
Legal Doctrine between Empirical and Rhetorical Truth. A Critical Analysis of Alf Ross' Conception of Legal Doctrine

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Abstract

The Danish philosopher of law Alf Ross established a theory of legal doctrine with the intention of bringing legal doctrine into line with logical positivism. Ross was aware of the fact that propositions of legal doctrine (as of social science in general) might influence the 'object' of the doctrine, for instance they could influence judicial decision-making. Such influence could be considered fundamental for a theory of legal doctrine. Although Ross considered words which create their object and therefore their own truth to be magic, he did not or could not recommend that legal doctrine refrain from such influence. In this way Ross faced an element of legal doctrine that was incompatible with his positivistic theory.

1 The Problem

During the whole of his academic life the Danish legal philosopher Alf Ross worked continuously with questions concerning the nature of legal doctrine. Ross put an enormous effort into developing a concept of truth applicable to the understanding of legal doctrine. His ambition was to establish a concept of law to ensure that legal doctrine would be seen as comparable with what he perceived to be modern science.

The present study concerns the concept of truth which Ross advanced in his *On Law and Justice*.¹ Legal doctrine which relates to the concept of truth includes the literature produced at law schools, faculties and similar institutions which presents the law in a

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¹ Alf Ross, *On Law and Justice* (Stevens, London, 1958, American edition by University of California Press, Berkeley and Los Angeles, 1959). References in the following are to the American edition. The text was first published in Danish as *Om Ret og Retfærdighed*, Nyt Nordisk Forlag Arnold Busck (Copenhagen, 1953).

specific state or nation, for instance ‘Californian energy law’, ‘Danish contract law’ or ‘French constitutional law’. Such literature is prescribed reading for law students who thereby gain knowledge and skills which are supposed to be relevant in their later professional practice. Legal doctrine or the ‘doctrinal study of law’ as Ross sometimes described it, is often referred to in legal argumentation, e.g. by barristers at trials or by administrative authorities.²

Ross distinguished between ‘the content of meaning of the legal norms themselves’ and legal doctrine with its ‘propositions about legal norms’.³ Legal doctrine makes claims about what is ‘valid law’ in a state (or ‘the law in force’ in a state). A rule is valid when it is applied in the practice of the courts — on this point Ross was inspired by the American realists. The application of a rule to which legal doctrine refers is future-regarding, i.e. it refers to ‘to hypothetical future decisions’. The application naturally presupposes that the facts of the case suit the putative rule. Ross summarised his definition thus: ‘[T]he real content of the assertion . . . [that a section of an act] is valid law at the present time of a certain state is a prediction to the effect that if an action in which the conditioning facts given in the section are considered to exist is brought before the courts of this state, and if in the meantime there have been no alterations in the circumstances which form the basis of [the assertion], the directive to the judge contained in the section will form an integral part of the reasoning underlying the judgment.’⁴

I shall return to some of the elements in this definition in the following analysis. Even this summary reflects how Ross wanted to establish an understanding of legal doctrine which rendered it an empirical science with the possibility of checking whether the doctrinal propositions were true or false. The field of the test which the definition quoted above highlights is the courts’ reasoning. The question is whether the reasoning in future judicial decisions confirms or falsifies the propositions of legal doctrine.

There are several reasons to be interested in Ross’ theory of legal doctrine. His theory has for a long time been well known in Scandinavian legal-academic institutions, is still well known in some foreign, primarily Mediterranean, environments, and in Denmark it was for a period the dominant legal theory of legal doctrine.

My purpose in the following analysis is not to consider the application of Ross’ theory. Nor is it my purpose here to develop alternative theories. My purpose lies somewhere in between: to investigate the steps which Ross took as he developed his theory of legal doctrine, to consider the decisions which each step implies and to evaluate the consequences which follow. Such a study may be a contribution to the development of alternative theories, and it may help to understand the limits (or pitfalls) of the old.

² My application of the term ‘legal doctrine’ does not completely conform to the terminology of Ross. He termed the descriptive part of legal literature the ‘doctrinal study of law’, which I, for reasons of simplicity, have termed legal doctrine, cf. Ross, *supra* note 1, at 11.

³ Ross, *supra* note 1, at 38–39 (or 1953 at 51).

⁴ *Ibid.*, at 42 (or 1953 at 55).

Ross' theory represented a well-structured theory of law which took scientific standards seriously and which consequently attracted support. My analysis may explain why his theory seemed so attractive in its time, but also why it was so difficult, perhaps impossible, to follow in practice.

2 Analysis

In this study I shall concentrate on what may be considered Ross' main contribution to legal philosophy, i.e. *On Law and Justice*, and make explicit the analysis which is found in this book, namely the route from the generally accepted interest in the problem of the nature of law to Ross' controversial interpretation of this problem as a problem of making statements about the law in force in a specific state.

