

Legal validity from the perspective of Scandinavian Legal Realism

Obowiązywanie prawa w ujęciu skandynawskiego realizmu prawnego

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Abstract:

The article provides an examination of the basic philosophical assumptions underlying Scandinavian legal realism. Adherents of this legal-philosophical current had rejected idealism prevalent in the Scandinavian philosophy until the beginning of the 20th century and turned to naturalism as the only source of explanation of legal phenomena. Affinity to naturalism entailed excluding all metaphysical entities from the realm of ontology. According to Scandinavian legal realist legal validity, as understood in traditional legal theory, contained a “suspect” category of objective ‘ought’. As such it was incompatible with naturalistic assumptions and required reformulation. The solution provided by the Scandinavian realists assumes reinterpretation of the concept of legal validity in terms of psychological and behavioral facts, e.g. objection of the apparent independence from legal-positivist conception of validity.

Keywords:

legal validity, naturalism, Scandinavian legal realism, Alf Ross, Karl Olivecrona

Streszczenie:

Celem artykułu jest rekonstrukcja głównych filozoficznych założeń leżących u podstaw skandynawskiego realizmu prawnego. Przedstawiciele tego nurtu w filozofii prawa odrzucili idealizm dominujący w skandynawskiej filozofii do początku XX wieku, uznając naturalizm za jedyną teorię pozwalającą na wyjaśnienie zjawisk prawnych. Przyjęcie stanowiska naturalistycznego – wyłączającego poza nawias dopuszczalnej ontologii wszystkie byty czy zjawiska metafizyczne

– wymagało w ich przekonaniu przeformułowania pojęcia obowiązywania tak, aby nie zawierało w sobie ‘podejrzanej’ z perspektywy naturalizmu kategorii obiektywnej powinności. Propozycja skandynawskich realistów zakłada re-interpretację obowiązywania prawa w kategoriach faktów psychologicznych i behawioralnych, np. zarzut pozornej niezależności od pozytywistycznej koncepcji obowiązywania prawa.

Słowa kluczowe:

obowiązywanie prawa, naturalizm, skandynawski realizm prawny, Alf Ross, Karl Olivecrona

1. Introduction

Scandinavian realism is a current in legal philosophy developed at the beginning of the 20th century, represented mainly by Swedish and Danish scholars. The first representative and originator of Scandinavian legal realism was Axel Hägerström (1868–1939), a professor at Uppsala University, adherent of naturalism and advocate of scientific method. His reflections on the phenomenon of law and morality had influenced the most acknowledged representatives of this current: Karl Olivecrona (1897–1980) and Alf Ross (1899–1979). Jes Bjarup concisely characterizes Scandinavian realism in the following manner:

Hägerström's motto for his philosophy was 'praetera censeo metaphysicam esse delendam' ["Moreover, I propose that metaphysics must be destroyed"]...and this holds for Scandinavian realism as well. The origin of all vices in the sciences consists of metaphysical ideas, and we must destroy these in order to understand reality. The dividing line of legal philosophy is between idealism and realism.... Characteristic of the proponents of Scandinavian realism, such as Hägerström, Lundstedt, Olivecrona and

Ross, is their critical attitude towards metaphysics and natural law. Law cannot be looked upon in the light of the idea of law or according to substantive norms of justice... Rather, law must be seen as a purely factual manifestation of reality, and explanations of legal phenomena must be stated in empirical terms^[1].

All representatives of Scandinavian legal realism, despite significant differences in their views, therefore shared the conviction that it is necessary to establish a scientific (i.e. corresponding to the methodology of natural or social sciences) theory of law free from any traces of metaphysics. Their views on this matter were radical, since they assumed that all normative concepts (legal, ethical, aesthetic) were either to be removed or replaced with empirical categories. One of the fundamental questions that arise in the context of such a research program is how to explain the phenomenon of legal validity (i.e., a normative aspect of law) in naturalistic terms. The solution proposed by the Scandinavian realists is revolutionary from the perspective of the classical legal theory encompass-

¹Bjarup, J. (1978) Skandinavischer Realismus, München, p. 16 as cited in Spaak, T. (2014) A Critical Appraisal of Karl Olivecrona's Legal Philosophy, Heidelberg, p. 6.

ing legal positivism and natural law theory. It is based on the rejection of dualism of 'is' and 'ought' through reinterpretation of the notion of validity in terms of empirical (psychological or behavioral) facts. In the following paragraphs, I discuss the fundamental methodological and ontological assumptions adopted by the Scandinavian legal realists (point 2), following which I present their solution of overcoming the dualism of 'is' and 'ought' (point 3). In the conclusion, I provide a critical evaluation of their main assumptions (point 4).

