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Critical Remarks on Alf Ross's Probabilistic Concept of Validity

1. Introduction

The concept of legal validity is regarded within the dominant – legal-positivistic – account of law as a non-gradable concept: a legal rule is either valid or non-valid. However, this account of validity is criticized by some scholars for being too strict and rigid. Apparently, an attractive alternative might be Alf Ross's account of validity as a probabilistic concept. Ross assumed that the stronger predictions of judicial behavior a given rule generates, the higher probability can be assigned to its being valid. This conception is usually called 'predictive' but it may be just as well be called 'probabilistic': according to Ross, assertions about legal validity of rules are probabilistic, and they are probabilistic precisely because legal rules are a basis for (uncertain) predictions of future judicial decisions. However, as we shall see, this account of legal validity is by no means uncontroversial. In the paper we formulate several objections against it. Our discussion of these objections will be preceded by a detailed presentation of Ross's conception of validity.

2. Presentation of Ross's conception of validity

Ross's theory of legal validity as a probabilistic concept is an answer to what is considered to be the dominant problem of jurisprudence. Following Kelsen, Ross observed that traditional legal philosophy conceives law as an entity or phenomenon at the same time real and ideal, as a fact and validity. He claimed that legal theorists maintained

that that the concept 'valid law' refers not only to some factual phenomena, but also to the metaphysical validity stemming from, for instance, rational nature of man or divine reason. He argued that such dualism leads to a series of antinomies in legal thought, which he traced and preliminarily resolved in his book *Towards a Realistic Jurisprudence*. In this book Ross proposed that the two elements, i.e., reality and validity of law, are not irreconcilable but, on the right interpretation, constitute two aspects of the same phenomenon. He contended that the concept of validity can be easily explained by means of science, without recourse to metaphysics, as it is in fact an element of reality. In his view, propositions concerning valid law must be interpreted as referring to a specific type of social facts which are decisions of the courts. He claimed that the scientific procedure that is supposed to confer meaning upon the doctrinal assertions about valid law is the procedure of verification. Accordingly, if a tested doctrinal assertion cannot be verified it is devoid of meaning, and thus should be excluded from the scientific doctrinal study of law. The scientific legal doctrine, as understood by Ross, is built of cognitive propositions, which are not norms but assertions concerning the norms – and these assertions are to the effect that a certain norm has a character of 'valid law'. Thus for Ross the doctrinal study of law is normative, but in the sense of being norm-descriptive rather than norm-expressive. More precisely, he claimed that the doctrinal assertion that 'A' is valid law does not express the law, but "(…) is a prediction to the effect that if an action in which the conditioning facts (…) are considered to exist is brought before the courts of this state, and in the meantime there have been no alterations in the circumstances which form the basis of A, the directive to the judge contained in the section will form an integral part of the reasoning underlying the judgment" (Ross Alf. 1958. *On Law and Justice*. Berkeley: University of California Press. 42). Ross treated this kind of analysis of assertions about validity as a an application of the method of verification; as he wrote, "a proposition about valid law is to be verified by fulfilling the prescribed conditions and observing the decision" (Ross A. op. cit. 41). Consistently with his claim that assertions about legal validity are predictions, he maintained that the statements concerning valid law always refer to hypothetical judicial decisions in the future, arrived at under certain conditions; as he put it: "Valid law is never a historical fact but a calculation with regard to the future" (Ross A. op. cit. 22), and,

in a similar vein: "(…) a statement concerning valid law at the present moment does not refer to the past" (Ross A. op. cit. 41). It is by no means clear, however, whether Ross's assertion that "valid law is never a historical fact" entails the claim that predictions should not be based on the past judicial decisions. This seems to have been Ross's claim, but it is controversial, even on his own assumptions (we shall return to this problem in section 3). To return to our exposition of Ross's conception: it bears stressing that the above-mentioned reference to the future is not targeted towards a result of a case. The possibility of anticipating a future result does not have to indicate the content of valid law. The legal scholar is to predict the rule on which the judge will base his decision and not the decision itself. According to Ross, such predictions of the future applications of the rules are possible on the assumption of the existence of the common judicial ideology, which motivates each single judge and animates his actions:

> If (…) prediction is possible, it must be because the mental process by which the judge decides to base his decision on one rule rather than another is not a capricious and arbitrary matter, varying from one judge to another, but a process determined by attitudes and concepts, a common normative ideology, present and active in the minds of judges when they act in their capacity as judges. It is true that we cannot observe directly what takes place in the mind of the judge, but it is possible to construct hypotheses concerning it, and their value can be tested simply by observing whether predictions based on them have come true (Ross A. op. cit. 75).

