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Alf Ross' theory of legal validity in the context of current research on the judicial decision-making

La validez jurídica de la Teoría de Alf Ross en el contexto de la investigación actual sobre la toma de decisiones judiciales

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Resumen

El propósito de este artículo es doble. En primer lugar, se presentan los presupuestos básicos de la Teoría de la validez jurídica de Alf Ross. En segundo lugar, se examina la validez de la Teoría de Ross en el contexto de la investigación psicológica actual sobre la toma de decisiones judiciales. Para Ross la enunciación relativa al imperio jurídico válido es una predicción en el sentido de que el Juez va a utilizar la regla de base para sus decisiones futuras. Estas predicciones son posibles en la asunción de criterios objetivos que motiven las acciones del juez, que para Ross es una ideología normativa compartida por los jueces. Tal ideología se basa en las fuentes del derecho en la jerarquía adecuada. Los factores individuales, que no pueden servir de base para las predicciones fuertes, se excluyen deliberadamente de la Teoría de Ross. A pesar de que era plenamente consciente de la complejidad del proceso de toma de decisiones humana, sin embargo, tuvo que ignorar ese aspecto de la motivación humana, que sería inútil como base para las predicciones. La cuestión es si una Teoría basada en factores objetivos íntegros está de acuerdo con la investigación actual en el campo de la toma de decisiones judiciales. El artículo analiza algunas de las investigaciones actuales con el fin de establecer si dan una imagen clara del proceso de juzgar, y cómo esta imagen podría afectar la Teoría de validez de Ross. Como se afirma, ninguna imagen clara se desprende de los datos empíricos actuales. Por esta razón, la afirmación de que la Teoría de Ross es empíricamente obsoleta no se puede sostener. Por otra parte, incluso, si los datos empíricos indican que los criterios subjetivos desempeñan un papel importante en las decisiones de los jueces, no van a socavar la Teoría predictiva de validez legal de Ross.

Palabras clave: teoría predictiva de la ley; validez legal; fuentes del derecho; toma de decisiones judiciales.

Abstract

The purpose of this article is twofold. Firstly, it presents basic assumptions of Alf Ross' theory of legal validity. Secondly, it examines validity of Ross' theory in context of current psychological research into the judicial decision-making. For Ross the utterance concerning valid legal rule is a prediction to the effect that the judge will use the rule as the basis for his future decisions. Such predictions are possible on the assumption of objective criterion motivating the judge's actions, which for Ross is a normative ideology shared by the judges. Such ideology is based on the sources of law in the proper hierarchy. Individual factors, which cannot form a basis for strong predictions are deliberately excluded from Ross' theory. Although he was fully aware of the complexity of human decision-making process, yet had to ignore that aspect of human motivation, which would be useless as a basis for predictions. The question is whether a theory based on fully objective factors is in accordance with current research in the field of judicial decision-making. The article analyses some of the current researches in order to establish whether they give a clear image of the process of judging, and how this image might affect Ross' theory of validity. As it is stated no such clear image emerges from the current empirical data. For this reason, the allegation that Ross' theory is empirically outdated cannot be sustained. Moreover, even if empirical data indicate that subjective criteria play a significant part in judge's decisions, they will not undermine Ross' predictive theory of legal validity.

Keywords: predictive theory of law; legal validity; sources of law; judicial decision-making.

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1. INTRODUCTION

Throughout his academic career Alf Ross sought to develop a scientific theory of law, according to which legal rules can be investigated by means of the principles of empirical science. This aim was apparent particularly in his theory of legal validity formulated under the strong influence of logical positivism. Inspired by this current Ross claimed that sentences pertaining to validity of rules must be empirically verifiable. There is nothing metaphysical in the concept of legal validity; the law does not derive its validity form some *a priori* principles, but from the fact that it is actually applied by the judges (behaviouristic aspect of validity), because they feel bound by the rules (psychological aspect of validity). Consequently for Ross the statement concerning validity of a given rule is a prediction to the effect that this rule will become a basis of future judicial decisions. Thus instead of deriving legal validity form *a priori* principles, Ross based his theory only on empirical facts. According to him all of the previous legal theories proposed a distorted picture of law as 'something' at the same time real and ideal, which lead to unconquerable antinomies. He recognised that:

> (…) the fundamental source of error in a number of apparently unconquerable contradictions in the modern theory of law is a dualism in the implied prescientific concept of law which more or less consciously forms the basis of the theories developed. It is the dualism of *reality* and *validity* in law, which again works itself out in a series of antinomies in legal theory. (…) As a preliminary explanation it may be said that law is conceived at the same time as an observable phenomenon in the world of facts, and as a binding norm in the world of morals or values, at the same time as physical and metaphysical, as empirical and *a priori*, as real and ideal, as something that exists and something that is valid, as a phenomenon and as a proposition[1].

