Introduction: Alf Ross and Life Beyond Realism

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When I read *On Law and Justice* by Alf Ross at the beginning of postgraduate studies in the 1970's, I immediately felt that much of what I had learned of the profession of law lost its intellectual credibility.[1] The book struck me as a real eye-opener, articulating an unease I had felt about the nature of the training I had received in a legal milieu penetrated predominantly by the standards of European formalism. In particular, the theoretical justifications for international law I had learned from the textbooks were finally demonstrated as little more than an unorganized mélange of natural law abstractions, juristic common-sense and a bourgeois conviction about the rightness of one's most banal political beliefs. Legal realism bit hard on international law, especially on its domestic analogies and conceptual abstractions that were animated by a political optimism that flew in the face of historical experience.

As Knud Waaben notes in his biographical sketch below, Ross had written the first (Danish) edition of his *Textbook of International Law* in 1942 as a reaction to the disappointing failure of the legal system of the League of Nations to check the antidemocratic and militaristic tide. It is impossible to read the book today without sensing the author's frustration, anger even, about the way the conceptual scaffolding of the law offered by academic writings had built on self-contradiction, 'metaphysical fiction' and plain 'error'. The very definition of the subject, so the book begins, was based on a vicious circle of references from law to statehood and back again. 'It is a disgrace to us that such an obvious absurdity marks the current theory of international law.'[2] On the other hand, the demystifying language of Ross himself, we may now record, emanated from commitments to science, value subjectivism and democracy that were not far from the liberal sentiments that lay behind the mainstream abstractions. As a result, as discussed in detail in the essays that follow, the way Ross the lawyer — in contrast to Ross the theorist — dealt with particular legal problems came not to differ markedly from the way his colleagues discussed them. Ole Spiermann rightly notes that like most international lawyers, Ross came to the discipline from national law, sharing the conceptual *problématique* offered by

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1 A. Ross, *On Law and Justice,* Berkeley (1958).

2 A. Ross, *A Textbook of International Law. General Part* (1947), at 41.

domestic law and the image of legal dogmatics associated with it. Ross shared the sensibility of his more pedestrian colleagues, and their politics, but was dissatisfied by the way they had failed to defend themselves by scientifically respectable arguments. But the simple opposition between 'magic' and 'logic', as Alejandro Lorite puts it in his spirited essay, that Ross had to offer was itself based on a rather crude form of positivism that ultimately showed itself untenable. Legal science did not succumb to the empirical urge — indeed, as Carl Landauer notes, Ross sometimes seemed to offer a political realism without any political reality. Legal doctrines continued to have an effect on the social world that, to highlight Henrik Zahle's useful point, and the paradox involved, could only be itself described as 'magic'. Perhaps the psychological realism on which Ross built his theory was, in the end, too demanding, or led too far away from the concerns of practising lawyers. In any case, as Anthony Carty suggests, his brand of realism stopped short of its own project. As Ross was writing, empiricism was already being overcome by a phenomenology that suggested an analysis of law as 'culture' that, had it been followed, would have revolutionised the discipline.

But one should not be too obsessed by the gap between the psychological realism developed by Ross, and the styles of argument he used to deal with particular problems and dogmatic questions. As I have argued elsewhere, legal theory and legal practice do not and probably cannot link to each other in any clear-cut linear form.[3] Theory does not provide a final truth about a society's law or a firm grounding for practitioner experience. It sharpens the ability to argue a case when one is writing an article for a law review, defending a client, or making a statement about legal policy among colleagues in an international organization. And it unsettles the self-congratulatory voice of pragmatism, received from the miraculous coincidence between the privileges offered by the profession, and the moral high ground it claims to occupy.

These are quite sufficient reasons why the odyssey through legal realism, still uncompleted in Europe, remains necessary. Realism may not be have been able to isolate myth and enlightenment in watertight compartments and many of the ensuing essays expressly discuss its failure to do so. But it does go a long way towards explaining wherein lies the difficulty to reduce the cosmopolitan project into legal rules, and why an acute sense of the political stakes in particular patterns of legal argument is an invaluable aspect of the juristic craft. Realism did not do away with the antinomies of legal thought. But it did bring those antinomies into sharper focus. For a student of international law, Alf Ross remains fascinating not only because of his debunking of *both* the kinds of natural law and legal formalism that are the (usually unarticulated) background from which standard contemplation about international legal rules and principles emerges, but also because his work suggested that a basic commitment to international law is insufficient for dealing with the its endemic problems — the weakness of its argumentative structures, and its complex relationship to international politics.

