



HAL
open science

Alf Ross and Realist Conceptions of Legislation

Éric Millard

► **To cite this version:**

Éric Millard. Alf Ross and Realist Conceptions of Legislation. Pierre Brunet, Eric Millard, Patricia Mindus. *The Theory and Practice of Legislation*, Hart Publishing, pp.77-89, 2013. halshs-00935700

HAL Id: halshs-00935700

<https://shs.hal.science/halshs-00935700v1>

Submitted on 25 Jan 2014

HAL is a multi-disciplinary open access archive for the deposit and dissemination of scientific research documents, whether they are published or not. The documents may come from teaching and research institutions in France or abroad, or from public or private research centers.

L'archive ouverte pluridisciplinaire **HAL**, est destinée au dépôt et à la diffusion de documents scientifiques de niveau recherche, publiés ou non, émanant des établissements d'enseignement et de recherche français ou étrangers, des laboratoires publics ou privés.

Abstract

Alf Ross was certainly the best-known and consistent theoretician within the movement known as Scandinavian realism. In his main work, *On Law and Justice*, Ross constructs an empiricist theory of law on the basis of a positivist methodology and non-cognitivist meta-ethics. In this constellation, legislation does not occupy the same place as in formalist theories like normativism. Legislation instead is an element of the sources of the law, and for that reason, considered a part of the normative ideology of judges. Despite this, according to Ross there is no call from a scientific point of view for a specific study of legislation, and in particular of law-making. One of the most surprising aspects of the theory proposed by Ross in *On Law and Justice* is found in its final chapters, where Ross develops his concept of legal politics. Legal politics is not a scientific activity, but a scientifically-based practical activity: Guidance for the legislator for the purpose of articulating premises for influencing social action and proposing formulations instructing legislative organs when they enact the law. There is no inconsistency in the way Ross deals with this issue, and the entirety remains coherent to his non-cognitivist premises. On the other hand, his theory of legal politics appears unrealistic as the preconditions for its efficacy are scarcely tenable. In a sense, this theory appears more to be a self-justification for the practical activities of certain Scandinavian lawyers rather than a true realist theory.

Keywords: Alf Ross – Legal Politics – Legal Realism – Legal Science - Legislation – Non-cognitivism – Sources of Law – Validity.

A – Introduction

Alf Ross (1899-1979), Jur. D. Copenhagen, Ph. D. Uppsala, Professor of Law at the University of Copenhagen, was a Danish legal philosopher and probably one of the most influential philosophers in the school of Scandinavian realism, along with Axel Hägerström, Karl Olivecrona and Vilhelm Lundstedt. However, Ross cannot be seen as a “pure” Scandinavian realist. On many occasions, Ross extends the framework structuring his theory beyond that of Scandinavian realism. Ross initially studied with Kelsen, who inspired his first important work, a theory of legal sources,¹ and incorporated some parts of Kelsen’s normativist theory in his own version of legal empiricism. Ross then gave attention to the Vienna Circle movement and its positivism as can be seen in two senses: A positivist methodology but also a legal illustration of the logical positivism orientating Ross’ two classical books: *Towards a realistic Jurisprudence. A criticism of the Dualism in Law*² and *On Law and Justice*.³ Ross proposes as a result an empiricist theory of law that rests upon a strong non-cognitivist approach in meta-ethics and an empirical reductionism as scientific methods.

An individual seeking a theory of legislation in Ross’ works would probably be disappointed. Naturally, concepts such as legisprudence cannot be found in his various and numerous works, despite a consistent and permanent interrogation of what the law is. But even the very idea of legislation is not appropriate for Ross’ conception of law. This paper aims to explain the reasons why legislation can be seen as a marginal problem for Ross. Two reasons are advanced for such a minimization. First, it is obvious that the necessity of providing a concept of valid law adequate for a scientific analysis of what the law is obliges Ross to deconstruct the juristic ideology and to reconstruct “enacted” law as a main element of a descriptive theory of the sources of law. Second, when taking legislation into account, Ross does so mainly through legal politics, a controversial and rather obscure part of his theory. Consequently, the next section (sect. B) deals first with Ross’ conception of validity; after this his theory of legal sources is examined (sect. C) and accordingly, his analysis of legislation as an element of legal sources is illuminated (sect. D). Going to the second part of his analysis of legislation, his idea of legal politics is presented (sect. E) as well as its epistemological status (sect. F). In conclusion, the task of legal politics, to provide the legislator with guidance, is addressed (sect. G) before providing a short conclusion given in order to better appreciate Ross’ theory on legislation (sect. H).