In order to avoid the mentioned contradictions, Ross proposed a theory that offered to reinterpret validity as an element of reality. This reinterpretation is presented in the next section of this article. The second section also focuses on the basic assumptions of Ross' predictive theory of legal validity. In order to make predictions possible, it is crucial to base them on some objective criteria. Such objective criterion is a shared normative ideology, which consists of the sources of law. Thus in his theory of legal validity Ross discounted subjective and individual factors underlying the decisions, such as emotions or biases. Although Ross consciously decided not to include the mentioned factors, such deliberate omission might be conceived as a weak spot of his theory, as individual and subjective factors certainly play a part in judicial decision-making. Ross was obviously conscious that judicial decisions are based on numerous factors, objective as well as subjective, but he had to exclude those subjective ones in order for his theory to be coherent with his neo-positivistic foundations. The third section analyses the current research into the problem of judicial decision-making, especially these attempting to determine which factors and to what extent influence the judge's decision. Such analysis will determine whether Ross' theory is challenged by current empirical researches in psychology. The answer proposed in this article is explicit; as it will be claimed, Ross' theory is not outdated regardless of the results of psychological research.

2. BASIC ASSUMPTION OF ROSS' THEORY OF LEGAL VALIDITY

In the aforementioned quotations from *Towards a Realistic Jurisprudence,* Ross pointed at the problem of dualism permeating legal theories of any kind. Not all of them are however explicitly dualistic. Some try to avoid this dualism by opting for one of the possibilities, namely either reality or validity. Kelsen for instance defined the law, as belonging to the domain of pure ought, while American legal realists located

1 ROSS, A (1946). *Towards a Relistic Jurisprudence. A Criticism of the Dualism in Law*, Scientia Verlag Aalen, Copenhagen, p. 11.

the law in a domain of empirical facts. As Ross points out in *Towards a Realistic Jurisprudence*, these theories didn't solve the problem as they only avoided dualism but did not conquer it. This difficulty cannot be solved by a simple choice of one of the possibilities within the dualism. Ross claimed that these two perspectives are interrelated and thus cannot be easily separated. Basing legal theory on reality without relating to validity (and the other way around) is impossible. Since the two perspectives are interrelated and cannot be treated as independent basis for a theory of law it must be indicated that rightly interpreted, they are not two irreducible and mutually exclusive categories[2]. Ross set forth a far-reaching reinterpretation of the notion of legal validity. Instead of treating it as a pure abstraction foreign to reality, he proposed to grasp it in terms of rationalization of beliefs and experiences. He claimed that the mind rationalizes the illusion of validity providing it with the stamp of something real. Within such approach legal phenomena belong to a wider set of social and psychological phenomena.

Traditional legal theories proposed a catalogue of elements constitutive for the law. These components are: firstly – an element of reality, secondly – an element of validity, and thirdly – the logical interdependence of these two elements. Ross claimed that the tree mentioned elements have their counterparts within acceptable realistic framework and reinterpreted them in terms of psychological and sociological phenomena. These elements are: interested behaviour attitude, which is a fear of compulsion, disinterested behaviour attitude having a stamp of validity (rationalized experiences of validity), and mutual interaction between these two elements. Another important factor along the three already mentioned is a fear of compulsion that reinforces and strengthens beliefs regarding the validity[3]. However the mere fear of compulsion is not all it takes to explain legal validity. The law, according to Ross, did not arise as the effect of mere fear of compulsion or the mere respect for the authority applying the law. These two elements – namely fear of compulsion and acceptance of the power of the state – always occur together, so the appearance of one element always leads to the second[4]. Isolating these two elements is a serious mistake. This was Ross' main allegation against Theodor Geiger, author of *Vorstudien zu einer Soziologie des Rechts,* an important study in legal sociology form 1947. Ross criticised Geiger's thesis, according to which the law was created as a result of fear of compulsion. As he remarked in a review of Geiger's book, what is equally important is the acceptance of state's force based on adopting the ideology underlying this force[5]. It shall be stressed again that ultimately the existence of law depends on four factors: firstly, a system of compulsion, secondly, interested behaviour attitude being a fear of compulsion, thirdly, disinterested behaviour attitude having a stamp of validity and resulting form custom, and lastly, competence of certain authorities to establish rules[6] . Due to these four elements legal system exists as a kind of social order. The existence of law as the apparatus of force and the feeling of validity are interrelated elements, which cannot be separated and treated as two exclusive bases for the law. Understanding legal validity as rationalised experiences enables coordinating validity with a sphere of real social phenomena. So there is nothing mystical or supernatural in legal validity, as it is simply a phenomenon belonging to reality.

