. The basis of jurisprudence must be a sociological outlook"[23].

This definition relies on purely factual phenomena, making no recourse to metaphysics. Another definition puts a stronger stress on the predictive function of propositions about law: "legal norms serve as a

18 Cfr. ELIASZ, K (2015). 'Obowiązywanie prawa w ujęciu skandynawskiego realizmu prawnego', in: STELMACH, J; BROZEK, B; KUREK, L & ELIASZ, K (Eds) (2015). *Naturalizm prawniczy. Stanowiska,* Wolters Kluwer, Warsaw, pp.193-194.

19 Cfr. SERPE, A (2013). 'Su democrazia libertà eguaglianza. À propos del Ross di Hvorfor Demokrati', *i-lex*, 20, pp. 453-478 (www.i-lex.it).

20 ROSS, A (1958). *Op. cit.*, p. 38.

21 *Ibid.,* p. IX.

22 *Ibid.,* p. 19.

23 *Ibid.*, p. 27.

scheme of interpretation for a corresponding set of social acts, the law in action, in such a way that it becomes possible to comprehend those actions as a coherent whole of meaning and motivation to predict them until certain limits"[24].

More generally and by way of conclusion: the result of Ross' naturalistic outlook, within which the task of philosophy is construed as a logical analysis of empirical statements, was his methodological conviction that philosophy of law can only be analytic – focused on a logical analysis of legal notions. Accordingly, he believed that there is no place for normative or ethical jurisprudence, i.e. the philosophy of natural law. However, given our critique of his critique of practical reason, we must conclude that his narrowing down of the task of legal philosophy (as well as his narrowing down of the task of moral philosophy of which we wrote in the preceding section) is unconvincing: the perspectives for metaphysical or normative legal philosophy are by no means so dim, as he maintained them to be, since the basic concept for developing this kind of philosophy – the concept of practical reason – is alive, notwithstanding Ross's efforts to make it dead or prove it to be already dead. In other words, the foundations which Ross wanted to provide for his legal philosophy are shaky or at least by no means as solid as he thought they are.

24 *Ibíd.,* p. 29.

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Ross on the Dualism of Reality and Validity

Ross y el dualismo de la realidad y la validez

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Resumen

En este artículo, quiero considerar la intrigante crítica de la dualidad de la realidad y la validez elaborada en 1946 por Alf Ross y las implicaciones de esta crítica para las llamadas teorías de doble naturaleza de la ley, tales como la teoría defendida por Robert Alexy. El significado de este dualismo, que Ross considera estar en la base del pensamiento jurídico tradicional, es que tanto el propio concepto de derecho y algunos otros conceptos jurídicos fundamentales — tales como el concepto de las fuentes del derecho y el concepto de derecho subjetivo (que abarca el concepto de un derecho legal y el concepto de un deber legal) — constan de dos partes, una factual y empírica y una normativa y metafísica. Ross objeta, sin embargo, que este dualismo da lugar a ciertas antinomias muy problemáticas, tanto en el concepto de la ley como en los otros conceptos jurídicos fundamentales, y que los dualistas no pueden evitar estas antinomias eliminando el concepto de validez de sus teorías, ya que hacerlo dejaría la teoría resultante (monista) sin encontrar incluso su objeto de estudio, debiendo sustituir una explicación no-cognitivista de afirmaciones de validez legal por la explicación no-naturalista (intuicionista) característica de este dualismo.

Voy, sin embargo, a argumentar que la discusión de Ross sobre la dualidad de la realidad y la validez y las antinomias resultantes, aunque muy interesante, no son en última instancia, persuasivas; que la solución propuesta por Ross al problema de las antinomias probablemente habría tenido éxito si en realidad hubiera sido un problema que necesitase una solución; y que en cualquier caso la crítica de la dualidad de la realidad y la validez de Ross no se aplica a la teoría de la doble naturaleza de la ley de Robert Alexy.

Palabras clave: Ross; realidad; dualismo; teoría de la ley de naturaleza doble; Alexy.

Abstract

In this article, I want to consider Alf Ross's intriguing 1946 critique of the dualism of reality and validity and the implications of this critique for so-called dual-nature theories of law, such as the theory defended by Robert Alexy. The meaning of this dualism, which Ross considers to be at the foundation of traditional legal thinking, is that both the very concept of law and certain other fundamental legal concepts – such as the concept of the sources of law and the concept of subjective law (which encompasses the concept of a legal right and the concept of a legal duty) – consist of two parts, one factual and empirical and one normative and metaphysical. Ross objects, however, that this dualism gives rise to certain very troublesome antinomies both in the concept of law and in the other fundamental legal concepts, and that dualists cannot avoid these antinomies by eliminating the concept of validity from their theories, since doing so would leave the resulting (monist) theory unable to even find its study object, but must instead substitute a non-cognitivist account of claims of legal validity for the non-naturalist (intuitionist) account characteristic of such dualism.

I am, however, going to argue that Ross's discussion of the dualism of reality and validity and the ensuing antinomies, although very interesting, is ultimately not persuasive, that the solution proposed by Ross to the problem of the antinomies would likely have been successful if there really had been a problem that needed a solution, and that in any case Ross's critique of the dualism of reality and validity does not apply to Robert Alexy's dual-nature theory of law.

Keywords: Ross; reality; dualism; dual-nature theory of law; Alexy.

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1. INTRODUCTION

In this article, I want to consider the legal philosophy of the Dane Alf Ross, who together with the ***Swede Karl Olivecrona***[2] was the most prominent of the Scandinavian realists. I want to consider, more specifically, Ross's intriguing 1946 critique of the dualism of reality and validity and the implications of this critique for so-called dual-nature theories of law, such as the dual-nature theory defended by Robert Alexy. The meaning of this dualism, which Ross considers to be at the foundation of traditional legal thinking, is that both the very concept of law and certain other fundamental legal concepts – such as the concept of the sources of law and the concept of subjective law (which encompasses the concept of a legal right and the concept of a legal duty) – consist of two parts, one factual and empirical and one normative and metaphysical. Ross objects, however, that this dualism gives rise to certain very troublesome antinomies both in the concept of law and in the other fundamental legal concepts, and that dualists cannot avoid these antinomies by eliminating the concept of validity from their theories, since doing so would leave the resulting (monist) theory unable to even find its study object, but must instead substitute a non-cognitivist account of claims of legal validity for the non-naturalist (intuitionist) account characteristic of such dualism.

I find Ross's critique intriguing and well worthy of our attention. I am, however, going to argue (i) that it is doubtful whether there is in the concept of law a dualism of reality and validity of the type that Ross has in mind, (ii) that while the first antinomy in the concept of law and the first antinomy in the concept of the sources of law do arise, they have nothing to do with such a dualism of reality and validity, (iii) that the second antinomy in the concept of law and the second and third antinomies in the concept of the sources of law do not arise at all, (iv) that while the first and the second antinomies in the concept of subjective law do arise, they have nothing to do with such a dualism, and (v) that the third antinomy in the concept of subjective law does arise but can be handled. I am also going to argue (vi) that Ross's proposed solution to the problem of the antinomies would likely be successful if there really were a problem that needed a solution, and (vii) that in any case Ross's critique of the dualism of reality and validity does not apply to Robert Alexy's dual-nature theory of law. Finally, I am going to argue (viii) that Kelsen in his 1960 critique of Ross's analysis – where he objects inter alia that Ross mistakenly takes claims of legal validity to express a belief that the valid entity has a confused property – overshoots the mark, because he confuses Ross's non-cognitivist account of claims of legal validity with an error-theoretical account of such claims.

I begin by giving an outline of the philosophical foundations of Ross's legal philosophy (Section 2) and proceed to consider Ross's discussion of the dualism of reality and validity and the resulting antinomies in the concept of law (Section 3), in the concept of the sources of law (Section 4), and in the concept of subjective law (Section 5), as well as the solutions proposed by Ross to the various antinomies (Section 6). Having done that, I introduce Alexy's dual-nature theory of law and consider the question of whether Ross's critique of dualism would apply to Alexy's theory (Section 7). The article concludes with a critical discussion of Ross's critique of dualism (Section 8).

2. NATURALISM AND NON-COGNITIVISM IN ROSS´S LEGAL PHILOSOPHY

Ross is a naturalist and a non-cognitivist, and we might say that this combination of naturalism and non-cognitivism constitutes the philosophical foundation of his legal philosophy. But what is naturalism, and what is non-cognitivism? Writers on naturalism make a fundamental distinction between (i) ontological (or metaphysical) and (ii) methodological (or epistemological) naturalism. *Ontological* naturalism is a thesis

2 OLIVECRONA, K (1939). *Law as Fact.* Copenhagen, Einar Munksgaard & London, Humphrey Milford; OLIVECRONA, K (1971). *Law as Fact.* 2nd ed. London, Stevens & Sons.

about the nature of what exists: there are only natural entities and properties[3]. I shall assume here that a natural entity or property is an entity or property of the type that is studied by the social or the natural sciences, though I recognize that it is difficult to find a fully satisfying characterization of natural entities or properties[4]. *Methodological* naturalism requires that philosophical theorizing be continuous with the sciences. Brian Leiter[5] makes a distinction between methodological naturalism that requires "results continuity" with the sciences and methodological naturalism that requires "methods continuity" and explains that whereas the former type of naturalism requires that philosophical theories be supported by scientific results, the latter requires that philosophical theories emulate the methods of inquiry and styles of explanation employed in the sciences. As he points out[6], it is the "methods continuity" version that has been at the center of philosophical interest through the years, and it is this version that I have in mind when I speak of methodological naturalism in this article.

Ross makes it clear in *On Law and Justice* (1959) that he espouses both ontological and methodological naturalism. He maintains, inter alia, that jurisprudential idealism rests on the assumption that there are two distinct worlds (or realms) with two corresponding modes of cognition, namely (i) the world of time and space, which comprises the usual physical and psychological entities that we apprehend with the help of our senses, and (ii) the "world of ideas or validity", which comprises "various sets of absolutely valid normative ideas" and is apprehended by our reason[7]; and he points out that jurisprudential realism is concerned with the world of time and space and aims to attain knowledge of the law using the methods of modern empiricist science. As he puts it[8], "[t]here is only one world and one cognition. All science is ultimately concerned with the same body of facts, and all scientific statements about reality—that is, those which are not purely logical-mathematical—are subject to experimental test."

Ross was not only a naturalist, but also a non-cognitivist. Non-cognitivists maintain that there is no moral reality or moral knowledge, and that moral judgments do not assert anything about anything and that therefore they cannot be true or false. Instead, they typically maintain that a person who makes (what appears to be) a moral judgment is simply expressing his feelings, attitudes or preference[9], or prescribing a course of action (Hare 1981). On this type of analysis, the function of moral judgments is to influence people. This means that on the non-cognitivist analysis, terms like 'right,' 'duty,' and 'ought' lack cognitive meaning and do not refer, though they may have so-called emotive meaning[10].

Ross's non-cognitivism was explicitly stated in a couple of early articles. For example, in a 1936 article celebrating the 25th anniversary of the *Pure Theory of Law*, Ross maintains that we cannot conceive of law as a system of norms in the sense contemplated by Kelsen and others, because norms do not express propositions, do not refer to states of affairs, but simply express the speaker's attitudes or feelings. A normative claim, Ross[11] insists, "does not have any meaning that can be expressed in abstraction from the reality of

3 See: POST, JF (1999). "Naturalism", In: AUDI, R (Ed.,) (1999). *The Cambridge Dictionary of Philosophy.* 2nd ed., pp. 596-597. Cambridge, Cambridge University Press.

4 On this see: COPP, D (2007). *Morality in a Natural World.* Cap. I. Cambridge, Cambridge University Press; RIDGE, M (2008). "Moral Non-Naturalism", in: ZALTA, EN (Ed.,) (2008).*The Stanford Encyclopedia of Philosophy (Fall 2008 Edition).* URL = <http://plato.stanford.edu/archives/fall2008/entries/moral-non-naturalism/>.

5 LEITER, B (2007). *Naturalizing Jurisprudence.* Oxford, Oxford University Press, pp. 34-35.

6 *Ibíd.*, p. 34.

7 *Ibíd.*, p. 65.

8 *Ibíd.,* p. 67.

9 BLACKBURN, S (1998). *Ruling Passions.* Oxford, Oxford University Press; HäGERSTRöM, A (2013). *On the Truth of Moral Ideas.* Trans by Tomas Mautner, in: ELIAESON, S; MINDUS, P and STEPHEN, P & TURNER, T (Eds.,) (2013). *Axel Hägerström and Modern Social Thought* (European Studies in Social Theory), pp. 409-428. Oxford, The Bardwell Press. (Originally published under the title "Om moraliska föreställningars sanning" in: FRIES, M (Ed.,) (1939). *Axel Hägerström, Socialfilosofiska uppsatser*, pp. 35-65. Stockholm, Bonniers); STEVENSON, Ch L (1944. *Ethics and Language.* New Haven, Yale University Press.

10 See: STEVENSON, Ch L (1937). "The Emotive Meaning of Ethical Terms". *Mind, New Series,* 46, pp. 14-31.

11 ROSS, A (1936). "Den rene Retslæres 25-Aars-Jubilaeum" ["The Twenty-Fifth Anniversary of the Pure Theory of Law"]. Tidsskrift for

experience. It is not a 'thought' the truth or falseness of which can be tested as something that is absolutely independent of its psychological experience"[12].

Ross does not have much to say about meta-ethical questions in *On Law and Justice*, but his distinction between assertions, which can be true or false, and directives, which lack truth-value[13], together with his comments on the idea of justice, suggest that he still adhered to the emotivist version of non-cognitivism in the late 1950's. As he puts it[14], "[t]o invoke justice is the same thing as banging on the table: an emotional expression which turns one's demand into an absolute postulate."

3. DUALISM IN THE CONCEPT OF LAW

Ross opens his 1946 treatise *Towards a Realistic Jurisprudence*[15] with the following words:

> The starting point of the exposition in the present book is the view that the fundamental source of error in a number of apparently unconquerable contradictions in the modern theory of law is a dualism in the implied pre-scientific concept of law which more or less consciously forms the basis of the theories developed. It is the dualism of *reality and validity* in law, which again works itself out in a series of antinomies in legal theory.

Dualist theories, he explains[16], conceive of law "at the same time as an observable phenomenon in the world of facts, and as a binding norm in the world of morals or values, at the same time as physical and metaphysical, as empirical and *a priori,* as real and ideal, as something that exists and something that is valid, as a phenomenon and as a proposition." And he proceeds to maintain that the concept of law as we know it does contain such a dualism:

> Characteristic of the concept of law is *the belief in an incarnation of the valid, the metaphysical, the ideal in the realm of the actual, the physical, the real.* The law is not, like morality, pure ideality. But neither is it, like the tyranny of crude power, a purely empirical social reality. The law is both, valid and factual, ideal and real, physical and metaphysical, but not as two things co-ordinated, but as *manifestation of validity in reality,* which is only thereby qualified as law. The content of law, therefore, consistently leads to a *spiritualistic metaphysic,* to the assumption that there exist elements within the physical world which in their inmost essence are an incarnation of spiritual principles or rational ideas expressing supertemporal values. The concept of law is in principle couched in the categories of the so-called practical knowledge, only, that these are considered to be deprived of their purely *a priori* character, and [are] so to speak amalgamated with the categories of the knowledge of reality[17].

Having thus characterized the concept of law as being dualistic in this sense and having considered some different types of theory of law that illustrate this type of dualism, such as the theories of Savigny, Lask,

rettsvitenskap [Journal for Legal Science], p. 313.

12 Translated into English by Robert Carroll. The Danish original reads as follows: "Det normative Udsagn besidder altsaa netop ingen Mening, der lader sig fremstille i Abstraktion fra den psykologiske Oplevelsevirkelighed. Det er ingen "Tanke," hvis Sandhed eller Falskhed kan prøves som noget, der er absolut uafhængigt af dens psykologiske Oplevelse.

13 ROSS, A (1959). *On Law and Justice*. Berkeley & Los Angeles, University of California Press, pp. 6-11.

14 *Ibíd.*, p. 274.

15 As Ross points out in the preface, this book is based on an earlier publication in Danish, namely, ROSS, A (1934). *Virkelighed og gyldighed i retslaeren. En kritik af den teoretiske retsvidenskabs grundbegreber. [Reality and Validity in the Theory of Law. A Critique of the Fundamental Concepts of Theoretical Legal Science].* Copenhagen, Levin & Munksgaard; ROSS, A (1989-1946). *Towards a Realistic Jurisprudence. A Criticism of Dualism in Law.* Translated by Annie I. Fausbøll. Aalen: Scientia Verlag. (Originally published 1946 by Munksgaard, Copenhagen).

16 ROSS, A (1989-1946). *Op. cit.*, p. 11.

17 Ibíd., p. 20.

Radbruch, Binder, and others[18], Ross turns to consider the antinomies that, as he sees it, arise from a dualistic concept of law. He begins, however, by discussing then current (1946) versions of legal positivism in order to show that they, too, suffer from these antinomies[19]. He does this because he anticipates that critics might want to object to his line of argument, that legal positivists do not operate with a notion of validity strong enough to give rise to the antinomies.

Legal positivism, he explains, has it that law is a historical product located in the world of time and space, and that a norm is a legal norm if, and only if, it can be traced back to a source of law[20]. As he puts it[21], "[p]ositive law (the law of the land) is the sum total of norms engendered by an historical process which, by virtue of certain external, observable distinguishing marks (e.g. by legislation), qualifies the norm as legal. Hence valid law is an historical fact given by experience and independent of how this fact is evaluated." This, of course, is in keeping with the social thesis of legal positivism, according to which one can determine what the law is using (exclusively or essentially) factual criteria[22].

Ross then formulates the *first* antinomy as follows[23]:

> ***Thesis:*** "The validity of the law as law is determined relatively to certain relevant, historical phenomena."
>
> ***Antithesis:*** "The relevant historical phenomena are determined relatively to the validity of the law as law."[24].

If we express this idea in terms of valid legal norms and sources of law, we get something like the following: Whereas the validity of legal norms presupposes that these norms can be traced back to a source of law, the existence of such a source of law presupposes in turn that it is recognized by a valid legal order, that is, an order consisting of legally valid norms. Ross adds[25] that the theories of prominent legal positivists, such as John Austin, Karl Bergbohm, Hans Kelsen, and John Chipman Gray, are all guilty of this type of circular reasoning. For they all hold that we can trace all valid legal norms back either to a sovereign lawgiver or to the courts, even though they cannot determine whether X is a sovereign lawgiver, or a court, without presupposing precisely the existence of a valid legal order that confers on X the property of being a source of law.

Ross's idea, then, is that legal positivists maintain both (a) that a norm is a legal norm if, and only if, it can be traced back to a source of law, and (b) that something is a source of law if, and only if, it is recognized by a valid legal order. As Neil MacCormick[26] has noted, the same type of circularity problem plagues H. L. A. Hart's theory of law, according to which the *rule of recognition* is a rule that is practiced by *judges* and fulfills the function of determining whether any given rule is a rule of the system. For, MacCormick points out, while we need the rule of recognition to determine whether a given rule is really a legal rule (that is, a rule of the system), we also need *rules of adjudication* to determine who is a judge – if we have no judges, we will have no rule of recognition.

18 *Ibid*., pp. 33-38.

19 *Ibid*., pp. 53-57.

20 *Ibid*., pp. 53-55.

21 *Ibid*., p. 54.

22 On the social thesis see: e. gr., RAZ, J (1979). *The Authority of Law*. Oxford, Clarendon Press, pp. 37-52; WALUCHOW, WJ (1994). *Inclusive Legal Positivism*. Oxford, Oxford University Press, pp. 80-141; SPAAK, T (2003). "Legal Positivism, Law's Normativity, and the Normative Force of Legal Justification". *Ratio Juris,* 16, pp. 472-473.

23 ROSS, A (1989-1946). *Op. cit.*, p. 57.

24 I have omitted the emphasis in the original.

25 ROSS, A (1989-1946). *Op. cit.,* p, 61.

26 MAcCORMICK, N (1981). *H. L. A. Hart*. Stanford, Stanford University Press, pp. 108-109.

What does this have to do with jurisprudential dualism? Ross's idea, I take it, is that in order to break out of the circle, legal positivists will have to invoke the concept of legal validity and argue that only sources of law recognized by a *valid* legal order, that is, a legal order consisting of legally valid norms, qualify as sources of law. But by invoking the property of legal validity, they are also *transforming* their monist theory into a *dualist* theory, one that includes not only real, but also ideal, elements, and in their (subsequent) effort to anchor law in reality they will be transforming the dualist theory back into a *monist* theory, namely, one that includes only real elements. This movement back and forth between thesis and the antithesis, Ross explains, is a never-ending process[27]: "[T]he antinomy expresses not so much a direct contradiction as an interminable return to the starting-point. It is like looking down the endless vista of parallel mirrors."

The *second* antinomy is as follows [28]:

> ***Thesis:*** "The legal rule is a direct practical statement as to the validity of the law, and its theoretical value as a truth is derived relatively to this (the legal rule as an imperative)."
>
> ***Antithesis:*** "The legal rule is a direct theoretical statement as to facts, and its validity as law is derived relatively to this (the legal rule as a (hypothetical) judgment)."[29]

Ross's idea, as I understand it, is that if we conceive of legal rules as imperatives (the thesis), we will be able to predict human behavior only if we also assume that the citizens will comply with the law, and this will lead us to the view that legal rules are hypothetical judgments about human behavior (the antithesis); and if we conceive of legal rules as hypothetical judgments about human behavior (the antithesis), we will be able to explain why people comply with the law only if we also assume that legal rules are imperatives, and this will lead us back to the view that legal rules are imperatives (the thesis). And, as in the case of the first antinomy, Ross maintains that legal thinking will keep moving from one endpoint of the continuum to the other, and back again. For as soon as one tries to stop at one endpoint, one will have to begin moving back towards the other endpoint, in order to be able to predict human behavior or explain why people comply with the law, as the case may be.

4. DUALISM IN THE CONCEPT OF THE SOURCES OF LAW

The doctrine of the sources of law, Ross explains, is a doctrine about certain historical facts, such as legislation, precedent, and custom, that endow a given norm with the quality of law, that is, a doctrine about the criteria judges should use for determining whether something is law. As he puts it,[30] "[t]he concept 'legal source' (. . .) denotes a certain *general form*, which is the epistemological basis for the knowledge that the normative content given therein is law"[31] . The general idea, then, is that a given norm is a legal norm if, and only if, it can be traced back to a source of law.

The sources of law thus conceived give us the legal raw material but do not say anything about how this raw material is to be interpreted and applied by judges and other law-appliers. The latter question,

27 ROSS, A (1989-1946). *Op. cit.*, p. 73.

28 *Ibíd.,* p. 74.

29 Here, too, I have omitted the emphasis in the original.

30 Ross's first monograph, ROSS, A (1929). *Theorie der Rechtsquellen.* Leipzig, Deuticke. (Dissertation), is wholly devoted to the doctrine of the sources of law. In his discussion of this topic, in: ROSS, A (1989-1946). *Op. cit.*, p. 126. Ross draws extensively on the earlier monograph.

31 I find Ross's emphasis on the *epistemological* aspect of the sources of law a bit misleading, because I consider this to be nothing more than a secondary property of a source of law. The primary property, as I see it, is the *metaphysical* property of *determining* that a norm that can be traced back to a source of law qualifies as a legal norm *because* it can be so traced back – if a given norm can be traced back to a source of law, it is a legal norm, and if it cannot be so traced back, it is not.

as Ross notes, is dealt with by the so-called legal (or juridical) method,[32] which includes the usual interpretive arguments (such as the textual, systemic, intentionalist (or historical), and purposive (or teleological) principles of statutory interpretation), the modalities of decision, as I call them, (that is, plain application, *contra legem* decision, strict and liberal interpretation, analogical application and *e contrario* decision), and certain other norms, such as the so-called rule of lenity, the principle of legality, and perhaps also the principle that rules that provide exceptions to a main rule should be strictly (narrowly) construed[33].

But the concept of the sources of law is problematic, according to Ross, because it incorporates the above-mentioned dualism of reality and validity. The problem, he explains[34], is that a source of law must simultaneously perform two very different functions, namely, (i) that of ensuring that judges and other law-appliers will actually apply the law and (ii) that of endowing law with validity. And as a result of this underlying problem, Ross continues, judges and other law-appliers faced with the problem of determining whether a given norm is a legal norm tend to move from an emphasis on *formal* sources of law to a more or less tacit use of substantive considerations[35]: "In one way or another farther-reaching methods beyond this [that is, beyond formal sources] are nearly always presupposed, which imply *material* legal sources, that is to say, a law which does not originate from an authoritative form or establishment, but directly from certain material principles, ideas or purposes."

Having thus explained the problem in general terms, Ross proceeds to identify three distinct *antinomies* in the concept of the sources of law. Here is the first antinomy[36]:

> ***Thesis:*** "The propositions of the doctrine of the sources of law do not themselves belong to positive law, but are valid independently of a given positive system of law."
>
> ***Antithesis:*** "The propositions of the doctrine of the sources of law vary from one legal system to another, and must therefore form part of these."37

This antinomy, which appears to be a special case of the first antinomy in the concept of law, thus concerns the question of the relation between the concept of law and the concept of the sources of law. The problem, as I understand it, is that we think of the sources of law, *SL*, of a certain legal order, *LO,* as both conceptually dependent on and conceptually independent of *LO* at the same time. On the one hand, says Ross[38], if the function of a given source of law, SL_1, is to determine whether a norm, n, belongs to *LO,* SL_1 "can only be developed from the concept of law itself," that is, from *LO*, so that the details of SL_1 will depend on the details of *LO* (the antithesis). On the other hand, if SL_1 is what determines whether n is a legal norm in the sense of belonging to *LO,* SL_1 needs to be conceptually independent of *LO* in order to avoid the problem of circularity alluded to above (the thesis) – if SL_1 were dependent on *LO* (=not independent of *LO)*, it would presuppose the existence of the very property it was meant to explain, that is, legal validity. Hence the antinomy.

We see that Ross's view is that the antithesis means that any given doctrine of the sources of law must be precisely adapted to the particular characteristics of the relevant legal order, in order to be able to fulfill its function, and that this means that it must be *dependent on* that legal order. For

32 *Ibid*., p. 127.

33 On the legal method, see: SPAAK, T (2007). *Guidance and Constraint. The Action-Guiding Capacity of Theories of Legal Reasoning.* Uppsala, Iustus. Chap. 3.

34 ROSS, A (1989-1946). *Op. cit.,* p. 129.

35 *Ibid*., p. 130.

36 *Ibid*., p. 131.

37 Here, too, I have omitted the emphasis in the original.

38 ROSS, A (1989-1946). *Op. cit.*, p. 132.

example, he says[39] that "the question as to what importance should be attached to the motives of the law [the preparatory works] in the interpretation of it [the law] cannot be answered in the abstract from a consideration of the concept of law, but only with a view to a certain given state of law." As I understand it, he is saying that no doctrine of the sources of law that is independent of the relevant legal order (or "concept of law," as he says), could possibly account for, say, the fact that Swedish judges should, or that French judges should not, consider preparatory works when interpreting statutes.

Here is the second antinomy[40]:

Thesis: "The supreme source of law (basis for the knowledge of law) is itself a norm or validity, not a fact."

Antithesis: "The supreme source of law is itself a fact, not a norm (validity)."

As Ross[41] points out, this antinomy concerns the details of the definition of the concept of the sources of law. He reasons as follows. Following Kelsen, he notes that the law-creating power of the act of legislation presupposes a constitutional *norm*, according to which the legislative body has the legal competence to enact laws; and, he adds, the same goes for every other historical act, such as custom. Thus in every legal order there occurs also formation of customary law that is independent of statutory law, including the constitution. And if this procedure is to be legitimate, we need to posit a fundamental norm that makes it legitimate. But the problem with this move, he points out[42] is that ". . . the fundamental norm itself cannot be posited independently of the actual course of events, the actual machinery of compulsion as such." For, he explains, "[i]f the system is not to be an arbitrary device, the fundamental norm must be chosen in such a way that it will 'accord with' the actual functioning system." Hence the antinomy.

Note that this (the second) antinomy in the concept of the sources of law is more or less identical to the first antinomy in the same concept and, therefore, more or less identical to the first antinomy in the concept of law. I do not, however, find it conducive to clarity to introduce the same antinomy twice, even thrice, using slightly different formulations.

Finally, we have the third antinomy[43]:

Thesis: "The assumption of a multiplicity of original sources of law is an impossibility."
Antithesis: "The attempt to reduce the multiplicity of sources to a systematic unity is not practicable."

Ross[44] explains that there are two reasons why it is impossible to assume a multiplicity of sources of law, namely, that doing so is incompatible (i) with the idea of the unity of the *concept* of law and (ii) with the idea of the unity of the *content* of the law derived from the sources of law. He points out, as regards (i), that if we assume a multiplicity of sources of law, we must be able to explain how that which is derived from one source is law in the same sense as that which is derived from another source, and that we can do this only by giving priority to one source, say, legislation, and *reduce* the other sources, such as precedent and custom, to that source. But, he objects, any attempt to reduce some sources to the others will inevitably lack any real foundation:

39 *Ibid.,* p. 132.
40 *Ibid.*, p. 133.
41 *Ibidem.*
42 *Ibid.*, p. 134.
43 *Ibid.*, p. 136.
44 *Ibid.*, pp. 136-139.

> If, for instance, we take legislation as a legal source because it expresses the will of the social power, it is incompatible with this to accept custom as a source at the same time, because it expresses the view of law of those who are subject to its norms. If it is the essence of law to be an expression of the will of the social power, all sources of law, not only statutory law, must be referable to this starting-point, the will of the social power. Authors who are consistent introduce various constructions of permission and authorization as a means to this end. It is not difficult to see, however, that such permissions to use certain subsidiary sources are quite fictive, and that, apart from the actual state of affairs, and perhaps the private estimate of the author in question, every real foundation for determining the content of the permission is lacking[45].

He continues to argue[46], as regards (ii), that in order to avoid a situation in which different sources of law give different answers to a legal question, it is necessary to arrange the different sources in a hierarchical order, so that a given source, (β), will be considered only if a higher source, (α), is inapplicable. The problem with this arrangement, however, is that the judge will in most cases be unable to determine whether (α) is applicable or not, unless he *evaluates* the situation, and this in turn means that there will be no objective way to determine what is the content of law.

Ross does not, however, explain just why any attempt to reduce a multiplicity of sources to a systematic unity would not be *practicable* (the antithesis).

5. DUALISM IN THE CONCEPT OF SUBJECTIVE LAW

Following jurisprudential tradition, Ross[47] makes a distinction between objective law in the sense of a set or a system of norms, that is, a legal system, and subjective law in the sense of such a set or a system that is in some sense at the disposal of a certain individual, who will then have a legal right or a legal duty (or a legal obligation). The conceptual relation between objective and subjective law, he continues[48], depends on the nature of law. For example, assuming a natural law view of law, it is natural to think of legal rights as being conceptually prior to legal duties, and assuming a legal positivist view of law, it is natural to think of legal duties as being conceptually prior to legal rights. And if we choose to think of legal rights as being conceptually prior to legal duties, Ross[49] explains, we will see that it is quite natural to analyze the concept of a legal right either in terms of interests (as Rudolf von Ihering did) or in terms of will (as Bernard Windscheid did).

But either way, he points out[50], the idea of a specifically practical validity enters into the concept of subjective law, since we define the concept of law (conceived as a legal order) with the help of the concepts of a legal right or a legal duty, and since the latter concepts "belong to practical dogmatism, not to the knowledge of reality"[51].

45 *Ibid.,* pp. 136-137.

46 *Ibid.*, pp. 137-138.

47 *Ibid.,* p. 159.

48 *Ibid.*, pp. 160-166.

49 *Ibid.*, pp. 166-119.

50 *Ibid.*, p. 169.

51 I fail to understand Ross's train of thought here. If he wants to show that the idea of a specifically practical validity enters into the concept of subjective *law,* why invoke the fact, if it is a fact, that we define the concept of law in terms of the concepts of a legal right and a legal duty? Why not instead rest content with the claim that the concepts of a legal right and a legal duty "belong to practical dogmatism, not to the knowledge of reality"?

Ross then introduces the first antinomy:[52]

Thesis: "The existence of subjective law is determined relatively to the actual function of the compulsory system."

The antithesis: "The actual function of the compulsory system is determined relatively to the existence of subjective law."

This antinomy, which concerns the relation between an efficacious legal order, on the one hand, and legal rights and legal duties, on the other, thus says that whereas the existence of subjective law presupposes the existence of an efficacious legal order ("a functioning compulsory system"), the existence of an efficacious legal order presupposes the existence of subjective law. So it reminds us of the old question of how to view the relation between social efficacy and legal validity: Should we say that a legal norm is valid because it is applied or that it is applied because it is valid?[53] The former is the view held by legal realists, and the latter is Kelsen's (and many other legal scholars') view. As Kelsen[54] sees it, validity amounts to bindingness, where bindingness is different from, but not independent of, social efficacy. As should be clear, and as Ross points out[55], this antinomy is a special case of the first antinomy in the concept of law.

Here is the second antinomy:

Thesis: "The duty-creating character of the consequences of compulsion is conditioned by their character as 'sanctions.'"

Antithesis: "The character as 'sanctions' attaching to compulsion is conditioned by its following upon the contravention of a duty."

This antinomy thus says that the consequences of compulsion create a legal duty if, and only if, they qualify as a sanction, although they qualify as a sanction if, and only if, they follow from a breach of a legal duty; and, as Ross points out[56], this antinomy is really a version ("a special formulation") of the first antinomy in the concept of subjective law. For this antinomy, too, makes it clear that the existence of a legal duty presupposes the existence of an efficacious legal order, whereas the existence of an efficacious legal order presupposes the existence of a legal duty.

Here is the third antinomy:

"The element of will in the concept of subjective law can neither be retained nor abandoned".

The reason why this is so, Ross[57] explains, is that, on the one hand, the concept of will cannot be retained as a constituent part of the concept of subjective law, since we recognize children and mentally handicapped persons as right-holders even though they do not have the requisite will, and, on the other hand, that the concept of will cannot be eliminated as a constituent part of the concept of subjective law, since it is needed in order to distinguish between legal rights and mere reflexes (of another person's

52 As before, I have omitted the emphasis in the original. Cfr. ROSS, A (1989-1946). *Op. cit.,* p. 171.

53 This in turn appears to be a version of the so-called Euthyphro problem (see: MATTHEWS, GB (1995). "The Euthyphro Problem", in: HONDERICKT (Ed.,).*The Oxford Companion to Philosophy,* p. 253. Oxford, Oxford University Press. When Euthyphro suggests in Plato's eponymous dialogue that to be pious is to be loved by the gods, Socrates counters with the question: Is the pious loved by the gods because it is pious, or is it pious because they love it?

54 KELSEN, H (1960). *Reine Rechtslehre* [The Pure Theory of Law]. 2nd ed. (Reprint) Vienna, Österreichische Staatsdruckerei. (Originally published by Franz Deuticke, Vienna), pp. 215-221.

55 ROSS, A (1989-1946). *Op. cit.,* p. 171.

56 *Ibid.*, p. 172.

57 *Ibid.,* p. 174.

legal duty)[58]. We might perhaps put it thus: The will theory of legal rights is both false (because of the existence of very young or mentally handicapped right-holders) and true (because of the need to distinguish between legal rights and reflexes) at the same time.

We see, then, that Ross's position is that we need the element of will to distinguish between a legal right and its reflex. But what does Ross mean by 'reflex' in this context? The problem he has in mind is that under the interest (or beneficiary) theory of legal rights – which has it that a person has a legal claim-right if, and only if, he is the intended beneficiary of another person's legal duty, that is, if (and only if) he is the person who has an (immediate) interest in the performance of the duty – a legal right turns out to be nothing more than a reflex of the (more fundamental) legal duty and therefore does not contribute anything of interest to legal thinking[59]. The insight of will-theorists is that a person has a legal right if, and only if, his will is recognized as controlling (in a certain sense) the other person's legal duty. This, then, is the reason why Ross says that we need the element of will in order to distinguish a legal right from a mere reflex.

Let us now proceed to consider Ross's purported solution to the problem of the antinomies.

6. DISSOLVING THE ANTINOMIES: A NON-COGNITIVIST ACCOUNT OF CLAIMS OF LEGAL VALIDITY

Since, as we have seen, the reason for the antinomies in the concept of law and in the concepts of the sources of law and of subjective law is one and the same, namely, the dualism of reality and validity identified by Ross and considered above, one may suspect that any solution to these antinomies should at bottom be the same. And, according to Ross, so it is. Accordingly, he attempts to dissolve the antinomies in all three concepts in the same way, namely, by substituting a non-cognitivist account of claims of legal validity for the non-naturalist account of such claims, which, as he sees it, gave rise to the underlying dualism in the first place. The point of doing so is, of course, to retain the concept of validity in legal thinking, while getting rid of the troublesome assumption that valid (or binding) legal norms exist in some sort of higher realm. To retain the concept of validity in legal thinking is very important, Ross explains, because any theory of law that eliminated this concept would fail spectacularly as a theory of law in that it would fail to even *identify* its study object, that is, law. As Ross sees it, if one does not have access to the concept of validity, one cannot determine whether a given norm is a legal norm or not, or whether a certain human behavior is legally relevant or not:

> If the law is defined as a certain actual behaviour, dualism is, indeed, avoided to begin with. Statements about the law will be purely theoretical statements about what happens or what will happen. But this results in a complete disruption of the concept of law. For the question will arise how social conduct which is law can be precisely delimited from all other social conduct. Such a delimitation can not take place without going back to the notions of validity that it was attempted to avoid[60].

Ross's idea is that the concept of validity, although admittedly absurd, symbolizes certain facts that are important to the study of law, but whose nature is not yet clear to us, namely, expressions

58 *Ibid*., pp.167-168.

59 *Ibídem*.

60 KELSEN, H (1999-1945). *General Theory of Law and State.* Trans. Anders Wedberg. Union, New Jersey, The Lawbook Exchange. (Originally published 1945 by the Harvard University Press, Cambridge, Mass), pp. 175-176, made essentially the same point when he objected to the claim by sociological jurisprudents that sociological jurisprudence is the only real science of law, that sociological jurisprudents cannot even determine what human behavior to focus their sociological study on, unless they invoke the concept of law employed by normative jurisprudents, a concept that is defined in terms of the concept of validity. ROSS, A (1989-1946). *Op. cit.*, p. 49.

of certain peculiar psycho-physical experiences[61]: "Our object in determining the concept of law is not to spirit away the normative ideas, but to put a different interpretation on them, reading them for what they are, the expression of certain peculiar psycho-physical experiences, which are a fundamental element in the legal phenomenon." Ross maintains, in keeping with this, that one cannot avoid the antinomies simply by giving up on the concept of legal validity and constructing a monist theory that focuses on either the real or the ideal dimension[62]: "The sting of the problem lies in the very fact that the two points of view cannot be distinguished and isolated; the thesis is bound to lead to the antithesis, and vice versa. The interpretation by means of reality cannot be carried through without recourse to the category of validity, and the reverse."

He proceeds to argue that the dimension of validity, as it is understood in traditional theories of law, is a category of thought that is assumed to be distinct from, although in some sense parallel to, the category of reality. But, he explains[63], the truth of the matter is that "there exist no notions of validity at all, but merely conceptually rationalized expressions of certain subjective experiences of impulses", that from a standpoint transcending consciousness, the notions of validity are simply "certain peculiar disinterested behaviour attitudes", and that owing to a natural illusion the human mind rationalizes these attitudes in "the idea of a 'validity' as something objectively given." And he therefore proposes[64] that we substitute for the idea of validity in the sense explained "the experiences of validity (in the sense of certain actual behaviour attitudes) underlying this rationalisation and symbolised by it."

We see that Ross's non-cognitivism is at work here. On the non-cognitivist analysis, (first-order) value judgments and claims of rights and duties and of validity do not (correctly or incorrectly) report moral facts, but *express* the feelings and attitudes of the speaker (or else prescribe a course of action). Once we see this, Ross reasons, we will not be deceived into imagining that there really are (objective) norms and values, which then have to be located in some sort of supersensible realm, such as Kelsen's 'world of the ought.' As fellow Scandinavian realist Karl Olivecrona[65] puts it in an illuminating article on realism and idealism in legal philosophy, "[w]e are misled by our own feelings of being bound by the law into believing in these metaphysical relations."