B – What is Valid Law?

* Professor of Law, Université Paris Ouest Nanterre La Défense, eric.millard@u-paris10.fr.

1 A. Ross, *Theorie der Rechtsquellen, Ein Beitrag zur Theorie des positiven Rechts auf Grundlage dogmenhistorischer Untersuchungen* (Franz Deuticke, Leipzig-Vienne, 1929).

2 A. Ross, *Towards a realistic Jurisprudence. A criticism of the Dualism in Law* (Munksgaard, Copenhagen, 1946).

3 A. Ross, *On Law and Justice* (University of California Press, Berkeley, 1959) : hereinafter “OLJ”.

A realist approach to law is generally defined as an attempt to give an account of law as a part of reality, that is seen as a complex of facts existing in our world. It is a kind of sociology, but one for which a sociological explanation is not sufficient. On the other hand, it refers to the causal connection as a method of explanation. The concept of validity fitting such an approach cannot be the same, for instance, as for a normative science, or a science of law based on norms as ideal entities.

In a well-known lecture given in Buenos Aires,⁴ Ross established that the word “validity” is used in legal philosophy with three different meanings designating three different functions respectively. The first is a non-theoretical but technical use: to say that a legal act produces legal effects. It has an internal function, and stating that an act is valid is a legal statement according to a system of rules. The second is a scientific use corresponding to a theoretical concept: to say that a norm or a system of norms exists, that it is real. It has an external function, and saying that a norm exists is to refer to a set of social facts. This assertion is not according to a rule, but about a rule. The third one is an ethical use, to indicate that a system of norms has an *a priori* property, a “binding force”, *i.e.*, that there is a moral obligation to obey those rules constituting the system, or this system of rules itself. Obviously, the second sense is the only one that is adequate for a realist program, and this is the sense that Ross recommends using. Further precision must then be given.

First, Ross refuses any ontological approach of law, and this is consistent with his non-cognitivist meta-ethical position. In *On Law and Justice*, he writes: “The function of the doctrinal study of law is to give an account of a certain individual national system of norms... All these systems are facts whether we like them or not. In any case we need a term to describe these facts and it is purely a matter of terminology without any moral implications whether for this purpose the term ‘law’ or any other term is chosen.”⁵ He later insists that “a descriptive terminology has nothing to do with moral approval or condemnation.”⁶

Second, Ross refuses to identify, as do American realists for instance, law and judicial decisions. For Ross, we can say that a system of norms is valid “if it is able to serve as a scheme of interpretation for a corresponding set of social actions in such a way that it becomes possible for us to comprehend this set of actions as a coherent whole of meaning and motivation... This is based on the fact that the norms are effectively complied with, because they are felt to be socially binding.”⁷ The effectiveness is the validity of the law, that is its existence, and the counterpart of the norms must be the decisions of the courts. Far from any behaviouristic realism, or psychological reductionism, his concept of validity implies two dimensions: an external-factual one (effectiveness) and an internal psychological one (a judge’s feeling that there is a socially binding force). These two elements are often seen as giving birth to a set of antinomies, and Ross’ project is to allow the dissolution of these antinomies through a reconstruction of legal concepts, such as the concept of validity: a reconstruction in the legal practice of the normative idea that a valid norm contends. This does not mean that the norm is accepted by the popular legal consciousness, as is the case for psychological realists. Neither does this entail that the reality of law simply means that law is applied. A synthesis is needed: “[C]onsistency and predictability are found in the externally observed verbal behaviour of the judge [but] 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.”⁸ The decisions of judges are not law. They are the factual counterparts of this normative ideology that is law. In other words, legal science does not describe adjudication as law, but describes law through the knowledge of adjudication.