2. Philosophical foundations of Scandinavian legal realism: naturalism and non-cognitivism

The naturalism of Scandinavian realists was a critical response to Christopher Jacob Boström's (1797-1866) philosophy, prevalent in the Scandinavian universities at the end of the 19th and the beginning of the 20th century. Boström's conception is a version of

conscious entity (God) in which all other beings are contained. Boström's philosophy is sometimes referred to as 'rational idealism', since it assumes the existence of only one consciousness and the ideas it produces. 'Rational idealism' provided a critical background for the development of philosophical ideas of Axel Hägerström and his adherents. They rejected the Boströmian idealism with its notion of spiritual reality by assuming the existence of one spatiotemporal, material reality consisting of physical objects, their original properties, and causal relations. Hägerström labeled his philosophy as 'rational naturalism', to emphasize the distinctiveness of his stance with regard to Boström's 'rational idealism'^[3]. Adopting a naturalistic vision of reality entailed non-cognitivism towards norms and values, since such entities are foreign to the physical, spatiotemporal realm. In the remainder of this section, I shall discuss both of the above-mentioned essential assumptions adopted by Scandinavian realists, i.e., naturalism and non-cognitivism in more detail.

The concept of 'naturalism' is notoriously ambiguous; it comes in many varieties, some of which are difficult to reconcile with each other.

idealism inspired by Berkeley's principle of *esse est percipi*, according to which objects do not exist autonomously, but are correlates of consciousness^[2]. Reality in Boström's approach to idealism is purely spiritual: the highest being in the ontological hierarchy is a self-

2.1. Naturalism

The concept of 'naturalism' is notoriously ambiguous; it comes in many varieties, some of which are difficult to reconcile with each other. In order

^[2]Bjarup, J. (2005) The Philosophy of Scandinavian Legal Realism, *Ratio Juris*, vol. 18, no. 1, p. 3, see also: Mindus, P. (2009) *A Real Mind. The Life and Work of Axel Hägerström*, Heidelberg, p. 16–19.

^[3]Bjarup, J. (2000) Ought and Reality, in: Wahlgren, P. (ed.) *Legal Theory*, Stockholm, Available at: <http://www.scandinavianlaw.se/pdf/40-1.pdf>, p. 24.

to provide some systematization naturalism is sometimes (somewhat schematically) divided into two standpoints: ontological and methodological. In discussing Scandinavian realism both varieties should be taken into account^[4]. Ontological naturalism, simply speaking, assumes that any supernatural phenomena should be excluded from admissible ontology as not belonging to nature. The concept of nature is therefore fundamental for indicating which entities are to be included in the ontological framework. Scandinavian realists assumed that any phenomenon that can be located within the frames of time and space is natural and therefore ontologically acceptable^[5]. They claimed that spatiotemporal reality consisted of physical, social and psychological facts (i.e. empirical state of affairs). Such monistic image of reality entails excluding any supernatural entities from the realm of admissible ontology. According to the Scandinavian realists, legal validity, as understood by traditional legal philosophy, is such a 'bizarre', supernatural entity, since valid law is at the same time an observable factual phenomenon and a binding norm belonging to the realm of values^[6]. In other words, the traditional conception of legal validity is dualistic, and this dualism is unacceptable for two reasons: firstly, as Ross proves, it leads to a series of antinomies in legal theory, and secondly, it cannot be maintained since Scandinavian realists assumed that there can be no

connection between objects of two extremely different ontological characteristics (*no connection thesis*^[7]). They have justified this thesis on epistemological ground. Their conception assumes that only those entities and phenomena which can be recognized as elements of a coherent system involving spatiotemporal objects may be considered as existing^[8]. Since physical objects and 'supernatural' entities, such as the validity of law, cannot be part of a coherent ontological whole, and thereby, lack any *connection*, they cannot be a ground for a consistent system of assertions that could encompass both types of entities^[9]. The first Scandinavian realist to clearly formulate this problem was Axel Hägerström in his critical evaluation of Hans Kelsen's *Allgemeine Staatslehre*. Hägerström claimed that:

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^[10].