The proposed solution to the problem of the antinomies is in keeping with Ross's fundamental assumption, that the science of law is part of the science of human behavior and that legal phenomena "must be found within the field of psycho-physical phenomena",[66] and that the proper method here is to investigate and see what the realities are that have given rise to the rationalizations found in dualist theories. Ross maintains in keeping with this that the three elements that are characteristic of all dualist theories of law – namely, (i) the element of reality, (ii) the element of validity, and (iii) the element of logical interdependence of (i) and (ii) – correspond to and symbolize the following three factors all of which belong in the psycho-physical reality of law: "1) *an interested behaviour attitude, more precisely determined as an impulse of fear of compulsion; 2) a disinterested behaviour attitude having the stamp of validity; and 3) an actual, inductive interaction between these factors* in such a way that the existence of the former tends to cause and stabilize the existence of the latter, and vice versa"[67].

61 *Ibídem*.

62 *Ibíd.*, p. 76.

63 *Ibíd.*, p. 77.

64 *Ibídem.*

65 OLIVECRONA, K (1951). "Realism and Idealism: Some Reflections on the Cardinal Point in Legal Philosophy", *New York University Law Review*, 26, p.131.

66 ROSS, A (1989-1946). *Op. cit.*, p. 78.

67 *Ibídem.* Emphasis in the original.

Ross then turns to a consideration of the antinomies in the concept of the sources of law [68]. He begins by noting that if we reject the traditional understanding of the concept of law and substitute for it a revised concept in which "the rationalisations of validity are reduced to what they are, namely symbolical expressions of irrational factors", and in which the idea of law as a system of norms has been rejected in favor of the idea of law "based on the study of psycho-physical facts of the juridical phenomena", we will see that both the concept and the problem of the sources of law will undergo a change of character. And, he continues[69], if we keep in mind that legal knowledge, like all other knowledge, can only be gained through experience, and that "legal behavior attitudes are not immediately given statically, but develop dynamically from certain 'immediate ideas of competence' to authoritatively established normative expressions deduced from them"[70], we see that the *form* that according to the doctrine of the sources of law is the source of legal validity is identical to the *form* of the authoritative establishment of legal norms, and that the power of this form to create legal validity is in turn a result of the competence to establish legal norms, which is nothing more than 'the rationalized expression of certain attitudes.'

What this means, then, is that we can account for the validity of legal norms by invoking certain *attitudes*, which are part of reality. And this in turn means, Ross points out, that the dualism of reality and validity in the concept of the sources of law will disappear. For, on this analysis, both the formal and the material (substantive) aspects of the sources of law will come to reflect two types of *motivating factors* in legal thinking, namely, "the authoritative formal decisions, in themselves bearing the stamp of legal validity prior to and independently of their application in a judicial decision, and the free material practical considerations, ideologies, and other motivating factors, which do not in themselves possess, but only through their application acquire, the stamp of legal validity"[71].

Ross adds[72] that the rejection of the dualism in the concept of the sources of law and the consequent dissolution of the antinomies will also influence our understanding of the legal (juridical) method. More specifically, the rejection of dualism makes it clear that interpreting a statute is not the logical matter of establishing in the abstract the complete and precise meaning of the provision in question, but rather the practical matter of determining the meaning of words according to ordinary usage[73]. As he puts it,[74] "[t]he decision does not depend on reflection and theoretical proofs, but on a psychological process of motivation, which will again largely depend on the practical interests associated with one or the other use of the word." For example, we now see that there really is no such thing as textual (or literal) interpretation, and that legal interpretation must be *purposive* (or teleological)[75]. This is so, he explains, because the question of whether a certain word or expression, such as 'house,' 'forest,' or 'farming,' covers a certain phenomenon is ultimately a *practical*, not a theoretical, question, which cannot be answered except by reference to what he calls the "practical interests" that are associated with various interpretations of the relevant legal norm:

The practical interests which are decisive here may be either those that directly dominate the judge as an individual influenced by his community, class, or profession, or they may be those which the judge supposes have influenced the legislator. From the history of how the law came into being he will

68 *Ibid.*, p. 140.
69 *Ibidem.*
70 *Ibid.*, p. 141.
71 *Ibidem.*
72 *Ibid.*, p. 148.
73 *Ibidem.*
74 *Ibid.*, p.149.
75 *Ibid.*, pp. 149-150.

then try to ascertain the motives that has [*sic*] influenced the law-giver. Since however 'the lawgiver' as an expression of one will is a mere fiction, and since the law will as a rule have come into being as the resultant of various interest components, the difference between the two methods will not usually be very great[76].

Finally, he turns to consider the antinomies in the concept of subjective law[77]. Focusing on the concept of a legal right instead of the concept of a legal duty, he attempts to dissolve the three antinomies by rejecting the underlying idea that a legal right is a single entity that has magical properties, such as a power of dominion, and substituting for it the idea of a legal right as what he calls a technical right-concept. He puts the main idea as follows:

> In rationalization rights are conceived as a quality of unity, a legal power of dominion, localized to a human individual, the subject of the rights. Three assumptions may be distinguished in this conception: the assumption that a right constitutes a unity; that the necessary basis of a right is a human subject; and that the nature of the right is the special legal control of an object. If a right is regarded as a technical figure in positive law, all three assumptions are false and apt to involve fictions, pseudo problems, and corruptions[78].

Having discussed in some detail the advantages of substituting the concept of a legal right conceived as a technical right-concept for the concept of a legal right conceived as a concept of something that has unity and magical powers, Ross concludes that we can now easily dissolve the three antinomies that we have found in the concept of subjective law. He treats the first two antinomies together and points out that they will be dissolved as soon as we substitute the idea of an attitude to a behavior for what he calls the "rationalized fictions"

In these cases there is merely a special formation of the general antinomy between reality and validity in law, which, when the irrational realities are substituted for the rationalised fictions, resolve themselves in an interaction between actual compulsion and a disinterested behaviour-attitude (experience of validity)[79].

The third antinomy is different, however, he explains[80], since it arises because of the peculiar dogmatism of the concept of subjective law. He notes that it expresses the antagonism between will theories and interest theories of legal rights, and that this antagonism does seem unconquerable. But, he explains[81], we know now that the problem is that the concept of a legal right is ambiguous and involves a false assumption of conceptual unity. If we manage to give up on the hopeless idea of conceptual unity and get rid of the ambiguities, the antagonism between will theories and interest theories of rights will disappear – that is, the antinomy will disappear.

Let us now turn to consider a contemporary example of dual-nature theories of law, namely, Robert Alexy's well-known and much-discussed theory of law.

7. ALEXY´S DUAL-NATURE THEORY

Robert Alexy maintains that law has a dual nature, in the sense that it necessarily consists of both a real and an ideal part, and that this feature[82] is "the single most essential feature of law". He maintains,

76 *Ibíd.*, p. 150.
77 *Ibíd.*, Chap. 8-10.
78 *Ibíd.*, p. 191.
79 *Ibíd.*, p. 202.
80 *Ibídem.*
81 *Ibídem.*
82 ALEXY, R (2010). "The Dual Nature of Law". *Ratio Juris,* 23, p. 180.

more specifically, that the elements of authoritative issuance and social efficacy constitute the real part of law, whereas the claim to (moral) correctness makes up the ideal part. And, he points out, the dual-nature thesis implies non-positivism [83]: "[i]f one claims that social facts alone can determine what is and what is not required by law, that amounts to the endorsement of a positivistic concept of law. Once moral correctness is added as a necessary third element, the picture changes fundamentally. A non-positivistic concept of law emerges."

Alexy does not, however, say anything in this context about the nature of moral correctness. It is, however, clear from his earlier writings[84] that he rejects not only all versions of non-cognitivism and relativism, but also both naturalist and non-naturalist versions of moral realism. Instead, he defends the view that practical, including moral, reasoning, is a rule-governed activity, and that one may properly speak of the correctness of practical – including moral – claims[85]. And in a later article[86], he defends, in keeping with this, a Kantian conception of practical rationality (or practical reason) in the shape of a discourse theory, according to which "a norm is said to be correct precisely when it is or might be the outcome of a specific procedure." Since I have seen nothing in his more recent writings that suggests that he has abandoned this stance, I shall assume that Alexy is a meta-ethical *constructivist*. Note, however, that he does not maintain that discourse according to his rules of discourse will always yield "one right answer." For there might be cases in which the participants in the discourse reach conflicting conclusions, although they have both (or all) followed the rules of discourse. In such cases, Alexy[87] is content to speak of a *discursive possibility.*

Alexy[88] aims to establish the ideal component of law by means of the intriguing argument from performative contradiction, which features a hypothetical constitutional provision, according to which *X* is a sovereign, federal, and unjust republic, and a court judgment, according to which the defendant is wrongly sentenced to life imprisonment because the law was interpreted incorrectly. The constitutional article reads as follows:

(CA) X is a sovereign, federal, and unjust republic.

And the court judgment reads as follows:

(CJ) The defendant is – wrongly, because the valid law was interpreted incorrectly – sentenced to life imprisonment.

Alexy's strategy is to identify an *absurdity* in the very idea of a legal act – such as an act of legislation or a court judgment – that does *not* involve a claim to correctness, and to argue that this absurdity can only be explained by reference to the occurrence of a performative contradiction, which he considers to be a *conceptual* defect (in a broad sense). Beginning with (CA), he points out that the absurdity is clearly not due to a technical, moral, or conventional fault, but to a performative contradiction. What he means is that the reason why (CA) is absurd is that the act of legislation necessarily involves the raising of a claim to correctness, and that this claim to correctness is contradicted by the *content* of (CA). To enact (CA), then, is to make a conceptual mistake (in a broad sense) Turning to (CJ), he applies the same type of reasoning and argues that the reason why (CJ) is absurd is that the act of rendering a judgment necessarily involves the raising of a claim to correctness, and that this claim to correctness is

83 *Ibid*., p. 167.

84 ALEXY, R (1989). *A Theory of Legal Argumentation.* Oxford, Oxford University Press (Originallypublished 1978 under the title Theorie der juristischen Argumentation by Suhrkamp Verlag, Frankfurt am Main), pp. 34-47.

85 *Ibid*., pp. 47-99.

86 ALEXY, R (1992). "A Discourse-Theoretical Conception of Practical Reason". *Ratio Juris*, 5, p. 234.

87 ALEXY, R (1989). *Op. cit.*, pp. 206-208.

88 ALEXY, R (2010). *Op. cit.*, p.169.

contradicted by the content of (CJ)[89]. Since this is so, we have in this case, too, a conceptual mistake (in a broad sense).

Having established to his satisfaction the existence of the ideal dimension of law, Alexy proceeds to point out that the insufficiency of the ideal dimension necessitates the existence of the real dimension of law. The necessity, he explains[90], "stems from the moral requirements of avoiding the costs of anarchy and civil war and achieving the advantages of social co-ordination and co-operation." The idea, then, is simply that law needs a real part to ensure that people actually obey the law.

I have doubts about the cogency of Alexy's line of argument[91], however, though I shall not pursue my objections to Alexy's line of argument here. Instead, I shall grant Alexy the conclusion that law necessarily has a dual nature. Does this mean, then, that Alexy's theory gives rise to antinomies of the type Ross identified in his critique of dualism? No, I do not think so. As we have seen, Ross clearly has in mind dual-nature theories that involve a non-naturalist meta-ethics, the idea being that the ideal dimension of law is a reflection of a mind-independent, non-natural reality. But, as we have also seen, Alexy rejects non-naturalism and appears to espouse instead some sort of constructivism, according to which moral truth or validity, which is what characterizes the ideal dimension of law, is a result of a constructive procedure carried out by moral thinkers. But if constructivists need not be committed to the existence of some sort of non-natural realm of moral norms and values, Alexy need not be – and he does not seem to be – committed to a dual-nature theory that places law partly in some sort of higher realm of norms and values. The natural conclusion, therefore, is that Alexy's dual-nature theory is not a dual-nature theory in the strong sense that Ross was concerned to refute.

Nevertheless, Ross's criticism will be worth the attention of anyone who is interested in Alexy's dual-nature theory. For one thing, one might wish to reject Alexy's constructivism, conceived as a meta-ethical theory, and insist that any defensible meta-ethics has to be non-naturalist. Certainly, Ross and the other Scandinavian realists assumed that the main contenders in the field of meta-ethics were non-cognitivism and non-naturalism (intuitionism).

8. ROSS' CRITIQUE-AN ASSESSMENT

We have seen that Ross objects to dual-nature theories, that they give rise to troublesome antinomies, while pointing out that one could avoid the dualism and therefore the antinomies not by eliminating the concept of validity, but by espousing a non-cognitivist instead of a non-naturalist account of claims of legal validity. I have not, however, discussed critically Ross's claims (i) that there is in the concept of law and other fundamental legal concepts a dualism of reality and validity, (ii) that this dualism does give rise to certain antinomies, or (iii) that one could avoid the antinomies by substituting a non-cognitivist account for the non-naturalist account of claims of legal validity. Let us therefore turn to consider these claims now, beginning with (i).

I find Ross's claim that the above-mentioned legal concepts include a dualism of reality and validity rather implausible, yet well worth discussing. The fundamental dualism, as we have seen, is to be found in the concept of law, and the dualism present in the other fundamental legal concepts is the very same dualism. The

89 *Ibíd.*, p. 39.

90 *Ibíd.,* p. 173.

91 For criticism, see, e.g., BULYGIN, E (1993). "Alexy und das Richtigkeitsargument [Alexy and the Argument from Correctness]", in: AARNIO, A et al (Eds.,) (1993). *Rechtsnorm und Rechtswirklichkeit. Festschrift für Werner Krawietz zum 60. Geburtstag [Legal Norm and Legal Reality. Festschrift for Wernert Krawietz on the Occasion of his 60th Birthday],* pp. 19-24. Berlin, Duncker & Humblot; RAZ, J (2008). "The Argument from Injustice, or How Not to Reply to Legal Positivism", in: PAVLAKOS, G (Ed.,) (2008). *Law, Rights and Discourse. The Legal Philosophy of Robert Alexy,* pp.17-35. Oxford and Portland, Oregon, Hart Publishing.

idea, as we have also seen, is that, necessarily, law is at the same time[92]: "an observable phenomenon in the world of facts, and . . . a binding norm in the world of morals or values", something that is "physical and metaphysical", "real and ideal", "something that exists and something that is valid", "a phenomenon and (. . .) a proposition." Thus conceived, Ross says,[93] law is "an incarnation of the valid, the metaphysical, the ideal in the realm of the actual, the physical, the real."

Ross does not, however, explain in so many words why we should accept his claim that the concept of law includes these two parts. But I believe we can see his claim as the result of a so-called inference to the best explanation[94]. As we have seen, Ross attributes to law two necessary and very different properties, namely, that of being real and that of being valid, and like the other Scandinavian realists he also believes that neither law nor anything else can have these properties at the same time. The reason, according to the Scandinavians, is that these properties belong, and *must* belong, in some sense in different worlds, and that these worlds just cannot come into contact with each other. As Axel Hägerström, the spiritual father of Scandinavian realism, put it in a critical review of Hans Kelsen's *Hauptprobleme der Staatsrechtslehre:*

> A legal prescript is, in fact, for him [Kelsen] a judgment concerning a supernatural existent, which nevertheless (at least in so far as his view is carried out consistently) must be completely realized in the world of nature. But this is an absurd idea. The supernatural juridical system cannot be thought of as even existing alongside the natural order. For no knowledge of any reality is possible except through relating its object to a systematically interconnected whole. But the supernatural and the natural systems, as being different in kind, cannot be co-ordinated in a ***single*** system. Therefore, so far as I contemplate the one, the other does not exist for me[95].

This line of reasoning is difficult to assess, however, because it is difficult to see clearly what is involved in the idea of different kinds of world that cannot be coordinated in a single system. Hence we are left with what I take to be Ross's idea, i.e., that the existence in the concept of law, in the concept of the sources of law, and in the concept of subjective law of the dualism of reality and validity is the best explanation of the existence of the *antinomies*. We therefore need to consider the purported antinomies carefully to see whether they can be said to exist, and if so, whether they can be said to be a result of the above-mentioned dualism, and whether they can be avoided or in some way neutralized.

As regards point (ii), I find Ross's discussion of the antinomies intriguing and well worth discussing, if not persuasive. But, to begin with, as I see it, Ross has not succeeded in showing that the first antinomy in the concept of law is a result of the dualism of reality and validity, or that the second antinomy in the concept of law arises at all.

The first antinomy, as we have seen, can be described as follows. Whereas the validity of a legal norm, *n*, presupposes that *n* can be traced back to a source of law, SL_1, the existence of SL_1 presupposes the validity of the relevant legal order, *LO*, which in turn depends on the validity of *n* and other norms – if SL_1 were not recognized by *LO*, SL_1 would not qualify as a source of law, and this means that SL_1 could not be used to confer legal validity on *n* and other norms.

92 ROSS, A (1989-1946). *Op. cit.*, p. 11.

93 *Ibid*., p. 20. Emphasis omitted.

94 On this topic, see: HARMAN, G (1965)."Inference to the Best Explanation". *The Philosophical Review,* 74, pp. 88-95.

95 Hägerström's argument is repeated, in:OLIVECRONA, K (1939). *Op. cit.,* pp. 15-16. See also ROSS, A (1989-1946). *Op. cit.*, pp. 42-44. The argument is based on a rather difficult analysis of the concept of reality put forward in Hägerström (2013[1939]), which I discuss briefly in: SPAAK, T (2013). "Naturalism and Non-Naturalism in Legal Philosophy: Hägerström on Kelsen", in: ELIAESON, S; MINDUS, P & TURNER, SP (Eds.,) (2013). *Axel Hägerström and Modern Social Theory,* pp. 231-255. Oxford, The Bardwell Press.

The reason why we find ourselves in a predicament is this: Not all systems of norms, or all human behavior, are legal norms, or legally relevant behavior, and this means that we need some way of determining whether a certain system of norms is a legal system or whether certain human behavior is legally relevant behavior. And this, of course, is where the concept of legal *validity* enters the picture. For only a valid system of norms and only human behavior qualified as legal by a valid system of norms count. Ross does not, however, explain why the distinguishing mark – that which turns *X* into a *legal X* – has to be understood in terms of the strong conception of legal validity that he contemplates, or *how* invoking the strong conception could help us avoid the circle. More specifically, given that the antinomy is that we cannot have law unless we already have sources of law or sources of law unless we already have law, then precisely how could the introduction of the strong conception of legal validity help us? I have no idea. As far as I can see, one could solve this antinomy *only* by presupposing that one already has law (or sources of law) and go from there. To ask what is logically prior – law or sources of law? – seems to be about as fruitful as asking what came first – the chicken or the egg?

As we have seen, the second antinomy in the concept of law can be described as follows. If we conceive of legal rules as imperatives (the thesis), we will be able to predict human behavior if, and only if, we also assume that the citizens will comply with the law, and this will land us in the view that legal rules are hypothetical judgments about human behavior (the antithesis). If, on the other hand, we conceive of legal rules as hypothetical judgments about human behavior (the antithesis), we will be able to explain why people comply with the law if, and only if, we also assume that legal rules are imperatives (the thesis).

I do not, however, find persuasive the claim that dualist theories of law suffer from the second antinomy. Ross appears to believe that an emphasis on the practical nature of legal rules will have to lead to a state of affairs in which law is in some sense cut off from reality, and that the transformation of the thesis into the antithesis is necessary in order to anchor law in reality“. . . it will not do to regard the legal validity as perfectly independent and primary in relation to facts. If the law as such does not consist in certain actual functions, it will resolve itself into the merely ideal sphere of morality. There is, therefore, a tendency to make the legal rule a function of the maintenance of the law.” (*ibid*, p. 74)

But if the argument is that one needs to anchor law in reality, in order to maintain some realism in the analysis of legal matters, one could simply follow Kelsen[96] and insist that the validity of law *presupposes*, though it is by no means identical to, the social efficacy of law. And if so, one could rest content conceiving of legal rules as imperatives (or norms) and would not have to worry about the transformation of imperatives into hypothetical judgments about human behavior at all. As Kelsen[97] points out, the question of the relation between the validity and the efficacy of law is one of the most important questions that a legal positivist theory of law faces. There are, he explains[98], two extreme ways one could go when determining the relation between validity and efficacy. The first alternative is to argue that validity is independent of efficacy, and the second is to argue that validity is identical to efficacy. The first alternative is the one that natural law theorists choose, and the second is the one that certain legal realists opt for, and it is clear that it is these two alternatives that Ross has in mind when he formulates the second antinomy.

Kelsen objects that both alternatives are wrong, however. The trick is to find a middle way, he says, and he points out that he himself defends the view that although validity is something different from efficacy, it nevertheless *presupposes efficacy:*

96 KELSEN, H (1960). *Op. cit.,* pp. 215-221.

97 KELSEN, H (1959/1960). “Eine “Realistische“ und die Reine Rechtslehre“. *Österreichische Zeitschrift für öffentliches Recht*. Vol. X, p. 9.

98 *Ibidem.*

> The basis of validity, that is the answer to the question of why the norms of this legal order should be obeyed and applied, is the presupposed basic norm, according to which one should comply with a constitution that is actually enacted and by and large efficacious, and thus with the norms that have been issued in accordance with this constitution and that are by and large efficacious. Through the basic norm, enactment and efficacy have been made the conditions of validity; efficacy in the sense that it must combine with enactment, lest the legal order as a whole, as well as the individual legal norm, lose its validity. A condition cannot be identical to that which is conditioned by it[99].

I agree with Kelsen. I cannot see that the theorist's wish to anchor law in reality means that the theorist has to conceive of legal norms as hypothetical judgments (that is, predictions) about human behavior. Instead, he can avoid the movement back and forth between reality and validity by insisting that legal norms are precisely norms, not predictions about human behavior, and that they are part of a system of norms that is, on the whole, efficacious. What, exactly, does Ross object to in Kelsen's analysis? I do not know, but he might reason that Kelsen's idea of *presupposing* efficacy rather than *stating* it (as he himself does) marks a distinction that is somehow misconceived or of no philosophical significance,[100] though he does not discuss this distinction in the context of his critique of dual-nature theories either. More specifically, he might reason like those who prefer Bertrand Russell's well-known analysis of the claim "The present king of France is bald", according to which that claim is false, to the alternative analysis (advocated by Peter Strawson and others), according to which the claim is meaningless, not false, on account of the non-existence of the subject of the sentence[101]. The main benefit of Russell's analysis, as I understand it, is that it avoids truth-value gaps, and perhaps Ross could say the same about his (Ross's) analysis compared to Kelsen's. I shall not, however, discuss this question any further.

I conclude that Ross has not given us good reasons to accept the claim that the dualism in the concept of law gives rise to the two antinomies we have considered. While the first antinomy is indeed problematic, it has nothing to do with any dualism of reality and validity. And the second antinomy does not even arise.

Turning to consider Ross's discussion of the antinomies that result from the dualism in the concept of the sources of law, I must begin by saying that I find surprising and unpersuasive Ross's claim that the sources of law must perform simultaneously two different functions, namely, (i) that of endowing norms with legal validity and (ii) that of ensuring that judges and other law-appliers actually apply the law. While I can see that the sources of law must endow norms with legal validity, though not necessarily validity in Ross's strong sense, I do not understand why they would have to ensure that law is socially efficacious, or even how they *could* do it, even if it were only a matter of judicial application of the law and not social efficacy in general.

99 Translated into English by Robert Carroll. The German original reads as follows: "Grund der Geltung, das ist die Antwort auf die Frage, warum die Normen dieser Rechtsordnung befolgt und angewendet werden sollen, ist die vorausgesetzte Grundnorm, derzufolge man einer tatsächlich gesetzten, im großen und ganzen wirksamen Verfassung und daher den gemäß dieser Verfassung tatsächlich gesetzten, im großen und ganzen wirksamen Normen entsprechen soll. Setzung und Wirksamkeit sind in der Grundnorm zur Bedingung der Geltung gemacht; Wirksamkeit in dem Sinne, daß sie zur Setzung hinzutreten muß, damit die Rechtsordnung als Ganzes ebenso wie eine einzelne Rechtsnorm ihre Geltung nicht verliere. Eine Bedingung kann mit dem von ihr Bedingten nicht identisch sein." KELSEN, H (1960). *Op. cit.*, p. 219.

100 This idea was suggested by Svein Eng in his: "Context or Concept? Kelsen and Ross on Valid Law and Efficacy", in the special working group on Kelsen and the *Problem of Normativity* at the IVR conference in Belo Horizonte, Brazil, 2013.

101 On the questions see, e.g. GARSON, JW (2006). *Modal Logic for Philosophers.* Cambridge, Cambridge University Press, pp. 385-394; SAINSBURY, M (2001). Logical Forms. An Introduction to Philosophical Logic. 2nd. ed. Oxford, Blackwell, pp. 188-195

But what about the antinomies? As the reader will remember, the first antinomy in the concept of the sources of law is as follows:

> ***Thesis:*** "The propositions of the doctrine of the sources of law do not themselves belong to positive law, but are valid independently of a given positive system of law."
>
> ***Antithesis:*** "The propositions of the doctrine of the sources of law vary from one legal system to another, and must therefore form part of these."

I agree that this antinomy is problematic. And this is only to be expected, given that it is a version of the first antinomy in the concept of law. I do not, however, find Ross's *reasoning* persuasive. The problem is that Ross fills the doctrine of the sources of law with too much content when he takes it to cover the interpretation and application of legal rules as well as the process of endowing norms with legal validity. Thus, although Swedish and American (and other) judges do and should invoke preparatory works when interpreting statutes and other enactments, this has nothing to do with the question of legal validity, but simply reflects a commitment in the Swedish and American (and certain other) legal communities to the principles of intentionalist (or historical) and purposive (subjective-teleological) interpretation. Ross's line of argument here is all the more confusing in light of the fact that, as we have seen (in Section 4), Ross observes that we need to distinguish between the doctrine of the sources of law and the legal (juridical) method, precisely because they concern different phases in legal reasoning (the questions of validity and interpretation, respectively). I conclude that since the doctrine of the sources of law does not, and does not have to, deal with this aspect of legal reasoning, this particular line of argument does not establish the conclusion that the doctrine of the sources of law forms part of the relevant legal order (or concept of law), that is, the antithesis.

Moreover, Ross speaks of the 'concept of law' in an idiosyncratic way. It seems to me that what he really means by the relevant 'concept of law' is the relevant legal order – that is, he means to say that the Swedish, say, doctrine of the sources of law cannot be conceptually independent of Swedish law – and this means that he could, and in my view should, restate his claim in terms of legal orders, as I have done above. I mention this idiosyncratic use of the term 'the concept of law' not because I believe it undermines Ross's argumentation, but because it makes it more difficult to understand what Ross really means. I can only hope that I have understood him rightly here.

But even if one considers Ross's reasoning to be unconvincing, one may well wonder what a doctrine of the sources of law that is conceptually independent of a given legal order might look like. As far as I can see, and as I have indicated above (in Section 4), any given source of law will have to be a source of law of some legal order – if there were no Swedish legal order, there would be no sources of Swedish law. If, however, a source of law has to be the source of law of some legal order, specifically, the legal order in question, then we face a problem of circularity. This is so because (as we have seen) for any source of law, SL_1, to be a source of law of a given legal order, *LO*, the latter *(LO)* has to already exist; and the existence of *LO* in turn presupposes the existence of SL_1 (or SL_2 or SL_3, etc.) – if SL_1 (or SL_2 or SL_3, etc.) did not exist, there would be no *LO*. I can see no way to dissolve this antinomy, except by presupposing that we already have law (or sources of law).

As I said above, this antinomy – that is, the first antinomy in the concept of the sources of law – appears to be more or less identical to the *first* antinomy in the concept of law. And I adopt the same position in regard to this antinomy that I adopted in regard to the first antinomy in the concept of law, namely, that while it does pose a difficult problem, it has nothing to do with any dualism of reality and validity.

The second antinomy reads as follows:

Thesis: "The supreme source of law (basis for the knowledge of law) is itself a norm or validity, not a fact."

Antithesis: "The supreme source of law is itself a fact, not a norm (validity)."

I find the second antinomy rather more interesting than the first, but in the end less convincing. To begin with, I cannot see that a tacit presupposition of a fundamental norm that makes the (factual) sources of law legally (or normatively) relevant really must amount to a *transformation* of the sources of law *themselves* conceived as facts into sources of law conceived as norms. Consider in this regard the theory of normative legal positivism, according to which we have good normative, even moral, reasons to insist on the social thesis[102]. Clearly, those underlying normative reasons do *not* transform the social thesis either into a normative thesis about factual sources or into a factual thesis about normative sources. That is to say, the social thesis remains factual even if our reasons for espousing it change from, say, conceptual to normative reasons.

Moreover, the notion that one must move from the idea of sources of law as norms (the antithesis) back to the idea of the sources of law as facts (the thesis) just because one adapts the presupposed constitutional norm in a certain way to the circumstances is also problematic, indeed mistaken. To be sure, Ross is right to point out that Kelsen holds that one should presuppose the basic norm only if it corresponds to an efficacious system of norms[103]. But why would such an adaptation have to mean that the basic norm *itself* has been *transformed* from being a (presupposed) norm into being a (presupposed) fact? I cannot see that the fact that the presupposition of the basic norm and, in an indirect and rather weak sense, the content of the basic norm, depend in this way on facts would mean that the basic norm has been (or is being) transformed from a norm into a fact. Nor does Ross explain why this would (have to) be the case. I therefore conclude that the second antinomy in the concept of the sources of law does not arise.

Finally, we have the third antinomy in the concept of the sources of law:

Thesis: "The assumption of a multiplicity of original sources of law is an impossibility."

Antithesis: "The attempt to reduce the multiplicity of sources to a systematic unity is not practicable."

The general idea, as I understand it, is that anyone who starts out by assuming a multiplicity of legal sources will soon see that this is impossible and will therefore attempt to find in these sources a systematic unity, only to find that this is not practicable. That is to say, you are damned if you do (assume a multiplicity of legal sources) and damned if you don't. I am not convinced by Ross's reasoning, however. First, as regards the thesis, Ross does not explain (i) why any attempt to show that that which is derived from one source of law is law in the same sense as that which is derived from a another source of law would have to lack any real foundation, or (ii) why the necessity in some cases of evaluating the situation (on this, see below) would have to undermine the objectivity of law. He might, as regards (i), have in mind John Austin's view that law is the content of a sovereign will, in the sense that it is a set of commands issued by the present sovereign, and that commands issued by previous sovereigns or by subordinate agencies are to be thought of as commands implicitly adopted by the present sovereign on

102 See, e.g., WALDRON, J (2001). "Normative (or Ethical) Positivism", in: COEMAN, J (Ed). (2001). *Hart's Postscript,* pp. 411-433. Oxford, Oxford University Press.

103 See: KELSEN, H (1960). *Op. cit.,* pp. 215-221.

the grounds that he (the present sovereign) has not explicitly disavowed them[104]. It is, however, clear that even if Austin did not succeed in his attempt to subordinate some sources of law to his preferred primary source of law, some other writer might well succeed on that count. Munzer[105], for example, appears to do, or purport to do, precisely what Ross says is not practicable. Ross's brief and curt dismissal of any and all such attempts is simply not persuasive.

As regards (ii), Ross[106] reasons that if we operate with more than one source of law, we will run the risk of receiving incompatible answers to legal questions from different sources of law, and that if we try to handle this difficulty by ranking the sources of law and saying that a subordinate source of law will be applicable only if one or more higher ranked sources do not contain any applicable norm, we will find that we cannot settle the latter question – whether there is an applicable norm or not – except by *evaluating* the situation. That is to say, we cannot determine in a value-neutral way whether there is a gap in the law because the prior question of whether we can accept the answer given to a legal question when there is no applicable norm presupposes evaluation. For example, can the judge reasonably acquit the accused on the grounds that he assaulted the victim with a hammer while the relevant statutory prohibition speaks only of knives, or should she say instead that the absurdity of an acquittal makes it clear that there is a gap in the law and that he should proceed to consider customary rules? As Ross[107] puts it, "[t]o the cognitive mind there will never be any 'gap'", and this in turn means that we find ourselves in a situation in which the objectivity, or, as Ross puts it[108], the possibility of "unconditional knowledge," of law has been compromised. I believe Ross is right in principle about the antithesis, but I also believe that serious problem cases will be rare and that therefore the possibility of objectivity has not been seriously compromised.

I conclude that there is no good reason to accept the thesis, that the assumption of a multiplicity of original sources of law is an impossibility.

The most important objection to Ross's analysis concerns the antithesis, however. For, as far as I can see, Ross does not even try to explain *why* any attempt to reduce the multiplicity of sources to a systematic unity will not be practicable. Note here that his discussion of the necessity of evaluating the situation and thus undermining the objectivity of law, which could perhaps be understood to concern the idea that reducing a multiplicity of sources to a systematic unity is not practicable, does seem to concern not the antithesis, but the second argument – (ii) – in support of the thesis.

I thus conclude that the alleged third antinomy in the concept of the sources of law does not arise.

Let us, finally, consider the antinomies in the concept of subjective law. The first antinomy, as we remember, has it that the existence of subjective law presupposes the existence of an efficacious legal order (thesis), whereas the existence of an efficacious legal order presupposes the existence of subjective law (antithesis). And it will be remembered that the second antinomy has it that the duty-creating character of the consequences of compulsion presupposes that the consequences are sanctions attaching to compulsion, whereas their character as sanctions attaching to compulsion presupposes that they follow upon the contravention of a duty. That is to say, the consequences of compulsion create a

104 On this see, e.gr., AUSTIN, J (1998-1832). *The Province of Jurisprudence Determined and The Uses of the Study of Jurisprudence.* With an Introduction by H. L. A. Hart. Indianapolis, Hackett Publishing Company. (The former book was first published 1832 and the latter 1863. The former was published again 1954 by Weidenfield & Nicholson), p. 32; HART, HLA (1961). *The Concept of Law.* Oxford, Clarendon Press, pp. 45, 62-64.

105 MUNZER, S (1972). *Legal Validity.* The Hague, Martinus Nijhoff, pp. 56-69.

106 ROSS, A (1989-1946). *Op. cit.*, p. 137.

107 *Ibid.,* p. 138.

108 *Ibidem.*

legal duty if, and only if, they qualify as a sanction, although they qualify as a sanction if, and only if, they follow from a breach of a legal duty.

Ross believes that he can solve the first two antinomies by invoking his solution to the first antinomy in the concept of law[109], namely, to substitute the idea of legal validity conceived as a behavior attitude for the idea of legal validity conceived as a non-natural property, or, if you will, to substitute a non-cognitivist account of claims of legal validity for a non-naturalist account of such claims. As he puts it, in the case of the first two antinomies:

> (…) there is merely a special formulation of the general antinomy between reality and validity in law, which, when the irrational realities are substituted for the rationalized fictions, resolve themselves [that is, the above-mentioned antinomies] in an interaction between actual compulsion and a disinterested behavior attitude (experience of validity)[110].

But, as I have said, I do not find Ross's attempt to dissolve these antinomies convincing, because I cannot see that the antinomies are in any way a consequence of the alleged dualism of reality and validity. On the contrary, I believe we are stuck with these antinomies whether or not we accept a non-cognitivist account of claims of legal validity. Let me elaborate on this. Like the first antinomy in the concept of the sources of law, the first antinomy in the concept of subjective law is (as Ross notes) a special case of the first antinomy in the concept of law, and this in turn means that it is not a consequence of the dualism of reality and validity. The reason, as we have already seen, is that we could not get rid of the antinomy either by eliminating the concept of legal validity altogether or by reinterpreting claims of legal validity along non-cognitivist lines. For the problem is that we cannot have the one component of the antinomy without already having the other: If there is no subjective law, there will be no efficacious legal order, and if there is no efficacious legal order, there will be no subjective law. And this is indeed a difficult problem, which I do not know how to solve, except by simply presupposing (as we usually and tacitly do) that there already is an efficacious legal order in existence. The antinomy has thus nothing to do with any dualism of reality of validity.

Since the second antinomy in the concept of subjective law is just an alternative formulation of the first antinomy in the same concept, I conclude that although it is very difficult to solve, it has nothing to do with any dualism of reality and validity. The reason, or reasons, are the same as the ones I gave above in my discussion of the first antinomy in the concept of subjective law and (before that) in my discussion of the first antinomy in the concept of law.

The third antinomy in the concept of subjective law, finally, has it that the element of will in the concept of subjective law can neither be retained nor abandoned. More specifically, the problem is that, on the one hand, the concept of will cannot be retained as a constituent part of the concept of subjective law, since we recognize children and mentally handicapped persons as right-holders, although they do not have the requisite will, and, on the other hand, that the concept of will cannot be eliminated as a constituent part of the concept of subjective law, since it is needed in order to distinguish between legal rights and mere reflexes.

As we have seen, Ross[111] holds that this antinomy depends on the fact that our current understanding of the concept is ambiguous, and he attempts to dissolve (or neutralize) the antinomy by substituting an interpretation of the concept of a legal right, according to which this concept is conceived as a technical concept, for the dominating interpretation, according to which it is the concept of a unified

109 *Ibíd.*, p. 202.

110 *Ibídem.*

111 *Ibídem.*

entity that has the non-natural property of validity (or bindingness). He reasons that if we conceive of the concept of a legal right as a technical concept, we will not have to worry about whether it is to be understood in terms of will or in terms of interest, since it will clearly be neither the one nor the other. As should be clear, Ross is here anticipating the analysis put forward in Ross[112], according to which the term 'legal right' is semantically empty and fulfills a syntactic function only, namely, that of connecting a disjunction of legal conditions with a conjunction of legal consequences.

I believe that Ross is right to point out that neither the will theory nor the interest theory of legal rights is fully satisfactory, though I am less sure that we can avoid the problem identified by Ross by giving up on these theories and accepting instead Ross's connective analysis. True, I have discussed the main difficulties that mar Ross's analysis elsewhere[113] and have suggested ways to overcome these difficulties. However, it now seems to me that my own attempt to remedy the defects I see in Ross's analysis suffers from a rather serious defect, namely, that it fails to respect the distinction between the semantic and the syntactic dimensions of the analysis. More specifically, in my attempt to remedy the defects in Ross's analysis, I help myself to ideas that clearly belong to the semantic dimension, which Ross was so intent on leaving behind.

As for the third question listed at the beginning of this section, we have seen that Ross thinks he can avoid the dualism of reality and validity by substituting a non-cognitivist account of claims of legal validity for (what he considers to be) the usual non-naturalist account of such claims. He is, however, careful to point out that in doing so, he has ***not*** rid himself of the concept of validity, but has *reinterpreted* this concept in a naturalistically acceptable way[114]. We might say that he has offered a non-cognitivist *conception* of the concept of validity (on concepts and conceptions, see Dworkin[115]. This point about reinterpretation is very important to Ross, because he believes, as we have seen, that one cannot just discard the concept of validity, if one wants a competent theory of law – if we spirit away the concept of validity, he says [116], we will be unable to determine what human behavior is legally relevant.

The question, however, is whether Ross has succeeded in avoiding the dualism and the antinomies, or whether he has in reality put forward precisely such a realist, monist theory that he considers to be unable to even find its study object. I am inclined to accept the proposed solution. Kelsen[117] is not so inclined, however, maintaining as he does that the resulting theory is precisely such a theory that Ross was trying to avoid – that is, a theory that has eliminated the concept of validity and sees law as nothing more than human behavior. Kelsen reasons as follows. He assumes that Ross holds that the very idea of non-natural validity is confused[118], and that Ross aims to reinterpret claims of validity in such a way that they say that a person who maintains that a legal norm is valid really believes that the body that enacted the norm had *legal competence* to enact valid legal norms[119]. He then infers[120] that this means that Ross holds that such a person must believe that the relevant body has a property – legal competence – that does not make any sense, depending as it does on the confused concept of legal

112 ROSS, A (1957). "Tü-tü", *Harvard Law Review*, 70, pp. 812-25. Ross's analysis was originally published in Danish in: *Festskrift till Henry Ussing*, eds O. A. Borum & Knud Illum, pp. 468- 484. Copenhagen, Arnold Busck.

113 See: SPAAK, T (2014). "Alf Ross on the Concept of a Legal Right". *Ratio Juris,* 27, pp. 461-476.

114 ROSS, A (1989-1946). *Op. cit.,* p. 49.

115 DWORKIN, RM (1978). *Taking Rights Seriously.* 2nd. ed. London, Duckworth, pp. 134-136.

116 ROSS, A (1989-1946). *Op. cit.*, p. 49.

117 KELSEN, H (1960). *Op. cit.*, p. 216.

118 See: ROSS, A (1989-1946). *Op. cit.*, p. 77.

119 *Ibid.,* p. 80.

120 KELSEN, H (1960). *Op. cit.*, p. 216.

validity. And he therefore concludes [121] that Ross has substituted a *belief* in a confused property for the confused property itself, that this is not to reinterpret claims of validity but to reject them out of hand, and that Ross is therefore stuck with precisely such a monist, realist theory of law that he (Ross) considers to be seriously inadequate.