Third, asserting that a norm is valid is “a prediction to the effect that this norm will be taken as the basis for decisions in future legal disputes.”⁹ Much has been written on this aspect of Ross’ theory: a prognostic, a prognosis. According to his logical positivist framework, this mainly means that an assertion that norm D is valid could be verified through its future application (reproduction), in such a way that the logical meaning of the assertion is a prediction. The idea is that the normative ideology cannot be observed elsewhere than in the courts’ behaviour, and that to state it is an actual ideology, *i.e.*, that the norms referred to in the assertion that a norm is valid/exists implies that this ideology produces effects beyond an individual case under the same conditions. One can discuss this criterion for a scientific assertion, and mainly the question of verifiability instead of the one of falsification. But it implies that for Ross, this actual ideology is an ideology of the sources of law.

C – A Descriptive Theory of the Sources of Law

The same antinomies we have seen with validity are present in the field of theories as to the sources of law. Jurists and legal philosophers typically refer to a prescriptive, normative theory. The aim of this kind of theory is not to describe what the sources of law are, but to establish what they ought to be. In other words, what are the legitimate sources (according to a certain point of view, ethical or technical, for instance)? In a sense, this is the significance of the

4 A. Ross, 'Validity and the Conflict between Legal Positivism and Natural Law', *Revista Juridica de Buenos Aires*, (1961) IV, 46-93.

5 OLJ p. 31.

6 OLJ p. 32.

7 OLJ p. 34.

8 OLJ p. 74.

9 OLJ p. 75.

Kelsenian Pure Theory of Law that assigns to the legal science the description of the ideal, objective meanings of certain facts seen as the legitimate sources of law (constitution, enacted law, and so on). But this Kelsenian normativism differs only in consistency from any formal approach to the law. In that sense, such an approach is certainly the necessary precondition for any practical or prescriptive Legisprudence. On the other hand, certain theories of the sources of law rely on a sociological-descriptive point of view. But the sceptical-rules starting point they adopt oblige them to invoke psychological inquiries that they can hardly achieve, and condemn them to abandon any idea of a normative ideology. The “Breakfast Theory” can be seen as an extreme variation of a broader category of theories even less caricaturist.

On the contrary, the subject of a descriptive theory of the sources of law is a “common normative ideology, present and active in the mind of judges when they act in their capacity as judges.”¹⁰ If prediction is possible, according to Ross it must be “because the mental process by which the judge decides to base his decision is not a capricious and arbitrary matter, varying from one judge to another, but a process determined by attitudes and concepts”.¹¹ This ideology is “the foundation of the law system and consists of directives which do not directly concern the manner in which a legal dispute is to be settled but indicate the way in which a judge shall proceed in order to discover the directive or directives decisive for the question at issue”.¹² It is clear from this that the traditional criticisms that Hart directs at realism in general, *i.e.*, both American and Scandinavian, fail, at least for Ross.¹³ According to Ross, it is inconsistent to adopt an attitude of scepticism about rules, and at the same time assert that the law is what judges make: how can we identify judges without pre-existent rules? If the sources of law have a normative function, as well as a directive function, that is if there are elements of an ideological nature in the sources of law, we do not need rules to identify (legally) authorities, but an efficacious ideology supporting actual behaviours. Sources of law must be then understood as “the aggregate of factors which exercise influence on the judges’ formulation of the rule on which he bases his decisions”,¹⁴ including the rules concerning his competence.

A descriptive theory of the sources of law must permit “the establishment and identification of general types of sources of law which according to experience are found in all mature legal systems”.¹⁵ This implies that “not all law is positive in the sense of formally established”,¹⁶ and is a call for a reconstruction of the concept of positive law on a realistic basis. Among such sources of law, Ross indicates legislation, precedent, custom and the tradition of culture (“reason”).

D – Enacted Law as a Source of Law

This concept of sources of law is “not intended to imply a procedure for the production of rules of law. This characteristic only belongs to legislation”.¹⁷ Ross recognizes that “the most important source of law in the Continental law [of his time] is legislation”.¹⁸ He defines legislation as enacted law, which is “created by a resolution made by certain human beings”. This “supposes norms of competence which indicate the conditions under which this may take place”.¹⁹ His approach of legislation is broad, comprising “not only the constitution (if written) and Acts of Parliament, but also kinds of subordinate and autonomic enactments, by whatever name they may be called: orders in council, statutory rules and orders, by-laws by local authorities, autonomic corporations, churches, etc.”²⁰ It must be clear that questions, such as to the specificity of the “Parliamentary sovereignty” according to a political doctrine of the separation of powers, are not relevant for a descriptive theory of the sources of law. That which is important is the original form of enactment as a way to identify a type of source.