'No connection' thesis therefore entails that the law, so long as it is understood as ideal

⁴Spaak, T. (2009) Naturalism in Scandinavian and American Legal Realism: Similarities and Differences, in: Dahlberg, M. D (ed.), De Lege, Uppsala-Minnesota Colloquium: Law, Culture and Values, Uppsala, p. 36–40.

⁵Spaak, T. (2014) Naturalism and Non-naturalism in Legal Philosophy: Hägerström on Kelsen, in: Eliaeson, S., Mindus, P., Turner, S. P. (eds.) Axel Hägerström and Modern Social Thought, Oxford. Available at SSRN: <https://ssrn.com/abstract=2151194>, p. 8.

⁶Ross, A. (1946) *Towards a Realistic Jurisprudence*, Copenhagen, p. 11.

⁷Spaak, T. (2017) Realism About the Nature of Law, *Ratio Juris*, 30 (1), p. 87–89.

⁸Mindus, P. (2009) *A Real Mind. The Life and Work of Axel Hägerström*, Heidelberg 2009, p. 55–59.

⁹Spaak, T. (2017) Realism About the Nature of Law, *Ratio Juris*, 30 (1), p. 88.

¹⁰Hägerström, A. (1953) *Inquiries into the Nature of Law and Morals*, Uppsala 1953, p. 267 as cited in: Spaak, T. (2017). Realism about the nature of law, *Ratio Juris*, 30 (1), p. 88.

or universal validity, cannot be included in the system of knowledge describing the spatiotemporal reality. Law, being a partly supernatural phenomenon, would have to be located 'somewhere' outside of the realm of time and space. As Hägerström argues in the above quotation, such a parallel world would be so extremely different from the natural one that it would be impossible to perceive them as united in any way. Therefore adopting a naturalistic, monistic ontology placed the Scandinavian realists in opposition to Kelsen. It is apparent in the works of Hägerström, Olivecrona and Ross that Kelsen was an important, however mostly negative point of reference for their philosophy. The most important difference between Kelsen and the Scandinavian realists amounts to the fact that according to the former, a legal norm is an *a priori* category, which however relates to the events occurring in material reality:

The norm as such, not to be confused with the act by which the norm is issued, does not exist in space and time, for it is not a fact of nature. The possible content of the norm, however, is the same as the possible content of an actual event, for the norm refers in its content to this actual event, above all, to human behavior^[11].

The Scandinavian realists could not agree with such assumptions due to no connection thesis. Kelsen was however well aware that such objection could be raised, and attempted to repel it by introducing a category of modally indifferent substrate common to both 'is' and 'ought' and *ipso facto* combining the two realms^[12]. Nonetheless this solution remains unaccepta-

ble for the Scandinavian realists since, as Ross observed, the mere idea of such a substrate is unthinkable, as it would have to take the form of either 'ought' or 'is'^[13]. Thus, for the Scandinavian legal realists, the law cannot be understood as a system of valid norms, at least not in the sense adopted by representatives of legal positivism (like aforementioned Kelsen) or natural law theory. Their alternative stance amounts to the claim that the binding force of the law is merely a feeling, a psychological illusion. As Olivecrona argues: 'The belief in the objective ought includes the idea that the sentences are held really to engender the relations which they enunciate (...). This is the great error. We are misled by our own feelings of being bound by the law into believing in these metaphysical relations'^[14]. In other words, the Scandinavian realists claimed that the belief in objective legal validity is merely a rationalization of individual psychological feelings, and, what follows, argued that the vast majority of legal theory rests on a fundamental mistake (namely belief in objective validity). What is particularly interesting and revolutionary in the Scandinavian legal realism is precisely the explanation of legal validity in terms of psychological and behavioral facts (point 3)

As for methodological naturalism, it rests on an assumption of continuity between philosophical inquiries and scientific research^[15]. Brian

¹¹Kelsen, H. (1992) Introduction to The Problems of Legal Theory, Oxford, p. 12.