Kelsen continues to point out[122] that if we accept Ross's analysis, we must think of any human behavior as law that has been caused by the mistaken belief that in acting in a certain way one is acting in keeping with an objectively valid normative order. But, he objects, this is a mistake. If one conceives of law as something that is necessarily valid in the psychological sense proposed by Ross, one must also hold – on pain of contradiction – that whenever there is the relevant attitude on the part of the legal subjects, there is law. But, he objects, this is not so[123]. Persons who obey the law can do this for any number of reasons, so there is no guarantee that the reason is a belief in the legal competence of certain organs. As he puts it, "die Frage, ob die rechtsetzende Instanz "kompetent" ist, kommt den sich rechtmäβig verhaltenden Menschen zu allermeist gar nicht ins Bewuβtsein."

Kelsen concludes that the relevant concept of legal validity must be 'ought-validity' and that any attempt to spirit away the normative import of the concept of validity will lead to some version of the mistaken predictive theory of legal validity:

> As an essential element of the concept of law, 'validity' can be none other than 'ought'-validity. Ross rejects the claim of the Pure Theory of Law that the concept of law must embrace the meaning by which the law is directed to the individuals whose behavior it regulates, and that it must therefore be determined as an ought-norm. For – Ross asserts – 'ought' has not the true but only a pretended meaning. But he says at the same time "By this, however, I do not mean to say that the legal proposition – as some have believed – can be reinterpreted as a statement in the indicative mood as to what will (probably) happen in the future. This would, in fact, be to overlook the tendency of the legal proposition towards 'what is valid.'" But if the law is not 'ought,' not norm, but reality, and therefore actual behavior, statements of law, as far as they relate to the behavior determined by the legal norm, can only be statements about a behavior that will likely occur in the future. 'The tendency of the legal proposition' is the meaning of the statement of law. If the meaning of these statements is directed 'towards what is valid,' it cannot be a statement about a fact, for a fact of reality cannot be valid. It can only be a statement of an ought-norm, not a statement that people erroneously believe that they should behave lawfully, but that they should behave lawfully[124].

I do not, however, believe that Kelsen reads Ross correctly. First, he confuses Ross's non-cognitivist account of claims of legal validity with an error-theoretical account of such claims when he

121 *Ibíd.*, pp. 216-217.

122 *Ibíd.*, p 217.

123 *Ibídem.*

124 Translated into English by Robert Carroll. The German original reads as follows: "Als wesentliches Element des Rechtsbegriffs kann 'Geltung' nichts anderes als ‚Soll'-Geltung sein. Ross lehnt die von der reinen Rechtslehre vertretene Forderung ab, der Rechtsbegriff müsse den Sinn erfassen, mit dem sich das Recht an die Individuen wendet, deren Verhalten es regelt, und müsse daher als Soll-Norm bestimmt werden; denn – so behauptet Ross – 'sollen' sei nicht der wahre, sondern nur ein vorgetäuschter (pretended) Sinn. Aber er sagt zugleich: "By this, however, I do not mean to say that the legal proposition – as some have believed – can be reinterpreted as a statement in the indicative mood as to what will (probably) happen in the future. This would, in fact, be to overlook the tendency of the legal proposition toward 'what is valid.'" Aber wenn das Recht nicht Sollen, nicht Norm, sondern Sein (reality) und daher tatsächliches Verhalten ist, können Aussagen über das Recht, sofern sie sich auf das Verhalten beziehen, das in den Rechtsnormen bestimmt ist, nur Aussagen über ein Verhalten sein, das wahrscheinlich in Zukunft stattfinden wird. ‚The tendency of the legal proposition', ist der Sinn der Aussage über das Recht. Wenn der Sinn dieser Aussagen gerichtet ist, ‚towards what is valid', kann es keine Aussage über eine Tatsache sein, denn eine Seins-Tatsache ist nicht gültig. Es kann nur die Aussage über eine Soll-Norm sein, nicht die Aussage, daβ die Menschen irriger Weise Glauben, sich rechtmäβig verhalten sollen, sondern daβ sie sich rechtmäβig verhalten sollen." *Ibíd.,* pp. 217-218.

maintains that Ross substitutes a *belief* in a confused property for the confused property itself (on error theory, see[125]. On a non-cognitivist analysis, there is neither any confused property nor any belief in a confused property. For, on this type of analysis, a claim of legal validity does not express a belief about any property, but an attitude to, or a preference for, the object of evaluation, and this means that the person who makes the claim is not asserting that there is a certain (confused or not confused) natural or non-natural property and that the relevant norm-enacting body has it. Hence Kelsen is mistaken when he attributes to Ross the view that a claim of validity expresses a belief that someone or something has a confused property.

Moreover, if we disregard for a moment the confusion between non-cognitivism and error theory, we see that Kelsen gets things backward when he asserts that if one conceives of law as something that is necessarily valid in the psychological sense, as Ross does, one must also hold that if there is such an attitude on the part of the legal subjects (A), there is law (B). On the contrary, if one conceives of law as something that is necessarily valid in the psychological sense, one must also hold that if there is law (B), then there is the relevant attitude on the part of the legal subjects (A). That is to say, Kelsen confuses the conditional "if B then A" with the conditional "if A then B." Whereas Kelsen objects to the latter ("if A then B"), Ross defends the former ("if B then A").

I conclude that ***if*** the relevant legal concepts include a dualism of reality and validity, and ***if*** this dualism gives rise to at least some of the antinomies considered above, *then* Ross's proposed solution is successful. I will have to leave for another day the fundamental meta-ethical question of which meta-ethical theory is the true theory and shall be content to say that non-cognitivism is at least a serious contender in this game.

125 MACKIE, JL (1977). *Ethics. Inventing Right and Wrong.* Chap. I; OLSON, J (2014). *Moral Error Theory. History, Critique, Defence*. Oxford, Oxford University Press.

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On tû-tû

Sobre "tû-tû"

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Resumen

Mi objetivo en este breve artículo es argumentar que los llamados conceptos intermediarios juegan un papel esencial en la organización y la generación del conocimiento legal. Mi punto de partida es una reconstrucción y una crítica del análisis de estos conceptos de Alf Ross. Su objetivo era argumentar que existen conceptos en la ley que no tienen referencia semántica. Sin embargo, es razonable utilizarlos a medida que realizan alguna función útil con respecto a la presentación de las normas jurídicas. Creo que Ross está equivocado en ambos casos: su argumento en el sentido de que los conceptos intermedios no tienen ninguna referencia es defectuoso, y su caracterización de las funciones que estos conceptos ejercen en la ley es demasiado limitada.

Palabras clave: conceptos legales; Alf Ross; referencia en ley; coherencia en legislación.

Abstract

My goal in this short paper is to argue that so-called intermediary concepts play an essential role in organizing and generating legal knowledge. My point of departure is a reconstruction and a critique of Alf Ross's analysis of such concepts. His goal was to argue that there exist concept in the law which have no semantic reference, yet it is reasonable to use them as they perform some useful function regarding the presentation of legal rules. I believe that Ross is wrong on both counts: his argument to the effect that intermediary concepts have no reference is flawed, and his characterization of the functions such concepts play in the law is too limiting.

Keywords: legal concepts; Alf Ross; reference in law; coherence in law.

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1. ROSS' ARGUMENT

In his famous paper of 1951 Alf Ross takes us to the imaginary Noîsulli Islands in the South Pacific to meet the Noît-cif tribe[2]. In the language of Noît-cif there exits the concept of *'tû-tû'*. Whoever encounters his mother-in-law, or kills a totem animal or has eaten the food prepared for the chief, becomes *tû-tû.* Whoever is *tû-tû*, is subject to a ceremony of purification. Thus, Ross observes that the following statements are true in the language of Noît-cif:

1. If a person *x* has encountered their mother in law, *x* is *tû-tû*.
2. If a person *x* has killed a totem animal, *x* is *tû-tû*.
3. If a person *x* has eaten the food prepared for the chief, *x* is *tû-tû*.
4. If a person *x* is *tû-tû*, *x* is subject to the ceremony of purification.

Ross further asks, what is *tû-tû.* And he replies that, it is "of course nothing at all, a word devoid of any meaning whatever. (…) The talk about *tû-tû* is pure nonsense"[3]. The word has no semantic reference, although the expressions in which it appears are meaningful. In order to show that it is so, Ross observes that "the pronouncement of the assertion '*x* is *tû-tû'* clearly occurs in definite semantic connection with a complex situation of which two parts can be distinguished:

> (i) The state of affairs in which *x* has either eaten of the chief's food or has killed a totem animal or has encountered his mother-in-law, etc. This state of affairs will hereinafter be referred to as *affairs*$_{1.}$
>
> (ii) The state of affairs in which the valid norm which requires ceremonial purification is applicable to *x*, more precisely stated as the state of affairs in which if *x* does not submit himself to the ceremony he will in all probability be exposed to a given reaction on the part of the community. This state of affairs will hereinafter be referred to as *affairs*$_{2}$"[4].

In order to show that '*tû-tû*' has no semantic reference, Ross considers the propositions (3) and (4):

3. If a person x has eaten the food prepared for the chief, x is *tû-tû*.
4. If a person x is *tû-tû*, x is subject to the ceremony of purification.

There are two ways of pinpointing the semantic reference of *'tû-tû'* – it may either be identified with *affairs*$_1$ or *affairs*$_2$. The natural move would be to substitute *'tû-tû'* with *affairs*$_2$ in the proposition (1), and with *affairs*$_1$ in the proposition (2). But this solution is unsatisfactory, since in such a case *'tû-tû'* would have two different meanings, and the argument based on (3) and (4) to the effect that a person who has eaten the food prepared for the chief is subject to the ceremony of purification would not be logically valid due to the fallacy of *quattuor terminorum*. The second option is to understand *'tû-tû'* as referring uniquely to *affairs*$_1$; this, however, will not do, since it would make the proposition (3) analytically void:

> (3)* If a person *x* has eaten the food prepared for the chief, the state of affairs exists where *x* has either eaten of the chief's food or has killed a totem animal or has encountered his mother-in-law, etc.

2 The paper appeared first in Danish. Below, I quote the English version, ROSS, A (1975). "Tû-Tû", *Harvard Law Review,* vol. 70, Issue 5, pp. 812–825.

3 *Ibidem*, p. 812.

4 *Ibid.,* p. 814.

Similarly, if one claimed that the meaning of '*tû-tû*' is ***affairs***$_2$, the proposition (4) would become analytically void. Therefore, Ross concludes, '*tû-tû*' has no semantic reference.

At the same time, Ross claims that the use of such semantically empty concepts may be useful as an efficient method of the presentation of (legal) rules. Let us assume that in the culture of Noît-cif being '*tû-tû*' not only requires to undergo the process of purification, but also makes the person unfit for combat as well as for hunting. Thus, in addition to the proposition (1) – (4), the following two rules are valid:

1. If a person *x* is *tû-tû*, *x* is unfit for combat.
2. If a person *x* is *tû-tû*, *x* is unfit for hunting.

Now, the absence of the concept of '*tû-tû*' would make (the relevant part of) the Noît-cif legal system more complex, since the contents of the propositions (1) – (6) would become:

(1)^a If a person *x* has encountered their mother in law, *x* is s subject to the ceremony of purification.

(1)^b If a person *x* has encountered their mother in law, *x* is unfit for combat.

(1)^c If a person *x* has encountered their mother in law, *x* is unfit for hunting.

(2)^a If a person *x* has killed a totem animal, *x* is s subject to the ceremony of purification.

(2)^b If a person *x* has killed a totem animal, *x* is unfit for combat.

(2)^c If a person *x* has killed a totem animal, *x* is unfit for hunting.

(3)^a If a person *x* has eaten the food prepared for the chief, *x* is s subject to the ceremony of purification.

(3)^b If a person *x* has eaten the food prepared for the chief, *x* is unfit for combat.

(3)^c If a person *x* has eaten the food prepared for the chief, *x* is unfit for hunting.

In this way, six proposition become nine different propositions. In the actual, more complex legal systems, the utilization of such 'semantically empty' concepts as '*tû-tû*' may be even more advantageous. For example, Ross considers the concept of ownership. In any legal system there are many ways of acquiring ownership (purchase, inheritance, prescription, execution, winning a bet, exchange, earning, etc.) as well as many consequences of being an owner (the right to use, sell, consume, alter, share, exchange, transfer, give away, destroy, etc.). The concept of ownership – or any other such intermediate link between different states of affairs – is simply an efficient way of structuring and presenting legal norms. However, it changes little when it comes to identifying the semantic reference of the term 'ownership' – it is "a word devoid of any meaning whatever" just like '*tû-tû*', 'right', 'duty' or 'claim'.

2. EVERY CONCEPT IS tû-tûesque

I would like to argue in this section that Ross's argument to the effect that '*tû-tû*' is semantically void, is flawed. Let us consider one of the concepts Ross thinks to have semantic reference, e.g. 'totem animal'. Let us further assume that – in the culture of Noît-cif – the following propositions are true:

1. If *x* is a lion, then *x* is a totem animal.
2. If *x* is a tiger, then *x* is a totem animal.
3. If *x* is an albino animal, then *x* is a totem animal.
4. If *x* is a totem animal, then *x* should be worshiped by sacrifice.

Now, Ross's strategy for establishing the 'semantic emptiness' of '*tû-tû*' may be used to argue for the lack of semantic reference of the term 'totem animal'. It is enough to assume that ***affairs***$_3$ stands for

the state of affairs in which *x* is a lion, or a tiger, or an albino animal, and ***affairs***$_4$ for the state of affairs in which worship by sacrifice is required towards *x*. Now, if one claims that the term 'totem animal' should be understood as referring to ***affairs***$_4$ in the propositions (7) – (9), and as referring to ***affairs***$_3$ in the proposition (10), one would never be able to arrive at a conclusion that a particular lion, tiger, or an albino animal should be worshiped by sacrifice (due, of course, to the fallacy of *quattuor terminorum*); if, on the other hand, the semantic reference of 'totem animal' would be fixed as ***affairs***$_3$, the propositions (7) – (9) would become 'analytically void'; and if the reference was ***affairs***$_4$, the proposition (10) would be 'analytically void'.

This line of argument can be extended so as to include *any* predicate (and also a proper name, if one applies Quine's procedure of translating proper names into predicates)[5]. Let us observe that Ross's demonstration that a given concept has no semantic reference is made possible by simultaneously accepting two claims:

a. a (partial) meaning postulate, such as "If a person *x* has eaten the food prepared for the chief, *x* is *tû-tû*";

b. a norm in which the term under consideration appears in the description of a state of affairs that triggers the application of the norm, as in "If a person *x* is *tû-tû*, *x* is subject to the ceremony of purification."

Assuming that one can always identify a (partial) meaning postulate for any term, the possibility of carrying out Ross's argument to the effect that the term has no semantic reference hangs together with there being a norm in which the term appears in the description of a state of affairs that triggers the application of the norm. This is true also for the concepts, which – unlike '*tû-tû*' or 'totem animal' – are used also in extra-legal, extra-moral and extra-religious contexts. Let us consider the term 'food'; a partial meaning postulate for the term is, for example, "If *x* is a mango, then *x* is food". Now, it suffices that there exists a social nom such as "If *x* is food, then *x* should be shared among the members of the community", to arrive at a conclusion that 'food' has no semantic reference.

(A note at the margin: the confusion inherent in Ross's argument is clearly visible when one considers the epistemic status of the two kinds of propositions he contemplates in the '*tû-tû*' example. Meaning postulates, such as "If a person *x* has eaten the food prepared for the chief, *x* is *tû-tû*", are analytic statements in the sense that they are true in all possible worlds. Norms, on the other hand, such as "If a person *x* is *tû-tû*, *x* is subject to the ceremony of purification", are contingent, i.e. they hold only in some possible worlds. Due to space limitations I will not follow this line of critique; it seems, however, that Ross's mistake lies in confusing the intension of a term with its extension).

Our considerations so far reveal that there is no *logical* difference between '*tû-tû*' and, potentially at least, any other predicate. Thus, Ross's conclusion that such concepts as '*tû-tû*', 'obligation', 'ownership' or 'right' lack semantic reference can easily be applied to *any term*. This is, of course, highly paradoxical. Ross nowhere suggests that his analysis undermines the concept of semantic reference altogether. To the contrary – he tries to show that while some terms (such as 'chief', 'food' or 'ceremony of purification') have perfectly well defined referents, other concepts – '*tû-tû*', 'ownership', etc. – are mere presentation devices: they simplify the structure of the legal system, but carry no ontological baggage.

This, ultimately, is Ross's goal: he tries to establish a metaphysical claim to the effect that some legal concepts ('ownership', 'right' or 'obligation') do not refer to any existing entities. However, as we have seen, this cannot be done through mere logical means, since it is possible to show – in the same way – that any concept, which fulfills certain criteria (i.e., features in the description of a state of affairs which triggers

5 Cf. QUINE, WVO (1948). "On What There Is", *Review of Metaphysics,* 2, pp. 21–38.

the application of a legal norm), refers to no existing entity. In other words, the claim that some concepts have no semantic reference while others do, is *pre-logical*: it is determined by the chosen ontology. For example, Ross seems to assume that such concepts as 'chief', 'food', 'totem animal' or 'the ceremony of purification' refer to something, while '*tû-tû'* or 'obligation' do not. In light of this I believe that the best way to reconstruct Ross's argument is to say that it aims at *defending* a certain ontological stance and runs roughly as follows: if you are an adherent of a purely naturalistic view of the law, you face a difficulty when considering some legal concepts such as 'ownership', 'obligation' or 'right', since the way they are used in the legal discourse suggests that they refer to some existing phenomena. Ross's analysis shows that one can avoid this unwanted conclusion – it is logically consistent to treat the aforementioned concepts as devoid of semantic reference, while insisting on their usefulness in the structure of any legal system. Viewed from this angle, Ross's argument is a *defense* of a certain metaphysical view of the law; it aims to show that such a metaphysics is possible, and not that it is the necessary way of looking at legal phenomena.

3. WHAT tû-tû CAN DO?

Ross admits that intermediate concepts – such as '*tû-tû*' or 'ownership' – play a positive role in any legal system, since they enable a more efficient technique of the presentation of legal rules. I believe it is an understatement. Below, I would like to show that Ross underestimates what *tû-tû* can do; I would even go as far as saying that it would be difficult to imagine a functional legal system without any intermediate concepts.

The first function of intermediate concepts is to *increase coherence* in the legal system. But what is coherence of a set of propositions? The measure in question is determined by taking into account: (a) whether the set is consistent; (b) what is the level of inferential connections between the members of the set; and (c) what is the degree of the unification of the set[6]. A set of proposition which is inconsistent is also incoherent. For any consistent set of propositions, its degree of coherence increases with the increase of the inferential connections between the propositions it contains and its level of unification. There exist inferential connections between propositions belonging to a given set if they can serve together as premises in logically valid schemes of inference. In turn, a given set of propositions is unified if it cannot be divided into two subsets without a substantial loss of information. It is important to stress that the concept of logical coherence is not a binary one; coherence is rather a matter of degree.

Let us come back now to our initial example. The set of propositions:

(1) If a person *x* has encountered their mother in law, *x* is *tû-tû*.
(2) If a person *x* has killed a totem animal, *x* is *tû-tû*.
(3) If a person *x* has eaten the food prepared for the chief, *x* is *tû-tû*.
(4) If a person *x* is *tû-tû*, *x* is subject to the ceremony of purification.

Is coherent, since it is consistent. The degree of its coherence is determined by the fact that there exist inferential connections between its elements. (1) and (4), (2) and (4), as well as (3) and (4) may be used to derive three new propositions: "If a person *x* has encountered their mother in law, *x* is subject to the ceremony of purification", "If a person *x* has killed a totem animal, *x* is subject to the ceremony of purification", and "If a person *x* has eaten the food prepared for the chief, *x* is subject to the ceremony of purification". The set is also unified: if one divided it in any way (say, into two sets – {(1), (2)} and {(3),(4)}), one would lose some

6 Cf. BONJOUR, L (1985). *The Structure of Empirical Knowledge*, Harvard University Press, Cambridge, MA; BROZEK, B (2013). "Legal interpretation and coherence", in: ARASZKIEWICZ, M & DAVELKA, J (Eds.) (2013). *Coherence: Insights from Philosophy, Jurisprudence and Artificial Intelligence*, Springer, Dordrecht.

substantial information (i.e., it would no longer be possible to derive "If a person *x* has killed a totem animal, *x* is subject to the ceremony of purification", and "If a person *x* has eaten the food prepared for the chief, *x* is subject to the ceremony of purification").

Let us now compare our initial set with the following alternative, where the concept '*tû-tû*' is eliminated:

(1)[a] If a person *x* has encountered their mother in law, *x* is s subject to the ceremony of purification.

(2)[a] If a person *x* has killed a totem animal, *x* is s subject to the ceremony of purification.

(3)[a] If a person *x* has eaten the food prepared for the chief, *x* is s subject to the ceremony of purification.

The resulting set of propositions, even if smaller than the original one, is much less coherent. It is consistent, but there exist no inferential connections between its elements, and it is not unified – one can divide the set in a number of ways way without any loss of information.

But why coherence matters? An in-depth analysis of this problem exceeds the scope of this short note. However, it seems that the degree of coherence is closely correlated with a number of cognitive factors. Arguably, high degree of coherence enables us to better comprehend, learn and remember the given set of rules, and apply them in a more efficient way. A legal system which would be coherent only to a small degree would be dysfunctional, as illustrated by those historical legal systems which were highly casuistic.

The second role played by intermediate concepts is ***heuristic***, and it may help increase the completeness of a legal system[7]. Let us imagine that the council of elders of the Noît-cif tribe has to decide the fate of an individual who has killed an animal. It was not a totem animal, but a beast killed only once a year during a special ceremony and the only source of meat for the chief's diet. If the Noît-cif primitive legal system did not contain the intermediary concept of '*tû-tû*', the council of elders would have to devise a completely new legal rule governing the case at hand; however, given the pivotal role of the concept of '*tû-tû*' in the cases of killing a totem animal and eating the food prepared for the chief, the council would have some guidance in deciding the novel case and would probably arrive at the conclusion that the individual who committed the killing should be subject to the ceremony of purification.

Let us consider another example. According to Ross, ownership is only an intermediary concept, a link between some states of affairs and their legal consequences. Let us assume that in some legal system there exist only rules pertaining to the ownership of movable and immovable things, and the legislator must consider the introduction of a new set of rules regulating intellectual property. It is clear that the existing concept of ownership is useful in such an endeavor. The legislator does not have to devise a completely new system of norms for intellectual property, but instead works within the framework of the existing model of ownership, only adapting it to the peculiar character of the problem under consideration. In other words, introducing intellectual property into the existing framework of rules governing ownership is different than designing a completely new legal institution. In the former case, the process may be called adaptation – one takes advantage of existing solutions, justifications, and the entire body of legal knowledge that surrounds the concept of ownership; in the latter case, however, intellectual property would be an institution built from scratch, an essentially novel set of rules with no background knowledge to guide the legislator in their endeavor.

It should be clear from the above examples that intermediate legal concepts have more to offer than a helpful 'form of presentation' of legal rules – they perform an important heuristic function. Whenever one decides a hard case or considers regulating an as-yet unregulated sphere of social interactions, one is better off with '*tû-tû*'-like concepts than without them[8].

7 Cf. LINDAHL, L (2003). "Operative and Justificatory Grounds in Legal Argumentation", *Associations*, 7(1), pp. 185-200; ASHLEY, KD & BRUNINGHAUS, S (2003). "A Predictive Role for Intermediate Legal Concepts", in: BOURCIER, D (ed.) (2003). *Proceedings of the Sixteenthth Annual Conference on Legal Knowledge and Information Systems (Jurix 2003)*, IOS Press, Amsterdam, pp. 153–162.

8 See also insightful comments in: SARTOR, G (2008). "Legal Concepts: An Inferential Approach", *EUI Working Papers LAW/3*, http://www.eui.eu.

* * *

I believe that the above considerations support the conclusion that the picture of '*tû-tû*' and other intermediary legal concepts as painted by Ross is a bad caricature. Such concepts are more useful than Ross imagines – they not only generate much coherence in a legal system, but can also serve as a heuristic tool whenever one faces a novel situation or a hard case. '*Tû-tû*' and similar concepts are powerful tools which shape our legal systems.

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Alf Ross' theory of legal validity in the context of current research on the judicial decision-making

La validez jurídica de la Teoría de Alf Ross en el contexto de la investigación actual sobre la toma de decisiones judiciales

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Resumen

El propósito de este artículo es doble. En primer lugar, se presentan los presupuestos básicos de la Teoría de la validez jurídica de Alf Ross. En segundo lugar, se examina la validez de la Teoría de Ross en el contexto de la investigación psicológica actual sobre la toma de decisiones judiciales. Para Ross la enunciación relativa al imperio jurídico válido es una predicción en el sentido de que el Juez va a utilizar la regla de base para sus decisiones futuras. Estas predicciones son posibles en la asunción de criterios objetivos que motiven las acciones del juez, que para Ross es una ideología normativa compartida por los jueces. Tal ideología se basa en las fuentes del derecho en la jerarquía adecuada. Los factores individuales, que no pueden servir de base para las predicciones fuertes, se excluyen deliberadamente de la Teoría de Ross. A pesar de que era plenamente consciente de la complejidad del proceso de toma de decisiones humana, sin embargo, tuvo que ignorar ese aspecto de la motivación humana, que sería inútil como base para las predicciones. La cuestión es si una Teoría basada en factores objetivos íntegros está de acuerdo con la investigación actual en el campo de la toma de decisiones judiciales. El artículo analiza algunas de las investigaciones actuales con el fin de establecer si dan una imagen clara del proceso de juzgar, y cómo esta imagen podría afectar la Teoría de validez de Ross. Como se afirma, ninguna imagen clara se desprende de los datos empíricos actuales. Por esta razón, la afirmación de que la Teoría de Ross es empíricamente obsoleta no se puede sostener. Por otra parte, incluso, si los datos empíricos indican que los criterios subjetivos desempeñan un papel importante en las decisiones de los jueces, no van a socavar la Teoría predictiva de validez legal de Ross.

Palabras clave: teoría predictiva de la ley; validez legal; fuentes del derecho; toma de decisiones judiciales.

Abstract

The purpose of this article is twofold. Firstly, it presents basic assumptions of Alf Ross' theory of legal validity. Secondly, it examines validity of Ross' theory in context of current psychological research into the judicial decision-making. For Ross the utterance concerning valid legal rule is a prediction to the effect that the judge will use the rule as the basis for his future decisions. Such predictions are possible on the assumption of objective criterion motivating the judge's actions, which for Ross is a normative ideology shared by the judges. Such ideology is based on the sources of law in the proper hierarchy. Individual factors, which cannot form a basis for strong predictions are deliberately excluded from Ross' theory. Although he was fully aware of the complexity of human decision-making process, yet had to ignore that aspect of human motivation, which would be useless as a basis for predictions. The question is whether a theory based on fully objective factors is in accordance with current research in the field of judicial decision-making. The article analyses some of the current researches in order to establish whether they give a clear image of the process of judging, and how this image might affect Ross' theory of validity. As it is stated no such clear image emerges from the current empirical data. For this reason, the allegation that Ross' theory is empirically outdated cannot be sustained. Moreover, even if empirical data indicate that subjective criteria play a significant part in judge's decisions, they will not undermine Ross' predictive theory of legal validity.

Keywords: predictive theory of law; legal validity; sources of law; judicial decision-making.

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1. INTRODUCTION

Throughout his academic career Alf Ross sought to develop a scientific theory of law, according to which legal rules can be investigated by means of the principles of empirical science. This aim was apparent particularly in his theory of legal validity formulated under the strong influence of logical positivism. Inspired by this current Ross claimed that sentences pertaining to validity of rules must be empirically verifiable. There is nothing metaphysical in the concept of legal validity; the law does not derive its validity form some *a priori* principles, but from the fact that it is actually applied by the judges (behaviouristic aspect of validity), because they feel bound by the rules (psychological aspect of validity). Consequently for Ross the statement concerning validity of a given rule is a prediction to the effect that this rule will become a basis of future judicial decisions. Thus instead of deriving legal validity form *a priori* principles, Ross based his theory only on empirical facts. According to him all of the previous legal theories proposed a distorted picture of law as 'something' at the same time real and ideal, which lead to unconquerable antinomies. He recognised that:

> (…) the fundamental source of error in a number of apparently unconquerable contradictions in the modern theory of law is a dualism in the implied prescientific concept of law which more or less consciously forms the basis of the theories developed. It is the dualism of *reality* and *validity* in law, which again works itself out in a series of antinomies in legal theory. (…) As a preliminary explanation it may be said that law is conceived at the same time as an observable phenomenon in the world of facts, and as a binding norm in the world of morals or values, at the same time as physical and metaphysical, as empirical and *a priori*, as real and ideal, as something that exists and something that is valid, as a phenomenon and as a proposition[1].

In order to avoid the mentioned contradictions, Ross proposed a theory that offered to reinterpret validity as an element of reality. This reinterpretation is presented in the next section of this article. The second section also focuses on the basic assumptions of Ross' predictive theory of legal validity. In order to make predictions possible, it is crucial to base them on some objective criteria. Such objective criterion is a shared normative ideology, which consists of the sources of law. Thus in his theory of legal validity Ross discounted subjective and individual factors underlying the decisions, such as emotions or biases. Although Ross consciously decided not to include the mentioned factors, such deliberate omission might be conceived as a weak spot of his theory, as individual and subjective factors certainly play a part in judicial decision-making. Ross was obviously conscious that judicial decisions are based on numerous factors, objective as well as subjective, but he had to exclude those subjective ones in order for his theory to be coherent with his neo-positivistic foundations. The third section analyses the current research into the problem of judicial decision-making, especially these attempting to determine which factors and to what extent influence the judge's decision. Such analysis will determine whether Ross' theory is challenged by current empirical researches in psychology. The answer proposed in this article is explicit; as it will be claimed, Ross' theory is not outdated regardless of the results of psychological research.

2. BASIC ASSUMPTION OF ROSS' THEORY OF LEGAL VALIDITY

In the aforementioned quotations from *Towards a Realistic Jurisprudence,* Ross pointed at the problem of dualism permeating legal theories of any kind. Not all of them are however explicitly dualistic. Some try to avoid this dualism by opting for one of the possibilities, namely either reality or validity. Kelsen for instance defined the law, as belonging to the domain of pure ought, while American legal realists located

1 ROSS, A (1946). *Towards a Relistic Jurisprudence. A Criticism of the Dualism in Law*, Scientia Verlag Aalen, Copenhagen, p. 11.

the law in a domain of empirical facts. As Ross points out in *Towards a Realistic Jurisprudence*, these theories didn't solve the problem as they only avoided dualism but did not conquer it. This difficulty cannot be solved by a simple choice of one of the possibilities within the dualism. Ross claimed that these two perspectives are interrelated and thus cannot be easily separated. Basing legal theory on reality without relating to validity (and the other way around) is impossible. Since the two perspectives are interrelated and cannot be treated as independent basis for a theory of law it must be indicated that rightly interpreted, they are not two irreducible and mutually exclusive categories[2]. Ross set forth a far-reaching reinterpretation of the notion of legal validity. Instead of treating it as a pure abstraction foreign to reality, he proposed to grasp it in terms of rationalization of beliefs and experiences. He claimed that the mind rationalizes the illusion of validity providing it with the stamp of something real. Within such approach legal phenomena belong to a wider set of social and psychological phenomena.

Traditional legal theories proposed a catalogue of elements constitutive for the law. These components are: firstly – an element of reality, secondly – an element of validity, and thirdly – the logical interdependence of these two elements. Ross claimed that the tree mentioned elements have their counterparts within acceptable realistic framework and reinterpreted them in terms of psychological and sociological phenomena. These elements are: interested behaviour attitude, which is a fear of compulsion, disinterested behaviour attitude having a stamp of validity (rationalized experiences of validity), and mutual interaction between these two elements. Another important factor along the three already mentioned is a fear of compulsion that reinforces and strengthens beliefs regarding the validity[3]. However the mere fear of compulsion is not all it takes to explain legal validity. The law, according to Ross, did not arise as the effect of mere fear of compulsion or the mere respect for the authority applying the law. These two elements – namely fear of compulsion and acceptance of the power of the state – always occur together, so the appearance of one element always leads to the second[4]. Isolating these two elements is a serious mistake. This was Ross' main allegation against Theodor Geiger, author of *Vorstudien zu einer Soziologie des Rechts,* an important study in legal sociology form 1947. Ross criticised Geiger's thesis, according to which the law was created as a result of fear of compulsion. As he remarked in a review of Geiger's book, what is equally important is the acceptance of state's force based on adopting the ideology underlying this force[5]. It shall be stressed again that ultimately the existence of law depends on four factors: firstly, a system of compulsion, secondly, interested behaviour attitude being a fear of compulsion, thirdly, disinterested behaviour attitude having a stamp of validity and resulting form custom, and lastly, competence of certain authorities to establish rules[6] . Due to these four elements legal system exists as a kind of social order. The existence of law as the apparatus of force and the feeling of validity are interrelated elements, which cannot be separated and treated as two exclusive bases for the law. Understanding legal validity as rationalised experiences enables coordinating validity with a sphere of real social phenomena. So there is nothing mystical or supernatural in legal validity, as it is simply a phenomenon belonging to reality.

These were the basic assumptions of Ross' *Towards a Realistic Jurisprudence.* They served as the starting point for his further considerations form *On Law and Jutice* where he presented his theory of legal validity based on logical positivism. The basic hypothesis presented in the book is that a system of rules is valid when it can serve as a scheme of interpretation for social actions. Because of this scheme it is possible to understand social actions and predict them to the certain degree. This ability to understand and

2 *Ibid*., p. 76.

3 *Ibid*., pp. 78-79.

4 *Ibid*., p. 83.

5 See: ROSS, A (1950). "Review of: Theodor Geiger, Vorstudien zu einer Soziologie des Rechts", *Tidsskrift for Rettvitenskap*, vol. 63, pp. 215-224

6 ROSS, A (1946). *Op. cit*. pp. 88-89.

predict is due to the fact that the judges effectively apply the rules because they feel bound by them. It is exactly this effectiveness, which is the key element of Ross' theory of valid law. National and individual system of legal norms is valid when the norms ale felt to be binding by the judge, and because of that they become an element of his decisions. Having in mind necessary relation between law's effectiveness and validity, it is important now to point at the problem underlying the misunderstandings regarding Ross' theory, that had its deepest manifestation in his disagreement with Hart. In order to explain the reasons for such misunderstanding, and also to grasp Ross' idea in more detail, it ought to be clear what concept of validity he adhered to. Here some linguistic clarifications are required. Danish term used by Ross to describe valid law is *gaeldende rett.* In the English version of *On Law and Justice* the term was translated as *valid law.* Ross however in his review of Hart's *The Concept of Law* pointed out that this translation was not quite adequate and could have caused some misunderstandings[7]. The meaning of Danish *gaeldende rett* relates to the law, which is actually effective. Ross realized that the English term *valid law* did not relate to this crucial component of law's validity. More adequate translation of *gaeldende rett* would be *the law actually in force.* The term *valid law* can bring to mind inaccurate associations relating to validity of a norm established in the right procedure based on competence, or to validity established from the perspective other than empirical effectiveness of norms (metaphysical concept of validity). Ross rejects both aforementioned meanings of *validity.* According to him this concept relates to empirically verifiable effectiveness of norms. It should be explained in more detail what he meant by empirical verifiability of validity of norms.

According to Ross, rules are addressed directly to judges and only indirectly to other citizens. This means that the mentioned effectiveness of rules relates to their actual application by the judges when they act in their capacity as judges. Danish author was concerned mainly with legal phenomena in narrow sense, as distinguished from the wider sense, for instance the actual compliance with the rules. This may seem paradoxical, as common compliance with the norms implies that their validity is not actually verified in judicial practice. This is however an apparent problem, which becomes clear when Ross' idea that each sentence about valid law is a prediction concerning future judicial decisions is considered. Let's analyse the following example: "rule R is a currently valid law". This rule can be reformulated into a prediction. Such prediction is accurate if there are sufficient reasons to recognize that it will be included in future judicial reasoning. Prediction is however always a matter of degree. It can be judged, that depending on the circumstances, probability of its application by the judge is greater or lesser. This means that for Ross a rule is not just either valid or invalid, but it is a matter of probability between absolute impossibility and complete certainty. The degree of validity depends from variable probability with regard to future judicial decisions[8]. The degree of validity can be judged based on empirical material. Analysis of such material will allow indicating the degree of certainty with which it can be assumed that a given norm will be applied by the judge. So the norm that isn't applied by the citizens will also be considered a valid norm, when all premises indicate that it will become a basis for future judicial decisions. Depending on empirical material it is possible to judge whether the norm will be valid in greater or lesser degree depending on the probability of its application. Also certainty of such prediction depends on the source of law considered in a given case (it will be different regarding to bills, precedents, custom or tradition of culture).

Ross distinguished statements concerning the norms from the norms themselves. He was concerned with statements concerning valid law, which he understood as relating to hypothetical future judicial decisions[9]. Prediction is an utterance concerning the norms, stating that the given norm is an element of valid

7 See: ROSS, A (1962). "The Concept of Law by H. L. A. Hart: Review", *Yale Law Journal*, Vol. 71, No. 6, pp. 1185-1190.

8 ROSS, A (1959). *On Law and Justice,* The Lawbook Exchange, Ltd. Clark, New Jersey, p. 47.

9 *Ibid*., . 49.

national law. The meaning of such utterance is to be verified in line with logical positivism. Such verification is performed through examining the norm from the two perspectives: behavioural and psychological. It is consistent with Ross' reference to effectiveness of the norm as a key element of its validity. This effectiveness can be judged from the two mentioned perspectives. Relating to these two elements clearly distinguishes Ross' theory from other realistic legal theories, as they interpreted validity in terms of effectiveness, but this effectiveness was understood as either behavioural or psychological.

According to psychological interpretation, law is applied because it is valid. Norm is valid when certain subjects commonly accept it and treat it as an element of their motivation. In Ross' theory these subjects would be judges. Within this approach, the primary criterion for identification of legal rule is its acceptance, and the secondary criterion of less relevance would be its application. Application of a norm is in that case a result of its being recognized by the judges. In order to verify whether a certain norm is valid, it is crucial to establish if within a certain group there exists a conviction that the rule is a legal rule, and because of that it should be observed. According to Ross such internal conviction or belief relates to incentive effect of the rule. The rules are psychologically effective when they become an element of judge's motivation, when he acts in his capacity as a judge, and decides a case. So in this approach it is not important whether the rule was established in a right procedure. If the judges would not recognize a rule (even properly established) as a component of their motivation, it would not be possible to state that this rule is a valid legal rule. Thus Ross distinguishes the formal and the legal aspect of validity and the legal aspect is of much bigger importance. A formally valid (properly established) legislative act becomes legally valid (valid in proper sense) when it is effective within social relations. In psychological interpretation such effectiveness means that the judges actually use the rules in their decisions because they feel bound by them, and this feeling appears in each single judge as well as in the entire community of judges. According to Ross, future judicial behaviour can be understood and predicted due to the hypothesis concerning the existence of shared normative ideology that motivates judge's actions, and which is shaped by the sources of law. Sources of law provide a coherent normative ideology, which is not just a subjective feeling. Such shared normative ideology is possible only on the assumption that each judge has a strong experience of being bound by the rules. At the same time those motivating rules provide a scheme of interpretation that allows understanding of judge's actions and predicting them. This scheme has an intersubjective character. In order for this picture to be coherent and precise, it would be important for Ross to present this transition from subjective feelings to intersubjectively valid law. Ross however did not elaborate fully on that matter.

The psychological aspect is crucial for legal validity, however it is not alone sufficient, and because of that Ross is critical of the theories that focus only on this perspective. Such a view on legal validity can be found for instance in Karl Olicvecrona's legal theory. Assuming that the law is – as Olivecrona claimed – a phenomenon of individual psychology it is hard to explain the coherence and intersubjectivity of the norms creating the legal system. If one agrees that the system of valid norms is individualized to subjective beliefs, it wouldn't be possible to explain the unity of legal system, which is crucial for the proper functioning of the entire system. Ross cannot agree with such interpretation if only because the law being a scheme of interpretation requires certain shared beliefs at its foundations.