A Ross' Theory of Legal Doctrine

Statements about law are found in the legislation of Parliament, in the reasoning of the courts and in legal and academic textbooks. Alf Ross began with the basic questions as to what is the nature of law and what we mean when we speak of law. Ross was concerned with texts in which the law is stated and not the texts in which law is regulated or decided, although these two types of texts are often linguistically similar. Legal doctrine aims to describe, and not to prescribe in the way parliamentary acts or judicial decisions do. Ross' interest was with the descriptive element. '...[T]he problem of the 'nature of law' is the problem of how to interpret the concept 'valid (e.g. Illinois, California, common) law' as an integral constituent part of every proposition of the doctrinal study of law.'⁵

We have to note the specification which the unrestrained problem of 'the nature of law' has undergone: Ross leads us to engage with a theory of legal doctrine. The thrilling aspects of the nature of law are now problems related to the character of the scientific doctrine of law. If the nature of law creates problems in legal practice or regulation they are not confronted as problems which are basic to understanding the nature of law.

Legal doctrine is thereby given a privileged position, which is the result of a linguistic analysis. Ross claims it is possible to distinguish between three kinds of linguistic utterances: utterances with representative meaning, utterances with no representative meaning but with an intent to exert influence, and finally utterances with neither an intent to exert influence nor a representative meaning.⁶ 'Propositions in a textbook' (at any rate to a certain extent) aim to describe, while the purpose of legislation is to influence. Although legislative and doctrinal texts have the same linguistic appearance, they have different meanings. Textbook propositions (and not legislative propositions) must, according to Ross, 'be understood with the general proviso that the author is presenting the law in force'.⁷ And the clarification of the

⁵ *Ibid.*, at 11 (or 1953 at 21).

⁶ Ross did not mention the logical fourth category covering statements which both describe and influence.

⁷ Ross, *supra* note 1, at 9 (or 1953 at 20).

concept ‘the law in force’ (or ‘valid law’) is the specific problem for an understanding of legal doctrine.

The focus on legal doctrine may be considered a first step in a process of reduction since the focus on doctrine implies a neglect of regulation and practice.

B The Assertive Part of Legal Doctrine

At this point Ross had framed the problem of ‘the nature of law’ in a way ‘divested of its metaphysical formulation’. The next problem is the understanding of ‘the concept of ‘valid (e.g. Illinois, California, common) law’ as an integral constituent part of every proposition of the doctrinal study of law’. Ross asks: ‘What representative meaning is to be ascribed to this concept?’⁸

In answering this question Ross divided the legal literature into three parts: (1) Part one contains answers to questions such as those mentioned above, that are descriptions of law or as Ross framed it: ‘cognitive assertions concerning valid law of greater or lesser degree of probability’. (2) Part two consists of recommendations on which decisions courts should make or of proposals on law-reform, or — in the words of Ross: ‘non-cognitive directives’. (3) Finally a third part gives the historical arguments in favour of assertions or directives, i.e. ‘[c]ognitive assertions concerning historical, economic and social facts and circumstances which act as arguments for either (1) or (2).’⁹

It is clear that legal doctrine, which is the object of Ross’ analysis, falls into the first part (1) of Ross’ listing of the various types of legal texts. The ‘nature of law’ is directly related only to the ‘cognitive assertions on law’. By definition, these assertions (and thereby ‘the nature of law’) are or should be distinguished from the directive or political texts which may be part of the legal politics as defined by part (2). The law is — as Ross has stated many times — a *fact*.¹⁰

Ross has hereby performed a second reductive step since only the ‘assertive’ part of legal literature is to be considered.

C Ross’ Introduction of the Dominant Theory of Science to Assist in Defining ‘The Law in Force’

It is this representative meaning which distinguishes doctrine from legislation, and the clarification of this representation is the *Leitmotif* in Ross’ analysis. At this point Ross does not mention court practice, which is surprising since court practice turns out to be the determinative focus for legal doctrine. It may, however, be explained by the difficulty Ross would face with the obvious fact that (in his terminology) court practice expresses judgements and thereby has a normative or directive character which cannot qualify as scientific (e.g. the accused is sentenced to 12 years in prison!).

⁸ *Ibid.*, at 11 (or 1953 at 21).

⁹ *Ibid.*, at 46 (or 1953 at 60).

¹⁰ For a critical discussion see e.g. David R. Doublet, *Rett, Vitenskap og Fornuft* (1995) at 200 and Aleksander Peczenik, *Vad är Rätt?* (1995) at s. 103 ff.