¹²Spaak, T. (2016) Realism about the nature of law, Ratio Juris 30 (1), p. 89–92.

¹³Ross, A. (1933) Kritik der sogenannten praktischen Erkenntnis, Copenhagen, p. 53.

¹⁴Olivecrona, K. (1951) Realism and Idealism: Some Reflections on the Cardinal Point in Legal Philosophy, New York University Law Review, vol. 26, p. 130–131 as cited in: Spaak, T. (2016) Realism about the nature of law, Ratio Juris 30 (1), p. 80.

¹⁵Leiter, B. (2007) Naturalizing Jurisprudence, Oxford University Press, p. 34–35, B. Leiter, Naturalism in Legal Philosophy, E. Zalta (ed.) The Stanford Encyclopedia of Philosophy (Summer 2017 Edition), available at: <https://plato.stanford.edu/archives/>

Leiter points at two varieties of methodological continuity: firstly, 'methods continuity', understood as a claim that philosophical methods should imitate scientific ones; secondly, 'results continuity' according to which philosophical theories should be supported by the results of scientific research^[16]. In the case of Scandinavian legal realism, methodological continuity takes the form of continuity of methods^[17]. This

2.2. Non-cognitivism

Assuming ontological naturalism in its variety adopted by Scandinavian realists entails rejecting the category of objective values or objective 'ought' as 'unsuited' to a naturalistic worldview (irreducible to physical states of affairs). It is equally impossible to find the

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means that the inquiries conducted within the field of legal theory must rely on the methods derived from the sciences. In this respect, two variants of methodological naturalism should be distinguished: radical and moderate^[18]. The radical version of methodological naturalism assumes that reality can only be investigated using methods derived from the natural sciences. The moderate version of methodological naturalism recognizes (alongside natural sciences) also social sciences, namely psychology and sociology. The Scandinavian realists relied on this second, moderate version of methodological naturalism and sought to interpret legal validity in terms of psychological or behavioral facts.

counterpart of the concept of objective good in physical reality and the counterpart of the binding force or the validity of legal norms. Since non-cognitivists reject the belief in the existence of any independent moral reality, therefore they assume that normative phenomena cannot refer to anything conceivable in the real world (hence have no truth value). Consequently, value judgments are considered to be merely manifestations of individual, subjective beliefs or emotions (they have only emotional, but not cognitive dimension).

Adopting a non-cognitivist stance fundamentally influenced the way in which Scandinavian realists perceived the significance of legal theory^[19]. Its role amounted to a conceptual analysis of the language of legal doctrine; this analysis was intended to ensure logical coherence of the legal language. An analysis of key legal concepts such as 'validity', 'right' or 'duty' led Hägerström and his followers to the conclusion that these concepts have no counterparts

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¹⁶Leiter, B. (2007) *Naturalizing Jurisprudence*, Oxford University Press, p. 34–35.

¹⁷Spaak, T. (2015) *Ross on the Dualism of Reality and Validity, Utopia y Praxis Latinoamericana*, 20 (71), p. 43.

¹⁸Stelmach, J. (2015) *Stare i nowe interpretacje naturalizmu prawniczego*, in: Stelmach, J., Brożek, B. et al. (eds.), *Naturalizm prawniczy. Interpretacje*, Warszawa, p. 14.

¹⁹Bjarup, J. (2005) *The Philosophy of Scandinavian Legal Realism*, *Ratio Juris*, vol. 18, no. 1, p. 9–10.