In behavioural interpretation law is valid because it is applied. Norm is valid when there are sufficient reasons to state that the judges will use it as the basis for their future decisions. Such conception can be found in the legal theory of American legal realists. It was clearly expressed by Oliver Wendell Holmes who claimed that: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law" [10]. It is a clear expression of the thought according to which the law is valid because it

10 HOLMES, OW (1897). "The Path of the Law", *Harvard Law Review,* 10, pp.460-461.

is being applied. Such theory also isn't sufficient for Ross. It is not possible to predict future decisions only through observation of judicial customs, because the law is not just a habitual way of conduct. In fact judges act as they do because they have a shared feeling of being bound by the rules. As it was mentioned before, Ross stressed the need for the existence of shared judicial ideology, thus his theory joins both interpretations of legal validity: psychological and behavioural. The relations of the two mentioned aspects are apparent in the following quotation:

> To arrive at a tenable interpretation of the validity of the law is possible only by a synthesis of psychological and behaviouristic views (...). The view is behaviouristic so far as it is directed toward finding consistency and predictability in the externally observed verbal behaviour of the judge. It is psychological so far as the consistency referred to is a coherent whole of meaning and motivation, only possible on the hypothesis that in his spiritual life the judge is governed and motivated by a normative ideology of a known content[11].

To summarize briefly: the utterances stating that a rule is a valid national law are predictions to the effect that a given rule will be a basis for the future judicial decisions. Legal validity for Ross is a probabilistic concept, as predictability is a matter of degree, which means that, depending on a context it is more or less possible to state that a given norm will be used as a basis for judicial decisions. But in order to formulate clear an unambiguous criteria for such predictions, it is crucial for the judges to be motivated by objective factors. As it was already pointed out before, predictions based on subjective factors, as individual psychology of the judge would have a very low probability and be, as a matter of fact, completely useless. Thus the basis for the prediction must be a shared judicial normative ideology, that is the shared normative beliefs and attitudes within the law[12].

Shared ideology is a subject of a doctrine of the sources of law, which for Ross is a descriptive doctrine. The aim of such descriptive theory of the sources of law is establishing and identifying all the sources of law in the developed legal systems. According to Ross "a realistic doctrine of the sources of law must be a doctrine concerning the ideology which actually animates the courts, actually motivates them in their search for the norms to be taken as the basis for their decisions – an ideology which can only be discovered by studying the actual behaviour of the courts"[13]. He also points out that:

> The ideology of the sources of law is the ideology, which in fact animates the courts, and the doctrine of the sources of law is the doctrine concerning the way in which the judges in fact behave. Starting from certain presuppositions it would be possible to evolve directives concerning how the judge ought to proceed in making their choice of the norms of conduct on which to base their decisions. But it is clear that unless they are identical with those, which are in fact followed by the courts, such directives are valueless as bases for the determination of what constitutes valid law. Any such normative doctrine of the sources of law, which does not square with facts, is nonsensical if it pretends to be anything else than a project for a different and better state of law. The doctrine of the sources of law, like any other doctrine concerning valid law, is norm-descriptive, not norm-expressive- a doctrine concerning norms, not of norms[14].

Ross defines sources of law as a set of factors, which influence the shape of the norm on which the judge bases his decision in concrete case[15]. The influence of the sources of law on particular

11 ROSS, A (1959). *Op. cit.*, pp.73-74.
12 *Ibid.*, p. 75.
13 *Ibid.*, p. 104.
14 *Ibid.*, p. 76.
15 *Ibid.*, p. 77.

decision can vary. There are the sources, which provide a judge with a ready rule leaving a little space for interpretation. Ross refers to such sources as fully objective. Provisions of certain acts belong to such sources. There exist also the sources to which Ross refers as partially objective. These sources require interpretation and clarification from the judge. Such sources are custom and precedent. There is also a third source, the un-objective reasons based on the tradition of culture. The objectivity of these sources varies significantly. As a result fully or significantly objective sources form the basis for strong predictions, while less objective sources allow for weaker predictions. Depending on a source the prediction can be more or less certain, and the rule itself more or less valid.

3. CURRENT RESEARCHES ON THE PSYCHOLOGY OF JUDICIAL DECISION-MAKING

In the previous section I have briefly outlined some basic assumptions of Ross' concept of legal validity. Now, I will elaborate more closely on the question of its actuality in terms of current empirical research. Some of Ross' critics point out that his vision of science resulted in a distorted picture of legal phenomena[16]. Namely, Ross declared that his scientific doctrine of law should be empirical, but he never consequently expanded upon his own assumptions. He presented a narrow set of objective factors motivating judicial decisions. However – as it was mentioned before – he had a reason for such a limitation. Firstly, Ross aimed at formulating sound and certain predictions of future judicial behaviour. Only by relating to such predictions it is possible to state which rules are in fact valid legal rules. Therefore he had to demonstrate that the judges form their decisions based on objective factors – namely the sources of law. Secondly, by the time Ross wrote *On Law and Justice*, there were no empirical studies available that would validate or falsify his theory. Although Ross required science of law to be empirical, he didn't elaborate on a coherent psychological theory. Having that in mind, he claimed that scientific theory of law ought to be based on the sources of law, and not on subjective and individual psychology of the judge. This last claim requires to be developed in more detail. Statements concerning the law actually in force need to be verifiable, just as other scientific statements. The ground for such verification is behaviour of the judges. In Ross' theory, predictions concerning norms that will be the basis for future judicial decisions are possible only under the assumption that there exists a common and shared judicial ideology, and that each judge treats it as his own ideology. All of the judges must be motivated in equal degree by the same factors. Only under such assumption formulating plausible predictions is possible. Yet human actions are complex and shaped by various factors, many of which are not even realized. In order for his theory to be coherent, Ross had to ignore that complexity of human behaviour. He had to omit considering those individual experiences, biases etc. that underlie human actions, as they have no practical significance for predictive theory of law, because they cannot form the basis for certain and secure predictions[17].

Imagine, however the situation when one of a few judges deciding a case reports a dissenting opinion. All of the judges are influenced by one and the same judicial ideology, which consists of the sources of law in the proper hierarchy. Ross' theory seems to be quite powerless in such situation, as it does not consider individual factors motivating the judge, which must have influenced a dissenting opinion. It seems that American legal realists managed to avoid that problem underlining the significance of individual factors motivating the judges, though they faced another difficulty – namely they focused

16 AAMIO, A (2011). *Essays on the Doctrinal Study of Law,* Springer, New York, p. 83.

17 ROSS, A (1959). *Op. cit.*, p. 44.

on those individual factors, while ignoring the existence of shared normative ideology. The proper theory ought to include both motivations: shared ideology and individual factors. Ross faced a problem of similar kind. He focused only on one aspect of motivating factors, namely the objective ones. Ross' theory is thus vulnerable to a similar objection as the theory presented by the American legal realists. He proposed a limited vision of factors determining the process of judicial decision-making.

Having recalled Ross' basic assumptions it will be now possible to analyse the current psychological research into the judicial decision-making, and see if author's assumptions are challenged or reinforced. Current psychological research point that the judicial decisions are influenced by many factors beside the normative ideology (like personality, attitudes, and experiences). Naturally focusing mainly on subjective factors would also be a mistake if only because the judicial decisions are influenced, alongside individual factors, by education and professional training. Judge's behaviour is also determined by the law and must fall under it. He must be aware that if his decision does not correspond with the law: bills, precedents etc. The possibility of its undermining will be much greater when the case will hit the court of second instance. So the psychologists involved in the processes of judicial decision making ought to consider if the judges reach their decisions in the same manner as layman do, or if the specifics of their profession, especially the studies and practice, substantially affect these decisions. American legal realists claimed that judges reach their decisions like laymen do (obviously they made the reservation that legal reasoning in based on specific methods). Ross claimed something quite the opposite, namely that judicial decisions differ from these made by laymen, as they are shaped by the specific normative ideology, which does not concern extra-legal reality.

In the context of dispute about the actuality of Ross' theory of legal validity it seems reasonable to point at some current psychological research. Most of them seem to reinforce the thesis that the judges base their decisions also on the individual factors. However it is not quite clear whether such conclusion is legitimate.

Current psychological researches seem to indicate, at least *prima facie*, that the judges reach their decisions as laymen do. They are equally prone to biases, like for instance religious or political motives, racial or sexual intolerance and so on. Professional training weakens these biases only in a limited scope. The research conducted by J. Segal and H. Speath seems to confirm that the ability to weaken bias by training is limited. They claimed that knowledge of judges ideological profile is a stronger basis for predictions of judicial behaviour than reasons and arguments presented for a given judgement [18]. Many other researchers tried to establish to what extent professional training and legal restraints affect these individual factors underlying the decisions. In their research Landsman and Rakos examined the decisions of the judges and laymen in cases of product liability[19]. In the first variant of the experiment subjects were presented proofs, that are inadmissible under the law, but they have not informed that the proof is inadmissible. In the second variant the same facts have been presented, but this time the subjects were informed that the proofs are not admissible under the law, and therefore should not be the basis for a decision. This experiment proved that in both groups, judges and laymen (mock jurors) based their decisions on inadmissible facts, although they have been informed about their inadmissibility. Landsman and Rakos showed that „judges and jurors may not be very different in their reactions to potentially biasing material"[20]. Such thesis was also defended in the research conducted

18 SEGAL, J & SPAETH, H (2003). *The Supreme Court and the Attitudinal Model Revisited,* Cambridge-New York, p. 323.

19 LANDSMAN, R & RAKOS, F (1994). "A preliminary inquiry into the effect of potentially biasing information on judges and jurors in civil litigation", *Behavioral Sciences and the Law*, 12, pp. 113-126.

20 *Ibid.*, p. 125.

by Wistrich, Gurthie and Rachlinski[21]. It showed that the judges also could not ignore inadmissible evidence. The only exception was the situation of inadmissible confession.

Nevertheless the results of the mentioned experiments should be approached with caution and without too far-reaching conclusions. The situation of the experiment differs significantly from the situation of judging in real life. The examined judges had very little time to reach their decision. Also the experimental setting prevented them from making themselves acquainted with the views of other participants of the case (and it is quite probable that the arguments of the defence could influence the decision).

Other experiments involved the role of racial, religious or political biases in the process of judicial decision-making. Blair, Judd and Chapeau conducted the experiment examining whether race of the defendant affects the length of the sentence[22]. The subjects were presented the description of a crime together with the photos of the convicts. Most of the subjects, while deciding the case considered mainly the kind of crime, while race had significantly smaller influence on the decision. However the results within the group of Afro-Americans differed. People with more African features have been sentenced to a much higher punishment. This experiment confirmed that even the defendant's appearance might affect the judge's decision.

The role of emotions, and their relation to purely rational and logical reasoning was also examined by neuroscientists, for instance by Antonio Damasio [23]. It can be summarized, with a great simplification and without getting into neurological details in the following way: when a certain person is in a situation which is much alike the one she had experienced previously, ventromedial prefrontal cortex automatically activates previously experienced information along with the emotional feeling that accompanied the previous experience[24]. Because of that process the person recalls previous facts together with accompanying experiences. The outcome of this process can be either conscious or unconscious. When it is unconscious, we are dealing with a bias. Whet neuroscience shows, is that the decision-making process often involves unconscious factors.

The psychological and neurological research revealed the complexity of the decision-making process. It is however crucial to ask whether these researches justify the conclusion that judges are in fact motivated, to significant extent, by these subjective factors. There are some doubts concerning this conclusion. Human actions are motivated by numerous factors, thus conducting experiments is a complicated enterprise. As it was already mentioned before, they are conducted in controlled laboratory conditions, which differ to significant extent from the real circumstances of reaching the decision in judiciary practice. It is thus possible that the subjects would behave differently outside the laboratory. The psychologists involved in such research also raised objections concerning for instance the variety of outcomes depending from the particularity of the design. For instance Ross and Nisbett elaborated on this problem[25]. Moreover, psychological experiments were criticised due to unrepresentative choice of subjects, artificiality of experimental conditions, and detachment from the institutional context [26]. Another

21 WISTRICH, AJ; GUTHRIE, C & RACHLINSKI, JJ (2005). "Can judges ignore inadmissible information? The difficulty of deliberately disregarding". *University of Pennsylvania Law Review*, 153, pp. 1251-1345.

22 BLAIR IV; JUDD, CM & CHAPLEAU, KM (2004). "The influence of Afrocentric facial features in criminal sentencing", *Psychological Science*, 3, pp. 674-679.

23 DAMASIO, AR (1996). "The Somatic Marker Hypothesis and the Possible Functions of the Prefronatal Cortex" *Philosophical Transactions of the Royal Society B: Biological Sciences*, 351, pp. 1413-1420.

24 BENNET, H & BORE, GA (2007). "Judicial neurobiology, Markarian synthesis and emotion: How can the human brain make sentencing decisions?", *Criminal Law Journal*, p. 85.

25 ROSS, L & NISBETT, RE (1991). The Person and the situation: Perspectives of social psychology, McGraw-Hill, New York.

26 SIMON, D (2010). "In Praise of Pedantic Eclecticism: Pitfalls and Opportunities in the Psychology of Judging", in: KLEIN, DE &

problem is a consequence of a relatively small amount of research conducted on judges. Moreover those available, focus mainly on two aspects of decision-making: pointing out the facts significant for the case and sentencing. As Schauer points out in his essay *Is There a Psychology of Judging?* when performing experimental tasks judges focus only on just a few of many tasks which they normally perform in their work[27]. They focus on actions, which are more typical for the jurists, and to a lesser degree for the judges. In fact the most typical judicial activity is interpretation – creating the law and choosing the proper rule. So it is not obvious that the judges act alike laymen, and so it should not be treated as indisputable conclusion from the presented research. In many cases what is supposed to be an element of conclusion of an experiment is its premise. Psychologists often tend to imply that the actions resulting form experience and education can tell us less about the possible decision than purely individual actions of the judge. It is than important to consider the outcomes of the research, but with certain amount of scepticism. Perhaps judicial decision-making process differs significantly from the decision-making process in untrained layman? Schauer claims so, clearly separating these two processes. He even remarks that judges decide differently than other professional lawyers. His thesis is confirmed by the research, which did not refer to the decisions of the judges, but examined the impact of expert knowledge on making a decision in the fields that required such expert knowledge. These experiments demonstrated that experts decide differently than novices [28].

It is thus impossible to state with a complete certainty whether judges make decisions in principle as laymen do. It seems that researches confirm this thesis, but the allegations raised against them indicate that they should be treated with caution. The image of decision-making process emerging from the research is a very complex one. On the one hand judges, as professionals, reach their decisions based on their knowledge and experience within the framework set by the law, on the other hand researches indicate that their decision-making process is exposed to the same biases as in case of layman.

4. CONCLUDING REMARKS

How these observations relate to Ross' theory of valid law? As it was mentioned before, he tried to base his theory on the most reliable and certain empirical data. It was possible by reference to a shared normative ideology consisting of the sources of law in the right hierarchy. This catalogue of objective factors was supposed to enable accurate predictions. Thus in his theory Ross did not take under consideration these individual and extra-legal factors, which have been analysed by the researchers recalled in the previous section. Obviously such experiments have not been conducted in the first half of the 20th century. However this is not the only reason why Ross did not involve individual and extra-legal factors in his theory. An attempt to indicate factors other than the sources of law forming a normative ideology would expose Ross' theory to a lack of precision, which he tried to avoid at all costs.

Can current psychology help to complement Ross' theory by indicating a catalogue of factors, which influence the decision-making process? It seems that it is still impossible. There are still few researches, which – at this point – do not provide a coherent picture of judicial decision-making process.

MITCHELL, G (Eds.) (2010). *The Psychology of Judicial Decision Making,* Oxford University Press, Oxford, pp. 131-147

27 SCHAUER, F (2010). "Is There a Psychology of Judging?", in: KLEIN, DE & MITCHELL, G (Eds.) (2010). *The Psychology of Judicial Decision Making,* Oxford University Press, Oxford, pp. 103-120.

28 ERICSSON, KA & WARD, P (2007). "Capturing the naturally occurring superior performance of experts in the laboratory: Toward a science of expert and exceptional performance", *Current Directions in Psychological Science*, 16, pp. 346-350.

As it was also mentioned before, there is still a discussion to what extent those individual factors condition the decisions and whether they are more important than objective factors, such as a legal rules. It is thus hard to say to what extent judges base their decisions on political and religious beliefs, experience, biases and other emotional factors. At this point psychological theories can't support Ross' theory, as they do not provide precise data for successful predictions. Conversely, they suggest rather that making such predictions is a difficult endeavour because of the complexity of decision-making processes. On the other hand mentioned experiments do not undermine basic assumptions of Ross' predictive theory of validity, for they do nor indicate clearly whether the judges decide, in principle, same as laymen. The picture that emerges from the presented research neither confirms nor contradicts Ross' assumptions. Due to this ambiguity it is hard to claim that his theory is archaic or methodologically "naïve". Even if – contrary to what Ross claimed – normative ideology alone would not allow formulating exact predictions (because of the variety of other factors determining judicial decisions) it could not undermine his theory to significant extent. It seams that for Ross the mere possibility of making such predictions is more important, than the thesis that they are guaranteed by the shared normative ideology. After all it is not unlikely that the further development of research methods in psychology will enable accurate predictions, even if it turns out that judicial behaviour is determined mainly by the individual factors.

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Counteracting with healing antidotes. Beyond Kelsen, towards Ross

Contrarrestando con antídotos curativos. Más allá de Kelsen, aproximación a Ross.

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Resumen

Mi objetivo en este ensayo no es comparar todos los aspectos del pensamiento de Norberto Bobbio y Alf Ross. En lugar de ello, me propongo examinar algunas áreas clave de su filosofía legal donde se puede, razonablemente, ver cómo Bobbio responde o es influenciado por Ross, o cuáles comparaciones entre sus teorías son particularmente interesantes. La comparación toma un especial interés con respecto a las obras de Bobbio de los años sesenta en las que el kelsenismo, junto con todos los intentos de fundar la ley en una norma fundamental presupuesta y de purificar la ciencia jurídica, fracasa, en su opinión. En particular, la necesidad de claridad científica y adherencia a la realidad apelando a los principios básicos de la filosofía analítica y el empirismo lógico muestran niveles de aceptación de Ross. A pesar de que el positivismo jurídico kelseniano continua figurando en el pensamiento jurídico de Bobbio mucho después de que rechazó la tesis de pureza de Kelsen, las devotas discusiones de Bobbio sobre el positivismo jurídico y la doctrina de la ley natural, sus posteriores estudios sobre las normas legales y sobre la interacción entre la ley y la fuerza, pueden ser vistos como algunas de las formas más importantes en que él integra valiosa información sobre los puntos de vista de Ross en su propia teoría.

Palabras clave: Bobbio; Kelsen; Ross; positivismo jurídico; realismo legal.

Abstract

My aim in this essay is not to compare the thoughts of Norberto Bobbio and Alf Ross on all matters. Instead, I intend to examine some key areas of their legal philosophy in which one can reasonably see Bobbio as responding to or influenced by Ross, or in which comparisons between their theories are particularly interesting. The comparison is especially purposeful with regard to Bobbio's sixties works where Kelsenism, along with all attempts to ground law in a presupposed grundnorm and of purifying legal science fail in his view. Particularly, the need for scientific clarity and adherence to reality by appealing to the basic tenets of analytical philosophy and logical empiricism display levels of approval for Ross. Although Kelsenian legal positivism has continued to figure in Bobbio's legal thought long after he rejected Kelsen's purity thesis, Bobbio's devoted discussions on legal positivism and the doctrine of natural law, his later studies on legal norms and on the interplay between law and force, may be seen as some of the more significant ways in which he integrates valuable insights of Ross' standpoints into his own theory.

Keywords: Bobbio; Kelsen; Ross; legal positivism; legal realism.

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INTRODUCING THE TOPIC

Italian philosophical culture during the first ten years after the Second World War was dominated by Spritualism and Marxism in the wake of the German Idealism. This sharp conceptual distinction underwrote a sharp division of legal-philosophical labor. Legal philosophy came for a long while to be conceived of as including only normative issues, and the non-cognitive metaethical claims were not the appropriate concern of the legal philosopher or something he or she could be expected to deal with. In part under the influence of the dominant Catholicism, Neo-spiritualists displayed remarkable agreement on the criticism towards legal positivism accused of not having raised substantive moral questions and of complicity in recent history of nazism. The Catholic cognitivists, by and large, viewed the foundations of law on the divine origin of human nature very narrowly. Besides those strong forms of cognitivism, most non-Catholic legal scholars did not deny a foundationalist epistemology according to which our moral and legal knowledge is based ultimately on facts and properties metaphysically independent. Not surprisingly, boths trends in legal philosophy recalled and connected to the basic assumptions of the doctrine of natural law[1].

In that environment made of thinkers sharing the same basic tenets of natural law and working through their implications, Norberto Bobbio made his own way as a theorist of a different kind. After his apprenticeship in Phenomenology which proved his need to establish a distance from Idealism and Existentialism and to rescue law from political ideology by founding law in trascendental legality, Bobbio raised his hat to legal positivism. Already from the 1950s the driving forces behind his works were a striving towards scientific clarity and adherence to reality. Kelsen, for Bobbio, became a cardinal figure to whose inexhaustive rich source of ideas he stood fast. Kelsen and Bobbio both rejected rhetorical philosophy and without exception shared the assumption that the framework of a general legal theory is to be confined to the normative structure of law and ignore any question of values[2]. Although his interest in Kelsen's formalism had bashfully emerged in his previous writing on Phenomenology[3], the pivotal moment of the conversion came in the first quarter of the 1950s. Those years represented a crucial fracture within his intellectual life and marked the inception of a significantly fruitful interface between analytical philosophy and Kelsen's pure theory of law.

Just as Bobbio strove to provide a scientific account of law, he attempted to fight the decline toward legal positivism and Kelsen's legal theory accused of having dangerously decreased the anxious concern for values and the defense for democracy and pacifist ideals against imperialism and dictatorship. It is worthy of mention that the two Italian translations of Kelsen's works – *Lineamenti di dottrina pura del diritto* (1952) and *Teoria generale del diritto e dello Stato* (1952) came late within the obscure scene of dread of Kelsen's pure theory blamed for being only apparently ideologically neutral and of the thirst of revenge for both the Catholic supporters of the natural law doctrine and the sociologists[4].

In the manifesto-work of Kelsenism, *Scienza del diritto e analisi del linguaggio*, Bobbio adamantly rejected the traditional legal theory unfavourably influenced by metaphysics and declared his

1 See, amongst the others, some of the Italian defenders of the natural law doctrines such as C. Antoni, G. Quadri, G. Capograssi. On the issue, see the pioneristic contibution of PATTARO, E (1976). "Il positivismo giuridico italiano dalla rinascita alla crisi", in: *Diritto e Analisi del Linguaggio*, Milano, pp. 451-452.

2 See, for instance: BOBBIO, N (1954). Studi sulla teoria generale del diritto, Torino (especially the essays written between 1949 and 1954); Id., *Teoria della norma giuridica,* Torino 1958. Id., Teoria dell'ordinamento giuridico, Torino 1960.

3 See, for instance: *La consuetudine come fatto normativo*, Padova, 1942.

4 Compare: NICOLOI, R (1951). "Formalismo e storicismo del diritto", *Rivista Italiana di Scienze Giuridiche*, pp. 293-329; CAPOGRASSI G (1952). "Impressioni su Kelsen tradotto", *Rivista trimestrale di Diritto Pubblico*, pp. 767-815. For a more detailed reconstruction on the issue, see my work *Il filosofo del dubbio: Norberto Bobbio. Lineamenti della sua filosofia del diritto nella cultura giuridica italiana,* Roma 2012, pp. 41-47, 93-110; English translation: Id., *The doubting philosopher: Norberto Bobbio. Outlines of his legal philosophy within Italian legal culture,* Oslo 2008, pp. 10-15; Spanish translation: Id., *El filósofo de la duda: Norberto Bobbio. Bosqujos de su filosofía del derecho en la cultura jurídica italiana*, Ed. Astro Data, Maracaibo, 2012, pp. 34-40. See, also, SERPE, A (2008). "La "guerra fredda" dell'essere e del dover essere. Capograssi, Kelsen, Bobbio", in: MARINO, G (edited by) (2008). *Ricordo di Capograssi. Studi napoletani,* Napoli, pp. 243-265.

devotedness to the methods practised by logical empiricism and analytical philosophy. This was the road he followed to adjust Kelsen's pure doctrine to the new European trends in philosophy. Or, more precisely, the contemporary fundamental philosophical positions provided support for there being certain connections with the Kelsenian ideals of purity and neutrality in the study of law. Such interplay will not last very long. Shortly afterwards, the thread will break, as I shall come back to later.

In the first part of this work (1.2.3.) I shall bring into focus the different conceptions and meanings of legal positivism purported by Bobbio and Ross and their readings of Kelsen's legal positivism. After this, I shall focus on Bobbio's own *primary* Kelsenian concept of legal science and its *further* development (4.5.6.). Lastly, I shall look at the certain significant issues that might possibly be adavanced in support of convergences between Bobbio's and Ross' views. In so doing, I shall make use of the relationship between primary and secondary rules and of the connection between law and force (7.8.). In the background of the present reconstruction, Bobbio's theoretical shifts are shown in the light of his varying needs of finding new antidotes in order *to heal* Italian legal-philosophy. Formerly, from the prevailing metaphysics and natural law doctrines by means of a revisited Kelsenism, and at a later time from Kelsenism by means of the new European trends in the philosophy of law. With regards to the latter aspect, Bobbio' s views are a thread of not pure and simple interplay with Ross.

1. LEGAL POSITIVISM ARMED TO THE TEETH

Bobbio's University lectures on legal positivism held in the years 1960-1961 and originally published as pamphlets can be conceived as theoretical and historical commentaries of the contents of his previous courses *Teoria della norma giuridica* (1957-1958) and *Teoria dell'ordinamento giuridico* (1959-1960). It is worth mentioning here that in *Teoria dell'ordinamento giuridico* Bobbio displays some level of approval for Kelsen's theory of *Grundnorm*. In those lectures Bobbio had stated that any legal norm presupposes a normative power; from this assumption it follows that behind the constitutional norms there must be a constitutional power conceived as the last power, the supreme original power which in turn presupposes a power-producing norm. Bobbio argued that such a norm could not be anything but a basic norm[5].

At the very beginning of the sixties Bobbio shares Hart's and Ross' views that it would not make any sense at all to blame or praice someone for being defender or accuser of legal positivism by remaining entirely outside the investigation of its historical meaning and nature. Particularly, in his essay *Sul positivismo giuridico* dated 1961, one may see more than a nuanced inspiration form Hart's work of criticism toward Lon. L. Fuller *Positivism and Separation of Law and Morals* and Ross' English edition *On Law and Justice*[6].

Bobbio gives a mixed verdict to questions about whether or not legal positivism can be so easily regarded in a negative meaning as mere rejection to natural law doctrine. He argues that not all concerns can be so easily reduced to such a contrapposition. In particular, he provides support for the argument according to which even a rigorous legal positivist can handle the belief in those values upon which positive law can be approved or disapproved. And such a belief does not constitute reasons for a positivistic theory of law to give up the very conceptual core of legal positivism. The view is perhaps not very original but his concern with the historical account on the different meanings of legal positivism illustrates the contradictions into which the

5 BOBBIO, N (1993). *Teoria Generale del Diritto*, Torino, p. 190.

6 On summer 1960 Bobbio together with Alessandro Passerin d'Entrèves and Renato Treves organised a two weeks-seminars on legal positivism at Villa Serbelloni di Bellagio on the initiative of the Rockfeller Foundation. Hart and Ross took part in it. See, BOBBIO, N (1979). *Il positivismo giuridico,* Torino, p. 2; Id.,(1961). "Sul positivismo giuridico", *Rivista di Filosofia,* p. 14.

opposers fall when one fails to recognise its own historical limits. It is known that a couple of years before also Hart had identified through the means of the historical search the different meanings of legal positivism. With a view to Bentham' and Austin's Utilitarianism, and in order to sweep away the bandied ambuigity of the label "positivism" he pinpointed five main theses which are in short: 1) the contention that laws are commands of human beings; 2) the contention that there is no necessary connection between law and morals or law as it is and law as it ought to be; 3) the contention that the analysis (or study of the meaning) of legal concepts is worth pursuing and to be distinguished from historical and sociological inquiries and from the moral criticism or approval, or otherwise; 4) the contention that a legal system is a "closed legal system"; 5) the contention that moral judgments cannot be established or defended ("noncognitivism" in ethic)[7].

In short, Bobbio distinguishes three aspects of legal positivism: a) as an approach to the study of law (*method* of investigating law); b) as a *theory* (conception of law); c) as an *ideology* (of justice).

As a *method,* legal positivism must be regarded as based on the strong distinction between what law is and what law ought to be. The standpoint he associates here is that law can be investigated regardless of the value judgments, *Wertfreiheit*, and in accordance with laws of science. Law is the actual valid law, that is the whole of the norms in force issued according to determined procedures, regularly followed by the individuals and implemented by the Courts within a determined community. Thus, establishing law as a system of only positive norms allows us not to reject the existence of an ideal (natural or rational) law but to avoid conflicts between the two types in the identification of law and, not less importantly, to confine legal science itself to scientific method.

As a *theory*, legal positivism is connected to the historically modern conception of the State conceived as a "whole" representing its members and endowed with force. This broad conception is linked to a series of sub-peculiar theories considered as typical of legal positivism such as the imperativistic theory, the coactionistic theory, the legal sources theory, the theory of declarative interpretation of law, the theory of legal system considered as a structured whole whose semantic features are completness, consistency and decidability.

Finally, as an *ideology* legal positivism pertains to the belief in certain values to which positive law corresponds regardless of its conformity to an ideal law. From the fact that positive law is law by the will of whoever made it and it is just as such, it follows that legal norms reflect a moral duty commitment and a propensity not to act contrary to them. Duties of respect to law are required since the in/validity criterium for the identification of law perfectly coincides with the one applied to assess its own in/justice.

Once he has distinguished such aspects in which legal positivism has historically manifested, Bobbio condemns all the attempts at removing all the inner peculiarities generally included in the very core of the notion. The three aspects of legal positivism are grounded on three different reasons or judgments which are, for a) reasons of opportunity (taking law as it is and not law as it ought to be into account better serves the task of legal science of providing decision schemes for Courts); for b), factual judgments (it is a fact that the actual law is a whole set of norms of conduct directly or indirectly issued by the State); for c) value judgments (form the fact that the law has been issued according to formal criteria and by the will of whoever, it follows its positive value and, regardless of the content, obedience to the law is unconditional.

In what has now been outlined there are some fundamental lines of comparison between Bobbio's legal positivism and Ross' innovative approach within the North-European tradition of the early fifties. As a point of entry into the comparative perspective I shall continue by taking the three-fold differentiation of legal positivism as a starting point.

As to c). Besides the historical fact that not only legal positivists but also traditional supporters of natural law had advanced the argument of the moral duty of obeying the positive law (i.e. the Resistence

7 HART, HLA (1958). "Positivism and the separation of law and morals", *Harvard Law Review,* pp. 601-602.

theory of the early modern period grounded on the existence of predate natural rights), Bobbio argued for the distinction between an extreme legal positivism and a moderate legal positivism. The former is based on the central assertion that positive law is just as such; the latter is grounded on the moral duty of obedience on the assumption that positive law, irrespective of its content, serves to fulfill *values* such as order, peace, certainty and legal justice. The latter is a fundamental piece in Bobbio's main point – in opposition to the defenders of new natural law who had misinterpreted legal positivism as a divulger of seditious ideas of dictatorship – that one must keep such a differentiation in mind. The historical explanation for this difference is no doubt that such values were formulated in the 18th century by the classical liberal doctrine – with Montesquieu and Kant at the forefront – and this would prove that the ideology of legal positivism can be neither conceived as a means of invigorating the 20th century dictatorships nor as a means of weakening individual freedom and equality.

The question of whether, and if so to what extent, the emphasis on empiricistic principles and scientific method and the transcending of the realm of the spirit and values had entailed a sort of "*moral torpidity and complicity in the abominations of the Hitler regime*"[8] was also taken up by Ross. More particularly, his argumentation may be seen as directed against elements in natural law doctrines and the supposition of certain constituents of reality, the values, which we have access to through sense-experience. Under the influence of the models elaborated in the Vienna Circle and Logical Positivism of the inter-war period, Ross argued against the belief in the existence of natural law as all law is positive and such a denial is nothing more than the consequence of the non-existence of any ethical cognition at all. Both Ross and Bobbio clearly place great weight on the appeal that law cannot be understood in terms of metaphysical interpretation and described if not through a sufficiently clearly distinction between natural law and positive law. However, Ross' thesis is stronger than Bobbio's. Ross' argumentation based on the the meta-ethical view that moral judgements do not express facts and lack of truth-value is particularly significant. By denying the existence of other levels of non-empirical reality, he rejects the existence of a moral law independent of all sense-experience[9].

Sharper and more comparable with Ross' is Bobbio's concept of legal positivism as an *approach* to the study of law (a). This can find correspondence in Ross' usage of the term "positivism" as designating an anti-metaphysical attitude to problems of legal philosophy and jurisprudence in opposition to the approach of the natural law doctrines. As a step in his theory of valid law Ross puts forward the empirical characterisation of the methodology of legal science as grounded on the factual observation of social facts regardless of the appeal to morals or natural law.

Although for Ross social facts to be observed and interpreted are human behaviour and attitudes, this methodological thesis – which has the Austinian dichotomy of the factual existence of law and its merit and demerit as background – brings Bobbio closer to him. As shown earlier, Bobbio's formulation of legal positivism as an approach or *method* to legal problems (a) is the core thesis to which he has constantly adhered during his own intellectual life. Nevertheless, and quite unlike Ross, some years later Bobbio stated that the legal positivism and natural law approaches to legal knoweledge are not in contrast, but possibly combinable. Even if this alternative should be used deliberately, the contrast is, however, manifestly inadequate in relation to the fact that the general natural law demands of justice can be accounted as a demand of critique of law. In other

8 ROSS, A (1961). "Validity and the conflict between legal positivism and natural law", *Revista Jurídica,* Buenos Aires, p. 46. On the issue, compare also, Id., "Naturret contra Retspositivisme", in: *Tidsskrift for Rettsvitenskap*, 1963, pp. 497-525 (Italian translation: "Giusnaturalismo contro positivismo giuridico", *Rivista trimestrale di Diritto e Procedura Civile,* 1979, pp. 701-723).

9 Compare, on the matter, amongst the others, his earlier works: ROSS, A (1931). "Retskilde- og Metodlære i realistisk Belysning", *Tidsskrift for Rettsvitenskap*, pp. 241-301; Id., "Virkelighed og Gyldighed i Retslæren", in: *Tidsskrift for Rettsvitenskap,* 1932, pp. 81-106; Id., *Kritik der sogenannten praktischen Erkenntnis. Zugleich Prolegomena zur einer Kritik der Rechtswissenschaft*, Copenhagen, 1933; Id., "Den rene Retslære 25-års Jubilæum", in: *Tidsskrift for Rettsvitenskap,* 1936, pp. 304-331.

words, the rigorous application of scientific method does not prevent the positivist legal theorist from carrying out a substantive critical attitude on law in view of a better systematisation, mutation and evolution of law. One thing is to carve out a valutative definition of law in terms of justice, it is wholly another thing to investigate law as a fact dis/approved on the basis of determined value criteria assumed as such[10]. The latter aspect does not weaken the scientific commitment of a legal positivist to the study of the enacted law. Such a view formulated by the later-Bobbio contains the seeds of self-criticism which in turn leads directly to a theoretical discrepancy with Ross' well-known account on the strict separation between legal policy and pure legal science[11].

Another main area of comparison through factors is theory-resemblance concepts of legal positivism. In both Bobbio and Ross' language and argumentation there is seldom any basis for strong agreements regarding the variagate set of theories derived from the core separation-thesis of legal positivism. Stronger than Bobbio, but like-minded, Ross stated he wanted to limit himself to a descriptive characterisation of Austian interpretation of law as it is not expected to cover other implications or misleading conceptual reductions such as the imperative theory, the theory of force "behind" the law and the mechanist theory of the judicial process[12]. Here one must take into account the common blame, for both Ross and Bobbio (b), for the persistence of negative deviation of the pure concept of legal positivism and its incorrect application in relation to other views put forth by others in the name of legal positivism. To go into greater depth, Bobbio emphasises that while legal positivism is the dogmatic elaboration of legal voluntarism from which the above mentioned thesis derives, from natural law – as the doctrine according to which the fondation of conduct norms is to be found in the the eternal human nature – descends a set of theses regarding different aspects of the legal experience. Although not systematised, these theses such as norms are not imperatives but *dictamina rectae rationis*, the nature of the thing as the main legal source, the incompleteness of the legal system and the discretional power of the judge are to be considered theoretically poles apart from legal positivism[13].

2. WHAT IS MEANT BY NATURAL LAW? KELSEN AND THE IDEOLOGY OF LEGAL POSITIVISM

Finally, there is the question of what they meant by natural law and of whether and how naturalists and postivists theoretically clash.

Parallel to but partly different from Ross' identification of the main features of natural law, is Bobbio's view. In several works he has taken up his concept of natural law and has clarified its standpoints. One important clarification is that natural law does not represent a peculiar system of moral principles as the word "nature" does not say anything about the content of the moral prescriptions. Lacking any axiological basis, "natural law", and more specifically the term "nature", designates either the source or the foundation of law. So, natural law is nothing but a theory of morality and the common ground for all natural law doctrines is merely an objectivistic conception of ethics based on the assumptions that a part of the rules of conduct are not the product of human activity and that a part of them are axiologically superior to all other norms. Bobbio's analysis discloses the unsustainabilty of natural law and includes historical arguments (different natural law systems have been differently structured on different validity criteria of "nature") and logical arguments (from the assumed fact that nature is a valid criterium of distinction of human tendencies there cannot be entailed

10 BOBBIO, N (1965). "Giusnaturalismo e positivismo giuridico", in: Id. *Giusnaturalismo e positivismo giuridico,* Roma-Bari, 2011, Cap. VII, pp. 120-124.

11 On the relationship between science and politics to which I shall come back later to, see the chapter XIV of his *On Law and Justice*. With regards to the Italian translation, see: ROSS, A (1965). *Diritto e Giustizia*, Torino, pp. 280-308.

12 ROSS, A (1961). *Op. cit.*, p. 54.

13 BOBBIO, N (1965). *Op. cit.*, pp. 120-122.

any value judgments). What can one use the concept of natural law for? Bobbio's historical approach comes into play again. Natural law in its being an objective theory of morality has served to philosophically ground individual freedom and state-power theories[14].

Beyond the specification, the conceptual core of the matter is quite similiar in Ross. He asserted that in many formulations of natural law there is one central and common idea directly or indirectly claiming the existence of non-empirical but universally valid principles governing the life of a man in a civil society. For this reason, natural law belongs to the domain of general moral philosophy, ethics (or morality in the broad sense) but it differs from morality in a narrower sense which deals with the ultimate end of a man.

Ross knowingly draws this theoretical distinction on Verdross[15]. It is quite interesting to notice that also the main area of connotation specification of the legal positivism term is likewise taken by Ross from a passage contained in Verdross' book *Abendländische Recthsphilosophie* where he distinguishes between a dogmatic (extreme) version of legal positivism and a hypothetical (moderate) one. In his view, the former is grounded on the moral assumption of non-ethical cognition and on the implication that positive law possesses absolute validity which renders any legal system, if established, morally binding. According to the latter, legal positivism leaves the question on the moral cognition open and it designates the attitude of legal science to be largely engaged in the empirical study of law without appealing to any natural law principles. The crux of the matter here is that while Bobbio's reaction to discrepancy between the dogmatic legal positivism on the one hand and the moderate one on the other ends up with his adherence to the latter version, the same does not occur with Ross. For the concept of legal positivism as outlined in the account given, Ross not only claims it is unecessary to take a specific moral standpoint in the account of law, but to the greatest possible extent, it is necessary not to take any standpoint at all for the mere fact that the existence of natural law is denied as lacking, as any natural morals, ethical truths. It should be particularly emphasised in Ross that the existence of natural law and, more in general, of any moral judgments, is rooted in meta-ethics and is of no consequence for the practice of values itself[16].

To sum up: in Bobbio and Ross it is equally clear that natural law is an erroneous attempt to disguise the reality of law by wrapping law in the veil of authority of religion, or of tradition, or of the strongest historical ideology. What both were anxious to assert were that the criteria that are relevant for tenability assessment of natural law have historically varied (Cosmos, God, rational being of man, history) and practically served to defend or attack a diversity of political systems, from extreme conservative ones to revolutionary ones. Further, they present their own way of using the term "legal/positivism", which in their view leads to anti-dogmatism.

On the basis of the assumption of such non-empirical features of natural law and of its being vindicated by different naturalists for different political purposes, Bobbio and Ross' views regarding Kelsen's

14 BOBBIO, N (1965). "Argomenti contro il diritto naturale", in: *Giusnaturalismo e positivismo giuridico,* ed. cit., pp. 140-154; Id., "Il giusnaturalismo come teoria della morale", in: *Giusnaturalismo e positivismo giuridico,* ed. cit., pp. 157-170.