How are we then to understand the concept of ‘the law in force’ as an integral element of any proposition in the writings of legal doctrine? Ross’ understanding of this question was certainly not a descriptive understanding, taking the writings as they may be found in, for instance, Danish or English legal literature. It is not a question of how legal authors themselves understand their activity. Instead the question is reframed in the syntax of legal philosophy. The subject of legal philosophy, according to Ross, comprises ‘pre-eminently the fundamental concepts of general scope such as, for example, the concept of valid law’.¹¹

The philosophy which Ross followed when analysing the basic, implicit concepts of legal doctrine was that of logical positivism. He referred explicitly to Victor Kraft. In the Danish edition of *On Law and Justice* he furthermore referred to Eino Kaila and G. H. von Wright. Ross characterized this philosophy as an expression of ‘the fundamental ideas of modern scientific philosophy’.¹²

Ross did not debate the implications of this philosophical position. The implicit challenge which Ross’ analysis had to face was the implication of the transformation of legal doctrine as we have traditionally known it in accordance with the claims of logical positivism. One important implication is that the doctrine’s ‘propositions about valid law must be interpreted as referring . . . to social facts. It must be made clear in what procedure the doctrinal propositions can be verified’.¹³

Ross characterised this philosophy as ‘modern’ and as in opposition to the metaphysics of, for example, natural law. The dominant position in the philosophy of science legitimized this choice, which nevertheless was a *choice* which Ross made clear by calling it a ‘postulate’.

Ross’ interest in the (debatable) representative element in legal doctrine, his interpretation of legal doctrine as containing an implicit reference to ‘valid law’ (or ‘law in force’) and his neglect of the apparent similarity between legislation, doctrine and court practice is difficult to understand if not seen as the result of an assumed dictate, namely that legal doctrine has to be reinterpreted in accordance with ‘modern scientific philosophy’. This reformative process implies that 1) legal doctrine has to be distinguished from legislation and court practice, and this distinction is based upon the representative meaning of legal doctrine, and 2) the representation is given a common content by Ross’ assumption of an implied reference to ‘the valid law’. Ross did not present a completely reformed understanding of legal doctrine, but claimed that his understanding was somehow in harmony with implicit elements of the traditional legal doctrine. In this sense he was a traditionalist. The philosophy he introduced was not a personal choice but was legitimized by its philosophical basis. In this respect he may be seen as a modernist.

¹¹ Ross, *supra* note 1, at 25 (or 1953 at 35).

¹² *Ibid.*, at 40, note 2: Victor Kraft, *Einführung in die Philosophie* (1950); Ross, 1953 at 53 note 1, Eino Kaila, *Den mänskliga kunskapen* (1939), or G. H. von Wright, *Den logiska empirismen* (1943).

¹³ Ross, *supra* note 1, at 40 (or 1953 at 53).

D *A Traditionalist or Revolutionary Programme for Legal Science?*

Ross' endeavour to turn the traditional legal doctrine into an empirical social science was based on his adherence to logical positivism.

This endeavour may be understood partly as a reinterpretation of legal doctrine as it had been practised in the mainstream legal tradition. Ross stressed that 'doubtless, the intention of legal writers is to state the law as a fact'.¹⁴ This finding was, I assume, important to Ross because it confirmed that he found an element of fact-description even in traditional doctrine. Focusing on this aspect of the doctrine, Ross was able to introduce his empirical approach as a reformulation of what already existed. This approach may be seen as the adaptive or traditionalist legitimation of a theory for an academic discipline.

The limitation of this legitimation is, of course, that it does not cover the aspects of Ross' theory which are not in harmony with the traditional doctrine. Ross was well aware of this problem: 'My impression is that, at least in the Scandinavian countries, most jurists consider the political side of doctrine, the directives *de sententia ferenda* . . . as the most essential part of their work. Their main interest is practical, not theoretical.'¹⁵

Ross intended to construe legal doctrine in terms that fulfilled the claims which were established by logical positivism. It is understandable that he looked for elements in the tradition of legal doctrine which were in harmony with such claims. Although Ross was well aware that fact-description was not the most 'essential part' of the doctrine, the fact-descriptive element gave him a foothold for his reform. He was aware that the doctrine appeared not to put fact-description in high regard,¹⁶ but his philosophical basis made him elaborate fact-description as a starting point for creating a framework for a legal doctrine as an empirical science.

E *Propositions of Legal Doctrine are to be Verified (or Falsified) by the Study of the Reasoning of the Courts under Specific Conditions*

Scientific propositions on law are cognitive, not directive, and 'the doctrinal study of law must be recognised as an empirical social science'. Already in his day (1953/1959), he claimed that 'the intention of legal writers is to state the law as a fact', if not the only intention.¹⁷ Statements concerning valid law at the present time must, according to Ross, be understood as referring to hypothetical future decisions under certain conditions.¹⁸

Ross illuminated his conception of verification by referring to a proposition borrowed from the world of natural sciences: '... for example, "this is chalk" [which] implies that if I place the object under a microscope certain structural qualities shall appear; if I pour acid over it, certain chemical reactions will result; if I rub it on a

¹⁴ *Ibid.*, at 46 (or 1953 at 59).

