

Original Paper

What Does the Law Say?

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Abstract

The killings of George Floyd and Rayshard Brooks raise the highly pertinent question: What is law in these cases? The more one reflects on the nature of the legal order in a well-ordered society, the closer one arrives at Justice Holmes' statement: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law". A similar approach to the question above was delivered by Dane Alf Ross (1899-1979), who expounded in a succinct form so called Scandinavian Law Realism.

Keywords

meta legal theory, legal realism, law as fact or probability, Kelsen (1881-1973), Ross

1. Introduction

Reflecting over the nature of law (Posner (1939-), 1993; Posner, 2002), one arrives at the conclusion that it is not a pure objective set of phenomena, like, e.g., the Universe of suns and planets. Law is inherently judgmental and includes several subjective elements such as the definition of crime, the attribution of motive, as well as the weight of evidence. The belief that the judge plays a major role in defining what is law is called legal realism, and it was developed both in the United States and in Scandinavia. This article will cover Scandinavian realism.

The belief that law gives unambiguous and crystal clear answers to every crime and situation can not be upheld (Dworkin (1931-2013), 1986). As law is to some extent subjective, much depends on interpretation of both law texts and law cases. This comes with differences of opinion and conflict in court (Posner, 1995). Scandinavian legal realism discussed the "legal machinery" and rejected all notions of law as a set of abstract principles, or as a set of written texts. Arguably the most well known legal scholar of this school was Dane Alf Ross, although he did not invent the approach to law as facts.

2. 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 the 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 Kirkegaard’s 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 (1868-1939), Kelsen (1881-1973), Weber (1864-1920), and Hart (1907-1992). 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 and Dworkinn (1931-2013). 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.

3. 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 were 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.

4. 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.

5. Ross' Metaphor: Head and Tail

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 overcame 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".⁶ He is consequently convinced that they can be described as "two viewpoints, each mutually presupposing the other".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).

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.

6. Alf Ross' Life

Alf Ross made contributions to constitutional, administrative and international law, but his main focus was legal philosophy (Evald, 2014). 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, 1959). Like Kelsen and Hägerström, he was fascinated by the role of the state in law.

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 too eager to present new ideas first, writing all the time, but sometimes he "forgot" to cite and quote the relevant authors for his sources.

7. Conclusions

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.

The deaths of Floyd and Brooks will be tried in court under world scrutiny. It is impossible to predict in advance what the outcome will be with absolute certainty.

References

- Dalberg-Larsen, J. (n.d.). *Alf Ross and the Sociology of Law*. Stockholm Institute for Scandinavian Law, Stockholm, Sweden.
- Dworkin, R. (1977). *Taking Rights Seriously*. Harvard University Press, Cambridge, MA, USA.
- Dworkin, R. (1986). *Law's Empire*. Harvard University Press, Cambridge, MA, USA.
- Evald, J. (2014). *Alf Ross-a life*. DJOF Publishing, Copenhagen, Denmark.
- Hägerström, A. (1963). *Rätten och Staten tre föreläsningar om rätts- och statsfilosofi*. Natur och Kultur, Stockholm, Sweden.
- Hart, H. L. A. (1961 (2012)). *The concept of law*. Oxford: Oxford U.P.
<https://doi.org/10.1093/he/9780199644704.001.0001>
- Kelsen, H. (1934). *Reine Rechtslehre*. Deuticke Verlag, Wien, Austria.
- Kelsen, H. (1945). *General Theory of Law and State*. Harvard University Press, Cambridge, MA, USA.
- Posner, R. A. (1993). *The Problems of Jurisprudence*. Harvard University Press, Cambridge, MA, USA.
- Posner, R. A. (1995). *Overcoming Law*. Harvard University Press, Cambridge, MA, USA.
- Posner, R. A. (2002). *The Problematics of Moral and Legal Theory*. Belknap Press, Cambridge, MA, USA.
- Rawles, J. (1971). *A Theory of Justice*. Belknap Press, Cambridge, MA, USA.
- Ross, A. (1933). *Kritik der sogenannten praktischen Erkenntnis*. Felix Meiner, Leipzig, Germany.
- Ross, A. (1934). *Virkelighed og Gyldighed i Retslæren: En Kritik af den teoretiske Retsvidenskabs Grundbegreber*. Levin & Munksgaard, Copenhagen, Denmark.
- Ross, A. (1952). *Why Democracy?* Harvard University Press, Cambridge, MA, USA.

Ross, A. (1959). *On Law and Justice*. Oxford University Press, Oxford, UK.

Weber, M. (1978). *Economy and Society*. Berkeley: University of California Press.