15 ROSS, A (1961). *Op. cit.*, p. 50.

16 On his view about the difference between the theory and the practice of values, compare his contributions: ROSS, A (1946). *Hvorfor Demokrati?*, København (English translation: *Why Democracy?*, Cambridge 1952); Id. *Hvad er Demokrati?*, in: ROSS, A & KOCH, H (edited by) (1946). *Nordisk Demokrati,* pp. 191-206; Id., "Sociolog som Retsfiloso", in: *Juristen*, 1946, pp. 259-269; Id., *Direttive e norme* (original title: *Directives and norms,* London 1968), Milano, 1978, p. 124. In particular, and besides the above mentioned works, on the concept of democracy and on his life-commitmment as non-cognitivist philosopher with regard to the practice of democracy and human rights, compare also: Id., *Hvorfor jeg stemmer på Socialdemokratiet,* in: Social-Demokraten, 25-10-1945; Id., *Kommunismen og Demokratiet,* København, 1946; Id., "Socialismen och demokratin", in: Tiden, 1947, pp. 392-404. I also resort to: SERPE, A (2013). "Su democrazia libertà eguaglianza. À propos del Ross di Hvorfor Demokrati?", in: i-lex, 20, pp. 453-478. For a deeper understanding of his later reflections on democracy, see the collection *Demokrati, magt og ret. Indlæg i dagens debat,* København, 1974, of which an Italian translation with an introduction edited by me is now being printed - Giappichelli Publisher. Lastely, of course, his numerous works on International law often contain significant insights on the issue. In 1939 Ross became Professor of International Law at the University of Copenhagen and from 1957 until 1971 he was appointed as a judge at the European Cort of Human Rights. See, amongst the others, his mostly known monographs: Id., *Lærebog i Folkret. Almindelig Del,* 2, 1946; Id., *Constitutions of the United Nations. Analysis of structure and function*, København 1950; Id., *The United Nations. Peace and Progress*, Bedminster 1966. Especially the first two works mentioned are theoretically based on the main tenets of his legal-philosophical viewpoints of both *Kritik der sogenannten praktischen Erkenntnis* (1933) and his shortly-after published *Towards a Realistic Jurisprudence* (1946).

own legal positivism clash. As is apparent from the discussion above, both philosophers distinguished two versions of legal positivism, the moderate and the extreme one. With no doubt, Bobbio's reading on Kelsen's pure doctrine of law does not reveal any parallel with the extreme version of legal positivism.

Already at the very beginning of the fifties, in his *defensio* addressed to denying the misinterpreted accusations propounded by the Italian main hostile opponents to Kelsen's pure theory (sociologists and naturalists), Bobbio ascribed Kelsen to the former version of legal positivism. He stated that the assessment of Kelsen's critique of the distinction between validity and value in order to safeguard the purity of law is, however, important to be kept conceptually separated from the supposed ideological set up of such a theory and the senseless conclusion that the task of his legal theory consisted in justifying any value system[17]. More unreflectingly, some Italian Catholic natural law supporters had asserted thay it would be impossibile to take content within law apart and that such terminology, stood up to closer reflection, expressed a feeble *petit bourgeois* ideology. This was a term for what Kelsen had apparently called *neutral* ideology his pure doctrine. Bobbio held on to Kelsen's arm. On the one hand, he drew his attention to the significance of a specific normative science whose task was to investigate law as a whole structuring and qualifying social reality regardless of the sociological, moral and psychological facts; on the other hand, he broke down the accusation of having reduced justice to the will of the strongest and of moral fidelity to law by recalling Kelsen's brave defense of democracy and pacifist ideals against imperialism and dictatorship. In the light of Bobbio's future distinction between moderate and extreme legal postivism, we may say that already at that time he had placed Kelsen in the former version.

A few years later Bobbio took Kelsen as a clear example of how his pure doctrine was a product of legal positivism as a theory which mirrored the formation of the modern State and was not shrouded in mystification of the State as expressed in the metaphysical view of Hegel's philosophy. As pointed out before, Bobbio built up three specifications of legal positivism terms a), b), c), and this point here is concerned with the derived questions of the possibility of the boundaries between legal positivism as a theory and as an ideology. Clearly enough, Bobbio's interpretation of Kelsen goes in the direction of the absence of such a parallel and this means the absence of the moral duty of obeying the positive law as required by the supporters of the ethical theory of State. Once again, Bobbio's conclusion was that none of the arguments put foward by naturalists or positivist-opposers could justify the assertion that legal positivism as ethics of legality, peace and legal certainty could not belong to the range of the democratic conception of the State. Parenthetically, Kelsen's view had provided an incontested insight[18].

3. ON ROSS. FIGHTING KELSEN ON ALL FRONTS.

Ross' passionate interpretation of Kelsen's legal positivism was grounded on the demand that a *true* theory of validity should be thought afresh on the question of the interconnection of law and reality. The grave mistake of a number of writers considered "postivists" had consisted in falling into a sort of 'naturalist' trap. Instead of deriving the validity of law from human nature or immnent rationality as naturalists do, plenty of "positivists" had placed law under the concept of authority of the State. The misconception that law "possesses" a validity of a different "nature" still remained deeply embedded in their views.

Quasi-positivismus, *Kripto-Positivismus* are expressions used by Ross for identifying his struggle over the *false* positivism, and for the empiricism which he assumed to be the *true* positivism[19].

17 See, for instance, his first defense of Kelsen: BOBBIO, N (1992). "La teoria pura del diritto e i suoi critici" (1954), in: Id., *Diritto e potere. Saggi su Kelsen,* Napoli, 1992, pp. 15-39. On the issue, I refer to the previous n. 4 of the present work.

18 BOBBIO, N (1961). "Sul positivismo giuridico", *Op. cit.*, pp. 22, 33.

19 Compare: ROSS, A (1933). *Kritik der sogenannten praktischen Erkenntnins,* Cap. XII; Id., *Om Ret og Retfærdighed* (1953), with the introduction of J.v.H. Holtermann, København, 2013, pp. 339-344.

Unlike the current expositions of valid law and from the viewpoint of Ross, "validity" is netiher an aprioristic quality to which it corresponds the moral duty of obedience nor a term meaning the legal effects of a determined normative act. "Validity" corresponds to the actual existence of a norm while valid law (*gædende ret*) is the law actually in force. The analysis conducted of the concept of "valid law" places Kelsen within the former mistaken conception of validity. For this purpose he attacked Kelsen's ways of understanding and using the term "validity" that lead to a distorted, or at least incomplete version of legal positivism. In order for legal doctrine to be a science of valid law or to have a character of scientific assertions, it must develop its own methodology for which validity is to be intended as the mere actual existence and this can only be demonstrated with reference to empirically observable (socio-psychological) facts. Kelsen, by asserting that valid norm does not only refer to its real existence but that possessing validity means "*that the individual ought to behave as the norm stipulates*", had drawned his *pure* legal doctrine in moral philosophy as revitalised the Hegelian roots of Idealism[20].

It is worthy of mention that in this respect, Ross not only refers to the conceptual apparatus of Kelsen's *General Theory of Law and State*, but also to his later inquiry into the concept of justice. More particularly, in his review to the volume *What is justice?*, Ross had shown his disagreement with regards to the Kelsenian concept of validity in so far as it lays down a concept of morality in terms of obedience to the legal authorities and the implied fallacy of ethical absolutism. For Ross, the lack of logical meaning of the idea of "validity" invests the concept of basic norm in so far as it is an absurdity to ascribe truth value to a norm without shuffling science and ideology[21].

This questions mentioned can in many connections be seen as two different perspectives on what Ross' criticism on Kelsen's *pure* approach to law, and on what Ross' *own* "legal positivism" consist of. Let's take a closer look.

In several works Ross showed his deep appreciation for Kelsenian contribution to legal theory. In 1924 and for about two years, Ross visited Vienna and attended the private seminars held by Kelsen at the well-known *Wiener Rechtstheoretische Schule*, a School which was influenced by – although not being a part of – the *Wiener Kreis* of philosophers intended to reconceptualise the empiricism through the means of formal science and logic method. Ross was entrhalled by Kelsen's project to purify law from political ideology and bend legal science to scientific method of clarity and neutrality. *Theorie der Rechtssquellen* is the Kelsenian-inspired Doctorate thesis which Ross submitted to the evaluation Committee at the University of Copenhagen in 1926, then vehemently criticised and rejected as considered somewhat extraneous to the Danish legal culture tradition. Ross' admiration for Kelsen perpetuated over the years in spite of his adherence to the main tenets of the Swedish legal realism and of the logical empiricism. By way of illustration only, Ross had always praised his: "*purely intellectual admiration for a lifetime's work*", "*passionate love for uncompromising truth*", "*work of rare monumentality and dimension*", "*renewed interest in the fundamentl problems of legal theory*"[22], and his "*trasparent clarity of style*", "*the merciless consistency*"[23]. Not less appreciative comments are contained in his masterpiece *On Law and Justice*. In a place he stated that *Reine Rechtslehere* was the most unique example from the modern philosophy of law capable of becoming a major attraction for several legal scholars of the XX's. The power of attractiveness, in Ross' view, laid on the impeccable attempt of developing the premisses of

20 ROSS, A (1961). *Op. cit.*, p. 80.

21 ROSS, A (1957-1995). "Hans Kelsen. What is justice? Law and Politics in the Mirror of Science. Collected essays", Berkeley and Los Angeles, California, University of California Press, 1995, *California Law Review*, pp. 567, 568.

22 ROSS, A (2011). "The 25th Anniversary of the Pure Theory of Law ", Translation from 1936 in: *Tidsskrift for rettssvidenskap*, 304-331, *Oxford Journal of Legal Studies*, Vol. 31, pp. 243, 244.

23 ROSS, A (1957-1995). *Op. cit.* p. 564.

legal positivism by means of logic in such a way for the notion of validity to gain independence from ethical postulates and, for legal theory to be cleansed of sociology, ethics and politics[24].

The passages quoted above have a value of shorthand expressions of admiration for Kelsen. Nevertheless, Ross' engagement in criticism of Kelsen's normativity thesis and, in wider terms of his concept of legal norm and legal system far exceed all the praises. In what follows I shall point out that and for the sake of brevity, the task will be limited to an accont of passages of some of his main works. And here we come to the second question.

The rejection of the possibility of strictly distinguishing between reality and validity, *Sein* and *Sollen* and the need of going beyond the strict version of legal positivism had been upheld by Ross, inter alia in 1933, in one of his main works, *Kritik der sogenannten praktischen Erkenntnis. Zugeleich Prolegomena zu einer Kritik der Rechtswissenschaft*. It is worthy of mention that *Kritik der sogennanten* was Ross' first work to be known to the Italian audience through the later critical review of Bobbio in 1937. Unsurprisingly in those years, Bobbio, persuaded by Kelsen's normativism, pointed out the difficulties of denying the possibility of a genuine practical reason and the consequent new angle of the psychological world of law[25].

This was the fundamental view that Ross has subsequently shown in several works, and systematically delved deeper as from his further *Towards a Realistic Jurisprudence. A Criticism of the Dualism in Law*, 1946. In this monography, he claimed that what is crucial is not whether validity is relevant in relation to the perspective and topic of legal science, but first and formost the impossibility of any objective normativity thought as a world distinguished from the spatio-temporal one. What exists behind the expressions of practical modality are solely psychological phenomena in time and space. In the light of this, validity as well as value or duty has no meaning, they are simply words. The subjective experience of such notions in our minds rationalises the idea of validity and generates the illusion that validity is something objectively given.

Therefore, no (validity) reality discrepant from the spatio-temporal reality exists. Ross puts it in this way: "*Viewed from the angle of the analysis of consciousness there exists no notion of validity at all, but merely conceptually rationalised expressions of certain subjective experiences of impulses* (…) *the "notions" of validity mean certain peculiar disinterested behaviour attitudes*"[26]. From these assumptions it follows that the legal system is a social order whose foundations are characterised by peculiar behavioural attitudes based on an intercation between compulsion and validity. Ross points out that such behaviour attitudes "*are at the same time expressions of interested and disinterested impulses, and have taken thier rise, developed, and established themselves by an inductive interaction between two motives, a fear of compulsion, and a belief in authoritative validity*". More specifically, the interested behaviour attitude consists in the fear of compulsion, whereas the disinterested behaviour attitude consists in notions of validity induced by the social suggestive power of custom. In short: behaviour attitudes (compulsion) and authority or competence (validity) are threaded together[27]. The said reduction of the validity to an experience of validity is in itself important in the assessment of the concept of law which is based, in Ross, on ontological

24 ROSS, A (1965). *Op. cit*., p. 65.

25 BOBBIO, N (1937). "Alf Ross, Kritik der sogenannten praktischen Erkenntnis, Zugleich Prolegomena zu einer Kritik der Rechtswissenschaft", Leipzig, Felix Meiner, 1933, p. 456, in: *Giornale critico della filosofia italiana*, XVIII, 1937, n. 1, pp. 73-75, re-published in: TARANTINO, A (a cura di) (1984). *Scienza e politica nel pensiero di Alf Ross. Atti delle giornate di studio su Alf Ross*. Lecce 14-14 maggio 1981, Milano, pp. 257-261.

26 ROSS, A (1946).*Towards a Realistic Jurisprudence. A criticism of the dualism in law,* Copenhagen, p. 77.

27 *Ibíd.,* pp. 76-93. See also, Id., "Retskilde – og metodelære i realistisk belysnin", in: *Tidsskrift for Rettsvitenskap,* 1931, pp. 241-301, especially p. 295.

naturalism rejecting any dualism in jurisprudence[28]. The anti-dualistic approach is a necessary condition for an anti-metaphysical and empirically oriented study of law. Thus, law and legal phenomena must be understood in terms of social facts and the study of law must be unconditionally conceived as a ramification of social psychology. With respect to what sort of definition of *realistic* tendency he is referring to, Ross wrote: "*by this I mean a conception which in principle and consistently considers the law as a set of social facts – a certain human behaviour and attitudes connected with it*"[29]. Accordingly, law is analyzable in factual components being ascribable to certain empirical perceptible phenomena of a psychological kind.

The aspects concerning law and legal phenomena that Ross' inquiry points to lie on another plane from the Kelsenian anti-empirical approach, which came under criticism in a number of works. Already in his early work dated 1936, *The 25th Anniversary of the Pure Theory of Law*, in wondering whether the propositions of law have meaning, Ross emphasised his criticism towards the Kelsenian system of norms for the reason that it is of great importance that normative propositions and normative claims are linkable to expressions of the speaker's subjective feelings and attitudes, so that the said propositions and claims allow themselves to be empirically checked. As is well known, Ross' critical discussion of the Kelsenian doctrinal exposition of law was closely linked to his adherence to a strict emotivist version of non-cognitivism slavishly acquired by Hägerström's moral philosophy during the time he spent in Uppsala where he received his doctorate in philosophy[30]. Ross stood fast on this view in his later and more illustrious monographs *On law and justice* (1958) where in some places he discussed justice from the viewpoint of emotivism characterizing justice as emotional expression[31], and *Directives and Norms* (1968) where in mapping what types of basic positions in moral philosophy are commonly-held, he explicitely stated his commitment to the meta-ethical view of emotivism[32].

The emphasis that the legal positivists à la Kelsen placed on the fact that the doctrinal propositions of law are statements in which a *Sollen* is expressed, not a *Sein* is heavily rebutted by Ross. In *On law and Justice*, Ross stated that in Kelsen's *Reine Rechtslehere* a *Rechtsnorm* and a *Rechtssatz* was *de facto* reduced to the same category of *Das Sollen*. For Ross, the mistaken lack of differentiation was then defeated by a lack of clarity in his later *General Theory of Law and the State* where Kelsen attempted to distinguish the legal norms themselves and the theoretical propositions about these norms by unhappily calling the latter "rules of law", i.e. statements in which a *Sollen* is expressed. In so doing, Kelsens' yearning to discern *Seinswissenschaft* from *Sollenswissenschaft* broke up into little pieces[33]. Already in his one year earlier review to Kelsen's *What is justice?*, Ross had more extensively put forth his hefty critique based on two level arguments on the whole Kelsenian theory of positive law. First, that the *logical* content of a legal norm is an ought-proposition (what Ross calls *directive*), that is neither true nor false and to which a theoretical doctrinal proposition corresponds whose *real* content may be empirically checked by observing the effectively regular behaviour of both the judges and officials. Second, the idea of validity

28 On this point, see the insightful work of SPAAK, T (2008). *Naturalism in Scandinavian and American Realism: Similiarities and Differences,* 25-year Anniversary Uppsala-Minnesota Conference, available at: SSRN: http://ssrn.com/abstract=1354154, p. 41.

29 ROSS, A (1946). *Op. cit.*, p. 9.

30 On Ross' vicissitudes concerning the rejection of his first Doctoral thesis at the University of Copenhagen, his later doctoral defense at the University of Uppsala and the influence of the figure of Hägerström upon his accademic life, see the in-depth biography of J. Evald, *Alf Ross- et liv,* København 2010, especially Chapter III and IV. I aslo resort to my work: SERPE, A (2008). *Realismo nordico e diritti umani. Le 'avventure' del realismo nella cultura filosofico-giuridica norvegese,* Napoli, pp. 21-41; Id., "Il realismo giuridico in Danimarca e Norvegia", *Materiali per una storia della cultura giuridica*, 1/2008, pp. 63-90.

31 ROSS, A (1953). "Om Ret og Retærdighed". ed. cit., pp. 357-386; Id. (1965). *Op.cit.,* pp. 253-279.

32 ROSS, A (1978). *Direttive e Norme*, Milano, pp. 124-127.

33 ROSS, A (1965). *Op. cit.*, pp. 10-11, n. 4.

depends on the social facts of effectiveness and it is identical and not only *conditioned,* as Kelsen has repeatedly stated, by such facts. The said premise in Kelsen that such facts can verify the "existence" (validity) of a norm provides a basis for the exceedance if not the insignificance of the notion of "validity" itself[34].

One year later, Ross wrote as follows: "*the real content of the juridico-scientific assertion* [that a norm] *is valid law is a prediction to the effect that* [the norm] *under certain conditions will be taken as the basis for decision in future, legal disputes* (…)". This is the core of his prediction theory. The prediction can be possibile because of the fact that the judges arrive at a legal decision being guided and governed by "*a process determined by attitudes and concepts, a common normative ideology* (…) *this ideology is the subject of the doctrine of the sources of law*"[35]. Finally, the conclusion is that the doctrinal propositions of the science of law can be empirically tested, namely verified, through observation because they are predictions based on such an ideology being nothing but the doctrine of the sources of law.

Furthermore Ross linked his critique of Kelsen's doctrinal exposition of law to his ideal of purity of doctrinal interpretation. Kelsen's own preoccupation laid in the more general notion for which science and politics must be taken apart without exception in order to provide a scientific basis for legal doctrine. Although he reckoned that the doctrinal interpretation might be guided by pragmatic considerations, the task of the legal scientist is confined to applying the tools of logical-linguistic analysis and carrying out practical consequences. Legal science as science cannot take place in the actual application of law. Such an inexorable assumption leads in Kelsen's view to the purity of legal science.

Kelsen wanted to ensure that a purely logical interpretation *fully* devoid of any pragmatic aim is illusionary, but, most importantly, that the purity of science in the way it is tradionally understood is not violated as the border between science and politics is clearly demarcated. Claiming that legal science is science is possible and the requirements for scientificity must be made through the methodological self-understanding of the legal scientist. The standpoint that legal doctrine ought to take in order to be able to use the term "science" for its own activity, is not to deceptively banish all the evalutative and emotive attitudes of which the scientific doctrinal exercise is actually made of, but rather to consciously disclose them as explicit premisses. This is to say that the doctrinal propositions seemingly have the status of descriptive propositions once the premisses are forthright and unequivocally expressed and the practical conclusions are presented as recommendations for judges rather than postulates[36].

3.1. ON SCIENCE AND POLITICS IN ROSS

Controversies over the word "science" play an important role. The reason for a difference here is grounded in the motivation-psychological aspects of norms and legal doctrine. Ross is not rejecting his adherence to an ideal: the purity is an aim to fulfil and it does not clash even when the legal scientist professionally pursues politics and science concurrently. For an adequate picture of Ross' reflection of the role motivations and emotions play in legal scientists' argumentation it is of significance to refer to other Scandinavians whose views persuaded Ross to step out from the shadow of Kelsen and take shelter elsewhere. One example is the Swedish economist, scholar and politician with an international reputation, Gunnar Myrdal. Although basing his views upon the value nihilism thesis of the common Mentor Hägerström, Myrdal had consistently stated the possible link between science and policy. One of his core ideas was that although a social scientist should not replace the politicians in setting goals and fighting for their implementation, he or she might do it only on

34 ROSS, A (1957-1995). *Op. cit.* pp. 566, 567.

35 ROSS, A (1958). *On Law and Justice*, London, pp. 75, 76. The translation is slightly altered.

36 ROSS, A (1965). *Op.cit.*, pp. 319-312.

the basis of a sober and long lasting knowledge of social problems[37]. His early work *Vetenskap och politik i national-ekonomien* (1930) displayed considerable understanding of modern political science. Through an analytical-critical reconstruction historically oriented on the role that the political speculation had played in the national economy over the centuries, he unveiled the misleading confusion of science and politics and explained how the economy would become practical science without being doctrinal. With the means of modern social psychology, the Swede claimed that the historical reproduction of dogma is so widely reflected in the mentality of the scientist as to infest the domain of social sciences. Nevertheless, Myrdal's intent was not to flush out science from emotional prejudices. Being aware of the attitude laying behind the scientific concepts and having made them explicit and accepted as pre-conditions of his own research, the scientist can formulate objective-hypotetical conclusions serving as recommendations for the pursuit of practical ends. In simple terms, this was Myrdal's project of social engineering (*social ingeniørkunst*).

Myrdal's perspective won great support in Ross to such an extent that in *On Law and Justice* and in a number of earlier works[38], Ross declared himself in agreement with him. He assimilated Myrdal's lesson whose joint influence may be felt in his forties' works on the concept of democracy and social democracy[39] and in his fifties' works on the concept of legal science. Firstly, from his early reflections on democracy, Ross had consistenlty stated that humanity needed a rational guide of experts, technologists, whose task was to point out what means can really enable the realization of political aims[40]. One might say that his concept of a modern democracy was formed also on the basis of such views. Secondly, as regards the concept of legal science, as illustrated above and from the passages quoted, Myrdal's view on the interplay between politics and science may be slightly reflected in Ross' discussion on the fluid boundary between the legal-theoretical intention and the legal-political intention in doctrine[41]. The Kelsenian sharp contrast between legal dogmatics and legal politics is liable to be too unreasonably indeterminate. More realistically, such a boundary sounds, in Ross' view, more like wishful thinking.

The analysis conducted here, however, takes as a point of departure, the Kelsenian ideal of pure science and develops into a criticism. The tendency to regard science as Weberian *wertfrei* also contributed to illuminating the ideal of purity but it did not help to facilitate a real understanding of how legal science in fact operates. In order not to continue in the vain attempt of idealising legal science but still preserve the survival value of scientific objectivity it was necessary to consider take joint-alternatives to soundness of mind. The Hägerströmian theoretical nihilism was not irrespective of the modern efforts of Vienna Circle exponents to shake reality from "myths" and turn aside all that was not susceptible to observation and verification. As we have seen, the rejection of straighforward metaphysical commitments and the possibility of analytically distinguishing science and politics was subsequently upheld by the Hägerströmian Myrdal. A reformulation of the scientific project of legal science in the vulnerability of the strict normative legal positivism meant that philosophical assumptions and valutative and emotive attitudes, if consciously introduced, are necessary parts of the study of law. Law cannot be studied through highly polished and shimmering lenses.

37 MYRDAL, G (1939). *The defence of democracy,* in: Id., *Maintaining Democracy in Sweden – Two articles by Gunnar Myrdal,* New York; STRANG, J (2010). *Why 'Nordic Democracy'?* in: STRANG, J (Ed.,) (2010). *Rhetorics of Nordic Democracy,* Helsinki, p. 107.

38 In *On Law and Justice*, Ross expressed his agreement with some tenets of Myrdal's view. Compare, for instance ROSS, A (1965). *Op. cit.*, pp. 300-306; Id., *Om Ret og Retærdighed* (1953), ed. cit., pp. 385, 386, pp. 407-413. Already in the thirties, Myrdal's reflections on social science and politics gripped the Dane. See: ROSS, A (1931). "Socialvidenskabernes krise", in: *Tilskueren*, 1931, pp. 62-63.

39 For some literature on the issue, I refer to the previous n. 16. It should be added that Herbert Lars Olaf Tingsten's viewpoints served to contribute the shaping of his concept of democracy. See, for instance, the concept of democracy as *"överideologi"* (over-ideology) propouded by Tingsten in: *Demokratiens problem*, Stockholm 1945 to which Ross resorted to into in his monograph *Why Democracy?*, pp. 64-65, 119.

40 ROSS, A (1931). *Socialvidenskabernes krise*, ed. cit., p. 65; Compare, also, Id., *Kommunismen og Demokratiet*, ed. cit; Id., *Socialismen och demokratin*, ed. cit.

41 ROSS A (1958). *Op. cit*., p. 140.

4. BOBBIO ON THE CONCEPT OF LEGAL SCIENCE

In connection with the purpose of the present work which is to pinpoint the ways in which comparisons between Bobbio' and Ross' theories are particularly interesting, I should remind the reader that Bobbio's fight against metaphysics and his purport to lay down the conditions which govern our understanding of legal doctrinal statements do not mirror or take influence either from the basic tenets of Scandinavian legal realism or from Ross' attitude in this respect.

I previously referred (introduction) to Bobbio's *Legal science and analysis of language* (Scienza del diritto e analisi del linguaggio) which is unanimously considered relevant in the setting up of the criteria of his Kelsenism. Put pointedly, but already symptomatic of the existence of a more or less conscious intuition of the weakness of Kelsen's pure doctrine of law, Bobbio had declared the adoption of logical empiricism and analytical philosophy methods within the legal field as tools apt to rescue the inquiry of the formal structure of law. The concept of modern science was rooted on the assumption that scientific propositions were not unconditionally true in the sense of reproducing a presupposed truth. Empirical research, as well as formal research, was recognised as a science whether propositions constituted a coherent and understandable system of utterances expressed through rigorous language or not[42]. The bases of both Kelsenism and the neo-positivistic concept of science could be combined and the conclusion that the legal doctrinal activity consists in explaining and, more particularly, in transforming by means of the analysis (purification, completion and systematisation) of a language legislative prescriptive discourse in a rigorous discourse.

This was of course not the same as assuming that legal science was a formal science like mathematics and logic since its object is the determined content of a determined discourse. Legal science is also something more than a purely empirical science as the legal professional does not undertake the task of observing legal phenomena in order to verify truth through experience. The analysis of language carried out in the same way as practised by empiricists and analytical philosophers from Russell to Wittgenstein and the Viennese School is what characterises legal science. It is clear that Bobbio's concept of legal science is ripe with Kelsen's logic concerned with the structure of the legal system, namely with the whole set of concepts and principles regarding the production and the extinction of norms and the solution. Moreover, in this perspective, one might agree in claiming that while Bobbio's conception of legal sociology is that of an empirical research, his legal theory is e *mélange* of the theory of legal sources and the theory of prescriptive language[43].

Bobbio is of course aware of the significance of Kelsen's theoretical distinctions. The merger, on the one hand, of the conceptual apparatus of logical empiricism and anaytical philosophy and, on the other hand, of the Kelsenian theoretical reconstruction of the legal system became one of the cardinal points of Bobbio's well known works *Teoria della norma giridica* (1958) and *Teoria dell'ordinamento giuridico* (1960) and several other contributions of those years such as "analogia", "norma giuridica", "principi generali del diritto", "fatto normativo", "consuetudine" contained in *Novissimo Digesto italiano* and in *Enciclopedia del diritto*. Such works have played a central importance in the formation of numerous Italian legal scholars.

The advantage of establishing a powerful connection between logical empiricism and analytical philosophy and Kelsenism did not endure forever. Soon, such a merger proved to be a failure. The neo-positivistic premisses revealed to be "*a sort of a Trojan horse within the Kelsenian fortress*"[44] and demonstrated the fragility of Kelsen's version of legal positivism. Although the formalism of Kelsen's legal theory cannot cover all the meanings of the expression "legal formalism", it still regards legal science as the

42 BOBBIO, N (1976). "Scienza del diritto e analisi del linguaggio", in: SCARPELLI, U (Ed.,) (1976). *Diritto e Analisi del Linguaggio*, Milano, pp. 299-302.

43 This is the view held by GUASTINI, R (1996), "Bobbio, o della distinzione", in: *Distinguendo. Studi di Teoria e Metateoria del Diritto,* Torino, p. 45.

44 I borrow this captivating expression from: PATTARO, E (1976). *Op.cit.,* p. 464.

only science based on objective values, the *Sollen*. By way of illustration we can look at some passages. In *What is justice?*[45], Kelsen had sharply distinguished moral value judgements from normative (legal) value judgements and stated that while the former are for their very nature subjective and cannot be verified by facts, the latter are objective. With regard to normative legal judgments, Kelsen adopoted a cognitivistic approach in that normative statements are statements of a binding force or of the value it institutes. In Kelsen's words: "*there is an essential connection between the concept of "value" and that of a "norm". A norm constitutes a value*"[46]. Thus, while moral values are not accessible to scientific knowledge, legal values are. From the viewpoint of logical empiricism and analytical philosophy, Kelsen's understanding of normative values, be it legal or moral, is fraught with serious difficulties.

A neo-empiristic philosophy is based on the assumption that no objective knowledge of value is possible at all, no matter which field. Bobbio's revisitation of Kelsen accordingly did not any longer permit a rational juncture with the new trends in philosophy and thus was doomed to fail. Hence Kelsen's characterisations of law and legal system stood on their own more unsteady feet as they could not satisfy such a requirement.

It might perhaps have passed unobserved if it had not been made more precise and determinate by authors such as Ross and Hart whose contributions rapidly made inroads within the Italian legal environment. Taken together, their standpoints on the anti-empirical concepts of legal validity, binding force and *Grundnorm*, may be seen as examples of parallel needs in the reconstruction and redefinition of law in the light of the main tenets of the purely empirical and analytical philosophical tradition. The outlined difficulties of the *pure* doctrine of law and its discrepancy with the *pure* assumptions of analytical philosophy and logical empiricism had already been treated in greater depth by Ross in the forties. Of course, Hägerström's realistic philosophy placed also significant weight on the Rossian assessment of the weaknesses of Kelsen's thought. Nevertheless, the epistemological background of the Uppsala School is for the most part in line with the spirit of the main thesis of logical empiricism. In this regard, Jørgensen stated that after a relatively different view on the types of reasoning and questions confronted, the two movements were both anti-metaphysically oriented and shared the view that the main task of philosophy was to undertake language analysis. By rejecting subjective idealism and its ontological implications, both declared that cognitivism was a false direction in moral philosophy and adhered to the view that moral notions and propositions are not rationally defensible, serving only as emotive signs expressing our attitudes[47]. For the sake of completeness, it should be added that while both share the idea that no one has rational access to the truth of value judgments, only the most radical logical positivists and British analytical philosophers such as Ogden, Ayer and Stevenson endorsed the meta-ethical view of emotivism[48]. That Ross himself ascribed great significance on the one hand, to the reality thesis and the analysis of language and, on the other hand, to non-cognitivism and emotivism in meta-ethics, in the sense that they better equip us towards a clearer insight into the legal material and the law itself, is something I have earlier given an account of.

Hence the defeat of Kelsenism was perpretated by the vitriolic action of logical empiricism and analytical philosophy so that Italian legal scholars became increasingly prone to the empirical approach to the study of law. At the same time as both philosophical currents developed in Italy, Scandinavian legal realism, by sharing some crucial viewpoints with them, took root. The three currents, as outlined above, are thus not to be

45 KELSEN, H (1957). *What is justice?*, Berkeley, Los Angeles, pp. 212-229.

46 KELSEN, H (1956). "A "Dynamic" Theory of Natural Law", *Louisiana Law Review,* 16, p. 602.

47 JøRGENSEN, J (1958). "Origini e sviluppi dell'empirismo logico", in: PEDUZZI, O (Ed.,) (1958). *Neopositivismo e unità della scienza*, Milano, p. 35 et seq. Cfr., PATTARO, E (1976). *Op. cit.,* now in: OLIVECRONA, K (1972). *La struttura dell'ordinamento giuridico*, Milano, pp. 25-37.

48 See, for instance, AYER, AJ (1936). *Language, Truth and Logic,* London; STEVENSON, CL (1937). "The emotive meaning of ethical terms", *Mind, New Series,* Vol 46, No. 181, pp. 14-31; Id., *Ethics and Language*, Yale University Press, 1944.

seen as delimited by sharp boundaries, but as specifications of an area essentially in common. One may say that the Italian ground was fertile and plowed for Scandinavian realism to be sown[49].

Scandinavian and British philosophy slowly gained ascendency over Bobbio but there is no simple way to classify all the influences on his general account of law that can trace their roots back to Ross' legal philosophy. But it is certain that Bobbio's triumph in partly overcoming Kelsen eagerly availed itself of the new empirically oriented doctrines and served as an opening of Italian legal culture towards the new approaches coming from beyond the Alps. Authors such as Hägerström, Lundstedt, Olivecrona and Ross were quite unknown to the Italian audience. Neo-empiricism and analytical philosophy allowed Bobbio (as had occurred with Ross since the late thirties!) to propose partial adjustments of Kelsen's doctrine and subsequently on the introduction of the new Anglo-Saxon and Scandinavian sophistication which expressed the analytical setting even more openly. This is, however, sufficient, to show that his new lines of thought functioned as an important step in freeing Italian legal culture from the grip of both Kelsenism and new natural law doctrines from the early sixties onwards. One might say it was a new antidote for counteracting the effects of new poisons.

5. NEW ANTIDOTES AGAINST NEW POISONS. A 'NEW' LEGAL SCIENCE GAINS GROUND

Bobbio's first buds of a new conversion within his legal-philosophical inquiries can be half-seen in his relevant volume *Giusnaturalismo e Positivismo giuridico* (1965). The buds fully bloomed in 1967 at the International Congress of social and legal philosophy titled *Is and ought within legal experience* held in Milano-Gardone. Bobbio's contribution was aimed at introducing the debate concerning the state of art of legal positivism at that particular time.

Just one year before, in a round table Conference held in Pavia, signs and symptoms of crisis were exhibited as he declared so: "*I take note of legal positivism is in crisis not only as ideology and a theory but also as an approach to legal issues*"[50]. On that occasion, Bobbio referred – as I pointed out in the earlier account of his own legal postivism – to the tripartition of meanings that the term 'legal positivism' covers and identified a widespread perplexity about the legal positivistic method, too. In 1967 the fog thinned out and in his opening speech, Bobbio clearly overturned the theories he had until then supported. The fifteen years of strategic alliance between legal positivism on the one hand, and analytical philosophy and logical empiricism on the other one came to an end. Bobbio recalled Kelsen's *Hauptprobleme der Staatsrechtslehre, entwickelt aus der Lehre von Rechtsaatz* to underpin his conclusions. Let us now follow his line of reasoning.

Bobbio's aim was to link the term "descriptive" with the term "normative". One central question in Kelsen's contribution was, for Bobbio, that he did not oppose the term "normative" to the term "descriptive" but to the term "explicative". On the other hand, in Kelsen's last writings, he did not oppose the term "descriptive" to "normative" but to the term "prescriptive". Because the "normative-explicative" and "descriptive-prescriptive" couples are not synonymous, it would not be wrong – in Bobbio's view – to state, as Kelsen did, that legal science was at the same time *normative* and *descriptive*, normative in the sense that what it describes are not facts (*Is*) but norms (*Ought*) and descriptive in the sense that its aim is not to prescribe[51]. On the basis of this basic argument, Bobbio raised two questions. Firstly, the task of legal science. A critical reflection

49 It deserves to be reminded that the first attention paid to Scandinavian legal-philosophical culture traces back to the Italian legal scholar Luigi Bagolini in 1949. In his work he delt with the issue of values from the viewpoints of Lundstedt and Olivecrona. As previously mentioned, *Kritik der sogennanten* was Ross' first work to be known to the Italian audience through the critical review of Bobbio, earlier in 1937.

50 BOBBIO, N (1967). *Norberto Bobbio's participation at the round-table.* Conference, Pavia, 2nd May 1966, Pavia, p. 73.

51 BOBBIO, N (2012). "Essere e dover essere nella scienza giuridica (1967)", in: Id., *Studi per una Teoria Generale del Diritto*, Torino, pp. 121-124.

on the tasks of legal science – what Bobbio called ***metajurisprudence*** – would demonstrate through the descriptions of the methods actually practised by different legal scientists whether jurisprudence is either ***normative*** or ***descriptive***, to put it simply, whether legal science in fact prescribes what jurists ***ought to do*** or whether it describes what in fact they ***do***. The result was that jurisprudence, as well as metajurisprudence, fulfils its task within an historical context. Therefore the jurist as well as the legislator and the judge actively participate in the formation and transformation of a determined legal system. This implied, in Bobbio's view, that in order to answer the question concerning the real function of jurisprudence, it was necessary to go beyond the statements of legal sources (i.e. jurisprudence is excluded by the range of legal sources) and take the ***real*** sources of law into account. The main conclusion of this first question is thus that legal science exerts a crucial influence on the legal system.

The second question concerned what Kelsen actually meant by saying that the task of legal science was ***descriptive***. Should it to be understood – Bobbio wondered – in the sense that legal science describes or must describe? In a few words, did he want to show what ***happens*** in the everyday life of the jurist or what actually ***should happen*** in order to conform legal science to a scientific (or political) ideal he considers desirable? Bobbio's sharp response was that as one follows Kelsen, the task of legal science consists in describing the existing law. But this would mean that description is nothing but an ***aim*** to achieve. The question whether legal science in Kelsen's doctrine was descriptive or not might clearly enough be answered using a captivating formula of Bobbio: "***legal science prescribes to describe***"[52]. The vaunted ***Wertefrei***-inspired model of legal science is not a point of departure, but perhaps and most wishfully, a finish line.

The analysis conducted of the concept of "legal science" gives ground for asserting that legal positivism was undoubtedly in crisis. Legal science is not a neutral science, indeed it belongs to the legal sources. Moreover, in Bobbio's view, legal science may be considered normative as it refers to norms, but is aimed at fulfilling social tasks, namely qualifying behaviour as permitted, prohibited and obligatory by using methods of observation and revision of norms. The whole and long road which Bobbio lays through the new definition of "legal science" seems in retrospect to have its foremost reason in the social and political changes of the society at that time and in the growth of the social state and welfare. From a Kelsenian-inspired "pure" theory of law, Bobbio turned to an "impure" sociologically-oriented theory of law.

Nevertheless, Bobbio's discussions in his later works cannot be regarded as denials of Kelsen's structural analysis of law or of the organic conception of law where law as a whole is investigated by the systematical understanding of every single piece. The in-depth studies on logic deontology are further proof of the fact that the structural analysis of law was handed down to the new though narrow generation of Italian legal scholars[53]. Nor does Bobbio's discussion provide any denial of the tasks of legal theory and its independence from other fields of research. The view that the ***structure*** is the specific characterisation of law which differentiates it from other normative systems and that a legal norm can be considered to belong to a legal system if and only if it is issued according to the formal procedures regulated by a higher legal source are still the fundamental points of his theory[54]. Nor was it Bobbio's intention first and foremost to change legal dogmaticians' way of arguing.

52 *Ibid.,* pp. 127, 128.

53 A.G. Conte is widely considered to be the Italian leading figure in Deontic Logic. For a brief and not thorough presentation of Conte's works, compare to n. 78 of the the present work. Of works that take up the topic of Ross' pioneristic investigation on Deontic Logic before the world-known work of G.H. von Wright, *Deontic Logic* (1951), may be mentioned the contribution in which R. Guastini traced back the origin of an insightful discussion on the nature of the nomative propositions to Ross' *essay Imperatives and Logic,* published in Theoria in 1941 (p. 53-71). See, GUASTINI, R (1981). "Questioni di deontica in Ross. Con un'appendice bibliografica sulla fortuna di Ross in Italia", *Materiali per una storia della cultura giuridica*, 1, pp. 481-506.

54 BOBBIO, N (1992). "Struttura e funzione nella teoria del diritto di Kelsen", in: Id: Diritto e potere. Saggi su Kelsen. ed cit., pp. 79-81.

He wanted to spur legal science on the grounds that it might develop an interest in more "impure" norms. The theoretical questions of the structure of law recede into the background, that is to say that what legal scientists ought to engage in should not consist in an exclusive inquiry into the structural elements of law but also their *functions*. The protective and repressive-oriented theories of law nestled in the traditions of Austin and Jhering. Kelsen offered an oversimplified picture of what law is *in reality* and became too homely and inadequate to reflect the social and economic *reality* of the times. In other words, Bobbio opened legal theory to empirical sociology[55].