¹⁵ *Ibid.*, at 46 (or 1953 at 60).

¹⁶ *Ibid.*, at 46 (or 1953 at 60).

¹⁷ *Ibid.*, at 40 and 46 (or 1953 at 52, 59).

¹⁸ *Ibid.*, at 41 (or 1953 at 53).

blackboard a line will show, and so on.¹⁹ Following the terminology of logical positivism, Ross developed this way of testing the statements of legal doctrine for the procedure of verification, and this concept defined the meaning of the proposition: ‘... the sum of verifiable implications is said to constitute the “real content” of the proposition.’²⁰

The verification procedure which defines the meaning of propositions brings us to the reasoning of the courts. This reasoning is the target of the verification procedure and thereby at the same time defines the meaning of the doctrinal propositions. The doctrinal claim (proposition) that X is part of the valid law (at a certain time and in a certain state) is verified by looking at the court’s reasoning under specific conditions.

This understanding of science is characteristic of logical positivism, and it is still regarded by many as the ideal understanding of scientific endeavours.

A characteristic element in Ross’ theory was the element of prognosis. When a law professor and author (or legal doctrine more generally) claims that a certain provision is part of the valid law of some state, the statement relates to the reasoning in possible future judgments, and the test of truth will be to see whether the provision is integrated in future judgments. If so it is confirmed that the provision is valid law, if not the claim has been falsified. This interest in the future is the background for Ross’ summary of his theory of verification and meaning which has already been quoted in full length: ‘[S]tatements concerning valid law at the present time must be understood as referring to hypothetical future decisions under certain conditions: if an action should be brought in which the particular rule of law has bearing, and if in the meantime there has been no alteration in the state of the law ... the rule will be applied by the courts.’²¹

This is often called a ‘prognosis theory’, a designation justified by the futuristic procedure for verification. It should be recalled, however, that legal doctrine is not future-oriented, or rather it is bound to the present and at the same time directed towards the future. This complication is well known to Ross who emphasised that ‘What is valid law ... refers ... to the future’ with the addition in the Danish edition that the zero-point moves forward in time.²² A text on French law published in 2000 may still be useful in 2002 or even 2010, but the text does not normally set any time limit. This vagueness in the doctrinal handling of the time aspect is highly simplified by the prognosis-concept. A simple prognosis cannot solve the problem. This will be clear when we consider the more specific method of assessing the ‘truth’ of a prognosis.

¹⁹ *Ibid.*, at 39 (or 1953 at 53).

²⁰ *Ibid.*, at 39 (or 1953 at 53).

²¹ *Ibid.*, at 41 (or 1953 at 54).

²² *Ibid.*, at 50 (or 1953 at 64).

F Alternatively a Verification-procedure May Be Directed towards the Basis for the Prognosis

Normally we call a prognosis ‘true’ if it is fulfilled. If a professor, for instance, claims that about 100 students will attend his next lecture — and it turns out that actually 100 students attend, the prognosis was true. But when the ‘zero-point’ of a proposition on law is not bound to the time of publication and is not given by a specification in the doctrinal statement, but continually moves, it is difficult to check its veracity, according to Ross.

Instead we may turn to an alternative method of assessing the truth of a prognosis. We may base the assessment on what was known when the prognosis was made. The prognosis may be evaluated by investigating not future events but the information which formed the basis of the prognosis. ‘In 1950 it was predicted that in June the Communists would march against West Berlin. It is possible that this prediction was true in the sense that a march of this kind had been decided.’²³

This way of verifying a prognosis is attractive because it makes it possible to check the veracity of a doctrinal statement without waiting for the day when (or rather if) a case turns up in which the law in question is applied — if the prognosis is correct. We do not have to wait; instead we may check the basis for the statement. If you claim that ‘a debtor has to produce a receipt to prove his payment’, you may be asked what it is that makes you believe that the ‘valid law’ concerning the debtor’s position is such. This question is typical for a doctrinal discussion, and it may be answered by referring to earlier judicial decisions or an explicit parliamentary act which contains a regulation similar to the one claimed to be ‘valid law’. As the prediction of a march on West Berlin in 1950 may have been true in the sense that when the prediction was made it was actually decided to make such a march, so it may be true to claim that a debtor has to produce a receipt in the sense that cases decided before this claim was made were based on such a principle.

What was supposed to be a predictive statement or rather a statement whose procedure of verification pointed towards the future may in this way be rephrased as a statement which refers to the past. But this alternative does not accommodate Ross’ position. He explicitly rejects the argument that statements about law refer to the past.