[3] See Koskenniemi, 'Between Commitment and Cynicism: Outline of a Theory of International Law as Practice', in United Nations, *Collection of Essays by Legal Advisers of States, Legal Advisers of International Organizations and Practitioners in the Field of International Law* (1999), at 495–523.

To get a grasp on those problems, one needs legal theory. Indeed, one needs legal theory much more than political science, sociology or international relations study that always seem to presuppose the most primitive notion of international law. If, as Spiermann suggests, international law has come about as a special case of law in general, it would indeed be odd if decades of domestic critique of 'idealist' or 'formalist' jurisprudence would have nothing to say about it. Reading Ross now is a useful reminder of the fragility of the conceptual structures handed down by the legal tradition. 'Sovereignty', 'legal sources' and 'binding force', among others, are weak and malleable, and never more so than when they are invoked in order to explain the nature of international law (whatever their usefulness in making points about valid law). But reading Ross also brings into light the limits of realism. In some ways, as H. L. A. Hart and others have shown, realist insights seem always to be beside the point for answering questions made to practising lawyers. The external perspective offered by realism may increase self-awareness and sharpen critical ability. But it does not provide responses to 'internal' questions about valid law. (It is interesting that Waaben reports Ross having been in agreement with Hart on this important thesis of analytic jurisprudence.) This is why realists did not succeed in revolutionising the discipline and why the legal world sketched by Ross was, in the end, remarkably similar to that implied in mainstream accounts, despite all the theoretical fury, and the dismissive tone of voice. Ross did not question international law's political project. What he tried to offer was a defence of that project against the more obvious objections about myth and ideology that made it seem so naive and vulnerable. In a way, reading Ross shows that theoretical ambition and political passion could both be aspects of a professional engagement with international law.

The only other scholar with whom I had felt something similar had been Hans Kelsen, whose *Reine Rechtslehre* was in the 1970's compulsory undergraduate reading at Turku University (praised be the faculty for that), but whose critical and political commitments remained hidden as students struggled through the Finnish translation of that difficult work as if it were just another disembodied part of the curriculum, on a par with the introduction to Finnish criminal law. Most students probably took the pure theory as an eccentric justification of the formalist technique we needed to learn in order to carry out the rather boring though reasonably lucrative tasks that graduation would open to us. That was a complete mistake, of course.[4] I am glad that the essay by Landauer expressly links Kelsen and Ross as two representatives of European legal theory that highlighted the political background of law, but also the need to articulate clearly the working principles of the *science* of law, taking seriously the role of legal dogmatics as a participant in the struggle for the distribution of spiritual and material values.

One important insight of the essays in this Symposium lies in the suggestion that Kelsen and Ross go together not only as teacher and student, but also as two

[4] The political commitment behind the search for a value-neutral, 'pure theory' of law has recently been usefully discussed in J. v Bernstorff, *Der Glaube an das universale Recht. Zur Völkerrechtstheorie Hans Kelsens und seiner Schule* (2001).

representatives of a fundamental critique of (international) law who are not at all so distant from each other as we have learned to think. In most law schools, 'formalism' and 'realism' are taught to relate to each other like day and night. Their opposition provides the fundamental problem-setting of jurisprudence. This suggests the unfortunate implication that being 'extremes' on a single scale, normativism and empiricism cancel each other out while the right position must lie somewhere in a pragmatic middle. No real engagement with either theorist may seem necessary because their positions in the force-field of jurisprudence always already condemns them. But as the following contributions show, these men are situated at the *same side* of another constitutive boundary, waging a joint battle against an enemy that is unwilling to have its name pronounced. What that enemy might be can be constructed out of the emphasis by both men on the manifold relationships of formal law to its political background. Thus, for example, both Kelsen and Ross view legal interpretation an act of norm-creation rather than deduction, motivated not only by the 'objectified sources', but above all by the 'free factors', as Ross calls them, following a venerable strand of continental jurisprudence.[5] Neither theorist would for a moment have defended the view that legal rules or principles have essential meanings — an assumption astonishingly taken by granted by modern Europeans elaborating 'definitions' to contested legal words as well as Americans linking law as regulatory policies to determined 'outcomes'. Both theorists also highlighted the role of law as a 'coercive order', enabling the use of force at the service of dominant interests. From this, the study of law receives an intrinsically critical tenor: instead of ritual restatement of humanitarian commonplaces, it becomes above all a study of the ways of power. The 'scientism' of Kelsen and Ross may seem old-fashioned but the ethos of political demystification is not. If neither theorist succeed in inaugurating a new type of legal technique, nothing has undermined their view of the study of law as being ultimately a study of power.

