

20th Century Legal Philosophy as Reflected in Dane Alf Ross

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Jurisprudence is a dogmatic science teaching various domains of law. Legal philosophy discusses the fundamental problems of dogmatic teaching, namely, what is law? Is jurisprudence an empirical science and does law exist being valid?

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Introduction

Danish legal scholar and political scientist, Alf Ross, has received his well deserved biography (Evald, 2014). Ross was a world class social scientist and legal philosopher. His life is simply fascinating. Ross tried to combine the basic ideas on the notion of the state by two dominant practical philosophers of the 20th century: Hägerström (Uppsala) and Kelsen (Vienna, Geneva, and Berkeley). Did Ross succeed?

Alf Ross made contributions to constitutional, administrative, and international law, but his main focus was legal philosophy. His most important book *Law and Justice* (Ross, 1959) is full of erudition, but it rejects all notions of justice, even rule of law, as “meaningless”. This is the legacy from his Vienna period, the logical empiricist arguing about “meaning” and “verification” in a manner that is now abandoned. He wrote a large number of books and articles. He also ventured into “staatswissenschaft”, publishing the best-seller *Why Democracy?* (Ross, 1952). Like Kelsen and Hägerström, he was fascinated by the role of the state in law.

The Problematics of Legal Philosophy

The classic problematic on legal philosophy is to explain what is law. Obviously, law offers norms for the conduct of behaviour, but what is the difference between legal norms and moral norms? Certainly, law can be written down and systematised into code books. Yet, how to know what it says before the judge decides? Obviously, law should benefit society. However, is jurisprudence utilitarian, maximizing “the greatest happiness of the greatest number”? If we start from Kirkegaards insight into human behaviour, “EITHER-OR”, one must ask on what grounds humans make their choices?

At the centre of legal philosophy is the fundamental relationship between IS and OUGHT. This distinction is also crucial in the Social Sciences. Famous Danish Law Professor Ross devoted his life to upholding this separation throughout his life 1899-1979, an ambition that he shared with several of the great legal scholars, like Hägerström, Kelsen, Weber, and Hart. Ross emphasised the division between valid law and justice. However, as of now, the separation between is and ought has once more become contested by Harvard philosophers, and legal philosophy has turned into nothing but moral philosophy with Rawles (1971) and

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Dworkin (1977). Alf Ross denied justice considerations in jurisprudence as “pointless”, and this was an early influence from the Vienna school during his first major visit abroad. Professor Evald manages to analyse Ross’ life against the background of international legal Philosophy, and a peculiar academic career characterised by many hindrances, not in the least from Danish colleagues.

The second major problematic in legal philosophy is to elucidate the distinction between on the one hand legal norms and moral rules on the other. Life is full of normativity, but which norms constitute valid law? Ross first came across Kelsen’s emphasis on the validity and subsequently he endorsed Hägerström’s focus on efficiency. He mixed ideas from Vienna and Uppsala seemingly without scruples, but he managed to be considered as a leading representative of the one of the major schools of legal philosophy: Scandinavian realism.

Validity

Kelsen made the concept of legal validity his most famous construction in jurisprudence. In 1934, he published *Reine Rechtslehre* where he offered his typical “stufenaufbau” of law as a system of norms. This is normativity writ large. The lowest level of norms was orders issued by superiors sanctioned by administrative law. In turn, administrative law was sanctioned by legislation which was sanctioned by the basic norm, the constitution. This systematic and logical legal expose became very controversial, but Kelsen’s exclusion of Natural Law was shared by Ross. It can be mentioned that the English translation *A Pure Theory of Law* is flawed and does not translate the 1934 book properly. In fact, it includes numerous rather superficial sociological essays by Kelsen. Kelsen’s books in staatswissenschaft still holds high quality, though.

Efficiency

Hägerström completely rejected the notion of law as legal validity, for him validity was a moral concept. He founded the school of legal realism in Scandinavia by equating law with the legal machinery, i.e., police, courts, and prisons. Jurisprudence could only be a science if it abstained from all forms of morals, and it could only be an empirical science if it studied the behaviour of judges in particular. Law was a fact and not a norm.

Ross’ Metaphor

Ross continued the school of Scandinavian legal realism and upheld their teachings to his very end. At first, he met fierce resistance from the University of Copenhagen, but he overcome this animosity and went on to serve as human rights judge in Strasbourg. Ross suggested the following solution of validity and efficiency: “law in action and the norms of law are not two independent spheres of existence, but different sides of one and the same reality” (1959, p. 6). He is consequently convinced that they can be described as “two viewpoints, each mutually presupposing the other” (1959, p. 7). In addition, he considers that “doctrinal study of law can never be detached from the sociology of law. Although doctrinal study is interested in ideology, the latter is always an abstraction from social reality” (Dalberg-Larsen, 2005).

Ross says that legal validity is the same as legal efficiency, but this is highly questionable. Law is conflictual, exhibiting contrary principles, and is often altered in response to social development, expressing new ideas of validity. Ross emphasized the reality of Law more than its normativity in his later writings, which opened him up for criticism from the rejuvenation of Natural Law.

Conclusions

Having been rejected by the University of Copenhagen, Ross was invited to Uppsala by none other than Hägerström. Alf Ross received his doctorate in Philosophy there, and wrote a book about the Kantian distinction: theoretical reason vs. practical reason. His results echoed Hägerström even if he did not point this out. Ross was always eager to present new ideas first, writing all the time, but sometimes he “forgot” to cite and quote the relevant authors for his sources.

The split between validity and efficiency is still a topic of much debate. Is law merely the decisions of the judges and thus jurisprudence an empirical science studying the behaviour of the legal machinery? Ross suggests the following solution for how law and legal realities are related:

In reality, the Ross solution amounts to confusion between is (efficiency) and ought (validity). Is and ought can never be different sides of the same thing. Validity is always normativity, subjective or objective, whereas efficiency implies existence.

It may be emphasized that Kelsen had the same disdain for justice deliberations as the Vienna school. He argued that law freed from justice deliberations will be a strictly logical system of norms objectively valid. Hägerström argued that Kelsen was wrong, as law had no validity at all. The efforts of Ross to unite Hägerström and Kelsen into one legal philosophy was an interesting endeavor, but hardly successful.

Interestingly, Ross’ life tells us about academia where scholars tend to line up in different groups, sometimes as enemies versus friends. “Amitiés” form integral parts of university existence, despite all talk about “excellence”. The senior Copenhagen professor Vinding Cruse harassed young Ross, but he got revenge when Cruse foolishly did not clearly distance himself from the NAZI occupation of Denmark. Ross was much helped by Swedish scholars, like e.g. Gunnar Myrdal.

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