The result is that Ross is forced to investigate the way in which a procedure of verification pointing to future events works.

G Legal Doctrine Relates to Future Judicial Decisions. Whether Such Decisions Conform with Doctrinal Statements or Not is Influenced by the Statements Themselves²⁴

Let us return to the West Berlin march which Ross introduced. Actually there was no march on West Berlin in 1950, although such a march was (or may have been)

²³ *Ibid.*, at 47 (or 1953 at 61).

²⁴ The following aspect is commented upon by Peter Blume, ‘A common sense defence for prognoses theory’ (in Danish), in *Juristen* (2000) at 76f, and Bronik Matwijkiw, ‘The impossible prediction’ (in Danish), in *Tidsskrift for Rettsvitenskap* (1997) at 103 ff.

planned, and the absence of such a march may have been the result of the publication of the prognosis that it would take place. *The prognosis made itself false*. Ross: 'It might be reasonably assumed that the march would have taken place, had not its very prediction called forth countermeasures by the Western Powers, by which the 'actually' true prediction rendered itself false.'²⁵ Other prognoses may be self-fulfilling.²⁶ This effect of scientific predictions is, according to Ross, a peculiarity within the social sciences: 'The life of the community cannot be studied with the same objectivity as the movements of the planets or a landscape seen from the air'.²⁷ As demonstrated by his counterexamples from astronomy and geography this interdependence, according to Ross, is not found in the natural sciences.

'Assertions concerning valid law are according to their real content a prediction of future social happenings. The latter are fundamentally indeterminate and do not permit of being unambiguously predicted. Every prediction is at the same time a real factor liable to influence the course of events and to that extent a political act.'²⁸

It is obvious that this phenomenon has a tremendous influence on how we understand doctrinal statements on 'valid law'. The philosophy of science, which Ross took as his model, was mainly (but not exclusively) developed with the natural sciences as its field of application. So Ross faced a serious problem when he realised that the verification procedure which positivistic philosophy made decisive for the meaning of scientific statements and which gave science its objective and modern character, did not work in principle in the social sciences.

At this point we will have to give up any expectation of achieving a method of verification which may be compared with associations of veracity connected with statements of the type: 'this is chalk'; statements introduced by Ross to enlighten us regarding the comparability of such statements with statements about law.

The fact that statements about law are made in a social context implies that the statements themselves influence the law. This simple fact is openly admitted by Ross, and it implies that it is impossible to establish a theory of legal doctrine which will give statements of legal doctrine a method of verification based simply on future independent empirical findings.

Statements about law may be held secretly. A secret statement normally has no social impact, but this 'neutrality' does not elucidate the character of legal doctrine, which is made public.

²⁵ Ross, *supra* note 1, at 50 (or 1953 at 64).

²⁶ This term (as well as its counterpart 'self-destroying predictions') was introduced by Robert K. Merton, *Social Theory and Social Structure* (2nd ed., 1951), to which Ross refers, *supra* note 1, at 47 note 5 (but not in the corresponding Danish text, 1953 at 61).

²⁷ Ross, *supra* note 1, at 47 (or 1953 at 61). A more direct translation of the Danish text would be: Social life cannot be studied independently of the study itself as can the movements of the planets or a landscape observed from an aeroplane.

²⁸ Ross, *supra* note 1, at 49 (or 1953 at 61).

3 The Interdependence of Statements of Legal Doctrine and the Future Reasoning of Courts May Be Compared with the Theory of Complementarity

As we have seen, Ross realized that predictions of social events are indeterminate. This indeterminacy is, according to Ross, something peculiar to the social sciences. ‘The life of the community cannot be studied with the same objectivity as the movements of the planets or a landscape seen from the air.’²⁹ This indeterminacy is a consequence of the communicative factor: the publication of a statement may influence social events because the published statement is read or heard, and the reader or listener may act in a way which is influenced by the statement. The influence may take various forms. A ‘listener’ may move away from the person talking simply to be rid of the ‘noise’. The influence to which Ross draws our attention is dependent on the *content* of the statement: The statement is understood and someone reacts on its content. This reaction may turn out to be a falsification as in the example of the march on Berlin or a fulfilment as is the case where a court is positively influenced by a legal textbook when deciding a case.

The recognition of this interdependence must have been a critical challenge to Ross. As an elementary claim according to his philosophy of science he stated that ‘[A] proposition must refer to an object outside itself, and its truth must be independent of whether the proposition is published or not.’³⁰

I assume that Alf Ross was acquainted with Niels Bohr’s theory of ‘complementarity’, although he does not mention it in *On Law and Justice*.³¹ When he stressed that the indeterminacy he found was specific for the social sciences, he probably assumed that the theory of complementarity was of no relevance for legal statements. Complementarity in nuclear physics concerns the relationship between the behaviour of atomic objects and the instruments of measurement. Bohr tentatively presented it as ‘... the impossibility of any sharp separation between the behaviour of atomic objects and the interaction with the measuring instruments

²⁹ *Ibid.*, at 47 (or 1953 at 61).