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This Symposium provides a welcome reminder that the battle call for 'realism' has a long and complex history that begins in Europe, and ranges from the writings of Georg Jellinek to Max Huber, Georges Scelle to Charles de Visscher, encompassing Georg Schwarzenberger's 'inductive method', Hans Morgenthau's 'functional jurisprudence', and leads in the United States into Myres McDougal's 'policy-orientation', calls for empirically oriented 'compliance' studies and interdisciplinary agendas for international law and international relations studies.[6] This history contains many useful insights. One of the lessons I learned from Ross and the other Scandinavian realists (especially Axel Hägerström and Karl Olivecrona) was a fundamental critique of the view of (international) law as an effect of somebody's (especially the sovereign's) political will. Instead, law could be much more usefully be seen, as Olivecrona put it,

[5] Ross, *supra* note 2, at 90–91.

[6] For a very useful (though incomplete) recent review of the sociological movement in international law, see S. Steinle, *Georg Schwarzenberger. Völkerrecht als Machtpolitik* (2002), at 87–142.

as 'free-standing imperatives' that constituted the raw-materials from which legal professionals constructed their arguments and decisions. Ross was well aware that the law the practitioner encounters is never just what somebody may have sometime wanted and that even if it were, we could not be sure what the content of that ('mythical', he would say) 'will' might be or might have been.[7] This insight, as, Carty observes, 'provide[s] a basis for breaking away from the sterile pseudo-positivism of the dominant doctrine of the sources of international law in the consent or will of States' and for understanding that rules are maintained by 'a heterogeneous range of social forces'. Perhaps the most important insight I still today carry from that reading of Ross is the utter implausibility of the kind of voluntarism that is often assumed in an offhand way by standard discussion of sources of international law.[8]

But as the following contributions show, reading Ross today brings into light also the limitations of the realist project(s). From the rejection of the view that words such as 'sovereignty', 'State' or 'right' contain fixed meanings, and the associated view of law as mechanic transmission of meaning-contents from the legislator (States) to the law-applier, it did not follow that the law could more accurately be seen in terms of motivational cause-effect relations, amenable to empirical verification. To translate the idea of legal validity to 'rationalisations of certain emotional experiences' (Landauer) usefully lifts professional lawyers, with their policies and sensibilities, in the forefront of analysis. Yet, as Zahle shows, Ross never succeeded in upgrading legal dogmatics into an empirically based study of judicial motivations. To think of legal science as a process for producing 'cognitive assertions' about what courts will do in the future, met with the familiar problem about how to account for the fact that those assertions themselves affect what courts in fact do. To come through legal realism is to learn that neither voluntarism *nor* empiricism is tenable, that law is neither an effect of psychology nor of sociology — and that legal competence does involve a 'magic' that makes it independent from those particular forms of expertise. For this same reason — the failure to take seriously the autonomy of the legal 'ought' — attempts to carry out purely instrumental analyses of law are bound to fail. Neither the ought-content of some putative standard, not the adequacy of its use in some professional context can be disposed of by empirical verification. To think otherwise is to fall prey to the mistake of scientism that other realists — particularly Morgenthau — took pains to exorcise in their writings.[9]

Most of the essays below reflect on the fact that legal realism had little consequence for the practice of legal argument even by realists such as Ross themselves. In their doctrinal analyses, Zahle notes, they 'followed a traditional approach which they found more suitable'. Spiermann points to the 'wide gap' between the exposition and critique of the circularity of the definition of international law that opens the *Textbook* and the subsequent arguments about what the law of 'self-governing communities' would look like. Despite all his stress on motivations, there was, Landauer observes,

[7] See K. Olivecrona, *Rättsordiningen. Ideer och fakta* (1966); Ross, *supra* note 2, at 79–91.

