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On Law and Justice, by Alf Ross

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ON LAW AND JUSTICE. By Alf Ross. Berkeley and Los Angeles: University of California Press. 1959. Pp. xi, 383. \$6.00.

In the last few decades the English language jurisprudential literature has been enriched by a number of books which are of either one of two types. There are the books which compile between two covers the writings of others arranged in a way that reflects the editor's interests. These are the kind of books most generally used in this country to teach courses in jurisprudence. On the other hand, there are the few original and creative writings which only seldom appear in book form and which, characteristically, unlike even Austin, do not purport to cover anywhere near the whole range of the problems indigenous to jurisprudence.

This latter type book is apparently only rarely adopted for instructions in jurisprudence courses and this for at least two reasons. First, jurisprudence is often regarded as the proper vehicle to satisfy the demands for some "culture" in the law school curriculum, and for some unexplained reason "culture" in such contexts seems to demand great breadth and wide vistas. As a result, jurisprudence ends up as a very superficial course which tries to survey too much, if not all legal philosophy since the pre-Socratics. This means a book of readings will be used

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where, if the editor did a good job, he may sacrifice offering the student ten lines from Spinoza (even though it may mean this name will not appear in the table of contents) in order to give such fuller treatment to a principal writer as will enable the student to gather at least a feeling for what the writer was after.

There is a second reason why original, creative jurisprudential writing is so little used to teach jurisprudence. Because such writings are often not panoramic treatises they may try to treat in depth only one aspect of legal philosophy or jurisprudence and as a result the jurisprudence instructor is likely to regard such a work as beyond the competence of a first class in jurisprudence. From a pedagogic point of view, there is some validity to this argument and what is more, it may be more difficult to sustain class interest where a single problem is analyzed in depth, especially as compared to the ease with which the instructor may assign and then discuss in one hour thirty or forty pages covering perhaps five writers.

This has been a perhaps overly long introduction to a review of this new book by Professor Ross. However, it was necessary if the reviewer was to make clear why he does regard *On Law and Justice* to be such a valuable addition to the jurisprudential literature. Valuable, both because of what Ross has to say and also because this book is a promising teaching tool. Unlike much original, creative writing it is not a very extended or elaborate analysis of some one or two particular jurisprudential questions. For example, Ross devotes less than fifty pages to the topic of what he calls "The Concept 'Valid Law,'" and equally few pages to the topic of judicial method. Yet, and of great importance, this is definitely not a compilation of what a dozen writers have said about the concept of valid law or about judicial method. The book is all Ross: It is what Ross thinks about the characteristic problems of jurisprudence and legal philosophy. This book, then, is more in the tradition of Austin's Lectures: It is a fairly tight, systematic and a purportedly coherent analysis of what are generally regarded as most of, if not all of, the proper problems of the field.

Thus far an effort has been made to indicate what this book attempts to do. Also, I have tried to show that Ross has produced a desirable product, at least from a teaching point of view, because this is not simply a book about other people's books, nor is it an extended analysis of only a limited range of problems. Now, it may be of interest to see what the author does say about some specific topics. Since the book does cover so wide a range of problems attention here will be directed to only one small part of one chapter so as to at least supply an idea as to the

flavor of what Professor Ross offers. It is believed that the sample offered below is not atypical.

Ross's working hypothesis for the explication of the concept of valid law is that in principle it should be possible "to define and explain" this concept in the same fashion as the concept "valid norm of chess." (p. 29) This hypothesis entails two questions and in stating these questions, as well as in his answers Ross reveals one of the most troublesome aspects of his writing. It is that Ross uses the characteristic vocabulary of continental (non-empirical) philosophy to write an empirical and analytical study of legal philosophy. In addition, this English version of the book has probably gained nothing in translation from the original Danish.

Ross states the two questions referred to above as follows:

"(1) How does the individual body of norms known as a national law system distinguish itself in content from other individual bodies of norms such as the norms of chess, bridge or courtesy?

(2) If the validity of a system of norms, broadly speaking, means that the system because of its effectiveness can serve as a scheme of interpretation, how can this view be applied to law?" (p. 29) Ross answers the first question by arguing that just as John Smith is the name of an individual who cannot be defined but can be pointed out, so too for the rules of chess and the norms of any national legal system. "'Danish law' is the name of an individual set of norms which constitute a significant coherent whole and are therefore not defined but can be pointed out." (p. 30) Although in his preface, Ross goes to the trouble of specifically thanking Hågerström "who opened my eyes to the emptiness of metaphysical speculations in law and morality" (p. x), one wonders what are the non-metaphysical criteria for deciding what is "a significant coherent whole." Indeed, at a later point, Ross thinks to clarify this clearly troublesome phrase by adding the even less empirical criterion of "an inner coherence of meaning." (p. 32) That Ross himself realized this was not too happy an expression is suggested by the fact that he does surround the phrase by inverted commas.