In what follows, I provide an overview of the multifarious features with regard to legal science that are relevant in the present discussion and that make it a conceptual representation of Bobbio's new standpoints possible: a) *the social task of legal science*: scientific reasoning and argumentation are situated in a social context; b) *Wertfreiheit is an ideal limit*; c) *the discretionary interpretation of legal science*: the interpretation of legal science means the attribution of meaning to norms and this depends on the intention of the jurist; c) *the object of legal science is intentional facts*: in interpreting, legal science has to track back to the legislator's intention and interpretation of legal material; d) *the legal system is a whole of ius conditum and ius condendum*; e) *the tasks of legal science are linked to the the language function and its effects on receivers*: the same doctrinal statement can produce different effects depending on the contexts, the speakers' and the receivers' attitudes; f) *the conclusions of legal science are not preacepta but consilia for legislators and judges*: the role of legal science is not authoritative as it is not imperative, but it holds substantional weight as it presupposes authoritativeness and deserves respect for its inherent reasonability[56].

6. NEW WAYS OF DEFINING LAW. A PREAMBLE

From the very end of the sixties, Bobbio considered it was necessary to fine tune the study of law to the changes of the contemporary society. As outlined above, his need to supplement the current definition of legal science with a conceptual model more directly aimed at linking sociology to political theory was an example suited to capturing these aspects. In his later analysis of fundamental legal concepts of "sanction", "legal norm", "primary and secundary norms", he carried out studies in the same spirit of the Anglo-Saxon and Scandinavian innovative inquiries and dealt with topics frequently treated in modern European legal philosophy. Was it the time to find new antidotes for removing new poisons and neutralizing unwanted effects?

It is a matter of dispute whether Ross' overall influence over Bobbio was actual and successful at that time. However, the importance within Bobbio's milieu of figures such as Hart and Ross should not be obscured and likewise the fact that these parallels should not obscure significant contrasts and partly distinctive doctrines. There are some areas in which there is a reason to have an awareness of the similiarities. In this last section I would like to provide a closer examination on two important legal issues where allusions to the differences and similiarities are an arguable claim.

Form the end of the sixties onwards, at a safe distance from Kelsen, Bobbio invested a lot of work in undertaking the aim of investigating the concepts of "norm" and of "primary norms and secundary norms". That he devoted himself to the study of legal norms and legal system over the years, has been discussed earlier. But at this point it might be helpful to higlight that his new inquiries undergo a profound mutation in so far as they conveyed the theoretical proposals of Hart and got a great foothold in Ross' perspective. More particularly, his new argumentation may be seen as directed against elements in a lot of classical liberalism from Hobbes, to Kant and Spencer and up to the legal positivism tradition of Thomasius, Austin, Jhering and

55 GUASTINI, R (1996). *Op. cit.,* p. 57.

56 BOBBIO, N (2012). "Essere e dover essere nella scienza giuridica", *Op. cit.*, pp. 140-148.

Kelsen. A number of the elements mentioned are found, inter alia in his inquiry into the concept "sanction". In the light of social and economic progress, any attempt to carry out the logical analysis as formal logical analysis of the concepts "norm" and "sanction" was utterly unsuitable and full of gaps. A new model had to be taken up and elaborated in compliance with the shift from a negative (liberal) conception of State to a more positive (post-liberal) one. It was not time to consider the legal system from a protective and repressive point of view. Law, therefore, is not only acting through "disincentives" (penalties, amends, reparations, fines, etc.) aimed at impeding socially undesirable acts[57]. The term "sanction", only denoting "negative sanctions" as measures of discouragement, should be supplied with the new meaning of "positive sanctions" as measures of encouragement. While the former are expressible through the formula "if you do A, then you *must do* B" or "If you do not want A, then you *must do* B", the latter are expressed, correspondingly, with the formula: "if you do A, then you *can do* B" or "if you want A, then you *must do* B". The latter are expedients for achieving a good action so the *premium* is a reply to a good action. Positive sanctions can cluster into *recompenses* and *facilities* depending on whether they are consecutive or preventive to a performed behaviour[58].

Therefore, in traditional literature the concept of "sanction" has been laid down in such a way as to only partly cover the denotation specification of the term, and this has led to an incomplete identification of criteria for properly distinguishing legal sanctions from other types of sanctions. This problem cannot be considered apart from that of the distinctive character of a legal norm. Neither the specific nature of the (negative) sanction as essential part in the structure of a legal norm, nor the specific content or the aim shape the very distinction between a norm and a legal norm. Bobbio acknowledges that in legal theory attempts were made to carry out the significance not only of the specific existence of a norm but also of its membership within a legal system as identification criterium. Kelsen's enterprise consisted in not abandoning the normative point of view in the passage from the study of single norms to the study of the legal system by considering the ways norms make up a system as a characteristic element of law[59]. In the wake of Kelsen who introduced the Nomo-dynamic theory as well as the Nomo-static theory, other authors such as Hart, Olivecrona and Ross claimed that it is the existence of a certain type of *legal system* and not a single norm which permits us to identify law and differentiates it from other normative phenomena.

The points outlined here touch the innermost nerve in the questions of the law as the union of primary and secondary norms and not less the one of the relationship between law and force. If a *legal norm* is not to be identified in terms of the form, or content or ends but as a part belonging to a whole of combined norms, and if the *legal system* is not to be understood as an organised body of coercive rules guaranteed by force, then a new reflection on the very content of the legal rules is unavoidable. The mutual interplay of the two issues raised here leaves enough room to discuss how the weight of the arguments of (Hart and) Ross had a significant impact on Bobbio's new perspective. Firstly, I shall emphasise the former question of the typology of legal norms outlined by Bobbio and explain the contrast and the compliance with the analyses by Hart and Ross. Secondly, I shall focus on the relationship between law and force.

7. ON PRIMARY RULES AND SECONDARY RULES

In his volume *Theory of legal norm* dated 1958, there is no account of differentiation between legal norms (rules) in terms of the more "post-Kelsen" primary and secondary rules. Bobbio adopted a formal approach on the study of legal norms and simply purported to show that norms are prescriptive propositions and as such they are irreducible to both descriptive and expressive propositions. More interestingly, he

57 BOBBIO, N (1977). *Dalla struttura alla funzione. Nuovi studi di teoria del diritto,* Milano, pp. 7-8.

58 *Ibid.,* pp. 19-21. To go into greater depth about the concept "sanction", see also, BOBBIO, N (1969). "Sanzione", in: *Novissimo Digesto,* Torino, XVI, pp. 533-536.

59 BOBBIO, N (1992). "Struttura e funzione nella teoria del diritto di Kelsen", in: Id., *Diritto e Potere,* ed. cit., p. 46.

claimed that the distinctive features of legal norms are the heteronomy and institutionalisation of the sanction that consists in its structural inner core[60].

Bobbio's interest in Hart's and Ross' theories is very terse in a later work where he gave a more precise accout of the categorisation criteria for the distinction between legal norms and other norms. Having gone through and classified legal norms in imperative positive, imperative negative, attributive and permissive norms, general, abstract, individual and concrete norms, and having rejected the imperative and the Kelsenian anti-imperative views on law, Bobbio, with Hart in mind (and Ross, indirectly) borrowed his language. He centred the discussion on the differentiation between the primary rules (norms of conduct) and the secondary rules. Nevertheless, this did not mean absolute dependance from Hart's view on these points.

Notoriously, in his masterpice *The Concept of Law*, Hart defined the secondary rules as power-conferring rules, whereas the primary rules are meant to be duty imposing rules[61]. Moreover, he enumerated three specific kinds of secondary rules: one of these is the rule of recognition which, in Hart's word: "*will specify some features or features possession of which by a suggested rule taken as conclusive affermative indication that it is a rule of the group to be supported by the social pressure it exerts*"[62]. In other words recognising the validity of a primary rule is therefore recognising that it had passed "*all the tests provided by the rule of recognition*",[63] given that the rule of recognition is the supreme criterion for assessing the validity of all norms and its own legal validity is not assessed by any other rule. Hart calls the other two rules rules of change and rules of adjudication[64]. The former empowers "*an individual or body of person to introduce new primary rules for the conduct of the life of the group, or of some class within it, and to eliminate old rules*"[65], whereas the latter empowers "*individuals to make authoritative determinations of the questions whether, on a particular occasion, a primary rule has been broken*"[66].

Unlike Hart, Bobbio clustered the secondary rules that he calls "rules governing rules or rules about rules" into two kinds: rules governing the production of rules and rules about the conservation of rules. The former are intended to establish the validity of all rules addressed to individuals and judges – and to which Hart's rule of recognition is in fact reduced inasmuch as it is useless – whilst the latter, being rules about the sanction and presupposing the rules governing the rules production, serves to render the rules once belonging to the legal system effective. The cause of Bobbio's being able to reduce Hart's triad is that also what he calls secondary rules, or rules about rules, are in fact rules of conduct in their own right for he considers the secondary rules as having recipients and an imperative content[67].

The issue of secondary rules is more extensively analysed later on in different terms. In 1968, after having gone through the various meanings of "primary" and "secondary" in the light of the traditional (Jhering), Kelsenian, and Hartian perspectives, Bobbio drew a new classification of secondary rules. In his opinion, their existence is justified by the fact that they refer to other rules. Thus he calls them "second degree rules". The new denomination serves to show the secondary character of these rules from both the functional and structural points of view and remove any misunderstanding regarding the usage of the term ("secondary" may also be attached to the evalutative meaning "of second importance"). This time such norms are diversified in

60 BOBBIO N (1958). *Teoria della Norma Giuridica,* Torino, pp. 71-99, 197-201.
61 HART, HLA (1994). *The Concept of Law*, Oxfor University Press, p. 89.
62 *Ibíd*., p. 94.
63 *Ibíd*., p. 103
64 *Ibíd*., pp. 91-99.
65 *Ibíd,* p. 95.
66 *Ibíd,* p. 96.
67 BOBBIO, N (1994). "Norma giuridica (1964)", in: *Contributi ad un dizionario giuridico,* Torino, especialy, pp. 230-232.

three classes: rules of identification, rules about the production, rules about the sanction.

It should be particularly emphasised that the rules of identification correspond only in part to Hartian's rule of recognition, although Bobbio thoroughly recognised his merit in having identified such a kind. Hart's rule of recognition can be neither valid nor invalid but it is simply accepted for the assessment of the legal validity of the primary norms and so it "exists" if it is followed in practice by Courts, officials and private persons. Bobbio knows three kinds of rules of recognition: rules about legal sources, rules establishing temporal and spacial limits of the issued norms and rules about the interpretation and application of rules. The difference may therefore be quite considerable as it lies, however, in the fact that the rules of recognition are not only plural in number but neither merely thought nor only socially accepted. They are posited by an authority through real acts of will[68]. Moreover, and more significantly, what secondary rules have in common is not their being power-conferring rules given that the rule of recognition does not confer any power, but their being rules about rules, second degree rules or, as Bobbio called them some years later, meta-rules[69].

Through the years, Bobbio's critique on Hart has taken other steps forward. The rule of changes have also been sifted through. Besides the fact that they are not present in all kinds of legal system as, for instance, the International law system, such rules are nothing but rules about legal production and as such they denotate a larger spectrum of functions: the creation, the modification and the extinction of legal rules[70]. Going more closely into the the function of the rules about the legal production, one discovers that they can be divided into: rules govering the procedure for the formation of rules; rules establishing spacial and temporal validity limits to rules; rules establishing a hierarchical order among the legal sources.

I have placed emphasis on the functional similiarity between the Hartian rule of recognition and Bobbio's rule about legal production because this contributes to determining the complete conceptual uselessness of the former. There is no need to duplicate a "basic rule" just because, all things considered, the rules about legal production are sufficient criteria for the identification of the legal rules within a legal system. In Bobbio's view the three kinds of secondary rules mutually interplay: they can be portrayed as successive rings of a chain of which the rules of conduct constitute the first ring[71].

This last passage is especially important as it does make, in an indirect way, a bridge with Ross. Firstly, in his last contributions on the present topic, Bobbio resorted more frequently to Hare with regard to the various types of discourse and the language function just as Ross had mantained years before in *Directives and Norms*[72]. Secondly, and more interestingly, he emphasised that it is of great importance that the only purely denotic operator is duty. As underlined above with regard to the relationship between primary and secondary rules, for Bobbio the rules of conduct play an important role in the whole of the law domain. Ross himself worked a great deal on developing the same conclusion. In *On Law and Justice*, Ross drew a distinction between the norms of conduct (duty-imposing rules) and the norms of competence (power-confering rules)[73] and distinguished them in norms conferring public or private power depending on the subject having the competence to issue other norms. Ross clearly defended a command-reductionist enterprise in so far as he stated: "*norms of competence are norms of conduct in indirect formulation*"[74]. He

68 BOBBIO, N (2012). "Norme primarie e norme secondarie (1968)", in: Id., *Studi per una teoria generale del diritto*, ed. cit., pp. 153-160.

69 BOBBIO N (2012). "Norme secondarie (1975)", in: Id., *Studi per una Teoria Generale del Diritto,* ed. cit., pp. 233, 234. Id., "Norma", in: Id., *Studi per una Teoria Generale del Diritto*, ed. cit., p. 204.

70 *Ibid*., pp. 238, 239.

71 *Ibid*., p. 241, 242.

72 More in detail, Ross had referred to R.M. Hare's work *The Language of Morals,* London, 1952.

73 ROSS, A (1958). *Op. cit.*, p. 32.

74 *Ibid*., p. 50.

claimed that even permissions are to be conceived as negations of duty[75]. This point was not overlooked by Ross in his later work *Directives and Norms* where he gave a more adequate picture of the significance of such a reduction admitting that "*any norms of comptence can be transcribed as a norm of conduct, whereas the converse does not hold*"[76].

In the places mentioned, both Bobbio and Ross take their points of departure in respectively Hare's inquiry on language functions and in a sort of persistent "pursuit of unity". Bobbio's perspective aroused much attention and was examined in depth with different outcomes by other Italian scholars such as Carcaterra, Conte, Azzoni, Mazzarese and Guastini[77]. Also Ross' study of such norms excercised a significant influence upon Norwegian and Danish authors such as Eckoff, Sundby, Lauridsen and Jensen[78].

8. ON LAW AND FORCE

If one looks at the discussion about the relationship between primary and secondary rules and the transcribability of norms of competence into norms of conduct as one of Ross' similarities with Bobbio, the same may be said with regard to the relation between law and force. This topic played a correspondingly greater role, that is to say that Ross' and, more expressly, Olivecrona's early theory according to which force is not a means for the realisation of law but the content of law itself, left its mark on Bobbio's thought. In what follows I shall take a closer look at the fact that if on the one hand the new view that law itself is an organisation of force has adherence in Bobbio, on the other hand Bobbio's reading of Ross' texts appeared so compelling as to lead to a possible misunderstanding which there was particolar reason to warn against.

A recurring question in philosophy of law since Jhering and Austin is whether law is definable in terms of an organised body of coercive rules and so composed of rules guaranteed by force. According to these authors and their followers, force is laid down as a means for the realisation of law. Against this view, many sought to advance an incompatibility for the reasons that there is, in relation to the very concept of law, *no room* for force (counterargument a): the general spontaneous observance of the rules); there is *little room* for force (counterargument b): the existence of rules devoid of sanctions in every legal system); there is *no room at all* for force at the summit of the the legal system (counterargument c): the impossibility of an infinite regression). On the basis of such assumptions which can be regarded as expressions of three different orientations although sharing the common view of removing coercion as an essential feature of the concept of law, Bobbio argued for the existence of coercion as *content* of legal rules.

As to the counterarguments, he objected as follows. Firstly, to a) that the spontaneous observance of the rules would be a valid argument only if the obedience were in fact general and constant. Secondly, to

75 *Ibid*., p. 164.

76 *Ibid*., p. 130. In relation to the question of the two classes of norms (directives) and to the different interpretations of Ross' concept of law within Italian literature, see the significant contribution of GUASTINI, R (1976). "Ross e i suoi interpreti italiani", *Rivista trimestrale di dDritto e procedura civile,* pp. 1065-1077.

77 Compare CARCATERRA, G (1974). *Le norme costitutive,* Milano; CONTE, AG *(ex multis)* (1985). "Materiali per una tipologie delle regole", in: *Materiali per una storia della cultura giuridica*, p. 345 et seq; CONTE, AG (1982). "Costitutività di regole", in: *Digesto delle discipline privatistiche Sezione Civile*,vol. IV, Torino, p. 42 et seq; CONTE, AG (1995). "Performativo vs. Normativo", in: Id., *Filosofia del linguaggio normativo*, II, Torino, p. 591 et seq; AZZONI, G (1988). *Il concetto di condizione nella tipologia delle regole,* Padova; GUASTINI, R *(ex multis)* (1996). "Norme supreme", in: COMANDUCCI, P & GUASTINI, R (1996). *Struttura e dinamica dei sistemi giuridici,* Torino, pp. 243-258; GUASTINI, R (1995). "In tema di norme sulla produzione giuridica", in: COMANDUCCI, P & GUASTINI, R (1995). *Analisi e Diritto* 1995. *Ricerche di giurisprudenza analitica,* Torino, p p. 303-313; GUASTINO, R (1995). "Norma giruidica (tipi e classificazione)", in: *Digesto delle discipline civilistiche,* vol. XII, Torino, pp. 1-16; MAZZARESE, T (1989). *Logica deontica e linguaggio giuridico,* Padova; MAZZARESE, T (1999). "Towards the "semantic" of constitutive rules in judicial reasoning", *Ratio Juris,* 12, 1999, pp. 252-262.

78 Compare ECKHOFF, T (1980). *Rettskildelære,* 3rd edition, Oslo; SUNDBY, NK (1972). *Om normer*, Oslo; ECKHOTT, T & SUNDBY, NK (1976). *Rettssystemer,* Oslo; LAURIDSEN, PS (1978). "Om jus og normer", in: *Tidsskrift for Rettsvitenskap,* p. 123 et seq; JENSEN, SG (1983). *Hvad er retfærdighed?*, Copenhagen, pp. 21-28.

b) that from an advanced account of the legal system in its entirety one cannot ignore the existence of the secondary rules addressed to officials (judges and executive agencies) and directly or indirectly regulating the exercise of force. This question must clearly be linked to the one outlined before on the relation between primary and secondary rules and on the view shared with Ross that the former can be transcribed as rules of conduct. And finally, to c) that the infinite regression is avoided if and only if one considers the rules at the summit of a legal system as the legal rules *par excellence* in the sense that by being power-conferring rules, they do attribute coercive power[79]. In sum: law is a whole set of rules regulating the exercise of force (or rather, rules *about* force) and fulfilling the functions of determining, in relation to force, the conditions, the persons, the procedure and the quantum[80].

In the account outlined here, Bobbio placed greater weight on the contributions of Kelsen, Olivecrona and Ross seen together as the pioneers of a "new theory". To put it more precisely, he took his departure point in some fragmented parts of Kelsen's theory of the relation between law and force. In particular, he resorted to some sentences contained in *Allgemeine Staatslehre* (1925) and in the *General Theory of Law and State* (1945). And in so doing, he emphasised the heritage and the influence of such an embryonic theory upon contemporary authors such as Olivecrona and Ross. In Bobbio's view, the common aspects concerning the idea of the legal system as a coercive order and thus characterised by rules for the exercise of force could be found in *Law as Fact* where Olivecrona claimed that "*law consists chiefly of rules about force*" and *On Law and Justice* where Ross stated that "*a national law system is the rules for the establishment and functioninig of the state machinery of force*" [81]. In other words, for Bobbio Olivecrona first, and Ross afterwards, took up Kelsen's theory. The decisive point at issue was the dispute of the paternity of such a theory. It represented the crux of the matter.

Very resentfully, in a short and sharp article, Olivecrona claimed a false paternity against Kelsen, accusing Bobbio of misinterpreting the origins of this thought. In no place in the books quoted by Bobbio there was overwhelming evidence that the new theory could be entirerly ascribed to Kelsen. In truth, the mistake was perpetrated by Alfonso Catania, another Italian scholar misled by the reading of Bobbio's contribution[82]. Unlike Bobbio, who did not quote any statements from the *Allgemeine Staatslehere*, Catania had sought a brief passage of the "new theory" in *Reine Rechtslehre* (1934, 2nd edition 1960) where he claimed *en passant* that: "*Es (das Recht)…eine bestimte Ordnung (oder Organisation) der Macht*"[83]. Indeed, a statement is distinct from a formulated theory therefore, for Olivecrona, the place pointed out by Catania could not offer any clear demonstration of Kelsen's paternity. To the extent that the literature of Kelsen is determinable, indeed there was a more specific reference in a passage of *General Therory of Law and State* where he expressively stated that law and force should not be conceived as absolutely at variance with one another as law is an organisation of force. Of this place mentioned, there was no trace within Bobbio' s discussion. Chronologically, a tangible source of the account of law and force was propounded at some length by Olivecrona himself in his *Law as Fact* [84].

There may be reason to emphasise that this topic would have made Olivecrona's name most widely known and that the quotations from Bobbio illustrate how even the most acute minds can fail to

79 BOBBIO, N (1965-1966). "Law and force", *The Monist*, XII (1966), XLIX, 1965, especially, pp. 321-341, pp. 332-334. Compare the Italian version "Diritto e forza", *Rivista di Diritto Civile*, pp. 537-548.

80 *Ibíd.,* p. 330.

81 OLIVECRONA, K (1959). *Law as Fact, London*, p. 134; ROSS A (1958). Op. cit., p. 34.

82 CATANIA, A (1974). "Il diritto come organizzazione della forza", *Rivista internazionale di Filosofia del Diritto,* pp. 371-397, especially, pp. 373-375.

83 OLIVECRONA, K (1976). "On the problem of law and force in recent literature", *Rivista Internazionale di Filosofia del Diritto,* p. 550.

84 *Ibíd*., p. 552.

ascribe the right theory to the right author. Or it may be the case that, as Olivecrona claimed, the origins of the Italian misunderstandings depended in good part upon a tricky footnote of Ross' *Om Law and Justice* (1958). In his famous work Ross, in insisting on the relationship between legal norms and force, had concluded that legal norms are not norms as they are upheld by the means of force but they are such as they do concern the application of force. In the corresponding author's footnote he acknowledged his debt to Kelsen for the insight contained in *Allgemeine Staatslehere* (1925) and reminded the reader that the same view was held by Olivecrona later on in *Law as Fact* [85]. Indeed, these two references coincided with those contained in Bobbio's *Law and force*.

Did Ross restort to a trick in order to cast a shadow over Olivecrona's paternity or was his footnote founded on a profound misperception of the root of the new theory? The struggle in which the Swede attempted to acquire his sole right to paternity, did not end then, but had further developments as demonstrated in a private letter the 80 year-old Olivecrona sent to Ross in 1977[86].

The question is whether and if so to what extent, Ross engaged himself in a conscious misconstruction. This question, of course, cannot be answered. However, even if a possible misinterpretation was in Ross' mind, the same cannot be said of Bobbio who briefly replied to Olivecrona and admitted to have learned from Ross about Kelsen's account on law and force contained in *Allgemeine Staatslehre*. Moreover, he insisted in claming that the presupposed connection mentioned had been extensively advanced by Kelsen in that work and formed its own backbone[87]. This was his versions of the events.

CONCLUDING REMARKS

The quarrel about the paternity may help to explaining, or facilitating a further understanding of how Ross' standpoints had won great support in Bobbio. On closer examination it seems likely that his theoretical formulation on the relation between law and force was likewise built on the pattern of Ross.

It is also the case that, although it is not possible to draw any boundary in principle betwen the legacies he received from the two authors, Bobbio unconsciously exploited and thus more easily engaged in the possibility of connection between Kelsen and Ross in solving particular problems in the philosophy of law. Let it be clear, as I pointed out earlier that Bobbio's criticism on Kelsen's main theses was not as strong as that of Ross. Their critical discussion on the different meanings of legal positivism of which I gave an account earlier ought to suffice. Conversely, Bobbio's perspective which partly looks past the psychological aspects of legal norms and within the role of legal science, demonstrates a perspective diversity.

Nevertheless, the absence of certain univocal connections between the two scholars is not a hindrance in finding uniform convergences. Most of Bobbio's continuous challenges to Kelsen's theory of law provide evidence for a thread of not pure and simple interplay with Ross. First, the sharing of the basic tenets of analytical philosophy and logical empiricism which undermined the Kelsenian version of legal positivism portrays more than a nuanced connection between the two figures and for which I believe many good grounds can be given. Secondly, the more specific areas of law as a whole set of interconnected legal norms is not purely interplay either. I have focused in the present work on the particular need to illuminate within this frame the relationship between primary and secondary rules

85 *Ibíd*., p. 551; Compare ROSS, A (1958). *Op. cit.* p. 53; Id., *Diritto e Giustizia* (1965). *Op. cit.*, p. 52, n. 1; Id., *Om Ret og Retærdighed* (1953), *Op. cit.*, p. 100, n. 27. In this passage, Ross referred to the Swedish version *Om lagen och staten* (1949), p.125 et seq.

86 Compare EVALD, J (2014). *Alf Ross- et liv,* København, especially, pp. 232-233; Id., *Alf Ross – a life,* København, pp. 228, 229.

87 BOBBIO, N (1977). "Ancora su diritto e forza. Replica al prof. Olivecrona", *Rivista Internazionale di Filosofia del Diritto,* pp. 414-416.

and finally, the relation between law and force. The latter inquiry has meant giving further answers to the questions of what more than nuanced connections might exist between the fundamental legal philosophical positions of Ross and Bobbio.

Lastly, one may consider Ross (and the contemporary European trends in the philosophy of law) to be fit to serve for Bobbio as new antidotes for removing the old poisons of Kelsenian unsuitableness, the same need of healing he had experienced years before when by means of the combined analytical philosophy/logical empiricism and Kelsenism he was able to nurse Italian legal philosophy back to health[88].

88 In connection with the present work I should finally remind the reader that the topics here have been investigated through the study of the most significant works with which the two authors have promoted their own views over the years.

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ARTÍCULOS

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CESA-FCES-UNIVERSIDAD DEL ZULIA. MARACAIBO-VENEZUELA.

Un aporte de Alf Ross a la estrategia de la Dóctrina Jurídica. (Hacia una mejor estrategia de la Verificación)

A contribution of Alf Ross to the Strategy of Legal Doctrine (Towards a Better Strategy of Verification)

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Resumen

Dentro de la consideración atribuida a la verificación por Alf Ross y por el integrativismo tridimensionalista trialista se atiende en especial a la importancia que le corresponde en la estrategia jurídica en la doctrina y el pensamiento jurídico en general. Se desarrollan las perspectivas de la estrategia en sí misma y de las dimensiones de realidad social, normas y valores con las que el trialismo construye el objeto jurídico. En ese marco la verificación resulta, sobre todo, un instrumento para desenmascarar los intereses, las fuerzas, los autores, los recipiendarios, las normas y los sentidos de valor presentes en los casos.

Palabras clave: Ross; trialismo; verificación; estrategia.

Abstract

Taking into account the consideration attributed to the verification by Alf Ross and by the three-dimensional trialist integrativism, we address particularly to the importance of legal strategy in doctrine and legal thinking in general. This paper develops the perspectives of strategy in itself and in the dimensions of social reality, norms and values with which trialism constructs its the legal object. In this context verification is, above all, an instrument to unmask the interests, forces, authors, recipients, norms and senses of value, present in each case.

Key-words: Ross; trialism; verification; strategy.

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I. IDEAS BÁSICAS

a) La necesidad de la Estrategia Jurídica

1. Una de las necesidades impostergables del Derecho de nuestro tiempo es la recuperación y el desarrollo de las perspectivas de ***Estrategia Jurídica***, que han ido quedando marginadas.

El despliegue ***estratégico***, de ordenación de medios al logro de fines, es inherente, de manera más o menos consciente, a la vida misma[1]. El desarrollo de la estrategia requiere el uso de ***tácticas***, el empleo de medios adecuados. A semejanza de Monsieur Jourdain, que hablaba en prosa sin saberlo[2], de modo inevitable, aunque sea con más o menos conciencia, vivimos "estratégicamente". Lo mismo acontece con los juristas. Vivir jurídicamente es en alguna medida vivir estratégicamente.

Importa conceptuar a la ***estrategia jurídica*** como la ordenación de los medios para lograr el objetivo general de Derecho perseguido y a la ***táctica jurídica*** como el empleo de los medios específicos adecuados para el cumplimiento de esa estrategia[3].

En este caso nos referimos de modo principal al relevante aporte a la Estrategia Jurídica que efectúa la exigencia de ***verificación*** [4], de cierto modo común al tridimensionalismo integrativista de la teoría trialista del mundo jurídico fundado por Werner Goldschmidt y el a veces denominado "positivismo realista" de Alf Ross.

Si bien las posibilidades de relación entre ambas orientaciones son diversas [5] y sin desconocer ciertas diferencias terminológicas atenderemos de manera principal a la exigencia de las dos en el sentido de que la ***doctrina*** y en general el ***"pensamiento" del Derecho***[6] sean sometidos a ***verificación*** e incluso de contar con una ***estrategia*** al respecto. Mediante la verificación la doctrina y el pensamiento del Derecho en general pueden "autocorregirse" y aportar a la "corrección" del Derecho.

Las perspectivas estratégicas jurídicas se satisfacen mejor en el curso de las posibilidades que a la verificación doctrinaria y del pensamiento del Derecho en general abren el trialismo y el "positivismo realista" "rossano".

1 Un clásico de la Estrategia es Sun Tzu, "El Arte de la Guerra", https://play.google.com/books/reader?id=xlkEDXKpQw8C&printsec=frontcover&output=reader&hl=es, 31-5-2015; cabe c. además The Clausewitz Homepage, http://www.clausewitz.com/, 20-6-2015.

2 MOLIÈRE, V (2014). "El burgués gentilhombre", adaptación Taller de Teatro "Ruth Niklison", "Entonces hace más de cuarenta años que hablo en prosa sin saberlo;" (http://www.danielcinelli.com.ar/archivos/Obras/Tercer_nivel/Comedia_del_arte/Obras/Moliere/El_burgues_gentilhombre.pdf, 27-10-2014).

3 En cuanto a la Estrategia Jurídica se puede ampliar por ej. en nuestros trabajos *Estrategia Jurídica,* Rosario, UNR Editora, 2011, CARTAPACIO (2014). http://www.cartapacio.edu.ar/ojs/index.php/mundojuridico/article/viewFile/1372/1575, 27-10-2014; "Acerca de la estrategia jurídica", *La Ley,* 16 de mayo de 2014 (Cita on line: AR/DOC/1215/2014). El número 46 de *Investigación y Docencia* es un monográfico sobre Estrategia Jurídica, Centro de Investigaciones de Filosofía Jurídica y Filosofía Social, http://www.centrodefilosofia.org.ar/, 10-9-2014.

4 Es posible vid., REAL ACADEMIA ESPAÑOLA, *Diccionario de la Lengua Española,* verificar, http://lema.rae.es/drae/?val=verificar, 14-6-2015; FERRATER MORA, J (1974). *Diccionario de Filosofía,* nueva ed. revisada, aumentada y actualizado por el profesor Joseph-Maria TERRICABRAS, Barcelona, Ariel, IV, verificación, p. 3676 y ss. También cabe referirse a la confirmación, otra relación, a veces tensa, se produce con la llamada *falsabilidad.* Cabe c. asimismo LePore, E (1997). "Principle of verifiability", in: AUDI, R (Ed.) (1997). T*he Cambridge Dictionary of Philosopy,* Cambridge University Press, 2ª. reimp., p. 646; por otra parte, "verificationism", p. 834. Vid., asimismo ROSS, A (1963). "Sobre el Derecho", Trad. doctor Genaro R. Carrió, Bs. As., Eudeba, p. 38 y ss., es posible c. parte de la obra en http://www.uv.es/mariaj/textos/ross.pdf, 16-4-2015; "El concepto de la validez y el conflicto entre el positivismo jurídico y el derecho natural", Trad. Genaro R. Carrió y Osvaldo Paschero, *Revista Jurídica de Buenos Aires,* IV, p. 47 y ss., reedición en "Academia", año 6, 12, p 199 y ss.,http://www.derecho.uba.ar/publicaciones/rev_academia/revistas/12/el-concepto-de-la-validez-y-el-conflicto-entre-el-positivismo-juridico-y-el-derecho-natural.pdf, 14-4-2015; *Hacia una ciencia realista del Derecho*. Crítica del dualismo en el Derecho, trad. Dr. Julio Barboza, reimpresión, Bs. As., Abeledo-Perrot, 1997.

5 Es posible *ampliar* en nuestro artículo "Alf Ross y la apertura del Derecho a la Política", in: *Alf Ross. Estudios en su homenaje, Revista de Ciencias Sociales,* Facultad de Ciencias Jurídicas, Económicas y Sociales, Universidad de Valparaíso, 25, II, p.489 y ss. En general pueden c. los "Estudios…", recién mencionados (Dialnet, http://dialnet.unirioja.es/servlet/libro?codigo=6836, 11-6-2015).

6 Incluyendo la "conciencia" popular y el "saber vulgar" acerca del Derecho.

2. La Estrategia reclama siempre conocer la *situación*, concretando posibilidades de verificación e incluyendo un sentido dinámico. Hay que tener en cuenta las *fortalezas*, las *oportunidades*, las *debilidades* y las *amenazas*[7]. Las fortalezas y las debilidades son propias, las oportunidades y las amenazas provienen del medio. Estudiar Derecho conduce a una fortaleza; la posibilidad del ejercicio de la magistratura, la profesión, la administración, la investigación y la docencia es un marco de oportunidades; las deficiencias en los conocimientos constituyen debilidades; la presencia de competidores, sobre todo en las medidas en que son fuertes y desleales, es una amenaza.

3. Es relevante la mejor relación posible verificable entre *costos* y *beneficios*. Hay verificaciones de alto costo, como las que requieren estudios de campo muy complejos. Importa relacionar esos costos con los beneficios que han de obtenerse de la verificación. Algunos beneficios pueden ser muy altos, por ejemplo, si se hacen estudios correctos sobre la contratación, la propiedad, las familias, las cárceles, la mentalidad judicial, etc.

4. La Estrategia requiere la confluencia de aptitudes *teórico-prácticas* y *creatividad* y éstas se concretan de manera considerable en la verificación. A veces se dice que es necesario contar con "insight" (chispazos que conducen a la mayor calidad de la estrategia y su resultado). Es a menudo posible formar un gran general, pero es muy difícil formar un Napoleón; es con frecuencia posible formar un muy buen hombre de Derecho, pero es muy difícil formar un Cicerón o un Savigny. Napoleón, Cicerón y Savigny pueden ver y resolver lo que otros no pueden.

5. En lo *personal*, la Estrategia doctrinaria y del pensamiento jurídico en general necesita *excelencia propia*, expansivo *relacionamiento* con los demás y *enfrentamiento* con los opositores, de cierta manera análogo a la guerra. La capacitación es una manera de la excelencia propia, la asociación es una vía de relacionamiento con los demás y la competencia un camino de enfrentamiento. Para concretar estas tácticas ha de mediar la verificación.

6. Existen posiciones estratégicas relativamente *espaciales* de *vanguardia*, de *flancos* y de *retaguardia*, referidas a los puestos adelantados, de costado o traseros, y otras orientadas al *centro*[8] o *laterales*[9] de las líneas consideradas. Puede ser necesario considerar *vías de avance y retirada*. También en el Derecho ninguna de ellas puede funcionar debidamente si no se atiende a la verificación. Una acción meramente declarativa puede ser una verificación de vanguardia; el logro de un crédito para sustentar la verificación es un apoyo en el flanco y la constatación del estado patrimonial del "apremiado" es una verificación de retaguardia. Cuestionar el crédito de un adversario es un choque en el flanco. El conflicto en el todo, v. gr. en cuanto a la existencia de un crédito, se plantea en el centro, el choque en relación con los intereses es lateral.

7. En ciertos casos se "queman los buques" a retaguardia quebrando las relaciones *personales* y el caso, v. gr. en afirmaciones de la demanda. Existen tácticas doctrinarias y de pensamiento en general relativamente *espaciales* y *dinámicas* que son *frontales* o de *guerrilla*. Las afirmaciones en la demanda y la contestación suelen ser tácticas frontales. Tal vez la negación en la absolución de posiciones sea una táctica de guerrilla[10]. Nada de esto se puede apreciar y realizar de manera correcta si no media la verificación.

8. En relación con el *tiempo*, existen tácticas de *prevención*, *precaución*[11], *corrección* y *reparación*. También la *sorpresa* es una táctica temporal importante. Existen además tácticas temporales

7 Se puede vid., por ej. Matriz Foda, http://www.matrizfoda.com/, 27-6-2015.

8 Quizás quepa decir el núcleo.

9 De cierto modo, costado.

10 La promoción de incidentes infundados es a menudo expresión de guerrilla. En este sentido suele ubicarse la chicana.

11 Se dice a menudo que en la precaución hay un riesgo y un daño dudosos y en la prevención el riesgo es cierto y el daño dudoso.

y dinámicas, de *aceleración* y *retraso*. La actual es en gran medida una sociedad del *riesgo*[12] y en ella la prevención, la precaución, la corrección y la reparación son especialmente significativas. Estudiar el Derecho es táctica de prevención; cuidar la redacción de un contrato es táctica de precaución. La renegociación puede ser táctica de corrección; el requerimiento de indemnización es táctica de reparación. El embargo preventivo y los incidentes pueden ser vías para la sorpresa. Mucho de esto depende de la verificación.

9. En vinculación con la *materia*, toda estrategia requiere atender a cuestiones *principales* y de *apoyo logístico* mejor desenvueltas cuando se logra la verificación. La verificación normosociológica para un pleito puede ser una estrategia "principal" respecto a la información para un crédito para sustentarlo que, en cambio, atiende a un problema logístico.

Asimismo hay posibilidades de comprender las tácticas como *defensivas*, que consolidan la propia posición (v. gr. la respuesta a la demanda, la "autodemanda", etc.) y *ofensivas* (la demanda, la obtención del beneficio de pobreza, etc.)[13]. El aseguramiento y la producción de pruebas pueden ser ofensivos y defensivos. Desplegar estas tácticas depende de la verificación.

10. Los desarrollos estratégicos pueden ser mejor comprendidos en su caracterización *compleja* en todos los aspectos referidos, v. gr. un reclamo extrajudicial puede presentar características de enfrentamiento, de vanguardia, de choque frontal en cuestión principal, de precaución, etc. También todos estos despliegues se consideran mejor por los caminos de la verificación. El *proceso* en general es en gran medida un complejo estratégico de verificación.

b) El integrativismo tridimensionalista trialista, el "positivismo" "rossano" y la verificación de la doctrina y el pensamiento jurídico en general

11. La *construcción* de un *modelo jurídico* es en sí una estrategia de gran importancia, también en cuanto a la verificación. Creemos que uno de los marcos mejores para el desarrollo de la Estrategia Jurídica es el que proporciona el *integrativismo tridimensionalista* de la *teoría trialista del mundo jurídico*. Dentro del tridimensionalismo, que incluye realidad social, normas y valores, la *teoría trialista del mundo jurídico* considera que los despliegues *comunes* a todo el Derecho son *repartos* de potencia e impotencia (es decir, de lo que favorece o perjudica a la vida humana, *dimensión sociológica*), captados por *normas* (*dimensión normológica*) y valorados, los repartos y las normas, por un complejo de valores que culmina en la *justicia* (dimensión axiológica, específicamente *dikelógica*[14])[15]. Con un sentido más dinámico, se hace referencia a la actividad vinculada al aprovechamiento de las *oportunidades* para realizar repartos captados por normas y valorados por un complejo de valores que culmina en la justicia.

El mundo jurídico, que es construido con un despliegue *común* tridimensional socio-normo-dikelógico, se *diversifica* en lo material, espacial, temporal y personal. Las diferencias en lo material constituyen ramas jurídicas.

12 Es posible v. por ej. BECK, U (1998). *La sociedad del riesgo*. Trad. Jorge Navarro y otros, Barcelona, Paidós, http://books.google.com.ar/books?id=V6t6JJCs5twC&printsec=frontcover&hl=es#v=onepage&q&f=false, 27-10-2014.

13 Suelen recomendarse el buscar el punto más débil del oponente, aprovechar su peso que le dificulte movilidad, etc.

14 *Diké* era una de las divinidades griegas de la justicia.