[8] See further my 'Introduction', in M. Koskenniemi (ed.), *The Sources of International Law* (2000).

[9] See H. Morgenthau, *Scientific Man v Power Politics* (1946).

'precious little socio-psychology' in his works. Whatever the external perspective yields seems to be lost when the theorists becomes the lawyer, arguing with or towards colleagues about particular doctrines, standards or situations. Lorite is surely right when he points out that the critiques were in any case too fundamental to bring about a change in the legal discipline — they 'would seem to prompt the disfiguration of the discipline as we knew it until then'. After the tone and depth of the critique, when Ross turned to reconstruction, there was 'room for some anti-climactic disappointment'.

The realists conceived of their enterprise in terms of a fundamental critique. In this they were both right and wrong. They were right to the extent that their insights did undermine much of the academic abstraction that underlay professional routines. Something more concrete, yet also more elaborate was needed to create a plausible defence for those routines. But they were wrong to think that such a new theory should — or could — have immediately led into new routines, other legal idioms or ways of assessing legal competence. Practising lawyers continued stubbornly to talk about 'sovereignty', 'human rights' or 'binding force'. Somehow, realism failed to answer questions that defined the jobs in which practising lawyers were involved.

Ross and Kelsen believed in sharp boundaries between what in law was 'true' and what was 'myth', in the irreducible opposition between reality and fiction, logic and magic. This was an aspect of their liberal optimism, their belief in science against prejudice, ideology, politics. In this they were disappointed in two ways. First, the oppositions were not as clear-cut as they assumed. Not only was there a large grey area between 'truth' and 'fiction'. Sometimes those notions merged completely into each other. Think, for instance, the way in which the continuity of statehood is constructed. But, second, even to the extent that the realists were able to demonstrate the irrational (*tû-tû*) character of 'sovereignty', 'source' or 'binding force', they were disappointed in the expectation that this would lead the profession immediately to drop them. They were not dropped in part because the practitioners had always known that their law could not be validated by empirical or scientific means but that this did not mean that it was terribly confused or unsuccessful. The profession was by and large able to answer the kinds of questions that were posed to it. In some cases, resistance could be explained by cynicism: few international lawyers have taken seriously the superficial justifications that textbooks provide for their practices. Sometimes resistance to changing the idiom has followed from a healthy self-assurance. 'If it works, do not fix it.' This is the ground from which today's legal pragmatism grows.

The attempt by Ross to change international law into 'science' reads like a periodic piece. No such project seems credible today. We are all too familiar with them, and our scepticism is too great. Lorite confesses that reading Ross led him into 'puzzlement, incomprehension, annoyance at best, disinterest at worst'. There is such a distance about what could be said about international law's justification in the 1950's and what can be said about it now. Yet the break is not complete. As I have tried to argue elsewhere, we are still embedded in a cosmopolitan tradition whose emotional appeal

is at odds with our ability to provide an intellectual defence for it.[10] Perhaps this results, as Spiermann suggests, from our being too tied up in the traditions of national law, unable to understand and provide articulation to the speciality of the international. In any case, Ross must be read among those theorists who did not accept the fragmentation of our world into incompatible spheres of experience, including those of theory and practice, reason and politics. Lorite sees that project end in political pessimism — but counsels us to remember that pessimism may be only a reaction formation to inflated expectations. Landauer argues that it led in the very hands of its defenders into the 'great disappearing act of international law'. For Carty, there was never any hope down that way in the first place. Focusing on judicial motivations would lead into conservatism because it would automatically underwrite the present that it always intuitively felt as the right or at least the most workable one. If it is 'reality' that motivates lawyers, then 'reality' is law. He suggests to take seriously the 'cultural turn' implied in Ross' arguments and to develop a new legal hermeneutics on it. This is not too different from Zahle's suggestion to move from naive empiricism to the study of international law as the magic of rhetoric, a magic attested to in Waaben's account of his effort to follow the train of thought of Ross the Professor while keeping up with the older man's step on the narrow paths of Danish countryside.

[10] M. Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870–1960* (2001).