in a naturalistically perceived reality and amount to emotive expressions of subjective beliefs. In order to understand this radical claim properly let us use as an example the concept of right. One can easily point at subjects or object bearing rights, but no such entity as a right in itself exists in a spatiotemporal reality. Having a right may involve the expectation of a certain behavior (or lack thereof), but the concept of right in itself is devoid of meaning since it lacks any real referent. Despite the fact that many legal concepts do not relate to anything perceptible in physical reality, they still have psychological meaning, since they exert influence on human behavior. A view according to which legal or moral concepts are purely influence-exerting categories devoid of any real meaning was labeled as 'legal nihilism'. This term was formulated by the critics of Hägerström's moral philosophy and was definitely pejorative^[20]. It was only Ingemar Hedenius who deprived 'legal nihilism' of negative connotations, using it as a descriptive philosophical term. Hägerström, Olivecrona and Ross adhered to 'legal nihilism' so understood. Their goal was to explain how legal 'magical' vocabulary exerts influence on behavior of both lawyers and layman and to investigate the emergence of the *feeling* that the law possesses a binding force. Let me recall that since on the ground of naturalistic and non-cognitive assumptions underlying Scandinavian legal realism, the concept of objectively binding norm is impossible to maintain, validity can be explained only in psychological or behavioral terms. Since among the Scandinavian realists Olivecrona and Ross developed the most thorough psychological conceptions of validity, in the next section I focus on their views.

3. Realistic reinterpretation of the problem of legal validity

3.1. Karl Olivecrona

In *Law as Fact*, Olivecrona formulates his aim in the following manner:

What I want to do is chiefly to treat the facts as facts. My purpose is to reduce our picture of the law in order to make it tally with existing objective reality (...). It is of the first importance to place the most elementary and well-known facts about the law in their proper context without letting the metaphysical conceptions creep in time and again^[21].

The aspect of law, which, according to Olivecrona is particularly exposed to such metaphysical explanation, is its binding force (validity). However, since valid law exerts influence on human actions, it must have its place in physical reality. Assuming the thesis of the lack of connection between objects with extremely different ontological characteristics, legal validity must be interpreted *only* in terms of natural facts. Otherwise, it would be impossible to explain the capacity of the legal rules to influence and shape social relations^[22]. In order to interpret legal validity in naturalistically acceptable terms, Olivecrona proposed to understand it as a set of psychological facts: the sum of beliefs about the legal consequences of human actions, and related sociological facts, i.e., behavior consistent with

²¹Olivecrona, K. (1939) *Law as Fact*, Copenhagen, p. 27.

²²Spaak, T. (2009) Naturalism in Scandinavian and American Realism: Similarities and Differences, in: Dahlberg, M. (ed.), *De Lege*, Uppsala-Minnesota Colloquium: Law, Culture and Values, Uppsala, p. 55–59.

²⁰Strang, J. (2009) The Scandinavian Value Nihilists. The Crisis of Democracy in the 1930s and 1940s, *Nordeuropaforum* 19 (1), p. 40.

these beliefs^[23]. Now Olivecrona claimed that law possesses a capacity to influence the human mind, so that it is experienced as binding. The question which requires to be answered is what exactly evokes this capacity. According to Olivecrona it is not a matter of a content of legal rules (the content being a certain 'idea of an imaginary action by a judge in an imaginary situation'^[24]). What is decisive for the psychological effectiveness of legal rules is their particular form. The form of the law, according to Olivecrona, is imperative, because its purpose is to exert a certain effect, i.e. particular behavior of the addressee^[25]. The imperative form of legal rules, so he claims, depends not on its grammatical formulation, but the intention of the speaker; therefore in order to determine whether the stated rule is an imperative, one must know the context in which it is pronounced. The prototype imperative is a command (however, as I indicate further, the two categories are not tantamount to each other). As Olivecrona claimed:

A command is an act through which one person seeks to influence the will of another. This may be done through words or signs or perhaps by a determined look only. It is characteristic of the command that the influence on the will is not attained through any appeal to things that constitute values for the receiver of the command. The command may be supported and strengthened by a threat or by a promise. But this is something secondary. The command as such does not contain any reference to values. It works directly on the will. In

order to do this the act must have a suggestive character. Whether words or other means are used, the purpose is obviously suggestion^[26].