In this sense, “any enactment acquires its authority from the norms of competence defining the conditions under which the enactment shall have force of law”.²¹ There are two kinds of conditions: formal and material. The formal defines the procedure, including the identification of the qualified authorities; the material conditions define the matter of the content that can be enacted. As for any positivist theory dealing with such questions, this leads Ross to the traditional question of the constitutional (if written) enactment and amendment: If the Constitution is (actually) the superior source of law, there is no superior rule indicating the conditions of its enactment: “Every system of enacted law is necessarily based on an initial hypothesis which constitutes the supreme authority, but which is not itself created by any authority”. This hypothesis is not of the kind as found in Kelsen’s basic norm: A theoretical fiction necessarily presupposed by legal theoreticians for the ends of describing a legal system as a set of (valid) prescriptive meanings. It

10 OLJ p. 75.

11 OLJ p. 75.

12 OLJ p. 76.

13 H.L.A. Hart, 'Scandinavian Realism', *Cambridge Law Journal* (1959), 233-240.

14 OLJ p. 77.

15 OLJ p. 77.

16 OLJ p. 101.

17 OLJ p. 77.

18 OLJ p. 78.

19 OLJ p. 79.

20 OLJ p. 78.

21 OLJ p. 79.

is closer to Hart's rule of recognition in the sense that "it exists only in the form of a political ideology which forms the presupposition for the system."²² On the other hand, there is no need to suppose that this ideology is valid in the sense that Hart uses the concept and the criterion of validity (by a statement of validity). Ross later on develops this very question from a logical point of view in one of his most discussed papers: *On Self-Reference and a Puzzle in Constitutional Law*.²³

The relation of legislation to valid law must be analysed according to both elements: Ross' conceptions of validity and sources of law. Usually, the juristic thought sees this relation as follows: "[T]o what extent does the law exist already created in the source itself" (legislation, for instance) and "to what extent is it the judge who first creates it?"²⁴ According to Ross, this concerns "the degree of probability with which the motivating influence of a source on the judge can be predicted".²⁵ Here, Ross separates himself from legal American realists such as Gray, who denied that statutes as such are law.²⁶ For Ross, "to regard the statute in itself as law signifies that we can generally and with a degree of probability bordering on certainty predict that it will be accepted by the judge."²⁷ In other words, it is law according to the actual ideology of judges. But this is no difference in nature but only (generally) one of degree between enacted law and other sources of law. Even a statute can be disregarded by a judge, and even custom or rules derived from "reason" can be considered as laws in themselves by judges. And of course, to say that statutes in themselves are valid law does not answer the subsequent question: How are the directives contained therein pragmatically interpreted by judges (how are norms created), which is a factual question as far as method (and discretion) are concerned.

E – The Idea of Legal Politics

The concept of legal politics is a very obscure one. Its content and epistemological status depend narrowly on the kind of theory of law adopted. The next section deals with the latter, even if Ross begins there. I want to first clarify what kind of activity Ross designates under the term "legal politics", which is the second occasion for him to deal with legislation.

For Ross, legal politics is easy to define if one adopts an idealistic theory of law. This is because for such a conception, law has its objective in itself (to perfect the idea of justice). Legal politics is a "specific branch of cultural politics, that branch which belongs under the specific cultural idea of law".²⁸ It is the doctrine of how the perfection of the idea of justice is to be attained. It is distinct from other branches of cultural politics, such as welfare politics or power politics. On the contrary, for a theory that rejects the "idea of a specific idea of law that gives the law an absolute value of its own", that is for a theory like a non-cognitivist theory of law that "looks upon positive law as a social technique or as an instrument for social objectives of any kind", legal politics should not be "determined according to a specific objective, but according to a specific technique".²⁹ In other words, legal politics "embrace all problems of action that arise from the use, for the attainment of social objectives, of the technique of the law".³⁰

F – Legal Politics as a Non-scientific Activity

As Ross himself admits, "defined like this, legal politics would acquire a scope far beyond what is in general considered as the legitimate field of action of the jurist".³¹ And it seems obvious that this scope is even further beyond the legitimate field of action of the legal scientist according to Ross' theory of legal science. Indeed, it would be surprising to find a quite long development of this topic in a non-cognitivist main work in legal philosophy.