³⁰ Ross 1953 at 16, my translation (‘*En påstand må referere til et sagforhold udenfor sig selv, og dens sandhed må være uafhængig af, om påstanden fremføres i en sætning eller ej. Det andet ville jo være den rene magi: ord, der skaber deres genstand og dermed deres egen sandhed.*’).

³¹ Ross participated in the Second International Congress for the Unity of Science which took place in Copenhagen in June 1936, see Jan Faye, *København og den logiske positivisme* at 46–47, in Thomas Söderquist et al. (eds), *Videnskabernes København, Roskilde Universitetsforlag* (1998), which reproduces a photo from the opening meeting in Copenhagen (at Carlsberg) with Ross in the audience. At this meeting Bohr held a lecture in which he, according to his own summary, ‘tried especially to stress the analogy in epistemological respects between the limitation imposed on the causal description in atomic physics and situations met with in other fields of knowledge. A principal purpose of such parallels was to call attention to the necessity in many domains of general human interest to face problems of a similar kind as those which had arisen in quantum theory...’, N. Bohr, ‘Discussion with Einstein on Epistemological Problems in Atomic Physics’, in P. A. Schilp (ed.), *Albert Einstein: Philosopher-Scientist, The Library of Living Philosophers Vol. VII* (1949) at 235–36, reprinted in J. Kalckar (ed.), *Niels Bohr Collected Works, Elsevier*, vol. 7 (1996) at 375–76.

which serve to define the conditions under which the phenomena appear.³² When Ross was writing *On Law and Justice* Bohr had argued in favour of the application of a similar approach in biology (mechanistic and vitalistic arguments), sociology (comparative cultural studies) and psychology (freedom of will v causal analysis).³³

The relationship between a published statement about the law and a future judicial decision cannot be compared with the interrelations covered by the concept of complementarity in nuclear physics. Ross did not accept Bohr's invitation to apply the theory of complementarity. This gives us two reasons for not investigating further the theory of complementarity which itself is not only difficult to access but still highly disputed.

Karl Popper had presented a theory of indeterminacy which covered predictions of social events. He discussed the influence of a communicated statement under the dramatic heading 'Oedipus-effect', and he had introduced the theme before Ross' work *On Law and Justice*.³⁴ Ross seems not to have considered this theory, which Popper in later works elaborated for a broader public, and it does not seem relevant to try to interpret Ross' theory of legal doctrine in the light of Popper's theory.³⁵

Ross intended to reinterpret legal doctrine in accordance with what he considered to be the modern philosophy of science. A statement about law which should be recognized as scientific had to be construed as a statement implying a possibility of empirical verification. The statement itself and its publication should have no impact. The philosophical framework on which Ross founded his theory of legal doctrine was simplified in the sense that in the middle of the twentieth century there was an extensive literature on the relationship between a scientific statement and its object which challenged Ross' framework. Although he was aware of the social impact of statements in the social sciences in general and in legal doctrine as well he did not revise his empirically steered philosophy of science accordingly.

4 Ross' 'Scientization' Moves from Empirical Verification Towards Rhetorical Verification

In respect of legal doctrine Ross restated the problem in the following way: '... however purely theoretical the intention may be, aiming solely at predicting which rule most probably will be accepted by the courts, nevertheless the interpretation, like any other social scientific prediction, is itself a legal-political factor.'³⁶ Here Ross made a distinction between 'the intention' which may be 'purely theoretical' and the effect of the pronouncement of the prediction which is socially active as 'a legal-political factor'. When Ross called 'the intention' theoretical, he may have had its purely

³² L.c. p. 210, reprinted l.c. p. 350.

³³ N. Bohr, 'On the Notions of Causality and Complementarity', in *Dialectica* 2 (1948) 312–19 (at 317–18), reprinted in J. Kalckar (ed.) *supra* note 31, at 329f.

³⁴ Karl Popper, 'Indeterminism in Quantum Physics, Part 2', in *The British Journal for the Philosophy of Science* (1950) at 188–89.

³⁵ Ross later commented on Popper, see Alf Ross, *Skyld, Ansvar og Straf*, Berlingske Forlag (1970) at 210–11, but these comments are not related to Ross' theory of legal doctrine.