It is important to notice that what is here criticized is *not* the conclusion drawn by Ross, *i.e.*, that "the question of a definition of 'law' ('legal system') is not one for jurisprudence." (p. 30) Rather it is the very ill chosen language Ross uses to make what, in fact, I believe to be an attractive argument. However, it is an argument which has been made so much better even by Austin, let alone by recent analytical English philosophers like Wittgenstein and others, with whom Ross seems to agree in the conclusion that the job of philosophy is not to define, but to describe. I take it that this is what Ross is after when he says: "If one

abandons these metaphysical presuppositions and the emotional attitudes involved in them, the problem of definition loses interest. The function of the doctrinal study of law is to give an account of a certain individual national system of norms." (p. 31)

After the discussion about definition, Ross proceeds to the first of the above two questions, namely, "how an individual national law system distinguishes itself in content from other individual bodies of norms." (p. 32) He purports to answer by concluding that a "national law system is the rules for the establishment and functioning of the State machinery of force." (p. 34) If this conclusion seems rather Kelsenite, the preceding two pages, which provide the argument in support of the above conclusion, shows even more clearly the influence of Kelsen of whom Ross writes, "Kelsen, who initiated me in jurisprudence and taught me, above all, the importance of consistency." (p. x)

Ross' two page argument is very murky, but he appears to say little that is different from Kelsen, to whom, however, there is not a single reference. Ross argues that the "inner coherence of meaning" of an individual norm system is determined by discovering what are the definite actions required by the norms and by whom are these actions to be performed. He first distinguishes norms of conduct and norms of competence but then concludes that the latter are really reducible to the former. In affecting this reduction in the course of some two or three sentences, I fear that Ross has passed over one of the most interesting aspects of the matter of validity. But even if this be so he does better than his teacher, Kelsen, who instead of passing over the issue, stumbled, some believe with fatal consequences, when he sought to show that even the "grundnorm" was "valid." Ross simply says that the norms of "competence (power, authority) . . . are directives to the effect that norms which came into existence in conformity with a declared mode of procedure shall be regarded as norms of conduct." (p. 32)

Having reduced all legal norms to norms of conduct Ross continues his argument by saying that "the real content of a norm of conduct is a directive to the judge, while the instructions to the private individual is a derived and figurative legal norm deduced from it." (p. 33) Since who is properly a judge is determined by the public law, the public and private law are integrated because the rules of private law are directed to the judge and because the "right" to exercise physical force is essentially a monopoly of the State. It is the law in its entirety that determines under what conditions force will be exercised and who (*i.e.* the judges) may order such exercise. Hence follows the conclusion mentioned above:

“A national law system is the rules for the establishment and functioning of the State machinery of force.”

All the valid criticism of Kelsen’s analysis of the idea of what is a legal system are probably applicable to the above “account” given by Ross. While Kelsen and Ross may indeed have avoided the possibly indefinite regresses of Austin’s command-sanction, they have surely not avoided other equally serious difficulties. For example, why is the “right” to exercise force a state monopoly? Why is force necessarily the index of where there is law, especially when one deals with areas of life other than the criminal law? For Ross, as for Kelsen, law (or, better, a legal system) is organized force applied according to rules, and this may not be any more wrong than it is to say chess is a game played according to rules. The trouble with both descriptions is not that they are wrong, but that they are far too simple to be useful.

This same criticism applies to Ross’ theory as to what determines the validity of a legal system: If it is not wrong, it is too simple. Ross argues:

A national law system, considered as a valid system of norms, can accordingly be defined as the norms which actually are operative in the mind of the judge, because they are felt by him to be socially binding and therefore obeyed. (p. 35)

So far as the individual judge is motivated by particular, personal ideas, these cannot be assigned to the law of the nation. . . . [T]he legal system forms a whole integrating the rules of private law with the rules of public law. Fundamentally, validity is a quality ascribed to the system as a whole. The test of validity is that the system in its entirety, used as a scheme of interpretation, makes us to comprehend, not only the manner in which the judges act, but also that they are acting in the capacity as “judges.” (p. 36)

The concept of the validity of the law rests . . . on hypotheses concerning the spiritual life of the judge. (p. 37)

In a later section, Ross adds:

Assertions concerning valid law are according to their real content a prediction of future social happenings Every prediction is at the same time a real factor liable to influence the course of events. . . . (p. 49)

A decision is wrong, that is, at variance with valid law, if . . . it appears most probable that in [the] future the courts will not follow the decision. (p. 50)

Ross seems to have taken what was possibly important in American legal realism and done what Professor Fuller once said would have happened if a German had fallen onto the theories of legal realism. Fuller writes, "If a German writer had hit upon the slogan of American legal realism, 'Law is simply the behavior patterns of judges and other state officials,' he would not have regarded this as an interesting little conversation-starter. He would have believed it and acted on it." Or, to repeat, Ross has taken what may be an intriguing and possibly even valid theory, and treated it as the solution to some very subtle problems despite the simplicity of the theory and its consequent lack of explanatory power. As among theories of equal explanatory power, the simplest may well be preferred, but when the cost of simplicity is loss of explanatory capacity, then the theory leaves something to be desired. I regret to say that too often when one reaches the heart of the solution offered by Ross, one finds these views insufficiently profound to be considered acceptable in light of the subtlety of the problems with which Ross was concerned. What is more, and as indicated previously, Ross is not purporting to write a book about what other people think about the various matters discussed. Nonetheless, I am of the impression that to one who has read Austin, Hägerström and Kelsen, Ross adds relatively little that is excitingly new.

In conclusion it may be well to return to the comments made by way of introduction to this review. Despite the several criticisms made of this book, I have arranged to use this work as the course text for the jurisprudence course to be taught during the 1960 spring semester. Although both Kelsen and Hägerström are more philosophically provocative than their student, at least as Ross appears in this book, neither of the teachers have published English language books which lend themselves to use in a first course in jurisprudence. Lundstedt's, *Legal Thinking Revised*, in the same philosophic tradition as Hägerström, Kelsen and Ross, was tempting but still too difficult for general class use. While there are philosophical objections to what Ross says in this book, he has the considerable merit of having said a great deal in a way which is generally sufficiently clear to be comprehensible enough to make the book useable as a class text.

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