The common normative ideology that forms a basis of doctrinal predictions is shaped by the sources of law in the proper hierarchy. Thus the normative ideology consists of directives, which do not determine future judicial decisions, but are more like guidelines for the judges, on the basis of which they can formulate final rules. Ross conceived the sources of law as the aggregate of factors that underlie the judge's formulation of the rule on which he subsequently bases his decision. Some of the sources provide the judge with a ready rule, while others require interpretation. Ross proposed the following classification of the sources of law depending on the degree of their, as he called it, 'objectification': the fully objectivated source (legislation), the partly objectivated source (custom, precedent) and the non-objectivated source (reason). The mentioned 'objectification' depends on whether the source provides a judge with a ready rule or is merely an inspiration, a material that requires interpretation. The variety of the sources of law results in the fact that predictions concerning valid law can

never be considered as absolutely certain. Thus doctrinal assertions about valid law can be probable to a greater or lesser degree depending on the basis on which they are made; as Ross claimed:

The probability is high, and the rule possesses a correspondingly high degree of validity, if the prediction is based on the well-established doctrine sustained by a continuous series of undisputed precedents; or it is based on statutory provision whose interpretation has been established in long and consistent practice. On the other hand, the probability is low, and the rule has a correspondingly low degree of validity, if the prediction is based on a single and dubious precedent or even the "principles" or "reason". Between the two extremes lies a sliding scale of intermediate variations (Ross A. op. cit. 45).

Such a graded conception of validity is in stark opposition to the dominant positivistic view according to which legal validity is considered to be an irreducible quality of a rule functioning in an "all or nothing manner", as it is derived form the superior norm. Such account of legal validity can be found, for instance, in Kelsen – for whom the norm is valid in relation to *Grundnorm*, and Hart – for whom the rule is valid in relation to the rule of recognition. However, the law valid in the positivistic sense need not be valid at all in Ross's ('realistic') sense or can be valid only to a slight degree: "not all law is positive in the sense of »formally established«" (Ross A. op. cit. 101). This realistic sense can be most succinctly summarized as "the recognition in court practice"; as Ross wrote:

> In general it is assumed as a matter of course that a statute having been put into proper form and duly promulgated is in itself valid law, that is, independently of its subsequent application in the courts. Conversely, it is probably rarely thought that what may be derived from "reason" could on these very grounds have the character of valid law – only the recognition in court practice invests the product of "reason" with such character (Ross A. op. cit. 101)

Ross's analyses led him to the conclusion that positivism, with its absolute notion of validity shall be rejected, as it does not take into account the variety of factors that form the basis of the common normative ideology. The alternative he proposed was the graded – probabilistic – concept of legal validity, which allows including as the sources of law influencing judges' decisions also those sources that were excluded by legal positivists. Prior to passing to a critical analysis of this concept, it is worth noticing that Ross used it with reference to three 'objects', namely:

(a) Doctrinal assertions:

> If the doctrinal assertion that a certain rule is valid Danish law is, according to its real content, a prediction that the rule will be applied in the future judicial decisions, than it follows that assertions of this nature can never claim absolute certainty, but can only be maintained with a greater or lesser degree of probability depending on the strength of the points on which the calculations about the future rest (Ross A. op. cit.45).

(b) Rules of law:

> (…) 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. This degree of probability depends on the material of experience on which the prediction is built (sources of law) (Ross A. op. cit. 45).

(c) Sources of law:

> To regard a statute in itself as law signifies that we can generally and with a degree of probability bordering on certainty predict that it will be accepted by the judge. Conversely, the rules derived form "reason" are not considered directly as law in themselves, because here we can do no more than guess the reaction of the courts (Ross A. op. cit. 102).