The answer has to be found in the relationship Ross establishes between science and politics. Ross clearly separates cognition and action. For him, the only cognition is empirical and thus a question arises: "How is it possible on this basis to arrive at legal politics – at any guidance for the legislator?"³² This question is not peculiar to legal politics. It "exists correspondingly for all sciences which pretend to give directions as to how we shall behave."³³ Therefore, Ross must give two types of answers: the first analyses the relation between science and politics, the second the peculiarity of legal politics.

For Ross, "cognition can never *motivate* an action; but assuming a given motive, it can *direct* the activity

22 OLJ p. 83.

23 A. Ross, 'On Self-Reference and a Puzzle in Constitutional Law' *Mind* (1969) 78, 1-24.

24 OLJ p. 101.

25 OLJ p. 102.

26 J.C. Gray, *The Nature and Sources of Law* (Columbia University Press, New York, 1909) ; See also J. Frank, *Law and the Modern Mind* (Brentano, 1930).

27 OLJ p. 102.

28 OLJ p. 327.

29 OLJ p. 327.

30 OLJ p. 327.

31 OLJ p. 327.

32 OLJ p. 298.

33 OLJ p. 298.

released.”³⁴ There is no possible practical cognition in the ethical sense, which Ross has constantly assumed.³⁵ On the contrary, our actions are conditioned by two factors: beliefs and attitudes. Attitudes are “those volitive and emotional phenomena of consciousness which are the source of all conscious activity.”³⁶ Our preferences constitute the practical form of consciousness; while our beliefs are the theoretical form. Our attitudes, which have no possible truth value but are facts, are under the influence of our beliefs; but not as a possible logical derivation from them. Conversely, the same can be said, just because our beliefs and our attitudes are in interaction, and does not render it possible to know whether our beliefs influence our attitudes or if our attitudes influence our beliefs. Consequently, “the task of science consists solely in serving rational argumentation by providing it with scientifically tenable assertions and by picking out with critical discrimination those that cannot stand up to a scientific test.”³⁷ Science does not persuade, convince or impose; neither does it justify.

Referring to Max Weber, Hans Kelsen and a number of young Swedish jurists as well as prominent American sociologists, Ross repeats the motto: “Science is one thing, politics another.”³⁸ Of course, a scientific consciousness supported by a theoretical approach and an appropriate methodology, has effects on our beliefs, and therefore on our (political) attitudes: “The role of theory is not only purely technical. It is also its task to give guidance concerning the objective itself; to clarify and give precision to the political attitudes by correction and supplementation of the conditioning beliefs; or to indicate the objectives which those in power would set themselves if they had a more adequate conception of reality than they actually have.”³⁹ This is what Ross calls applied social science, and Ross notes that this activity is frequent. On the other hand, this applied science can never be rationally conclusive as natural sciences must be. Ross concludes that “it is plain that this activity is not of a scientific kind. We cannot however draw the conclusion from the idea of the purity of science that such activity should not be undertaken by a scientist.”⁴⁰ Furthermore, Ross is of the opinion that “it is compatible with the idea of the purity of science, and expedient besides, for the theoretician himself to undertake the irrational jump and proffer the result in the forms of instructions to the practitioner”⁴¹ But of course, the limits are explicit: Those instructions are neither true nor false. It is then the responsibility of the practitioner to decide. Those instructions are designed to clarify problems, not to provide answers. Hence, “the idea of purity of science suffers no injury provided only that the boundaries between science and politics are clearly marked.”⁴² In other words, “no violence is done to the idea if the profession pursues science and politics together, provided that the ideal boundary between them is kept clear”. Legal science is not legal politics, but a lawyer can clearly and legitimately act as a legal scientist and as a legal-politics expert if he keeps in his activities a clear boundary between them.

Ross refutes the idea of an expert’s power, relying on a pretty optimistic dream. The necessary precondition for containing expertise of applied social science in the field of guidance is obviously that both experts and practitioners share the same non-cognitivist philosophy, which is a (non-certain) factual issue that Machiavelli already noted.⁴³ And even within a shared conception, Ross does not pay attention to a possible use of instructions not as guidance, but as justifications.