³⁶ Ross, *supra* note 1, at 49 (or 1953 at 63).

descriptive meaning in mind, but the intention is theoretical in another sense as well, since we are to analyse an intention which has not been pronounced and to specify the conditions under which the intended meaning is true. But, talking of the verification of an intention not pronounced makes the whole project of reforming legal doctrine into an empirical modern science quite futile. As already mentioned, legal doctrine is public (published). The claim for 'scientization' cannot be reserved for the *unpronounced* 'intention'. So what is left for realization of scientization must be the pronounced statements, and about such statements Ross told us that '... the argumentation supporting the interpretation, which hypothetically is the one the courts will apply, is liable, even though the hypothesis was originally false, to exert an influence on the courts and thereby turn itself into a true one.'³⁷

This line of thinking is based on two premises: 1) The veracity of a doctrinal statement is demonstrated by its conformity with future events, e.g. the future judicial decisions in relevant cases.³⁸ 2) The legal doctrinal statement may influence the future events, e.g. the future judicial decisions in relevant cases.

By introducing logical positivism as a model for legal doctrine, Ross aimed at a reinterpretation of legal doctrine which would make it empirical, person-independent and verifiable in a way comparable with 'modern science'. The interdependence between proposition and verification procedure implies a change in the character of Ross' project which does not seem to have been recognized earlier. We can no longer compare a statement about law with a statement about chalk. The pronouncement of a statement about chalk was not supposed to have any impact on the result of a verification procedure. But with respect to law the pronouncement may influence the veracity in the sense that the pronouncement itself may influence whether the statement is 'verified' or 'falsified'. The question of verification will not only depend on the character of the reasons which lay behind the statement, but will depend on the impact of the pronouncement of the statement as well. With its pronouncement the statement enters into a social environment, e.g. it is (or is not) integrated into the legal debate on the topic, it is accepted (or rejected) by other scholars, and it offers new arguments which may or may not influence the minds of the judicial decision-makers. The authority of the scholar may influence whether anybody takes notice of the statement, gives it serious consideration, and accepts its way of thinking. The linguistic framing of the statement and other circumstances become relevant.

We are involved in a rhetorical study of the impact of statements of legal science. The greater the authority of the scholar, the more adequate the presentation of the statement, the more fitting to the practical need for guidance the statement is framed, the higher is the

³⁷ *Ibid.*

³⁸ The 'originally false' hypothesis is described as 'false' because it is not supported by the sources of law at hand when the hypothesis is pronounced. It turns out to be true because Ross changes the verification procedure from past (sources of law) to future events (future court-decisions).

chance that the statement is 'followed' or rather — in the words of a verification procedure — will turn out to be 'true' in the sense that the law is decided as stated.³⁹

H Legal Doctrine Influences the Law, But Is Not a Source of Law

According to Ross, the concept of sources of law is understood as 'the aggregate of factors which exercise influence on the judge's formulation of the rule on which he bases his decision'. The sources he comments on are 1) legislation, 2) custom and precedent, and 3) reason (or as he termed it 'the tradition of culture').⁴⁰ Following the perception of legal doctrine (or legal science) which has been presented, it should not be surprising that Ross did not include legal doctrine among the sources of law. Legal doctrine 'is likely to provide practice with valuable support', its 'considerations are *de sententia ferenda*'.

*At this point of On Law and Justice Ross referred the influence of legal doctrine to the directive part of the doctrine, the 'non-cognitive directives' which are related to sententia ferenda. This part of the doctrine he considered 'political', and although it is this element which influences practice, he considered it non-scientific.*⁴¹

I The Model of Legal Doctrine which Alf Ross Produced Was Not Applied by Legal Authors Writing Legal Doctrine

Although Ross' theory has had a huge impact on the theoretical conception of legal doctrine, I have not been able to find any example of his theory being applied as a model for the production of legal doctrine. I doubt whether Ross' unconditionally committed supporters among legal authors actually framed their doctrinal studies in a way which respected the lines laid out by Ross. Rather his adherents paid lip-service to his theory in their introductory chapters on 'theory', but when it came to their doctrinal writing they did not pay much attention to his philosophy (or any other philosophy of law), but followed a traditional approach which they found more suitable. Even Ross' own doctrinal writings show little trace of his philosophy of legal doctrine.⁴²

This ambiguity has had the effect that for some time it has been considered

³⁹ In his doctrinal works, Ross contributed with many statements about law which did not follow his own theory on legal doctrine, see below. The point discussed in the text is therefore vital for the scientific legitimacy of such statements.

⁴⁰ Ross, *supra* note 1, at 77, and generally at 75 ff (or 1953 at 92, and generally at 90 ff).

⁴¹ *Ibid.*, at 46 (or 1953 at 60). The English text, 'non-cognitive directives' is a translation of a Danish text 'ikke-videnskabelige direktiver' which literally means 'non-scientific directives'.