However, this diversity of the usage of the concept of probabilistic validity should not be regarded as Ross's inconsistency; it is clear that it is a matter of convention whether one speaks about validity of rules themselves or about the validity of legal assertions about them; and given that the rules are derived from the sources of law, one can just as well speak about the validity of the latter. It seems therefore that he was justified in applying his probabilistic concept of validity, depending on the kind of analysis he conducted, to doctrinal assertions about law, rules of law, and sources of law. However, the account of legal validity proposed by Ross is by no means uncontroversial. In the next section we shall put it to a critical scrutiny.

3. Critique

Our critique will embrace four objections: the apparent gradability, the problematic ascertainability, the normative insignificance of the probabilistic information, and the neglecting of the normativity of legal rules. We shall successively discuss these objections and analyze their mutual relations.

(*The objection of the apparent gradability*) According to this objection Ross's probabilistic (and thereby gradable) account of legal vali-

dity in fact presupposes a non-gradable account thereof. This is so because in order to formulate predictions about the extent to which a given rule will be invoked in judicial decisions, one must know beforehand what rules should be taken into account as (potentially) grounding these predictions. It is precisely the positivistic concept of non-gradable, formal validity that provides the criterion of a selection of rules to be taken as bases of predictions. One can therefore say, if this objection is apt, that the probabilistic concept of validity is *partly* 'parasitic' on the formal concept thereof. We use the term 'partly' because this objection applies in its entirety only to the fully objectivated sources of law, namely the rules established by legislature, which aren't the only basis for Rossian predictions. The less objectivated source, e.g., custom, reason, traditions of culture, can also affect the shape of the rule on which the judge bases his decision in a case at hand. However, this reservation does not undermine our objection, as the main bases of Ross's predictions are properly established, formally valid rules of law.

(*The objection of the problematic ascertainability*) One might ponder whether the account of validity as a probabilistic concept implies that the assertions about legal validity are themselves probabilistic or, rather, that probability is only a measure of confirmation of in fact non-probabilistic assertions about legal validity. Ross is explicit in this point: as it was mentioned in the previous section, he endorses the view that assertions about legal validity are themselves probabilistic. This implies that, for him, assertions of the type "rule R is valid" are probabilistic, i.e., one can assign to them a certain value of probability. Ross does not explain how the process of determining probabilistic values is supposed to look like, but it seems that these values can be determined in either of the following two ways:

(1) In the process of the empirical testing of *initially non-probabilistic* assertions about legal validity (they are *initially* treated as deprived of probabilistic values because, before this testing, the values of probability are unknown); accordingly, the process of determining probabilistic values of these assertions can schematically be presented in the following way:

> *Non-probabilistic assertion A*: "rule R is valid" › testing its empirical consequences (predictions concerning the judges' decisions) › the determination of the probability of A › *Probabilistic assertion A*: "rule R is valid to a probabilistic degree *p*".

(2) In the process of the revision, in the light of empirical evidence, of *subjectively probabilistic* assertions about legal validity (the values assigned to them are *prior* probabilities revised in the process of Bayesian reasoning); accordingly, the process of determining probabilistic values of these assertions can schematically be presented in the following way:

> *Probabilistic assertion A*: "rule R is valid to a probabilistic degree *p*" › revising the value of *p* in the process of Bayesian reasoning› *Probabilistic assertion A*: "rule R is valid to a probabilistic degree *q*".

On the first account, the probabilistic assertions about legal validity are of the frequentist character, on the second account – of the subjective one.

However, the vexed question arises, irrespective which of these two accounts was meant by Ross, of how one can *ascertain* the probabilistic values of assertions of type *A*: the nature of empirical testing which, according to Ross, is supposed to provide these values seems rather mysterious. Ross believed that since assertions about legal validity are empirical they can be tested in the same manner as scientific hypotheses. But even granted his 'realistic' assumption that assertions about legal validity are empirical in character, it is very dubious whether they can be tested just as scientific hypothesis: the analogy between these two types of statements seems highly misleading in this point. As regards scientific hypotheses, none of them can be definitively verified (confirmed), since the set of instances to which it applies, and thereby the set of instances, which may *disconfirm* it, is virtually infinite; a scientific hypothesis can only be falsified (if at least one prediction implied by it will be inconsistent with empirical facts). Now, if we wished to apply the method of empirical testing in the same way as it is used in science to assertions about legal validity, it would turn out that virtually all of these assertions would be *disconfirmed (falsified)*, since, for virtually each rule, one can find a situation in which it will not be applied. Thus, the application of the scientific method of empirical testing to assertions about legal validity would lead to the conclusion that virtually all of these assertions should be rejected, i.e., that virtually all legal rules fail to be valid. Of course Ross does not endorse this absurd conclusion. But it means that he uses a loose manner of speaking, when he draws an analogy between testing doctrinal assertions about legal validity and scientific