The similarity between the command and imperative amounts to them both having a suggestive form which does not require any relation to values in order to exert influence on behavior. However, according to Olivecrona, there are some fundamental differences between these two categories. Firstly, unlike commands, imperatives do not require any kind of personal relationship between the person issuing the command and his recipient. The term 'independent imperatives', is supposed to capture the absence of such personal relationship. The words '... function independently of any person who commands. We may in this case speak of 'independent imperatives', in order to get a convenient term'^[27]. Secondly, whereas complying with the command is secured by a threat of sanctions (as it is claimed in Austin's command theory), acting in accordance with independent imperative stems from the mere feeling of being bound by it. Olivecrona pictures emergence of this feeling in the following manner: 'What lies behind the sentences is something other than judgment. It is that, in our mind, an imperative expression is coupled to the idea of action. This is a psychological connection only, though of the utmost importance in social life'^[28]. In the case of legal validity such explanation is however insufficient. The mere imperative due to and intention would not be capable of giving raise to the feeling of being bound by the rules (although Olivecrona seems to imply that imperative form

²³Ibidem, p. 59.

²⁴Olivecrona, K. *Law as Fact*, p. 29.

²⁵Ibidem, p. 31.

²⁶Ibidem, p. 33–34.

²⁷Ibidem, p. 43.

²⁸Ibidem, p. 46.

of legal rules is in this respect the most important factor). The second crucial component is authority. The legislative acts derive their capacity to influence the citizens' psychology from their respectful attitude towards the constitution: 'Under ordinary circumstances legislation takes place in accordance with the rules of the constitution. Its effect results in the first place from the general reverence in which the constitution is held and the habitual obedience to its rules'^[29]. According to Olivecrona, psychological effectiveness of the legal rules stems from the human inclination to obey conventions and commonly acknowledged authorities. However this does not have to be any constitutional or even political authority. As Olivecrona claims, the new psychologically effective rules can be introduced through the works of legal scholars: 'The legal writers do not, of course, assume

exactly independent imperatives exert influence on human psychology. He does not attempt to present any kind of justification of his theory. I will return to this problem in the last, critical part of this article. At this point it is important to emphasize that the conception of independent imperatives allows Olivecrona to avoid the metaphysical „loanwords' he discards.

3.2. Alf Ross

Ross formulates the concern common to all representatives of the Scandinavian legal realism in the following manner: 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

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the role of law-givers. Nevertheless, the effect of their writings is often to establish new rules. They are supposed to describe only what is already present in the law, but they give a great deal more, because they are trying to fill up the gaps in the law'^[30].

The biggest drawback of Olivecrona's conception of independent imperatives is its vagueness, in particular: its lack of clarity as to how

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^[31].

²⁹Ibidem, p. 52–53.

³⁰Ibidem, p. 64.

³¹Ross, A. (1946) *Towards Realistic Jurisprudence*, Copenhagen,

According to Ross, although the problems stemming from dualism of factuality and validity have been noticed and acknowledged in legal philosophy they nevertheless remained unresolved. Various legal-philosophical conceptions either embraced dualism or tried to avoid it, but none has overcome it. For instance, Kelsen, as was already mentioned, insisted on placing validity in the sphere of 'ought', American legal realists considered it merely as a fact, and proponents of natural law theory seemed to recognize the unavoidability of dualism. It might seem that Ross should have accepted the solution adopted by the American legal realists, however he recognized that their conception is vulnerable to some objections. Let me consider one of them: American legal realists claimed that law is not 'in books' but 'in action', namely in judicial decisions. However, so Ross claims, certain laws must antecede any decision made by the judge, as is the case with the laws determining the conditions under which judicial decisions are binding^[32]. Thus Ross' solution is different, he does not reject the normative aspect of law, but reinterprets it in factual terms: 'The way to conquer dualism and its unfortunate consequences is (...) to interpret the ideas of a superempirical 'validity' as rationalizations of certain emotional experiences and thus include them in the world of facts'^[33].

The issue of legal validity recognized in *Towards a Realistic Jurisprudence*, was developed in *On Law and Justice*, Ross' most acclaimed book. In order to emphasize that there is nothing supernatural or metaphysical in validity of legal norms, he introduced a metaphor

of chess; his point was to expose a clear analogy between the feeling of being bound by the rules of chess and by legal norms. He wrote:

The concept 'valid (Illinois, California, common) law' can be explained and defined in principle in the same manner as the concept 'valid (for any two players) norm of chess'. That is to say, 'valid law' means the abstract set of normative ideas which serve as a scheme of interpretation for the phenomena 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'^[34].