However, legal politics in its turn is a peculiar applied social science, “applied legal sociology or legal technique.”⁴⁴ The particular knowledge needed for it is “of relevance as soon as the technique of the law is employed for a solution of social problems irrespective of their objective”. That can only be “sought in the legal-sociological knowledge concerning the causal connection between the normative function of the law and human behaviour”, in other words, “concerning the possibilities of influencing human action by the apparatus of legal sanctions.”⁴⁵ Ross establishes there a clear and strong distinction between determinism, that is a necessary condition for legal politics as it is, and fatalism or predestination. From that point of view, he provides a strong critique of the Historical School (Savigny) and of the Economic Historicism of Marx, both seen as conceptions denying the possibility of legal politics (of influencing social actions through legal technique). His assumption is nevertheless not an assumption of a free will (that prevents legal politics from any utility) opposed to predestination, but the assumption of a moderate determinism: that “rational deliberation and argumentation are among the factors determining the actions of human beings.”⁴⁶ Because Ross’ position here seems to meet one of the most popular issues in contemporary legal philosophy, it could be useful to repeat that for him, none of the referred questions (instructions or expertise, decisions or prescriptions) are susceptible of any truth-value.

34 O LJ p. 298 (italics in the original).

35 See for the major work: A. Ross, *Kritik der sogennanten praktischen Erkenntnis. Zugleich Prolegomena zu einer Kritik des Rechtswissenschaft* (Levin & Munksgaard, Copenhagen-Leipzig, 1933).

36 O LJ p. 301.

37 O LJ p. 315.

38 O LJ p.318.

39 O LJ p. 322.

40 O LJ p. 323.

41 O LJ p. 324.

42 O LJ p. 338.

43 N. Machiavelli, *The Prince*.

44 O LJ p. 328.

45 O LJ p. 328.

46 O LJ p. 341.

Legal politics is a technology: a scientifically-founded policy-making. As Ross states, it is an applied legal sociology, able to provide views on questions such as “what influence does the formulation of the rules of damage have upon the caution people exhibit in various situations” or “what part is played in this connection by facilities for insurance against liability”.⁴⁷ The point is that a legal sociology of this form is not available. There is no knowledge (until now) of this kind, which is a systematic science, based on methodical research. This was true in Ross’ time, and it perhaps is still true, even if Ross mentions small beginnings of that science and even if he ardently urges the construct of such a sociology of law. But that which we know as the sociology of law rarely provides answers based on a systematic analysis of facts in order to be used as an exact knowledge for legal politics. Furthermore, in legal politics today, the sociological aspect is often minimized compared to other aspects: economics for instance, through the Law and Economics approach, or ethics. Hence Ross is obliged to accept that the lawyer operates with “knowledge obtained from the common experience of life, supplemented with more or less fortuitous statistical data”.⁴⁸ The result is that legal politics is often marked by vagueness, which we must accept, but which perhaps condemns the very idea of a rational and scientifically-founded legislative guidance.

G – Guidance for the Legislator

In our modern states, legal politics involves particularly legislation. Ross does not exclude judicial decisions from this. As well as *de lege ferenda* can occur in legal politics, can *de sententia ferenda* also occur. Such an assertion is consistent with Ross’ empiricist point of view (it is a fact that enactment is at the same time the most common way of a legal political action, and a special technique of law-making requiring special skills) and his theory of the sources of law. According to Ross himself, “legal politics is possible because the legislator is not impotent.” On the other hand, “the possibilities of legal politics are limited because the legislator is not almighty either.”⁴⁹

As far as legal politics implies legal technique, “there are no problems of legislation that are specifically legal-political, but every problem of legislation has a legal-political aspect”, even if this aspect is contingent in different situations.⁵⁰ But this contingency does not depend on the technical complexity. Ross indicates, for instance, that in tax law, a very technical and evolutive area, the legal-technical problems are of secondary importance: legal politics, or the legal-technical problem, deals with the link in the causal chain between normative enactments and compliance, and not with the technical complexity of the provisions. On the contrary, legal-technical problems are predominant in rather simple legal institutions, such as property, contract and marriage. This is because these institutions are deeply rooted in a relatively permanent ideology, and therefore, they seeming not to be political in a common perception, they become legal-political. As for validity, this is more a degree of difference than of nature.