hypotheses: while the latter are rejected if they generate false predictions, the former are almost always (with the rare exception when virtually all predictions they generate are false) preserved.[1] The loose manner of speaking is not, however, the thrust of our objection. The thrust is that Ross does not make precise how large must be the set of (legally relevant) situations in which the assertions about legal validity of a given rule should be tested and whether the testing should be limited to future judicial decisions or should also include the past ones. As was mentioned in the previous section, Ross claimed that doctrinal assertions concerning valid law at the present moment are predictions, and therefore refer to the future, not to the past. But it is unclear whether he derived from this claim about the *meaning* of these assertions the conclusion that the bases for these predictions should not be based on the past judicial decisions. In our view, such a conclusion would be untenable because, as it seems, among judicial decisions underlying a probabilistic assessment of the validity of a given rule, there *must be* some past ones (relative to the time the assessment is made), unless we imagine an entirely abstract situation in which a given rule is tested at some definite time t_1, and only decisions from the time interval $t_1 - t_2$, are taken into account in determining the probabilistic assessment of validity (which would then be relative to t_1). Thus, if one does not want to make the assertions about validity time-relative, one cannot avoid treating past judicial decisions as factors determining these assertions. Furthermore, it would be rather peculiar to claim that past decisions should be left out from the process of assessing the probability values of assertions about legal validity; they seem to be an essential factor in determining the probabilistic values of these assertions. As we already mentioned, it is not clear whether Ross endorsed this implausible conclusion or not. On the one hand, his insistence on the claim that legal rules refer to the future

[1] The analogy might be regarded as strict only if Ross's claim was that probabilistic assertions about legal validity should be empirically tested; in this case, none of them, like none of probabilistic scientific hypotheses, could be – strictly speaking – verified or falsified, since one can never exclude that 'in the long run' the proportion of judicial decisions based on a given rule and those not based on this rule will 'converge' to a probabilistic estimate of this rule's validity. But it clear that this was not his claim: when he says that a given rule provides a strong basis for predictions he does not mean that the probabilistic assertion about the validity of this rule is correct but that the probability of this assertion is high.

might suggest that he did endorse this view. On the other hand, this claim does not entail the conclusion that only future decisions matter in assessing the probability of assertions about validity; furthermore, while dealing with the problem of whether a rule which has not been verified in judicial practice (because citizens commonly act in accordance with it) is valid, he contends that such a rule can be considered valid when all the facts point that it will form a basis for future judicial decisions. But, clearly, such facts must be *past ones*. It should be stressed, though, that solving the puzzle of whether only the future judicial decisions, or also the past ones, should be taken into account in making probability assessments does not weaken in any way our objection; it is clear that probability values assigned to a given rule's validity may be strongly dependent on the number of considered instances of the potential applications of a given rule, and Ross does not make precise (because such a precisification would always be arbitrary) what this number ought to be. It seems therefore that Ross does not satisfactorily solve the problem of how to ascertain the probabilistic values of assertions about legal validity.

(*The objection of the normative insignificance of probabilistic information*) In assuming the view that assertions about legal validity are themselves probabilistic, Ross gets entangled in the following difficulty: given that he does not differentiate the binding force of rules on the basis of their different degrees of validity (i.e., he does not claim that a rule R whose degree of validity is smaller than that of a rule S is 'less binding', and thereby establishing a 'weaker' duty), the very idea of a probabilistic validity appears to have no normative significance. In other words, irrespective of whether given rules have a degree of validity close to 1, or close to (but different from) 0 (i.e., irrespective of whether they are, to use Ross's phrase, "a strong basis for predictions or not"), they are equally binding for the citizens, i.e., citizens have an equal (absolute or *prima facie*) duty to obey them. To be quite strict, Ross contented that legal rules are directed to judges, not to citizens[2], but this limitation of the application of legal rules seems entirely arbitrary. However, the acceptance of this limitation does not weaken our objection, because also judges, when applying a legal rule