Ross's point is that legal rules are valid when: a) they are effective, which means that judges rely on them when making their decisions, and b) they rely on them because they feel bound by them^[35]. At this point it is important to stress that according to Ross, it is the judicial legal consciousness which determines the content of valid law. Laymen convictions are useless in this case, since *ex hypotesi* they rely mostly on individual intuitions and beliefs. Judges, on the other hand, due to their education and professional training, are more reliable in determining which norms are actually valid. It should therefore be noted that legal validity contains two elements: behavioral: a judge's regular adherence to a particular pattern of behavior set by the norm, and psychological: his recognition of this behavioral pattern as a binding social norm^[36]. Thus in Ross's conception, the problem of validity cannot be exhaustively explained in behavioral terms, i.e., by external

p. 11.

³²Ibidem, p. 62.

³³Ibidem, p. 10.

³⁴Ross, A. (1958) *On Law and Justice*, Berkeley, p. 17–18.

³⁵Ibidem, p. 34.

³⁶Ibidem, p. 34–38.

observation of regularity in the judicial decisions. Their actions can be understood only by assuming a shared ideology that influences the judges and motivates their actions^[37]. Now the mentioned normative ideology shared by the judges consists of properly enacted legal rules, customs and precedents^[38]. Ross's precise claim is that the mere act of law enactment is not enough to recognize legal rules as valid (at this point his stance differs from legal positivists'). Validity of legal rules – as was already mentioned – depends on them being applied by the judges and on judges' internal conviction that they are binding^[39]. However it should be noted that this 'feeling of being bound by the rules' is in general – according to Ross – stronger in case of properly enacted legal rules, than in case of other kinds of rules (e.g. of customary law). In other words, legislation is the most significant factor in shaping the shared normative judicial ideology. Ross's chess metaphor should be clear at this point; there is nothing metaphysical in validity of both kinds of rules. Properly enacted legal rules, by forming a shared judicial ideology enable interpreting and predicting judicial decisions, just as the rules of chess create an interpretative context for understanding players' moves. According to Ross, the main task of the doctrinal study of law is to indicate and describe the valid rules of law (the statements about valid law are therefore not prescriptive, but descriptive). In order to formulate such descriptions, legal scholar must anticipate future judicial behav-

ior relying on the knowledge about the shared ideology (legislation, custom, precedent). Thus assertions of the doctrinal study of law are in fact predictions to the effect that the given rule will be used as the basis for future judicial decisions. Since these predictions rely on the variety of the sources law, they can never be absolutely certain but are probable to a greater or lesser degree. Moreover according to Ross not only doctrinal assertions have a probabilistic character, the same must be said about legal rules themselves: 'a rule can be valid to a greater or lesser degree varying with the degree of probability with which it can be predicted that the rule will be applied'^[40]. According to Ross, in order to maintain a scientific nature of the doctrinal study of law, such predictions concerning valid law must undergo the procedure of empirical verification. He claimed that: 'A proposition about valid law is to be verified by fulfilling the prescribed conditions and observing the decision'^[41]. Ross was under a strong influence of logical positivism, which assumed that only empirically verifiable assertions could be considered as scientific and meaningful. As I will point in the conclusion his allegiance to naturalism in this logical positivist version exposes his theory to criticism.

4. Conclusion

An attempt to reinterpret legal validity in terms of its psychological effectiveness is an unpromising enterprise, especially when such a new theory is supposed to radically dissociate itself from the dominant positivistic view of law. In the remainder of this section I present possible

³⁷Ibidem, p. 73–74.

³⁸Ibidem, p. 75–78.

³⁹Even the proper acts of legislation are not valid in Ross's realistic sense if they are not actually applied by the judges. Further, the informal rules of custom can be a valid source of law (on a par with, or even 'stronger' than legislation), provided that judges apply them in their decisions.

⁴⁰Ibidem, p. 45.

⁴¹Ibidem, p. 41.

objections facing such a realist stance. Olivecrona's conception of 'independent imperatives' is exposed to (a) an objection of subjective approach to legal validity and (b) an objection of vagueness. Both Olivecrona and Ross face the (c) objection of the apparent independence from legal-positivist notion of legal validity. Ross's conception is also vulnerable to the (d) objection of practical insignificance of the probabilistic concept of validity of legal rules and (e) objection of misusing the principle of verification.