15 Acerca de la teoría trialista del mundo jurídico cabe c. v. gr. GOLDSCHMIDT, W (1987). *Introducción filosófica al Derecho*, 6ª. ed., 5ª. reimp., Bs. As., Depalma; *La ciencia de la justicia* (Dikelogía), Madrid, Aguilar, 1958 (2ª ed., Buenos Aires, Depalma, 1986); *Justicia y verdad,* Buenos Aires, La Ley, 1978; CIURO CALDANI, MA (1976). *Derecho y política,* Buenos Aires, Depalma; *Estudios de Filosofía Jurídica y Filosofía Política,* Rosario, Fundación para las Investigaciones Jurídicas, 1982/4; *La conjetura del funcionamiento de las normas jurídicas. Metodología Jurídica,* Rosario, Fundación para las Investigaciones Jurídicas, 2000, Facultad de Derecho Unicen, Portal Cartapacio de Publicaciones Jurídicas, http://www.cartapacio.edu.ar/ojs/index.php/mundojuridico/article/viewFile/961/794, 29-6-2015; Centro de Investigaciones de Filosofía Jurídica y Filosofía Social, http://www.centrodefilosofia.org.ar/, 27-10-2015; CARTAPACIO (2015). http://www.cartapacio.edu.ar/, 27-6-2015; Libros de Integrativismo Trialista, http://www.cartapacio.edu.ar/ojs/index.php/mundojuridico/index, 27-6-2015.

Todos estos enfoques son caminos para la verificación.

12. En nuestra construcción el Derecho es considerado una rama del *mundo político* caracterizada por los requerimientos de justicia, específicamente como *política jurídica*. En su tridimensionalidad integrada, la teoría trialista del mundo político abarca actos de coexistencia (*dimensión sociológica*) captados por normas (*dimensión normológica*) y valorados por un complejo de valores de convivencia (*dimensión axiológica*). La convivencia es la coexistencia valiosa. Con un sentido más dinámico, se hace referencia a la actividad vinculada al aprovechamiento de las *oportunidades* para realizar actos de coexistencia captados por normas y valorados por el complejo de valores de convivencia.

Todas las manifestaciones del mundo político son tridimensionales, pero hay *especificidades* en la materia, el espacio, el tiempo y las personas y entre las particularidades materiales, ramas del mundo político, se encuentra la política jurídica (el Derecho).

Los despliegues de las teorías trialistas del mundo jurídico y el mundo político brindan perspectivas de verificación de gran importancia en la estrategia doctrinaria y del pensamiento en general.

13. El trialismo propone una *complejidad pura* que aprovecha la *simplificación pura* promovida por Hans Kelsen refiriéndola a la integración de realidad social, normas y valores. En la versión que sostenemos[16] los valores están *"desmetafisicados"*, los referimos a *construcciones* tomadas como base.

En el trialismo son muchas las posibilidades de *diálogo* que integran *jurídicamente* los resultados de las ciencias y las consideraciones de valor excluidas por Kelsen[17]. Se trata de una línea de pensamiento que pretende superar la hoy insatisfactoria limitación kelseniana y es franca mayoría en la teoría de nuestro tiempo. También son relevantes las posibilidades de diálogo con otras construcciones del objeto jurídico, sean de carácter positivista, jusnaturalista, críticas, de análisis económico, etc.

En nuestro caso, nos referimos al diálogo del trialismo con el *"positivismo realista"*, denominado a menudo *realismo jurídico*, de Alf Ross[18]. Si bien las posibilidades de relación son diversas e importantes[19], atenderemos de manera principal a la exigencia de ambas orientaciones de que la *doctrina* e incluso el resto del pensamiento jurídico sean sometidos a *verificación*[20]. El requerimiento de verificación es al propio tiempo trialista y realista[21], aunque cabe advertir que el trialismo no da a la verificación el significado

16 En partes diversa de la del fundador del trialismo, Werner Goldschmidt.

17 Es posible v., por ej., DABOVE, MI (2015). "El Derecho como complejidad de "saberes" diversos", CARTAPACIO (2015). http://www.cartapacio.edu.ar/ojs/index.php/ctp/article/viewFile/29/17, 18-6-2015.

18 Dada la importancia que Ross atribuye a las normas se suele considerar que su pensamiento es bidimensional y se cuestiona a veces su carácter de realista (LÓPEZ HERNÁNDEZ, J (2005). *Introducción histórica a la filosofía del derecho contemporánea,* 1ª. ed., 1ª. reimp., Murcia, Universidad de Murcia ("Alf Ross: La concepción analítica del Derecho"), págs. 107 y ss. , https://books.google.com.ar/books?id=KqyXsutPGW4C&pg=PA107&lpg=PA107&dq=Hacia+una+jurisprudencia+realista+Ross&source=bl&ots=bA-WphhTuz&sig=ecBZOYc-wpoYqkbTG1ie1uL8p_U&hl=es-419&sa=X&ei=AdsuVYCaKtDgsASd6IHADQ&ved=0CBMQ6AEwAA#v=onepage&q=Hacia%20una%20jurisprudencia%20realista%20Ross&f=false, 15-4-2015). "Si por "realismo jurídico" se entiende una teoría para la cual el derecho no consiste en normas, sino en algún tipo de hechos (como, por ejemplo, conductas de los jueces y otros funcionarios), entonces Alf Ross ciertamente no es un realista.", BULYGIN, E (1981). "Alf Ross y el realismo escandinavo", *Anuario de Filosofía Jurídica y Social*, 1, p. 75 y ss., http://eva.universidad.edu.uy/pluginfile.php/415060/mod_resource/content/1/Alf%20Ross%20y%20el%20Realismo%20Escandinavo.pdf, 19-6-2015).

19 Es posible *ampliar* en nuestro artículo "Alf Ross y la apertura …" *Op. cit.* En general pueden c. los "Estudios …" *Revista de Ciencias Sociales, mencionada.*

20 La verificación es una necesidad asumida en muchas áreas, en la ciencia, la técnica y la existencia en general. Es posible v. FERRATER MORA, J & TERRICABRAS, JM (1994). *Op. cit.*, Suele decirse que la verificabilidad es casi tan valiosa como la verificación porque ésta es mucho más frecuente y significativa. Una problemática relativamente afín, que muchas veces tiende a superar los obstáculos de la verificación, es la de la confirmación (se puede v. por ej. FERRATER MORA, J & TERRICABRAS, JM (1994). *Op. cit.*, t.I, p. 645 y ss. Además se emplea la expresión corroboración. Otra relación, a veces tensa, se produce con la llamada *falsabilidad* (FERRATER MORA, J & TERRICABRAS, JM (1994). *Op. cit.*, t.II, p. 1213 y ss.).

21 Cabe *ampliar* en nuestros artículos: "La justice et la vérité dans le monde juridique" (versión francesa en colaboración), *Archiv für Rechts- und Sozialphilosophie*, LXIX, fasc. 4, p. 446 y ss; "La doctrina jurídica en la postmodernidad", *Jurisprudencia Argentina*, 1999-III, p. 938 y ss. Hoy

fuerte y excluyente que suele asignársele en el positivismo. Con diversas terminologías e incluso con distintas acepciones en la propuesta de Ross, la verificación de la doctrina y el pensamiento en general interesan a las dos orientaciones. En el trialismo todo el pensamiento jurídico es relevante.

14. Dejando de lado las diversidades entre la "verdad" más objetiva y natural que presenta Werner Goldschmidt y el sentido de *construcción* que proponemos, la verificación es un requerimiento del trialismo, de gran relieve en la relación normosociológica, pero en nuestro caso atenderemos de modo destacado a su exigencia en la *doctrina*[22] e incluso el resto del pensamiento jurídico. Parafraseando una célebre canción, que dice que si la historia la escriben los que ganan, eso quiere decir que hay otra historia, "la verdadera historia", en el trialismo cabe referir que si las normas, la doctrina y el resto del pensamiento jurídico *los "escriben" y piensan los que pueden* eso quiere decir que *quizás haya una realidad jurídica, una doctrina y un resto del pensamiento de los que no pueden*[23].

En cuanto a las ideas de Ross, nos referiremos de manera destacada a la verificación que requiere en una de sus obras más prestigiosas: *"Sobre el derecho y la justicia"*[24].

consideramos que la verdad se refiere a la correspondencia entre la construcción de lo pensado y la construcción de lo considerado realidad. Vid,. asimismo RROSS, A (1963). *Op. cit.*; BULYGIN, G (1981). *Op. cit.*; AARNIO, A & PECZENIK, A: "Más allá del realismo: una crítica de la reconstrucción de la dogmática jurídica por Alf Ross", Trad. de Roberto J. Vernengo, *Revista de Ciencias Sociales,* ed. cit., 25, I, p. 130 y ss. Asimismo se puede vid., SOTO, A (2015). "Visión trialista del pensamiento de Alf Ross", CARTAPACIO (2015). http://www.cartapacio.edu.ar/ojs/index.php/centro/article/viewFile/372/282, 16-6-2015.

22 Cabe *ampliar* en nuestros artículos "La justice et la vérité dans le monde juridique": *Op. cit.*; "La doctrina jurídica en la postmodernidad", *Jurisprudencia Argentina*, 1999-III, p. 938 y ss. Hoy consideramos que la verdad se refiere a la correspondencia entre la construcción de lo pensado y la construcción de lo considerado realidad.
Goldschmidt procuró superar la aspiración metodológica monista de Kelsen mediante el empleo de tres métodos integrados de despliegues *socio-normo-dikelógicos*. Ross, pretendió la superación mediante otro *monismo metodológico*, de carácter no lógico sino empirista, orientado a la consideración de la realidad social y, de cierto modo, de las normas. Goldschmidt se declaró tridimensionalista socio-normo-dikelógico, Ross ha sido considerado "bidimensionalista" normo-sociológico. Sin embargo, a diferencia de la que denomina teoría jurídica idealista, con sentido *realista* desea entender el conocimiento del derecho de acuerdo con las ideas sobre la naturaleza, problemas y método de la ciencia elaboradas por la moderna filosofía empirista (ROSS, A (1963). *Op. cit.,* p. 63 y ss.).
Goldschmidt y el trialismo en general y Ross brindan una muy relevante consideración a la *realidad social jurídica.* Uno de los intereses fundamentales del trialismo es, en coincidencia con las ideas de Ross, tener muy en cuenta la realidad social de las *adjudicaciones.* El objetivo del trialismo es, en gran medida, avanzar respecto de las "máscaras" debajo de las cuales se suelen esconder intereses y beneficios no compartibles. Puede decirse que el trialismo es en mucho una teoría del "desenmascaramiento".
En el sentido de una al menos aparente superación de lo que el trialismo consideraría unidimensionalismo, Ross se refiere a dos ramas especiales del estudio del derecho. Atiende a la rama que se ocupa del derecho en acción, que es denominada sociología jurídica, mientras que aquella que se ocupa de las normas jurídicas, es denominada ciencia del derecho. El derecho en acción y las normas jurídicas no son dos esferas independientes de existencia, sino aspectos diferentes de una misma realidad. En consecuencia, se puede hablar de dos puntos de vista, cada uno de los cuales presupone al otro. La ciencia del derecho dirige su atención al contenido abstracto de las directivas y no a las realidades del derecho en acción. Sin embargo, el profesor danés pone énfasis en construir una diferenciación entre la teoría jurídica idealista, que cree que el derecho pertenece a los mundos de la experiencia y un razonamiento a priori, donde seguramente colocaría al trialismo, al menos el goldschmidtiano, y en sentido formal coloca a Kelsen, y la teoría jurídica realista, de base empirista, donde él mismo se sitúa.
Dice Ross que "una ciencia del derecho que no se hace cargo de la función social de éste tiene que resultar insatisfactoria desde el punto de vista del interés en predecir las decisiones jurídicas" (ROSS, A (1963). *Op. cit.*, p. 20), interés de gran importancia en el trialismo y el realismo. El autor danés sostiene, a diferencia de Goldschmidt, que la Filosofía del Derecho Natural es especulación metafísica sin justificación cientÍfica (ROSS, A (1963). *Op. cit.*, p. 25). Esta objeción no sería dirigible al trialismo que sostenemos, donde los valores son construidos. Rechazada esta Filosofía y planteado el despliegue histórico-sociológico como parte de la sociología jurídica como ciencia empírica, sostiene Ross que de las ramas tradicionales de lo que se considera Filosofía del Derecho solo queda como tal la analítica donde confluyen las líneas de John Austin y Hans Kelsen (ROSS, A (1963). *Op. cit.,* p. 25 y 2/3). Se opone expresamente al tridimensionalismo lógico, ético y sociológico de Julius Stone y otras versiones de alcances relativamente coincidentes, entre los que se hallaría el trialismo (ROOS, A (1963). *Op. cit.*, pp. 27-28).
En el trialismo las normas surgen de fuentes reales, principalmente formales que son "autobiografías" ("relatos") de los repartos hechos por los propios repartidores (constituciones formales, tratados internacionales, leyes, decretos, sentencias, resoluciones administrativas, contraltos, testamentos, etc.). La doctrina (ciencia juridica) se constituye con fuentes de conocimiento de las normas y el derecho todo.

23 "QUIEN QUIERA OIR, QUE OIGA", (Mignona / Nebbia), Album : Baglietto – Garré (1989), Juan Carlos Baglietto (Argentina), International Lyrics Playground, http://lyricsplayground.com/alpha/songs/q/quienquieraoirqueoiga.shtml, 7-6-2015.

24 1958. Vid., ROSS A (1963). *Op. cit.;* también c. *On Law and Justice*, The Lawbook Exchange, Ltd., 1959, Nueva Jersey, 2004, https://books.google.com.ar/books/about/On_Law_and_Justice.html?id=vJeEplBxTnUC&redir_esc=y, 19-6-2015; también vid., por ej. "Directives and

La estrategia, la doctrina, el resto del pensamiento jurídico y la verificación se necesitan entre sí.

II. LAS PERSPECTIVAS DE VERIFICACIÓN EN EL INTEGRACIONISMO RELACIONADO CON EL "POSITIVISMO" "ROSSANO"

a) Dimensión normológica

15. La propuesta de la teoría trialista del mundo jurídico presenta ***fuentes*** "internas" ("reales") en la tridimensionalidad de la realidad social de las adjudicaciones (los repartos que captan las normas), las normas y los valores. Las fuentes reales de las normas son materiales (la realidad de los repartos mismos) y formales (autobiografías, relatos de los repartos, por ej. constituciones materiales, tratados internacionales, leyes, decretos, sentencias, contratos, testamentos, etc.). También hay fuentes más "externas", que pueden ser denominadas ***"fuentes de conocimiento"*** y constituyen la ***doctrina*** o ***"ciencia jurídica***" en sentido estricto[25] y el ***resto del pensamiento*** acerca del Derecho (sin división tajante entre "ciencia", "conciencia popular" y "saber vulgar").

Las fuentes de conocimiento "completas" hacen referencia a las tres dimensiones y son ***verificadas***. Son terreno de una ***estrategia científico-jurídica*** más o menos consciente. La apreciación de la doctrina y el resto del pensamiento puede hacerse mejor aprovechando aportes de la epistemología y de la teoría de la ciencia jurídica[26].

En un sentido relativamente análogo al trialista, dice Ross que "La interpretación de la ciencia del derecho (…) reposa en el postulado de que el principio de verificación debe aplicarse también a este campo del conocimiento, o sea, que la ciencia del Derecho debe ser reconocida como una ciencia social empírica." [27] Desarrolla su idea expresando que "Sin duda, la intención de los autores jurídicos es exponer el derecho tal como es. Pero muy pocos limitan su intención a esto." [28]

16. El trialismo indica que las normas al propio tiempo ***describen*** los repartos proyectados y los ***integran*** con ***conceptos*** que les dan claridad y les incorporan sentidos. Si lo hacen según lo requerido

norms", Routledge & K. Paul, 1968; "On Guilt, Responsibility, and Punishment", 1a. ed, EEUU, Universidad de California Pr, 1975; "Lógica de las normas", traducción José S. P. Hierro; estudio preliminar sobre "Alf Ross, la ambición de la teoría realista del derecho" de José Luis Monereo Pérez, Granada, Comares, 2000. Se hace referencia a veces a tres etapas en el pensamiento de Ross con influencias de: 1) Kelsen, con su máxima manifestación en la teoría de las fuentes del Derecho, *Theorie der Recthsquellen* (1929); 2) A. Hägerström y el realismo escandinavo, *Towards a Realistic Jurisprudence* (1946); 3) el positivismo lógico, *Directives and norms* (1968). En relación con la obra de Ross puede vid., asimismo por ej. AARNIO & PECZENIK, *Op. cit.;* CARRIÓ, GR (1960). "Nota sobre la entrevista de Alf Ross", *Revista Jurídica de Buenos Aires,* IV, p. 205 y ss., reedición en "Academia", año p. 7, 13, 187 y ss., http://www.derecho.uba.ar/publicaciones/rev_academia/revistas/13/nota-sobre-la-entrevista-de-alf-ross.pdf, 14-4-2015; KOSKENNIEMI, M (2015). "Introduction: Alf Ross an Life Beyond Realism", European Journal of International Law, EJIL, 14, 4, p. 653 y ss., http://www.ejil.org/pdfs/14/4/437.pdf, 20-6-2015; ZAHLE, H (2015. "Legal Doctrine between Empirical and Rhetorical Truth. A Critical Analysis of Alf Ross. Conception of Legal Doctrine", EJIL, 14, 4, p. 801 y ss., http://www.ejil.org/pdfs/14/4/442.pdf, 20-6-2015; AWAABE, K: "Alf Ross 1899–1979: A Biographical Sketch", EJIL, 14, 4, p. 661 y ss.; EVALD, J (2014). "Alf Ross", DJOF Publishing, Copenhague; VILLORO TORANZO, M (2015). "El realismo jurídico escandinavo", http://www.juridicas.unam.mx/publica/librev/rev/jurid/cont/19/pr/pr4.pdf, 21-6-2015; Vid., KELSEN, H (2015). "The Verifiability of the Truth of a Statement—The Non-verifiability of the Validity of a Norm", c. Oxford Scholarship Online, http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780198252177.001.0001/acprof-9780198252177-chapter-46, 20-6-2015. C. HIERRO, LIBORIO, L (2009). "El realismo jurídico escandinavo. Una teoría empirista del derecho", 2ª. ed., Madrid, Iustel.

25 Vid., GOLDSCHMIDT, W (1987). "Introducción". *Op. cit.*, p. 219 y ss.

26 Se puede *ampliar* en nuestros artículos "Meditaciones acerca de la ciencia jurídica", *Revista de la Facultad de Derecho*, Universidad Nacional de Rosario, 2/3, págs. 89 y ss.; "Palabras de presentación "Simposio" La ciencia jurídica en Argentina", en "Revista de la Facultad …" cit., 2/3, págs. 69 y ss.; "La pantonomía de la verdad y los géneros literarios de la ciencia", http://www.academiadederecho.org/upload/biblio/contenidos/La_Pantonomia_de_la_Verdad_y_los__Ciuro_Caldani.pdf, 14-6-2015. (es posible v. http://www.fder.unr.edu.ar/demo/upload/n_23.pdf, 14-6-2015).

27 ROSS,A (1963). *Op. cit.,* pág. 39.

28 *Ibíd.,* p.45.

por los autores, por los receptores y por el resto de la sociedad realizan desde diversas perspectivas el valor *adecuación*[29]. Lo propio sucede con las fuentes de conocimiento. Describen el Derecho en sentido estricto y al mismo tiempo lo integran utilizando conceptos que lo clarifican y le incorporan sentidos. Es interesante verificar si las normas, la doctrina y el resto del pensamiento integran adecuadamente los repartos y los elementos del conjunto del Derecho captado[30]. Dice Werner Goldschmidt que los resultados de la ciencia jurídica forman parte del caudal de consideraciones que gravitan sobre los repartidores al realizar los repartos e igualmente sobre los recipiendarios. Expresa que así se produce una continua invasión de la ciencia en el mundo jurídico: las fuentes del conocimiento del mundo jurídico se transforman en fuentes reales de él[31].

Aprovechando una expresión de Ross es posible decir que toda predicción de una tendencia es al mismo tiempo un factor que en sí mismo *contribuye* a estimular esta tendencia o a neutralizarla y es así un "factor político". Esto significa, según el jurista danés, que en las ciencias sociales es fundamentalmente imposible establecer una distinción nítida entre la teoría y la intervención política[32]. Aclara Ross que algunos juristas dan prioridad a las consideraciones políticas y para otros el factor teorético es el predominante [33]. Se puede afirmar que la doctrina contiene a menudo aserciones de *"lege ferenda*" y de *"sententia ferenda*". En estos marcos se hace particularmente evidente la estrategia científico-jurídica[34].

En nuestra concepción de la teoría trialista cabe indicar incluso que al fin la doctrina y el resto del pensamiento son una *juridicidad "paralela" tridimensional*. Se *constituye* en una primera aproximación con *actos de conocimiento* captados *lógicamente* y valorados por un complejo de valores que culmina en la *verdad*. Sin embargo en cierto otro sentido se *constituye* con repartos captados por normas[35] y valorados por un complejo de valores que culmina en la justicia. Influye al fin en la juridicidad más propiamente dicha.

El pensamiento tiene *particularidades* materiales, espaciales, temporales y personales y se integra en un horizonte político, sobre todo en la política científica y la política jurídica. Existe en profunda relación con la juridicidad más propiamente tal y la cultura en general, donde se desenvuelve.

Abierta la problemática de la verificación, en la que se interesan el trialismo y el positivismo realista "rossano", el trialismo presenta un muy importante *complejo de puntos de vista de verificación*. El propio Ross atiende, por ejemplo, a la verificación de proposiciones jurídicas referentes a normas de conducta y a la verificación de proposiciones jurídicas referentes a normas de competencia[36]. En nuestro tiempo, de *cambio* de edad de la historia, los desafíos para la juridicidad en general y la doctrina y el

29 Es posible *ampliar* en cierto sentido análogo en nuestro artículo "Perspectivas trialistas para el reconocimiento de la adecuación de los conceptos normativos", *Revista del Centro de Investigaciones de Filosofía Jurídica y Filosofía Social,* págs. 41 y ss., CARTAPACIO (2015). http://www.cartapacio.edu.ar/ojs/index.php/centro/article/viewFile/1061/895, 19-6-2015.

30 Se puede vid., DABOVE, MI (2015). "Los productos de la Ciencia Jurídica: un nuevo desafío para la Metodología de la Investigación". In: *Metodologías y prácticas de investigación en el campo jurídico*, La Plata, Universidad Nacional de La Plata, pág. 83, http://www.academia.edu/7705284/Los_productos_de_la_Ciencia_Jur%C3%ADdica, 18-6-2015.

Incluso es importante tener en cuenta en general la posibilidad constitutiva de las palabras, por ej. AUSTIN, J (1982). "Cómo hacer cosas con palabras", trad. G. R. Carrió y Eduardo Rabossi, Barcelona, Paidós Ibérica.

31 GOLDSCHMIDT, W (1987). "Introducción". *Op. cit.,* p. 220.

32 ROSS, A (1963). *Op. cit.,* pp. 47-48.

33 *Ibídem.* En cuanto a la integración de reglas y teoría, p. 8 y ss. y p.12 y ss.

34 Dijo Ross "Mi impresión es que, por lo menos en los países escandinavos, la mayoría de los juristas consideran el aspecto político de la doctrina, las directivas de *sententia ferenda* (que no deben ser confundidas con las directivas de *lege ferenda*) como la parte más esencial de su trabajo. Su interés principal es práctico, no teorético." Y llegó a afirmar "Ellos se consideran políticos (en el más amplio sentido) antes que teóricos, aunque naturalmente es cierto que su política se basa en observaciones científicas…"(ROSS, A (1963). *Op. cit.,* p. 46). La teoría positivista de la ciencia de Ross lo lleva a dividir la dogmática jurídica en dos partes: predicciones científicas y valoraciones acientíficas (vid., AARNIO & PECZENIK. *Op. cit.*, p. 144).

35 Existen normas que rigen la constitución de la doctrina.

36 ROSS, A (1963). *Op. cit.,* p. 38 ss.

resto del pensamiento en particular son especialmente grandes. Ese amplio campo de despliegue permite apreciar que existe una muy significativa posibilidad de *estrategia doctrinaria y del pensamiento en general*.

17. La vinculación de la doctrina, el resto del pensamiento y su objeto puede ser resuelta y verificada también aprovechando la *teoría de las respuestas jurídicas*[37], que se ocupa de los *alcances*, la *dinámica* y las *situaciones* de unos y otro. La *dinámica* puede ser de "plusmodelación", "minusmodelación" y "sustitución"; las *situaciones* pueden ser de relativa coexistencia autónoma, dominación, integración, desintegración y aislamiento. Entre las manifestaciones más esclarecedoras de las situaciones se encuentran la posibilidad de calificar, si puede haber fraude y el rechazo. Por ejemplo: quien califica, se permite un fraude y un rechazo no recíprocos domina.

A veces la doctrina tiene una plusmodelación sobre las fuentes reales y prevalece sobre ellas (v. gr. en el "conceptualismo" alemán del siglo XIX) y en otros casos la doctrina es dominada por las fuentes reales (por ej. la ley, como ocurrió en la escuela de la exégesis). En el conceptualismo alemán los conceptos doctrinarios dominaban a las otras fuentes [38]. De cierto modo, también uno de los momentos muy importantes del predominio ordenado de la doctrina se produjo en la célebre Ley de Citas de Teodosio II y Valentiniano III (426 d. C.). Durante el imperio de la exégesis, en que la ley sometió a la doctrina, Jean-Joseph Bugnet, uno de los representantes de esa escuela, pudo decir con orgullo "Yo no conozco el Derecho Civil, yo enseño el Código Napoleón". La burguesía, que había sancionado sus intereses en el Código, lo defendía mediante el imperio legal sobre las otras fuentes.

También la juridicidad doctrinaria y del pensamiento en general tiene significados estratégicos, en su *propia constitución* y de modo particular en sus relaciones con el *objeto de referencia*. La verificación es imprescindible para mantenerse en relación con la *experiencia* y evitar el predominio de la doctrina y el resto del pensamiento por los senderos del idealismo y la alienación.

III) LOS DESPLIEGUES JURÍDICOS ESPECÍFICOS DE LA DOCTRINA Y EL RESTO DEL PENSAMIENTO, PERSPECTIVAS DE VERIFICACIÓN

a) Dimensión sociológica[39]

18. La *doctrina* y el *resto del pensamiento* del Derecho son construcciones jurídicas y a semejanza de las otras construcciones de esta clase tienen despliegues *sociológicos* en cuyo ámbito vale atender a adjudicaciones que son *distribuciones* de la naturaleza, las influencias humanas difusas y el azar y *repartos* originados por la conducción de seres humanos determinables. Sobre todo en las distribuciones hay que considerar las influencias humanas difusas de la economía, la religión, la lengua, la ciencia, la técnica, etc. Por ejemplo, la doctrina y el resto del pensamiento se influyen recíprocamente con la economía. Vale atender por ejemplo que, en medidas no descartables, solo se subsidia y se edita lo que puede interesar al mercado. En relación con las distribuciones Ross se pregunta por las fuerzas sociales que determinan el contenido y el desarrollo de un orden jurídico[40].

37 Se puede *ampliar* en nuestros "Aportes para una Teoría de las Respuestas Jurídicas", Rosario, Consejo de Investigaciones UNR, 1976, reedición en "Investigación …" *Op. cit.*, Nº 37, pp. 85-140, CARTAPACIO (2015). http://www.cartapacio.edu.ar/ojs/index.php/mundojuridico/article/viewFile/959/793, 9-5-2015.

38 Acerca de las diferencias de opinión en cuanto a los conceptos, cabe recordar la evolución de Rudolf von Ihering (v. gr. IHERING, R Von (1933). *El espíritu del Derecho Romano*. Trad. Enrique Príncipe y Satorres, Granada, Comares; Id. *Jurisprudencia en broma y en serio*. Trad. Román Riaza, Madrid, Revista de Derecho Privado, 1933.

39 Al tratarse de la dimensión sociológica de la ciencia nos referimos a la dimensión gnoseológica.

40 ROSS, A (1963). *Op. cit.*, p. 21.

Como todos los repartos los de la doctrina y el resto del pensamiento, que son específicamente actos de conocimiento, se desarrollan en marcos de *intereses* y de *fuerzas* y a través de una *libertad* real o supuesta que adopta y ejecuta *decisiones*. Es relevante verificar y resolver quiénes son los *autores* (repartidores) y los *recipiendarios* beneficiados y gravados en la doctrina, en el resto del pensamiento y en la realidad jurídica específica (quiénes son los "doctrinarios", por ej. investigadores, docentes, editores, libreros, etc., los ciudadanos y habitantes y los jueces, legisladores, administradores, profesionales, pueblo en general). Todo el pensamiento, las normas y los repartos llevan las *improntas* de sus autores. Importa considerar qué *potencias* e *impotencias* se adjudican (v. gr. qué se obtiene de los libros respectivos) y cuáles se verifican. Cada doctrinario, desde su posición, está en condiciones de mayor facilidad o dificultad para verificar aspectos del objeto. Así como los jueces y los abogados pueden percibir realidades diferentes, lo propio ocurre con los autores de tesis doctorales, manuales, monografías, etc. Es relevante verificar y resolver la comunicación en cuanto a *forma* y *razones* entre los repartidores y los recipiendarios, incluyendo a los de la doctrina y el resto del pensamiento. Todo está, sin embargo, en un marco de *ideología*. En muchos casos no se muestra, por ejemplo, el poder ideológico de la economía que, de modo destacado en el capitalismo, da o quita cauces a la doctrina y el resto del pensamiento, descubre y encubre.

19. Los repartos producidos por la conducción humana, incluyendo los actos de conocimiento, pueden producirse por imposición o por acuerdo. En consecuencia son *autoritarios* o *autónomos*. En los repartos autoritarios se realiza el valor poder y en los autónomos el valor cooperación.

Como se dice desde el trialismo y quizás le agradaría expresar a Ross, en la doctrina e incluso el pensamiento en general hay fuertes despliegues de *poder*. No siempre la doctrina, entusiasmada con el "brillo" de la lógica, expresa el poder que contienen ella misma y el objeto al que se refiere. Sin embargo conviene verificar sus planteos al respecto. Ya Francis Bacon decía que la ciencia del hombre es la medida de su potencia[41].

20. Los repartos, incluso los de la doctrina y el resto del pensamiento, pueden producirse en *orden* (régimen) o *desorden* (anarquía), con respectiva realización del valor orden y el "disvalor" arbitrariedad. El orden puede generarse según un *plan gubernamental* o por *ejemplaridad*. El plan indica quiénes son los supremos repartidores y cuáles son los criterios supremos de reparto. La ejemplaridad se desenvuelve según el seguimiento de modelos considerados razonables, por ejemplo en costumbres, prácticas, usos, jurisprudencia, etc. Cuando el primero está en marcha realiza el valor previsibilidad, la segunda satisface el valor solidaridad. La doctrina y el resto del pensamiento pueden constituirse de manera planificada y por despliegue de ejemplaridad. Se han de verificar desarrollos en los dos sentidos y cabe hablar de su *in-fluencia* en la juridicidad más específica.

En cierta medida por imperio de la adjudicación de recursos para la investigación, en nuestro tiempo hay crecientes despliegues de planificación doctrinaria. Se redactan y se desarrollan numerosos proyectos y programas de investigación con frecuencia de acuerdo con la planificación de prioridades. El Derecho está asumiendo una organización que era más común en las llamadas ciencias naturales. La educación planifica el pensamiento jurídico en general. Conviene verificar las referencias que la doctrina y el pensamiento en general hagan al plan de gobierno y a la ejemplaridad. La verificación suele ser un instrumento de evaluación de resultados no siempre a salvo de falsificaciones.

21. Los repartos y su ordenación, también cuando son actos de conocimiento y su ordenación, pueden tropezar con *límites necesarios*, que se oponen a la voluntad de los conductores. Estos límites pueden ser en general físicos, psíquicos, lógicos, sociopolíticos y socieconómicos; también

41 BACON, F (1984). *Novum Organum*. Trad. Cristóbal Litrán, Madrid, SARPE, p. 33.

pueden obligar al replanteo de los repartos proyectados en cuestiones vitales. La doctrina y el pensamiento en general encuentran a veces esos límites, que les impiden investigar y expresar lo que deberían; a su vez pueden no reflejarlos. Un límite psíquico y sociopolítico importante es el pre-juicio. Es necesario verificar qué y por qué la doctrina y el pensamiento en general hacen o no hacen y dicen o no dicen.

En ciertos marcos la *burocratización* y la *mercantilización* contienen falsificaciones que se presentan como doctrina cuando no lo son y, con especial gravedad, como investigaciones que no lo son. El poder internacional a menudo globalizado suele hacer que "desde la platea" de los países marginales no pueda ejercerse una auténtica voz que se concentra, en cambio, en el "escenario" de los países centrales. Con frecuencia la "ciencia", sobre todo en los países marginales, no es verificable, muchas veces porque se bloquea la verificación. En ciertos casos, en aras de la verificación se simplifica el objeto *mutilándolo*. Incluso se excluyen los modelos abiertos a la verificación, como el trialismo o el relativo positivismo "rossano".

Pese a la trama compleja y exigente con que se suele pensar la verdad a verificar, en alguna medida extrema la doctrina y el discurso en general han de ser evaluados teniendo en cuenta la tensa y en cierta medida inevitable fórmula de Kant: "(…) si todo lo que se dice debe ser verdadero, no por eso es un deber decir públicamente toda la verdad"[42].

22. Las *categorías básicas* de la dimensión sociológica del mundo jurídico trialista son la causalidad, la finalidad "objetiva" que encontramos en los acontecimientos, la finalidad subjetiva, la posibilidad, la realidad y la verdad. Las categorías pueden integrarse, y así por ejemplo es posible referirse a la "causabilidad" como posibilidad de causar, la "finabilidad", como posibilidad de finalidad, la realizabilidad, como posibilidad de realización y la verificabilidad como *posibilidad de verificación*. En el saber la categoría *verdad* ha de tener un papel muy destacado. En especial relación con ésta importa la *verificación*.

b) Dimensiones normológica y lógica[43]

23. La dimensión normológica pone especial cuidado en la relación de las normas con la realidad de los repartos y plantea, asimismo, la atención a la relación de la doctrina y el resto del pensamiento con su objeto. Se presentan así perspectivas de verificación normativa y del pensamiento. El correcto reflejo de la voluntad de los autores hace que las captaciones normativas, doctrinarias y del pensamiento en general sean *fieles*; la correspondencia de las normas con el cumplimiento de los repartos y de la doctrina y el pensamiento con el objeto jurídico hace que unas y otra sean *exactas*; la respectiva satisfacción que los conceptos empleados en las normas, en la doctrina y el pensamiento en general pueda brindar a lo pretendido por sus autores constituye su *adecuación*. En afinidad con el pensamiento de Ross cabe referir que un despliegue de la exactitud es el del futuro, en el sentido de que no interesa solo el cumplimiento actual sino el que corresponda en el porvenir.

24. La propuesta trialista señala vías para el *funcionamiento* de las normas y de la doctrina y el pensamiento en general. En ambos casos se requieren, según las circunstancias, tareas de reconocimiento, interpretación, determinación, elaboración, aplicación y síntesis. En el funcionamiento de las normas hay una importante relación, a menudo tensa, entre los autores (v. gr. legisladores) y los encargados del funcionamiento (por ej. jueces, administradores, contratantes, etc.). Además el

42 FISCHER, K (2015). "Kant", *Revista Contemporánea*, Madrid, 30 de diciembre de 1875, I, 2, p. 233 y ss., http://www.filosofia.org/hem/dep/rco/0010233.htm, 15-6-2015.

43 El Derecho tiene una dimensión lógica normológica, la doctrina una relativamente afín dimensión lógica.

funcionamiento formal hay uno conjetural. En el funcionamiento de la doctrina y el pensamiento en general se presentan importantes vinculaciones, también con frecuencia tensas, entre los autores (investigadores y difusores, tratadistas, doctorandos, maestrandos, etc. e integrantes comunes de la sociedad) y los protagonistas del Derecho referido (constituyentes, legisladores, jueces, contratantes, etc.). Asimismo entre los autores de la doctrina y los encargados de su funcionamiento (v. gr. lectores, usuarios, etc.).

En general la última palabra corresponde a los encargados del respectivo funcionamiento, pero siempre vale tener en cuenta que cada uno hace lo que quiere dentro de lo que puede. Mucho tienen que ver consideraciones prácticas y valores que el juez y el doctrinario asumen. La realidad social puede limitar lo que los encargados del funcionamiento quieren y pueden obtener. El Derecho en sentido estricto y la doctrina referida a él dependen, de maneras muy atendibles, de la llamada *conciencia jurídica material*. Uno y otra son de cierto modo lo que la sociedad los hace ser. Hay fuentes normativas y doctrinarias que son verdaderos *clásicos* y "viven" más allá de la voluntad de sus autores (el "Corpus Iuris", el "Sistema" de Savigny, etc.). Como hay una juridicidad específica variada, puede haber también una verificación variada.

25. En los casos de órdenes de repartos y de actos de conocimiento las normas se integran en *ordenamientos normativos* y la doctrina y el pensamiento en general se integran en *ordenamientos doctrinarios y de pensamiento en general*. Unos y otros pueden expresar respectivamente la voluntad de los integrantes de la sociedad y de las comunidades doctrinaria y de pensamiento, con respectivas verificaciones posibles como *fieles* en cada uno de los sentidos. A su vez, la doctrina y el pensamiento en general pueden ser verificados en cuanto a la medida en que expresen la fidelidad o infidelidad del ordenamiento normativo. Es posible verificar la fidelidad o infidelidad de la doctrina entrecruzada con la fidelidad o infidelidad de las normas. Es frecuente que en casos de recepción de normatividades y moldes doctrinarios ajenos las normas y la doctrina sean infieles.

Los ordenamientos normativos y doctrinarios pueden desarrollarse en sentidos *verticales* y *horizontales*[44]. En este marco es viable referirse a la metodología de los ordenamientos doctrinarios. La ciencia jurídica, como el pensamiento en general, puede desarrollarse en mayor sentido de *verticalidad* descendente o ascendente o en mayor despliegue de *horizontalidad*, de cierto modo como un *rizoma*. Un tratado científico es más vertical, la diversidad de tesis, monografías, etc. puede constituir más un rizoma. Hay obras doctrinarias que tienen grandes títulos a desenvolver en otros particulares, otras que encaran más directamente las particularidades. Se trata de distintas vías para la verificación. A veces, en el marco del ordenamiento de la doctrina, se dice que la verificabilidad es conectibilidad o conexionabilidad.

Según su relación con las *lagunas* normativas, los ordenamientos pueden ser meros órdenes o sistemas, atendiendo a que la integración corresponda respectivamente a los autores (v. gr. legisladores) o los encargados del funcionamiento (por ej. los jueces). Las fuentes formales habituales de los meros órdenes son las recopilaciones y las de los sistemas son codificaciones. A semejanza de esto, las obras doctrinarias pueden tener menos vocación de plenitud, análoga a las recopilaciones, como sucede en las *monografías* y en los *artículos* o más aspiración de plenitud, semejante a las codificaciones e incluso en relativa independencia de ellas, como ocurre en los *tratados científicos* e incluso en los *manuales*. En principio los tratados tienen más aptitud de verificación. Sin embargo,

44 Incluimos como "horizontales" todos los que no son verticales, aunque estén en diversos niveles como una resolución administrativa y una ley que la resguarda.

en el período que hemos estado transcurriendo la "descodificación" y la "articulización" y el empleo de la exégesis han sido muy frecuentes.

a) Dimensión axiológica

26. Según la propuesta de construcción del objeto jurídico de la teoría trialista en él ha de abarcarse un *complejo de valores* que culmina en la *justicia*. La verificación es camino a la verdad, en el Derecho de modo destacado sobre el complejo que culmina en la justicia. Al tratarse del complejo de valores de la dimensión axiológica de la doctrina jurídica, cuya cima es la verdad sobre la justicia, nos referimos a la dimensión ateneológica[45] (o "aletológica"[46]). La verificación ha de lograr la *coadyuvancia* de la verdad con los otros valores que pueden realizarse en el resto del mundo jurídico.

27. La propuesta trialista considera a los valores en tres despliegues de *valencia* (deber ser puro), *valoración* (deber ser aplicado amplio) y *orientación* (aplicación de criterios generales orientadores). El material estimativo de la justicia en el Derecho es la totalidad de las adjudicaciones razonadas pasadas, presentes y futuras ("pantonomía" de la justicia). Las exigencias de justicia son enormes. Se hace referencia asimismo a la "pantonomía" de la verdad, dirigida a la también enorme totalidad de sus posibilidades. Hay un despliegue quizás infinito de verificabilidades. Como esas plenitudes nos son inalcanzables, porque no somos omniscientes ni omnipotentes, nos vemos en la necesidad de *fraccionarlas* donde no podemos saber o hacer más, produciendo respectivamente *seguridad jurídica* y *certeza*.