[2] Cf. the following quotation: „The real content of a norm of conduct is a directive to the judge, while the instruction to the private individual is a derived and figurative norm deduced from it" (Ross A. op. cit. 33).

must treat it as a non-gradable concept: the very fact that some norms are a less reliable basis for prediction (i.e., their validity is of a smaller degree) will be of no importance for their decisions. Thus, *while characterizing a given rule 'from the side' of its validity, we can drop from our description the information about the degree of their probability, since it has no normative significance*. The probability of a given rule's being applied may have of course importance for the decision of the Holmesian 'Bad Man' as to whether comply or not with this rule. But, let us repeat the main point of our objection: the information about probability does not carry any significant *normative* content. It might have such a content only if one could determine some minimal threshold of probability dividing rules into 'valid' and 'non-valid' but it is clear that there are no non-arbitrary criteria of rationality for making such a determination[3].

It may be worthwhile comparing this objection to Hart's famous critique of Ross's conception of validity. Hart argued that if legal rules are what Ross takes them to be, viz. predictions of judges' behavior and their motivation feelings, they cannot guide judges' decisions; such a conception, in Hart's view, cannot make sense of the "meaning of judgment of legal validity in the mouth of a judge who is not engaged in predicting his own or others' behavior or feelings"; and he added: "'This is a valid rule' said by a judge is an act of recognition; in saying it he recognizes the rule in question as one satisfying certain accepted general criteria for admission as a rule of the system and so as a legal standard of behavior" (Hart Herbert Lionel Adolphus. 1959. „Scandinavian Realism". *Cambridge Law Journal*: 235). The core of Hart's argument is that legal rules, as understood by Ross, cannot guide judicial behavior. The argument correctly points at the paradoxical consequence of Ross's assumption that the empirical content of assertions about legal validity (i.e. predictions of judges' behavior and their motivational feelings) constitutes their meaning. But it omits Ross's important distinction between doctrinal and non-doctrinal assertions about valid law: the latter are not regarded by Ross as predictions of judicial decisions; and it is precisely the latter which, according to Ross, are supposed to guide judges' decisions. But this distinction does

[3] Cf, e.g., Grabowski Andrzej, 2014. *Juristic Concept of the Validity of Statutory Law: A Critique of Contemporary Legal Nonpositivism*. Heidelberg, New York, Dordrecht, London: Springer, Ch. 7, section 5.

not seem to safeguard Ross's conception from our objection (arguably weaker than Hart's), since, if his probabilistic concept of validity is to have any clear meaning, it should apply both to doctrinal assertions about legal rules and to the rules themselves.

(*The objection of neglecting the normativity of legal rules*). The empirical conception of normativity neglects its normative aspect. However complex will be the way in which we characterize these facts, it will not be possible to derive from them any reason why the rules ought to be treated as normatively binding. Ross might reply that normativity in this – strong sense – as distinct from the psychological facts concerning the judges' motivational feelings is a fictitious notion. But this consequence is inconsistent with the arguably widespread intuitions that normativity of legal rules cannot be reduced to judges' convictions or motivational feelings.

Let us summarize our critique. We have argued that the very concept of a probabilistic validity may be both *non-free-standing*, as it presupposes the non-gradable concept of validity, and *indeterminable*, as it generates the problem of ascertaining probabilistic values. But, as we have demonstrated, even if one assumes that probabilistic concept of validity is both free-standing and determinable, one can still formulate against it two other strong objections. Firstly, the probabilistic information lacks normative significance: the degree d to which a given rule is valid, provided only that this degree is contained in the interval $0 < d \leqslant 1$, has no consequences for the normative force of this rule. Secondly, Ross's contention that doctrinal assertions about legal validity are empirical – sociological and psychological – statements amounts to neglecting the normative aspect of the concept of validity: the mere empirical fact that a given rule is applied by judges and treated by them as binding does not explain why this rule ought to be treated as normatively binding, i.e., as possessing a normative aspect. The fact that Ross's theory does not account for the normative aspect of legal rules is a simple consequence of his his neo-positivist assumption that the meaning of assertions about legal validity are their empirical consequences, i.e. empirical predictions formulated on their basis. However, it seems that, contrary to what Ross maintains, predictions of judicial behaviour formulated on the basis of rules are not conceptually linked to their validity (i.e., they do not define the meaning of doctrinal assertions about legal validity); they are merely