What should a lawyer do in his expertise work? Ross first refutes that lawyers feel concerned by solely strictly legal-political questions: Legislation is a whole and it is hardly possible to divide all the questions implied in a piece of legislation in clearly separate matters for which a specific expert is necessary. This is why Ross advocates a collective body, a commission to report on legislative reforms, composed of experts having different knowledge. On the other hand, the respective places of different experts are difficult to draw between dilettantism and domination. It is obvious that Ross at that point believes in a rational collective deliberation that presupposes from everyone “discernment and tact”;⁵¹ “legal politics has the character of an art, a skill, where the value of the result is measured by being in fact accepted by others, particularly those in power, as the decision that best harmonises with all the dominating attitudes and operative beliefs.”⁵² Here again, Ross has no other possibility than to observe that his dream of a scientifically-founded policy-making is quite unattainable.

What should a lawyer do in his expertise work? Second, according to Ross, the lawyer must state the premises of the legislation: “to study the objectives and attitudes which in fact are predominant in influential social groups and thus determinative for the legislative organs.”⁵³ Such are to be studied not as general interests or principles, but as concrete and effective results of the prevailing ideology and common or conflicting interests. Ross admits that this is a difficult program: interpretation and subjectivity are inevitable. To avoid transforming himself into a “high priest”, the lawyer must be aware of this, and understand that the motivating attitudes (the premises he has to establish) are only hypothesis.

What should a lawyer do in his expertise work? Third, according to Ross, the lawyer must formulate conclusions. As far as the previous questions were concerned, this was a question of facts. Now, legal politics supposes that a theoretical inquiry is assumed, defining “the causal correlations operative in relation to the premises”.⁵⁴ But the conclusions formulated in the form of an instruction to the legislator are not of a logical character: they relies on “psychic causality”.⁵⁵ They are of a practical nature, and indicate the manner in which the legislator should act on the

47 OLJ p. 332.

48 OLJ p. 332.

49 OLJ p. 354.

50 OLJ p. 329.

51 OLJ p. 330.

52 OLJ p. 331.

53 OLJ p. 334.

54 OLJ p. 337.

55 OLJ p. 337.

basis of premises (attitudes and beliefs) he accepts.

From this, the role of the lawyer is derived as that of a legal politician: “to function, as far as possible, as a rational technologist. In this role he is neither conservative nor progressive. Like other technologists, he simply places his knowledge and skill at the disposal of others, in his case those who hold the reins of political power”.⁵⁶

H – Conclusion

If Ross had good reasons not to do develop a specific argumentation about legislation from the point of view of his non-cognitivist theory of law, and to reserve it to the part in which he deals with a descriptive theory of the sources of the law, the way he reintroduces legislation under the concept of legal politics is then artificial. Feeling dissatisfaction with such a conception is understandable from whatever standpoint is taken: Whether one accepts non-cognitivist premises and the correlative positivistic theory of law and legal science proposed by Ross, or whether one advocates any form of legisprudence. This attempt lacks critics, and self-critics. The idea and methods of legal politics are clearly and consistently presented according to Ross’ conception of what law is. Despite this, it is possible to consider that the price of this consistency rests on the practical impossibility of that activity, as Ross states it. It is clear that this part of his theory is not descriptive but prescriptive. It is not a sociology of the work of experts, of their preconceptions, or their production. It should be surprising to observe that Ross dedicated long pages at the end of his book to justifying an activity that on the basis of his own analysis, he claims is not a scientific one and can hardly be practised, if not honestly, at least safely (taking in consideration the practical political uses of instructions as formulated). It is difficult not to see in this a kind of self-justification, and one knows how legal realists, including Ross, participated as legal politicians to the social-democratic experiences. On the other hand, realism later was rejected by Scandinavian legal philosophers on a basis of a moral and practical evaluation of what legal politics means (and what it meant in practice), more than on a rational discussion of the core of their theories. Perhaps one can agree that a legal political analysis on such a basis (a prescriptive doctrine of a non-scientific activity) is not necessary for realist theories, and that self-justification is not a relevant reason for including it in a theory. The modern realism in Europe (the Genoa or Nanterre Schools, for instance) has considered that this part of Ross’ work should be allowed to remain in the books as a testimony of a given period, and of the human problems of that period. This author sees no reason to reactivate it, neither for the good of an empiricist theory of law, nor for the ends of giving a non-realist foundation to dogmatics.

56 OLJ p. 377.