Los repartos, las captaciones normativas y la doctrina no pueden más que referirse a fraccionamientos. La doctrina y el pensamiento en general construyen sus objetos con fraccionamientos y desfraccionamientos de la "verdad". La verificación no es infinita, debemos abarcarla en "la mayor medida posible".

Los cuestionamientos en los tres despliegues constituyen *"crisis"*. Es importante la *estabilidad* pero también lo son el *"pensamiento crítico"* y la *evolución* para obtener los mejores caminos de verificación.

28. Los *contenidos* de la justicia y la verdad son discutibles, pero los que se adopten pueden ser vías para la verificación. Parece acertado sostener que todos los valores son posibles sustentos de legitimación por "realizaciones superiores" y por "acuerdos". Es viable referirse consecuentemente a una legitimación *aristocrática* y a otras más *autónomas* o *democráticas*, más orientadas al acuerdo. Cabe atender a juridicidades en sentido estricto y a doctrinas más legitimados por la aristocracia, la autonomía o la democracia. Quizás quepa sostener que en el Derecho más específicamente tal ha de imperar la legitimidad autónoma y en la doctrina tenga especial relevancia la aristocracia (v. gr. en la investigación). Un tema de gran significación es el de la *responsabilidad* de los repartidores y los autores.

Es viable afirmar que los requerimientos de valor pueden apoyarse más en la respectiva *necesidad* o en su *cumplimiento*, en los merecimientos y los méritos. Los objetos del Derecho en sentido estricto y de la doctrina pueden ser más o menos *justos* o *veraces*. Estimamos que las formas en que se alcancen las realizaciones jurídicas y la doctrina deben ser sobre todo respectivamente de *audiencia* e *investigación*. Las razones de unas y otras han de concretarse en *fundamentación*.

45 En recuerdo de *Palas Atenea*, diosa de la ciencia.

46 *Aleteia* significa verdad.

Hay doctrinas y pensamientos en general más o menos fundamentados. Se han de verificar todos los títulos de legitimidad.

29. La proyección de la justicia al orden de los repartos y de la verdad al *orden* de la doctrina y el pensamiento en general requiere que se considere a los seres humanos como *fines* y no como medios. Esto significa que sean *humanistas*, no totalitarios. Hay que verificar estratégicamente la realización de todos los despliegues respectivos.

Las referencias a los seres humanos pueden hacerse de maneras *abstencionistas* o *intervencionistas*. Así se indica que el Derecho en su alcance estricto y la doctrina y el pensamiento jurídicos pueden desarrollarse más desde las iniciativas de cada individuo o desde la intervención en su vida. En ambos casos preferimos el abstencionismo. Cada individuo debería ocuparse básicamente del propio desarrollo de la verificación.

La concepción de los seres humanos que presenta el trialismo los considera únicos, *iguales* y partes de una *comunidad*. Esto importa, también en cuanto a verificación, que cada individuo ha de tener su propio despliegue, que lo constituye en su unicidad; su igualdad de trato con los demás, sobre todo en la igualdad de oportunidades, y su pertenencia a la comunidad.

Para realizar los órdenes de justicia y de la doctrina y el pensamiento en general es necesario *proteger y desarrollar* a los seres humanos verificando en todos los frentes: con referencia a los demás seres humanos, en su relación con los gobiernos, en cuanto a ellos mismos y respecto a todo "lo demás" (salud, miseria, ignorancia, soledad, desempleo, etc.).

IV. CONCLUSIÓN

30. Es necesario *verificar la doctrina y el pensamiento en general* de manera *estratégica desde todas las perspectivas de la juridicidad.* El interés trialista y "rossano" por la verificación y las amplias perspectivas de la teoría trialista del mundo jurídico en cuanto a éste en general y acerca de la estrategia tienen al respecto gran significación.

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NOTAS Y DEBATES DE ACTUALIDAD

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REVISTA INTERNACIONAL DE FILOSOFÍA Y TEORÍA SOCIAL
CESA-FCES-UNIVERSIDAD DEL ZULIA. MARACAIBO-VENEZUELA.

Algunas notas sobre la noción de Interpretación Jurídica de Alf Ross

A Few Notes on the Notion of Legal Interpretation of Alf Ross

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Resumen

Ross propone una *interpretación subjetiva* de la norma que haga posible considerar el contexto cultural donde debe adquirir su sentido. Los hechos en sí mismos no expresan la condición subjetiva de la vida, el orden positivo de la norma no es suficiente para declarar su aplicación. Es preciso argumentar a partir del universo de valores que se encuentran implícitos en el lenguaje jurídico que estructura técnicamente el código y que, a su vez, forma parte de la trama social de los sujetos. La interpretación del jurista va a depender necesariamente de un plexo intersubjetivo de acciones y conductas diversas que reorientan la aplicación de la norma en más de un sentido.

Palabras clave: Ross; argumentación; interpretación subjetiva; derecho positivo.

Abstract

Ross proposes a subjective interpretation of norma which makes it possible to consider the cultural context which must acquire its meaning. The facts themselves do not express the subjective condition of life; the positive order of the norm is not enough to declare its application. One must argue from the universe of values found implicit in the juridical language that structures technically the code and, in turn, is part of the social fabric of the subjects. The interpretation of the jurist will necessarily depend on an intersubjective plexus of actions and various behaviors that redirect the application of the norm in more than one sense.

Keywords: Ross; argumentation; intersubjective Interpretation; positive law.

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TRADICIÓN Y CULTURA EN ROSS

Se puede afirmar que, para comprender cabalmente las normas de un determinado ordenamiento–positivo jurídico y poder precisar su sentido y alcance, las mismas deben no sólo analizarse en el contexto de dicho ordenamiento, sino, también, situarse en el ámbito de un "código social", o de lo que el destacado iusfilósfo escandinavo Alf Ross denomina "tradición de cultura", y define así:

> En todo pueblo vive una tradición común de cultura que anima todas las formas manifiestas de vida de aquél, sus costumbres, sus instituciones jurídicas, religiosas y sociales. Es difícil describir la naturaleza y esencia de esta tradición. Se puede hablar de un conjunto de valoraciones, pero esta expresión es engañosa porque puede sugerir principios de conducta y *standards* formulados en forma sistemática. Sería mejor decir que bajo la forma de mito, religión, poesía, filosofía y arte, vive un espíritu que expresa una filosofía de la vida que es una íntima combinación de valoraciones (…) y de cosmogonía teorética, que incluye una teoría social más o menos primitiva[1].

Y el mismo autor señala, acertadamente, el papel que juega esa "tradición de cultura" o "código social" en la comprensión e interpretación de las normas jurídicas, cuando escribe:

> Las normas jurídicas, al igual que toda otra manifestación objetiva de la cultura, no pueden ser entendidas si se las aísla del medio cultural que las ha originado. El derecho está unido al lenguaje como vehículo para trasmitir significado, y el significado atribuido a los términos jurídicos está condicionado de mil maneras por presuposiciones tácitas en la forma de credo y prejuicio, aspiraciones *standards* y valoraciones, que existen en la tradición de cultura que rodea por igual al legislador y al juez[2].

En consecuencia, para poder entender e interpretar el *sentido* de las normas jurídicas generales como el significado de aquellas elaboradas con base en las mismas (normas jurídicas individualizadas, sentencias, decisiones administrativas, contratos, etc.), hay que estudiarlas en el contexto del orden jurídico-positivo en el cual están ubicadas, orden que se halla a su vez inmerso en la tradición de cultura arriba definida por Ross.

HERMENÉUTICA DEL JURISTA

Sin embargo, en el campo del derecho, generalmente, al destinatario de la norma jurídica, no sólo no le es posible comprender e interpretar ésta, sino que, a menudo, simplemente no la conoce. Corresponde, entonces, al abogado, ya sea en tanto consultor o patrocinante, o bien como juez o funcionario administrativo, la tarea de interpretar y retransmitir la "directiva"[3]. Es decir, que los hombres del derecho juegan el papel de

1 ROSS, A (1963). *Sobre el sentido y la Justicia*. Trad. Cast., del inglés por Genaro R. Carrió. Buenos Aires, EUDEBA, p. 95.

2 *Ibídem*. p. 96.

3 Ross dice que "es posible distinguir tres tipos de expresiones lingüísticas: 1) Expresiones de aserción (o más brevemente aserciones, con lo cual, empero, esta palabra se torna ambigua, pues significa tanto la expresión como su significado representativo), es decir, expresiones con significado representativo; 2) Exclamaciones, esto es, expresiones sin significado representativo y con las que no se pretende ejercer influencia, y 3) Directivas, esto es, expresiones sin significado representativo pero que se usan con el propósito de ejercer influencia. En cierto grado estas categorías corresponden a la clasificación gramatical; oraciones indicativas, interjecciones y oraciones imperativas. Ahora bien, teniendo en cuenta estos antecedentes, nos preguntamos ¿a cuál de estas categorías pertenecen las oraciones que se encuentran en las reglas jurídicas? Parece obvio que ellas tienen que ser directivas y no exclamaciones ni aserciones. Las leyes no se sancionan para comunicar verdades teoréticas sino para dirigir el comportamiento de los hombres –tanto de los jueces como de los ciudadanos- a fin de que actúen de una cierta manera deseable. Un parlamento no es una oficina de informaciones, sino un órgano central de dirección social. Se hace particularmente claro que las reglas jurídicas, según su contenido lógico, son directivas, cuando contienen expresiones que son usadas comúnmente en estas últimas" (*Ibídem*, pp. 7-8).

descifradores de los mensajes jurídicos expresados por las normas jurídicas. Para hacer esto, los juristas deben conocer el contexto, normativo y social, comprendiendo bajo estos términos al ordenamiento jurídico-positivo (Constitución Nacional, códigos, leyes, reglamentos, costumbres jurídicas, etc), la jurisprudencia, la doctrina (incluyendo aquí al lenguaje técnico-jurídico) y la tradición de cultura.

Luego, el jurista va a interpretar los mensajes transmitidos, mediante las normas jurídicas generales, por el legislador al súbdito jurídico, poniendo en lenguaje natural lo que el primero comunica al segundo. Claro que, a veces, las normas jurídicas generales tienen por destinatario al jurista mismo, principalmente, cuando es funcionario público caso en el cual la referida función hermenéutica se hace, prácticamente, innecesaria o, al menos, no explícita. Por supuesto, que si el jurista en tanto que científico (dogmático), teórico o filósofo del derecho, colabora con sus colegas abogados –ya sean estos, consultores, patrocinantes, jueces o funcionarios administrativos-, con el aporte de su reflexión (doctrina).

Entonces, como expresa el autor argentino Roberto José Vernengo, "entender o interpretar un enunciado es captar el sentido del mensaje enviado por el emisor"[4], lo que, en el marco de esta exposición,

> (…) significa establecer una coordinación entre un lenguaje natural cualquiera, y el técnico que utiliza el conocimiento profesional del derecho. Ahora bien: no todos los lenguajes, ni siquiera los naturales, están articulados equivalentemente, de suerte que no es posible obtener siempre una traducción interpretativa que no acarree una pérdida de información que puede ser importante. Ello es experiencia común del lego y del jurista: el lego experimenta que el jurista no traduce integralmente lo que pretende hacerle saber, y el jurista sabe que el lego es incapaz de leer en sus escritos una información técnica que, expresa o implícitamente, su jerga profesional transmite excelentemente entre quienes dominen ese lenguaje especial[5].

Aunque, como anota el conocido filósofo y lógico del derecho Ch. Perelman, dado "que una comunidad, regida por reglas de derecho, es, al mismo tiempo, una comunidad lingüística, se supondrá que lo términos utilizados en los textos legales deben ser comprendidos según un sentido comúnmente aceptado, a menos que razones especiales justifiquen que uno se aparte de él[6].

Hay que agregar aquí, que la tarea del jurista no se realiza, únicamente, al nivel de la interpretación y aplicación de las normas jurídicas generales sino, también, en la base de la elaboración, sanción y promulgación de dichas normas, ya que, frecuentemente, quienes fungen de legisladores no son juristas, por lo que, en este caso, se acude a éstos, para que le den forma jurídica a los mensajes o "directivas" que se quieren transmitir a los súbditos jurídicos[7].

4 VERNENGO, RJ (1972). *Curso de Teoría General del Derecho*. Buenos Aires, Cooperadora de Derecho y Ciencias Sociales, p. 381.

5 *Ibíd*., p. 382.

6 PERELMAN, Ch (1976). *Logique Juridique. Nouvelle Rhétorique*. París, Dalloz, p. 95.

7 Aquí, procede indicar que Jean Dabin expone: "En la elaboración del derecho, de una parte a otra, ora de arte o de técnica, se reconocerá, pues, la intervención de dos artes o técnicas diferenciales: el arte o la técnica política, que concierne a la **materia** de las reglas, donde la iniciativa y a decisión corresponde al hombre de Estado, no siendo consultado el jurisconsulto más que sobre la "practicabilidad" de la idea, el arte o la técnica propiamente **jurídica reglamentaria** de la materia, donde la iniciativa y la decisión corresponde al jurista, salvo el control del hombre de Estado en cuanto a la oportunidad de ciertos modos de realización formal. Más brevemente y para evitar equívocos, diremos que la **materia** de las reglas pertenece a la **política** y, puesto que la política se ejerce aquí, en el dominio del derecho, a la política **jurídica** que, por el contrario, la puesta en **forma reglamentaria** pertenece a la técnica propiamente **jurídica**…
"Al trabajo de la política jurídica encargada de componer la materia de las reglas, es decir, de decidir de la oportunidad, del sentido y de las modalidades de la ordenanza, le sucede el trabajo del técnico del derecho, encargado de poner en forma de reglas jurídicas la materia que le es transmitida por el técnico de la política. Después de la construcción **material** o **real**, elaborada según las exigencias del bien común, la construcción **formal** elaborada en función delas exigencias de la obra de la reglamentación jurídica. Se toca, aquí, al oficio propio del jurista y, en consecuencia, a la técnica específicamente jurídica, el jurista es el especialista de un cierto modo de reglamentación, la reglamentación jurídica, que es un arte dotado de una función, de un método y de procedimientos propios" (Cfr. *La technique de l'elaboration du Droit positif spécialement du Droit privé*. Bruxelles-Paris. Etabblissements Emile Bruylant et Librairie du Recueil Siret, 1935, pp.40, 571.

A este respecto vale la pena citar estas palabras de Vernengo:

> El lenguaje técnico del jurista configura una jerga institucionalizada, pues en derechos con órganos burocráticos, el uso de la misma es condición para comunicarse entre los súbditos y los órganos, y entre los órganos mismos. Usar ese lenguaje es parte de lo que se entiende por conocer derecho[8].

Así, pues, se puede recordar con Ross,

> (…) cuan poco realista es ese tipo de positivismo jurídico que limita el derecho a las normas puestas por las autoridades y que cree que la actividad del juez sólo consiste en una aplicación de ellas…
>
> En el cumplimiento de su misión el juez se halla bajo la influencia de la tradición de cultura porque es un ser humano de carne y hueso y no un autómata, o mejor dicho, porque el juez no es un mero fenómeno biológico sino también un fenómeno cultural. Él ve en su actividad una tarea al servicio de la comunidad. Desea hallar una decisión que no sea el resultado fortuito de la manipulación mecánica de hechos y parágrafos, sino algo que tenga un propósito y un sentido, algo que sea 'válido'. La tradición de cultura adquiere primordialmente significado porque el juez lee e interpreta el derecho en su espíritu[9].

Más adelante, dicho autor insiste en el mismo sentido al añadir:

> El juez es un ser humano. Detrás de la decisión que adopta se encuentra toda su personalidad. Aun cuando la obediencia al derecho (la conciencia jurídica formal) esté profundamente arraigada en el espíritu del juez como actitud moral y profesional, ver en ella el único factor o móvil es aceptar una ficción. El juez no es un autómata que en forma mecánica transforma reglas y hechos en decisiones. Es un ser humano que presta cuidadosa atención a su tarea social tomando decisiones que siente como 'correctas' de acuerdo con el espíritu de la tradición jurídica y cultural. Su respeto por la ley no es absoluto. La obediencia a ésta no es su único motivo. A sus ojos la ley no es una fórmula mágica, sino una manifestación de los ideales, actitudes, *standarts* o valoraciones que hemos denominado tradición cultural (…) Bajo el nombre de conciencia jurídica material esta tradición vive en el espíritu del juez, y crea un motivo que puede llegar a entrar en conflicto con la conciencia jurídica formal y su reclamo de obediencia al derecho… En la medida de lo posible el juez comprende e interpreta la ley a la luz de su conciencia jurídica material, a fin de que su decisión pueda ser aceptada no sólo como 'correcta' sino también como 'justa' o 'socialmente' deseable[10].

Y que por su parte Ross declara que "la política jurídica abarca en la práctica los siguientes elementos. 1) los problemas específicamente técnico-jurídicos de naturaleza sociológico-jurídica (política jurídica en sentido estricto); 2) los otros problemas políticos estrechamente conectados con aquellos en la práctica, que por su índole pertenecen en realidad al campo profesional de otros expertos, y respecto de los cuales el jurista aparece, por lo tanto, como un 'experto de segunda mano'; 3) la actividad de pesar consideraciones y decidir como árbitro de los expertos; y 4) **la formulación lingüística de la decisión (que, dicho sea de paso, difícilmente puede ser separada de la decisión misma), en un lenguaje jurídico aceptable, y que armonice con el cuerpo de normas existentes"** (*Op. cit.*, p. 321. Las negritas son nuestras).

8 VERNENGO, RJ (1972). *Op. cit.*, p. 382.

9 ROSS, A (1963). *Op. cit.*, p. 96.

10 *Ibíd*., pp. 133-134.

LA CONTEXTUALIDAD SUBJETIVA Y OBJETIVA DE LA INTERPRETACIÓN

Aunque compartimos el punto de vista de Ross, nos parece, sin embargo, que éste describe la actividad del funcionario judicial honesto y científicamente preparado para la importante tarea de valorar y resolver los casos concretos que se dan en la vida colectiva de una determinada sociedad, a la luz de las normas jurídico-positivas en vigor en ésta, y no toma en consideración el caso –lamentablemente frecuente en algunos países tales como el nuestro-, de los jueces no sólo intelectualmente incompetentes o culpablemente negligentes en el cumplimiento de su función jurisdiccional, sino también, lo que es peor, deshonestos y venales. Es por ello que Perelman tiene razón al expresar: "La personalidad de los jueces juega un papel esencial en la administración de justicia y es necesario, en un estado bien gobernado, jueces competentes e imparciales"[11].

Un argumento semejante empela el célebre iusfilósofo argentino Carlos Cossio, cuando observa que:

> (…) si la Teoría Egológica devela todo el poder que los jueces tienen en sus manos, acaso sirva para enseñar que el Derecho reclama que vayan a la magistratura sólo aquellos que se consumen en el estudio del Derecho movidos por una superior vocación hacia los valores jurídicos. Si el Derecho es una realidad humana de la que el Juez participa y a cuya creación el Juez contribuye con sus vivencias, se comprende que no es indiferente para la realidad de esa realidad, ni el saber del Juez ni su sensibilidad para la valoración jurídica. En el mundo del derecho, la realidad del hombre no es extraña al Derecho mismo, y eso vale tanto para la ley como para la sentencia[12].

Y esto nos recuerda a Aristóteles que decía:

> (…) cuando se produce entre los hombres alguna diferencia, recurren ellos al juez. Ir a encontrarse con éste es presentarse ante la justicia, pues el juez es, por así decirlo, la justicia encarnada. En la persona del juez se busca una tercera persona imparcial, y algunos llaman a los jueces árbitros o mediadores, queriendo significar con esto que cuando se habrá hallado el hombre del justo medio, se llegará a obtener justicia.
>
> La justicia es, pues, un justo medio, si por lo menos el juez lo es. El juez mantiene la alanza equilibrada entre las dos partes[13].

Ross, por otra parte, indica, pertinentemente, que si bien

> La tarea de administrar justicia es mucho más amplia que la de interpretar la ley, en el sentido genuino de esta expresión, es común, sin embargo, usar la palabra 'interpretación' para designar la actividad integra del juez que lo conduce a la decisión, inclusive su actividad crítica, inspirada por su concepción de los valores jurídicos que surge de actitudes que están más allá del simple respeto al texto legal. Este uso lingüístico responde al deseo de ocultar a función creadora del juez, preservando la apariencia de que éste no es otra cosa que un portavoz de la ley. El

11 PERELMAN, Ch (1968). "Eléments d'une théorie de l'argumentation", in: *Logique et Argumentation.* ed. cit., p. 85.

12 COSSIO, C (1964). *La Teoría Egológica del Derecho y el Concepto Jurídico de Libertad.* 2da Edición. Buenos Aires, Abeledo-Perrot, p. 168.

13 ARISTÓTELES (1973). *Ética Nicomaquea.* Libro V, Cap. 4, 1132 a/113b, in. *Obras.* Trad. cast., del griego por Francisco de P. Samaranch. 2da ed., Madrid, Aguiar, p. 1229.

juez no admite en forma abierta, por lo tanto, que deja a un lado el texto. Mediante una técnica de argumentación que se ha desarrollado como ingrediente tradicional de la administración de justicia, el juez aparenta que, a través de varias conclusiones, su decisión puede ser deducida de la verdadera interpretación de la ley[14].

Y Perelman coincide con Ross al escribir:

> Es verdad que en derecho existen técnicas de argumentación específicas, eso que llaman lógica jurídica, que permite al juez fundar sus decisiones en derecho, pues no basta a los jueces poseer una sabiduría práctica, una prudencia, que les permitiría juzgar bien, conforme al sentido común, sino que ellos deben pronunciar sus sentencias en derecho, conforme a la jurisprudencia o a la sabiduría práctica de los juristas…
>
> Pero la lógica jurídica, para ser bien comprendida, debe situarse en un cuadro más general, que es el de la teoría de la argumentación. La argumentación interviene, en efecto, en todos los casos en que los hombres deben tomar decisiones hacer elecciones juiciosas, cada vez que deben deliberar o discutir, criticar o justificar[15], y
>
> (…) la teoría de la argumentación se caracteriza por el hecho de que es elaborada en función del auditorio que se trata de persuadir y de convencer, en la ocurrencia, el juez que se trata de ganar a la causa propia[16].
>
> Es decir, que en el campo de la hermenéutica jurídica, se requiere de técnicas argumentativas comprensivas de los valores expresados por las normas jurídicas generales.
> La posición del brillante iusprocesalista italiano Piero Calamandrei es semejante a la de los autores antes citados, cuando proclama:
>
> No hay norma, se puede decir, que no consienta al juez un cierto respiro de libertad creadora (…) pues bien, aun en el sistema de la legalidad, la ley misma ofrece al juez los medios para no perderla nunca de vista, para mantenerse siempre en contacto con ella, aunque cambien los tiempos con más velocidad que las leyes…[17].

Es por ello que la

> (…) sentencia no surge directamente de la ley: surge de la conciencia del juez, estimulada por múltiples motivos sicológicos, entre los cuales la ley constituye el motivo más importante, pero no el único; un motivo que, para transformarse en sentencia, tiene que encontrarse y fundirse, como un crisol, con los demás motivos de orden moral, en contacto con los cuales se transforma, de abstracta proposición lógica, en concreta voluntad individual[18].

14 ROSS, A (1963). *Op cit.,* pp. 134-135.

15 PERELMAN, CH (1968). *Op. cit.,* pp. 84-85.

16 *Ibíd.*, p. 84.

17 CALAMANDREI, P (1973). *Instituciones del Derecho Procesal Civil según el nuevo Código*. Trad. cast., del italiano por Santiago Santos Melandro, Buenos Aires, E.J.E.A; Vol. III (Estudios sobre el proceso civil), pp. 235 y 240.

18 *Ibíd.*, p. 234.

Este texto de Calamandrei nos recuerda el proverbio de la milenaria cultura china que dice: "De diez razones que impulsen a un magistrado a decidir un caso habrá nueve desconocidas para el público"[19]. Sin embargo, no hay que olvidar -como apunta Perelman-, que

> (…) puede ser que el proceso sicológico, que ha llevado al juez a tomar posición, sea explicable por móviles de orden social, moral o político y, en un último extremo, por la simpatía que, por razones confesables o no, experimenta por una de las partes. Pero lo motivación del fallo no puede nunca limitarse a la explicitación de los móviles, por más generosos que ellos sean: su papel es de hacer la decisión aceptable para los juristas y, más especialmente, para las instancias superiores que tendrían que conocer de ella… No basta que la decisión parezca equitativa, es necesario además que sea conforme al derecho en vigor, y aceptable como tal, para los que la examinarán[20].

Precisamente, a este respecto, es conveniente señalar que Ross escribe:

> A menudo se hace una distinción entre las llamadas interpretación subjetiva e interpretación objetiva, en el sentido de que la primera se dirige a descubrir el significado que se intentó expresar, esto es, la idea que inspiró al autor y que éste quiso comunicar, mientras que la última se dirige a establecer el significado comunicado, esto es, el significado que está en la comunicación como tal, considerada como un hecho objetivo…
>
> (…) Lo que entendemos por interpretación subjetiva es en realidad la interpretación que alcanzamos cuando tomamos en consideración no solo la expresión lingüística, sino todos los otros datos relevantes. El contexto y la situación, que incluye las opiniones políticas y filosóficas del autor, el propósito declarado y el propósito presumido que lo guío al formular la expresión, etc. Podemos incluso interrogarlo, y su respuesta proporcionará datos interpretativos adicionales. Por otra parte, la comunicación como tal no tiene un significado objetivo preciso, la comprensión que suscita en los demás varía con los datos de interpretación que el destinatario toma en cuenta.
>
> (…) Toda interpretación parte de la comunicación y procura llegar a la intención. La diferencia depende de los datos que se toman en cuenta al interpretar. La interpretación subjetiva se vale de todas las circunstancias que pueden arrojar luz sobre el significado, en particular todas las circunstancias personales y de hecho ligadas a la composición de la expresión y a su declaración. La interpretación objetiva limita los datos a aquellos que son discernibles por el destinatario en la situación en que se halla al aprehender la expresión. La diferencia es más significativa cuando la situación en que la expresión aprehendida difiere de la situación en que ha sido formulada… La interpretación objetiva simplemente se rehúsa a investigar la intención estudiando la manera en que la obra llegó a producirse. De tal modo, la interpretación objetiva –en obvio contraste con lo que la terminología autorizaría a creer– adquiere un tono de mayor inexactitud y arbitrariedad que la interpretación subjetiva…
>
> La interpretación objetiva puede llegar a ser una construcción ideal en conflicto directo con la intención del autor… Las interpretaciones de este tipo son, pues, valorativas y creadoras[21].

19 Cfr. PIÑEIRO, J (1975). *Los mejores proverbios chinos.* Recopilación. Barcelona, Bruguera, núm. 1231, p. 145.

20 PERELMAN, Ch (1976). *Op. cit.,* pp. 162-163.

21 ROSS A (1963). *Op. cit.*, pp. 117-119.

Más adelante, Ross complementa lo anteriormente transcrito, diciendo que resulta

> (…) inconcebible un estilo de interpretación completamente objetivo, en el sentido de que se funde exclusivamente en las palabras de la ley. La actitud del juez hacia la ley estará siempre influida por una serie de factores, productos de la situación y por la conexión entre la ley y el resto del derecho... La comprensión de la ley por parte del juez dependerá siempre de su comprensión de los motivos y propósitos sociales de aquélla. Lo único que realmente distingue un estilo subjetivo de un estilo objetivo de interpretación es que de acuerdo con el primero, y no con el segundo, se admite echar mano de los antecedentes de la ley como prueba para demostrar el propósito de ésta y arrojar luz sobre los detalles de su significado.
>
> Precisamente porque la interpretación objetiva rechaza ciertos datos de interpretación (los antecedentes de la ley) y se atiene únicamente al texto mismo, conducirá frecuentemente a resultados menos precisos que la interpretación subjetiva, dejando así mayor ámbito para la libertad del juez. Es un cierto sentido, en consecuencia la interpretación 'objetiva' es más subjetiva que la subjetiva[22].

Indiscutiblemente, que es harto acertada la referida tesis de Ross en el sentido de que la llamada interpretación objetiva es, en el fondo, subjetiva y de que la denominada interpretación subjetiva puede llegar a tener una mayor objetividad que la primera.

Además, no cabe duda alguna que la interpretación objetiva parece dar al juez mayores posibilidades, tanto para realizar una labor creadora como para adecuar el derecho a los crecientes y acelerados cambios sociales, sin que haya necesidad de recurrir a una reforma legislativa (y a veces constitucional), a menudo, prácticamente imposible.

Hay que puntualizar, también, que igualmente estamos de acuerdo con dicho autor, en que no es posible "un estilo de interpretación completamente objetivo", dado que se trata, justamente, de "una ley, esto es, un instrumento de dirección política, que se origina en intereses e ideas en conflicto, y que apunta a ciertos objetivos sociales"[23]. En consecuencia, la comprensión de aquélla estará determinada por la "de los motivos y propósitos sociales", de la misma. Y esta actitud coincide, en gran parte, con aquella presente en la interpretación subjetiva.

Por otra parte, dado que la distinción entre ambos modos de interpretación un texto legal es esencialmente teórica, el juez puede optar, según las circunstancias específicas del caso concreto que debe resolver, entre un modo u otro de interpretación, todo con vista a satisfacer su particular concepción de la justicia como la aspiración colectiva a que los casos de especie sean solucionados de conformidad con el derecho positivo vigente, pero sin herir el sentimiento social de lo justo.

Por consiguiente, si bien la tesis a favor de la interpretación objetiva es, cronológicamente, posterior a la de la interpretación subjetiva, no se puede decir que una es mejor que la otra.

Luego, como consecuencia de lo antedicho, podemos sostener que el *sentido* de las normas jurídicas generales es aquel que le atribuyen los jueces u otros funcionarios encargados de aplicarlas concretamente (pero en especial los primeros), por lo que la eficacia de tales normas depende de la interpretación que los mismos –conforme a sus creencias, concepciones e intereses y bajo la influencia de un determinado ambiente histórico-social- les den.

Y como pertinentemente se ha expresado: "En la medida en que las tesis axiológicas implícitas que el juez asuma al sentenciar reflejen valoraciones intersubjetivas –correspondan, por ejemplo, a la opinión pública, o a la orientación de la ciencia jurídica- se considerará que el juez actúa imparcialmente"[24].

22 *Ibíd*., pp. 137-138.

23 *Ibíd*., p. 137.

24 VERNENGO, RJ (1972). *Op. cit*., p. 384.

Así, pues, "el derecho judicial se elabora con ocasión de los conflictos que el juez debe arbitrar, encontrándoles soluciones convincentes y satisfactorias en derecho, puesto que están jurídicamente bien motivadas"[25].

CONCLUSIÓN

Es posible decir que, indudablemente las opiniones expuestas por Ross han contribuido a confirmar que la interpretación *judicial* es el criterio fundamental que nos permite precisar el *sentido* de una norma jurídica dada, y es la sola interpretación que, en cuanto que fase *previa* a la *decisión judicial* pero *esencial* a la misma, adquiere definitiva transcendencia en el mundo de las relaciones jurídicamente relevantes, cuando alcanza a configurarse la *cosa juzgada*. Igualmente, su influencia es innegable, aunque no legalmente vinculante (en los ordenamientos jurídicos nacionales que pertenecen a la familia de derechos romano-germánica), a través del *precedente*.

25 PERELMAN, Ch (1976). *Op. cit.*, p. 84.

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Simona LA ROCCA (a cura di) (2015). ***Stupri di guerra e violenze di genere.*** Prefaz. di A. Rivera, introd. di I. Peretti, Ediesse, Roma.

Annamaria Rivera, Italia.

[…] Se il Novecento, in particolare, è stato epoca di violenze e stermini di dimensioni e intensità immani, è anche vero che essi –come ci ha ricordato tra gli altri Zygmunt Bauman (1992) – sono stati resi possibili dalla razionalità tecnologica e burocratica europea, dallo sviluppo della scienza e della tecnica: ragion per cui niente ce ne garantisce l'irripetibilità. Tanto è vero che un cinquantennio [dopo Auschwitz] la guerra civile nell'ex Jugoslavia avrebbe squadernato molti orrori collaterali, per così dire, *per certi versi* simili a quelli che hanno contraddistinto lo sterminio nazista e altri genocidi novecenteschi.

Nondimeno, sotto traccia continua ad agire l'ideologia che, fin da certe interpretazioni storiografiche, attribuisce a sacche di arretratezza, primitivismo e irrazionalità lo scoppio di conflitti regionali e guerre civili: spesso letti come esplosione periodica di odi ancestrali tra gruppi detti etnici (Dei, 2005).

La cronaca della guerra fratricida jugoslava, con epurazioni e stupri "etnici" sistematici – per meglio dire, *ginocidi* (Paciucci, 2010) –, ha rappresentato il trionfo del paradigma e delle designazioni etnicizzanti, che in tal modo, affermandosi come un dato di fatto indiscutibile, si sono consolidati anche nel linguaggio corrente. In realtà, la concezione primordialista dell'appartenenza, dell'identità, degli stessi conflitti è stata usata come strumento ideologico e di propaganda dagli stessi belligeranti (Hayden, 2005). E così ha contribuito a occultare o minimizzare il peso dei fattori economico-sociali, il gioco degli opposti nazionalismi, il riemergere del disegno egemonico della "grande Serbia", le strategie delle potenze europee, tendenti a soffiare a proprio vantaggio sul fuoco delle rivendicazioni separatiste (v. Rivera, 2012: 126-128). Soprattutto ha dissimulato un fattore decisivo: "le élite politiche uscite dal comunismo investirono il loro capitale politico nelle sciagurate imprese nazionaliste col solo scopo di mantenersi al potere e di riuscire a gestire le transizioni al capitalismo" (Paciucci, 2010).

Non molto diversamente, il conflitto in Ruanda e Burundi, culminato in genocidi e stupri di massa, è stato sottoposto a una lettura in chiave rigidamente etnicista, identitaria, tribalista, che ha lasciato completamente in ombra altre logiche ancor più determinanti e trascurato il suo carattere di conflitto economico, sociale e politico.

Per dirla con le parole dello storico Alessandro Triulzi (1996: 37), sebbene si sia espresso nelle forme più atroci, quel conflitto si è rivelato per molti versi di una "terrificante modernità": non solo in quanto risultante locale "di complessi processi di ricomposizione degli assetti societari e politici", ma anche perché la strategia dell'annientamento e degli stupri sistematici è stata concepita e pianificata da élite intellettuali urbane e "si è basata su sofisticate tecniche mediatiche" (*ivi*: 31).

Nel primo come nel secondo caso, gli stupri di massa sono stati usati come arma bellica, finalizzata a contaminare le donne

"altrui" col proprio seme-essenza etnica, a costringerle a procreare figli "bastardi", oltre che a umiliare, disonorare, piegare gli uomini della parte avversa.

La violazione sistematica delle donne rivela anche – come osserva l'antropologa Françoise Héritier (1997) – l'idea perversa che la pretesa identità etnica sia qualcosa di così essenziale e naturale da poter essere trasmessa attraverso il seme maschile. Non va trascurato un altro movente: quello dell'incertezza categoriale e dell'angoscia suscitata dal*troppo simile*, sicché lo stupro è anche un mezzo per*alterizzare* il gruppo avverso o nemico e così affermare, ristabilire o rafforzare, per quanto illusoriamente, la propria identità (Rivera, 2010: 96).

Sia pure *en passant*, conviene richiamare l'attenzione su un paradosso: l'ingannevole "utopia", propria del nostro tempo, di una guerra "a zero morti", chirurgica, asettica, incruenta, affidata alla presunta infallibilità dei droni, convive con la realtà dei conflitti odierni che usano e abusano di *corpi*, anche e soprattutto femminili. Un altro paradosso è dato dal fatto che, con lo stato permanente di guerra asimmetrica e non-dichiarata, si sia affermata una sostanziale indistinzione tra guerra e pace, spazio interno e spazio esterno, funzioni civili e funzioni militari (Kilani, 2008).

È anche per questo che lo stupro si configura non solo come *arma di guerra*, ma anche come *arma di pace*, e in un duplice senso. Anzitutto: le violenze sessiste, fino allo stupro e al femminicidio (o *femicidio*, come preferiscono dire alcune studiose), sono un dato strutturale dell'ordine patriarcale, il rumore di fondo, potremmo dire, cui si sovrappone il ricorrente fragore degli stupri bellici. In secondo luogo e per riferirci ai tempi presenti: dacché esistono le forze di pace internazionali, il cosiddetto *peacekeeping* tende a caratterizzarsi per una ricorsività allarmante di violenze, stupri, prostituzione forzata, sfruttamento e ricatti sessuali, esercitati dai "portatori di pace" contro le popolazioni civili, soprattutto donne, ma perfino bambine e bambini.

Il caso di *Ibis,* operazione condotta dai parà della Folgore, nell'ambito di *Restore Hope* (1992-'95), intervento dei Caschi blu nella Somalia devastata dalla guerra civile, è solo una manifestazione tra le più emblematiche e più note di questo crudele paradosso. Ricordiamo che i parà italiani si macchiarono di violenze atroci, anche sessuali, per le quali nessuno di loro è mai stato condannato. Tra gli episodi più orrendi e più noti vi sono quelli di una giovane somala stuprata con un razzo illuminante e di un prigioniero torturato con elettrodi applicati ai genitali.

Prima e dopo questo caso – e fino a oggi, nonostante gli innumerevoli rapporti internazionali, le raccomandazioni e le condanne dell'Onu e di altre istituzioni–, episodi analoghi o ben peggiori si sono susseguiti con una regolarità allarmante nei più vari contesti: per limitarci agli anni Duemila, in Eritrea, Burundi, Liberia, Guinea, Sierra Leone, Haiti, Repubblica Democratica del Congo, Costa d'Avorio, Benin, Sud Sudan… E, assai recentemente, di nuovo in Somalia, come documenta un rapporto del 2014 di*Human Rights Watch*; nonché, secondo notizie trapelate nel 2015, nella Repubblica Centroafricana e ancora ad Haiti.

Secondo un'indagine dell'*Internal Oversight Services,* organismo delle stesse Nazioni Unite, nel solo periodo tra il 2008 e il 2013 i Caschi blu si sarebbero resi responsabili di ben quattrocentottanta casi di sfruttamento e violenze sessuali, un terzo dei quali ai danni di minori.

Potremmo aggiungere che sono proprio lo sfruttamento e la violenza sessuali a costituire il *trait d'union* più evidente tra la sfera dei crimini di guerra e quella dei *crimini di pace*, per definirla in termini basagliani. Ricordo che nel 1975 Franco Basaglia, in collaborazione

con Franca Ongaro Basaglia, proponeva la nozione di crimini di pace come chiave per la comprensione delle violenze prodotte nell'ambito della "normalità" quotidiana. Il riferimento era prima di tutto alle istituzioni totali, certo, ma il concetto si estendeva a un'ampia serie di pratiche di subordinazione e disciplinamento del corpo e della mente che, de-umanizzando e reificando particolari categorie di persone, ne cancellano la dignità personale. Forse sarebbe utile riprendere questa nozione, anche per analizzare più a fondo la continuità e la dialettica fra tempo detto di pace e tempo di guerra.

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PPROFONDIMENTI

Gli stupri di massa e altre violenze sessuali contro donne, ma anche bambini e bambine, sono spesso l'atroce corollario dei conflitti armati, che siano o non guerre convenzionali. Come ha riconosciuto una risoluzione delle Nazioni Unite, ben lontano dall'essere incidentale, un tal genere di violenza costituisce una vera e propria tattica di guerra, finalizzata a umiliare e piegare gli uomini della parte avversa e l'intera comunità di appartenenza.

Le autrici e gli autori del volume affrontano il tema con approcci pluridisciplinari, e coprendo un arco di tempo storico che spazia dai colonialismi alla Seconda guerra mondiale, dal genocidio armeno alla guerra civile nell'ex Jugoslavia, dai

conflitti in Rwanda, Palestina, Somalia, Nigeria, India, Birmania, Darfur, America Latina alla violenza femminicida nei territori curdi occupati dall'Isis, fino agli "stupri di pace" compiuti dalle forze di peacekeeping. Vi si analizzano le diverse teorie interpretative, i risvolti della giurisprudenza locale e internazionale, le conseguenze mediche e psico-sociali, le iniziative di riscatto e di denuncia delle vittime, spesso sostenute da movimenti femministi. In uno dei saggi si analizzano metafore e rappresentazioni dello stupro nella storia dell'arte e delle immagini; le pagine conclusive contengono i risultati del progetto Lungo la Linea Gustav: le vittime delle violenze e dell'oblio, di cui lo stesso volume è parte.

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