⁴² In his treatise on constitutional law he integrated his theory on the impossibility of self-reflective law, see *Dansk Statsforfatningsret, Nyt Nordisk Forlag* (Copenhagen 1959) at 155 ff (2nd ed. 1965 at 176 ff). Ross' claims as to valid Danish law on this point and several others as well (e.g. the non-applicability of the Danish constitution section 72 in cases not belonging to criminal procedure, or the Danish Parliament's authority to pass bills regulating individual person's obligations to pay fines or pay compensation) had no support at the time of Ross' publication of his 'findings' and as such (that is without taking the authority of Ross into consideration) no chance of being accepted by the courts.

unnecessary to analyse whether the proclaimed theory could actually work, and if so how it would work. The analysis I have undertaken demonstrates that in practice a legal doctrine which followed Ross would — instead of being an empirical science — have turned out to be a pragmatic or rhetorical endeavour based on its ability to persuade readers and with no other criterion of truth than this ability of persuasion.

5 Conclusion: The Magical Doctrine

Ross' theory of legal doctrine as presented in *On Law and Justice* has generally been taken as an extreme variant of a scientific interpretation of legal literature as it is found in legal textbooks and articles in legal journals. Ross' basic model was logical positivism illuminated with simplistic examples from physics and astronomy. In accordance with the expectations created by the traditional natural science model, legal doctrine was conceived as an agent which stood outside judicial and administrative practice. As far as legal doctrine is scientific, it is, according to Ross, concerned with facts, and the statements about these facts are verified according to the natural science model, illustrated by impressive narratives on the method of identifying a piece of chalk.

This extension of the principle of logical positivism to include law has had an audience. It has given comfort to those who were doubtful whether legal doctrine was a real scientific activity. The doubtful were calmed by the analogous application of a natural science model which, in the middle of 1950's, enjoyed general support. Legal doctrine achieved scientific respectability. This may explain why Ross' project achieved such broad support and even until this very day has its supporters.

Paradoxically this acceptance has been strengthened by the fact that no author of legal doctrine has seriously studied and written in accordance with the line of thinking presented by Ross.

Ross was aware that statements of legal doctrine might have practical influence, and he therefore had to face two problems which challenged his approach: first, the practical influence of legal doctrine challenged the empirical approach taken in the basic literature on legal positivism to which Ross referred, and second, authors writing legal textbooks (or legal doctrine) gave more weight to the parts of their writing which might have influenced practice than the parts which were solely prognostic. Such 'influence' had to be considered as an integral element of legal doctrine.

The first problem, as I see it, although openly addressed, was not solved. The criterion for verification integrates the social impact of the pronounced statement, and that which was expected to be distanced, external, and in this sense empirical and objective, turns out to be rhetorical or pragmatic. In the attempt to integrate the 'influential' part of legal doctrine into his theory Ross gave up his empirical ambition. The essential test of truth is rhetorical and concerns persuasiveness. *The true legal statement is the statement which persuades the relevant audience, the courts.* The second problem was created by Ross' distinction between statements with and without

representative meaning. Ross' linguistic simplification implied distinctions which are not compatible with the character of legal doctrine.⁴³

Ross transferred our understanding of legal doctrine to the sphere of rhetoric, but he did so without recognizing that his empirical ambition had been mistaken. To recognize that legal doctrine could not be interpreted as a (purely) empirical endeavour would be in conflict with the anti-metaphysical philosophy which was fundamental to Ross. It is difficult to understand how Ross on one hand faced the impossibility of understanding legal doctrine as fact-describing and empirical and on the other hand insisted on the principles of logical positivism.

To admit that a (legal) doctrine could contribute to its object, that the distinctions between the author of a legal textbook and the topic of the textbook or between subject and object were questionable, would be to admit the possibility of magic forces in science: 'Words which create their object and thereby their own truth' would, according to Ross, be 'pure magic'.⁴⁴ And magic cannot be science. Ross demonstrated that legal doctrine somehow creates its own object and thereby contributes to its own truth. Consequently legal doctrine has a 'magical' element. It is up to us to face the magic which blinded Ross, to understand and handle it.

Although Ross disliked the spheres of rhetoric and magic, they are the spheres to which Ross brought the interpretation of legal doctrine, and it may be correct to integrate elements of magic and rhetoric in a new starting point for an understanding of legal doctrine and its production.

⁴³ The linguistic criticism of Ross may be found by Preben Stuer Lauridsen, *Om ret og retsvidenskab*, Gyldendal (Copenhagen, 1992) at 66 ff, and Peter Høilund, *Retsanvendelsens etik*, Nyt Juridisk Forlag (Copenhagen, 1995) at 106 ff.

⁴⁴ Ross, *supra* note 1, at 16 (my translation, Danish text reproduced in note 30).