a way of testing empirical hypotheses concerning the application (effectiveness) of legal rules. Accordingly, (successful) predictions based on a given rule do not show that a given rule is valid (to a high degree) but, simply, that it is usually applied by the judges, i.e., that it is effective. All in all, Ross's account of validity, though *prima facie* plausible in its emphasis on the relevance of "the recognition by the courts" to legal validity, encounters, on closer examination, serious, perhaps insuperable, difficulties.

At the end we would like to emphasize that our critique of a probabilistic concept of validity does not apply to all gradable concepts thereof. It refers solely to *its empirical* variety, which is based on the assumption that assertions about legal validity refer to empirical facts. A different variety of this concept is the typological one, which formulates certain general features of validity that may be fulfilled to a smaller or lesser degree, and that do not constitute necessary and sufficient conditions of legal validity (an example of this concept is Lon L. Fuller's conception of the 'inner morality of law'). However, a discussion about this kind of non-empirical, gradable concepts of validity lies beyond the scope of this paper.

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Uwagi krytyczne o probabilistycznym pojęciu obowiązywania Alfa Rossa
Streszczenie

Na gruncie dominującego stanowiska pozytywistycznego pojęcie obowiązywania prawa traktowane jest jako niestopniowalne: reguła prawna bądź obowiązuje, bądź nie obowiązuje. Jednak taka koncepcja obowiązywania krytykowana jest przez niektórych badaczy za nadmierny rygoryzm i sztywność. Z pozoru atrakcyjną alterna-

tywą mogłaby być zaproponowana przez Alfa Rossa teoria obowiązywania jako pojęcia probabilistycznego. Ross zakładał, że im silniejsze predykcje odnośnie do przyszłych decyzji sędziowskich generuje reguła, tym wyższe prawdopodobieństwo można przypisać jej obowiązywaniu. Taka koncepcja nie jest jednak wolna od kontrowersji. W niniejszym artykule sformułowane zostały przeciw niej cztery zarzuty: zarzut pozornej stopniowalności, zarzut problematycznej stwierdzalności, zarzut normatywnej błahości probabilistycznej informacji i zarzut zaniedbywania normatywności reguł prawnych. Zarzuty te traktowane są w poniższym tekście jako stanowiące silne podstawy dla odrzucenia twierdzenia Rossa, że predykcje zachowań sędziowskich sformułowane na podstawie reguł są pojęciowo powiązane z ich obowiązywaniem (tj. definiują ich znaczenie); broniona jest teza, że są one jedynie sposobem testowania empirycznych hipotez dotyczących stosowania (efektywności) reguł prawnych.

Słowa kluczowe: obowiązywanie, prawdopodobieństwo, predykcja, ideologia normatywna

Critical Remarks on Alf Ross's Probabilistic Concept of Validity
Summary

The concept of legal validity is regarded within the dominant legal-positivistic account of law as a non-gradable concept: a legal rule is either valid or non-valid. However, this account of validity is criticised by some scholars for being too strict and rigid. An attractive alternative would appear to be offered by Alf Ross's account of validity as a probabilistic concept. Ross assumed that the stronger the predictions of judicial behaviour that a given rule generates, the higher the probability that can be assigned to its validity. However, this account of legal validity is by no means uncontroversial. In this paper, four objections against it are formulated: apparent gradability, problematic ascertainability, the normative insignificance of probabilistic information and the neglecting of the normativity of legal rules. These objections are treated in this paper as strong grounds for rejecting Ross's claim that predictions of judicial behaviour formulated on the basis of rules are conceptually linked to their validity (i.e. they define their meaning); it is argued in the paper that they are merely a way of testing empirical hypotheses concerning the application (effectiveness) of legal rules.

Keywords: validity, probability, prediction, normative ideology

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