Ad (a): The first objection to Olivecrona's conception was raised by Ross. He claimed that Olivecrona's 'psychological realism' turns the

his standpoint is different: what he claims is that people are generally inclined to accept and respect some conventions (like aforementioned rules enacted in accordance with the constitution), which prompts them to conceive the law as binding. However since this respect for conventions varies from one individual to another, there is a little chance that the citizens would share equal feeling of being bound by the rules.

Ad (b): The first objection is connected to the second problem, namely it remains unclear why legal rules *qua* independent imperatives are felt to be binding. The mere imperative form or imperative intention is certainly not

Assertions of the doctrinal study of law are in fact predictions to the effect that a given rule will be used as the basis for future decisions of the judges.

question of valid law into a subject of individual psychology^[42]. Such individualistic perspective undermines the basic quality of law, i.e. its intersubjective nature. Ross also struggled with this problem, however he managed to avoid it by claiming that it is a judicial legal consciousness that determines the validity of legal rules. Now due to the shared judicial ideology and professional training, judges are limited in choosing the rules upon which they decide the case, whereas the legal consciousness of laymen is variable and dependent on many factors (including extralegal ones). It seems that, in order to defend the unity of a system of valid rules, Olivecrona would have to assume that rules *qua* independent imperatives have a capacity to exert equal influence on citizens' minds. However

sufficient to give rise to such a feeling, however Olivecrona seems to claim that this is the case and believes that a proper psychological inquiry could elucidate this problem^[43].

Ad (c): It seems that both Ross' and Olivecrona's departure from legal positivism is not as radical as they would hope for. Olivecrona tries to emphasize his indifference to positivism claiming that: 'It is impossible to ascribe a permanent existence to a rule of law or to any other rule. A rule exists only as a content of a notion in a human being'^[44], whereas a few pages earlier he claims that 'the state organization provides a machinery for making rules psycho-

⁴²Olivecrona, K. *Law as Fact*, p. 31.

⁴⁴*Ibidem*, p. 47–48.

⁴²*Ibidem*, p. 72.

logically effective (through legislation)¹⁴⁵. This means that the properly enacted law is the strongest source of the feeling of being bound by the rules. This is not to say that Olivecrona was a legal positivist, but merely that explanation of the binding force of law without any relation to the formally enacted rules is hardly possible. Ross's conception is exposed to this objection to a greater extent. It is the positivistic concept of a legal rule which constitutes the strongest element of the shared judicial ideology. In other words, judges arrive at their decisions mainly on the basis of properly enacted legal rules. Thus both Olivecrona's and Ross's concepts of legal validity are partly 'parasitic' on the positivistic concept thereof¹⁴⁶.

Ad (d): Ross's claim that the legal rule is a gradable (probabilistic) concept has no significance from the perspective of a judge deciding the case¹⁴⁷. While applying a legal rule, judge considers it as non-gradable (it is either valid or invalid; in the second case it is simply not applied).

Ad (e): Ross's strong attachment to naturalism is particularly apparent in his adherence to logical positivism in general, and his application of the principle of verification in particular. However, applying verificationism in the field of doctrinal study of law is not uncontroversial. Verification was usually applied to unprobabilistic universal statements, whereas applying any scientific mode of empirical testing to probabilistic sentences seems dubious¹⁴⁸. Thus Ross's conception does not fulfill the strict conditions of logical empiricism and is scientific in a weaker sense of the word.

Despite objections like those outlined above, the conception of legal validity developed by the Scandinavian realists still elicits interest among legal philosophers. It is partly due to their insightful analyses of various problems of legal theory (legal validity is one of the many issues they touched upon) and partly because of the ever-growing interest in the naturalization of law, that the works of Scandinavian realists are being read and interpreted anew.

¹⁴⁵Ibidem, p. 41.

¹⁴⁶Eliasz, K., Zaluski, W. (2015) Critical Remarks on Alf Ross' Probabilistic Concept of Legal Validity, *Principia*, p. 61–62, p. 250.

¹⁴⁷Ibid., p. 253-254.

¹⁴⁸Eliasz, K. (2016) Realistyczna koncepcja prawa Alfa Rossa, Warszawa, p. 79–80.

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