These were the basic assumptions of Ross' *Towards a Realistic Jurisprudence.* They served as the starting point for his further considerations form *On Law and Jutice* where he presented his theory of legal validity based on logical positivism. The basic hypothesis presented in the book is that a system of rules is valid when it can serve as a scheme of interpretation for social actions. Because of this scheme it is possible to understand social actions and predict them to the certain degree. This ability to understand and

2 *Ibid*., p. 76.

3 *Ibid*., pp. 78-79.

4 *Ibid*., p. 83.

5 See: ROSS, A (1950). "Review of: Theodor Geiger, Vorstudien zu einer Soziologie des Rechts", *Tidsskrift for Rettvitenskap*, vol. 63, pp. 215-224

6 ROSS, A (1946). *Op. cit*. pp. 88-89.

predict is due to the fact that the judges effectively apply the rules because they feel bound by them. It is exactly this effectiveness, which is the key element of Ross' theory of valid law. National and individual system of legal norms is valid when the norms ale felt to be binding by the judge, and because of that they become an element of his decisions. Having in mind necessary relation between law's effectiveness and validity, it is important now to point at the problem underlying the misunderstandings regarding Ross' theory, that had its deepest manifestation in his disagreement with Hart. In order to explain the reasons for such misunderstanding, and also to grasp Ross' idea in more detail, it ought to be clear what concept of validity he adhered to. Here some linguistic clarifications are required. Danish term used by Ross to describe valid law is *gaeldende rett.* In the English version of *On Law and Justice* the term was translated as *valid law.* Ross however in his review of Hart's *The Concept of Law* pointed out that this translation was not quite adequate and could have caused some misunderstandings[7]. The meaning of Danish *gaeldende rett* relates to the law, which is actually effective. Ross realized that the English term *valid law* did not relate to this crucial component of law's validity. More adequate translation of *gaeldende rett* would be *the law actually in force.* The term *valid law* can bring to mind inaccurate associations relating to validity of a norm established in the right procedure based on competence, or to validity established from the perspective other than empirical effectiveness of norms (metaphysical concept of validity). Ross rejects both aforementioned meanings of *validity.* According to him this concept relates to empirically verifiable effectiveness of norms. It should be explained in more detail what he meant by empirical verifiability of validity of norms.

According to Ross, rules are addressed directly to judges and only indirectly to other citizens. This means that the mentioned effectiveness of rules relates to their actual application by the judges when they act in their capacity as judges. Danish author was concerned mainly with legal phenomena in narrow sense, as distinguished from the wider sense, for instance the actual compliance with the rules. This may seem paradoxical, as common compliance with the norms implies that their validity is not actually verified in judicial practice. This is however an apparent problem, which becomes clear when Ross' idea that each sentence about valid law is a prediction concerning future judicial decisions is considered. Let's analyse the following example: "rule R is a currently valid law". This rule can be reformulated into a prediction. Such prediction is accurate if there are sufficient reasons to recognize that it will be included in future judicial reasoning. Prediction is however always a matter of degree. It can be judged, that depending on the circumstances, probability of its application by the judge is greater or lesser. This means that for Ross a rule is not just either valid or invalid, but it is a matter of probability between absolute impossibility and complete certainty. The degree of validity depends from variable probability with regard to future judicial decisions[8]. The degree of validity can be judged based on empirical material. Analysis of such material will allow indicating the degree of certainty with which it can be assumed that a given norm will be applied by the judge. So the norm that isn't applied by the citizens will also be considered a valid norm, when all premises indicate that it will become a basis for future judicial decisions. Depending on empirical material it is possible to judge whether the norm will be valid in greater or lesser degree depending on the probability of its application. Also certainty of such prediction depends on the source of law considered in a given case (it will be different regarding to bills, precedents, custom or tradition of culture).

Ross distinguished statements concerning the norms from the norms themselves. He was concerned with statements concerning valid law, which he understood as relating to hypothetical future judicial decisions[9]. Prediction is an utterance concerning the norms, stating that the given norm is an element of valid

7 See: ROSS, A (1962). "The Concept of Law by H. L. A. Hart: Review", *Yale Law Journal*, Vol. 71, No. 6, pp. 1185-1190.

8 ROSS, A (1959). *On Law and Justice,* The Lawbook Exchange, Ltd. Clark, New Jersey, p. 47.

9 *Ibid*., . 49.

national law. The meaning of such utterance is to be verified in line with logical positivism. Such verification is performed through examining the norm from the two perspectives: behavioural and psychological. It is consistent with Ross' reference to effectiveness of the norm as a key element of its validity. This effectiveness can be judged from the two mentioned perspectives. Relating to these two elements clearly distinguishes Ross' theory from other realistic legal theories, as they interpreted validity in terms of effectiveness, but this effectiveness was understood as either behavioural or psychological.

According to psychological interpretation, law is applied because it is valid. Norm is valid when certain subjects commonly accept it and treat it as an element of their motivation. In Ross' theory these subjects would be judges. Within this approach, the primary criterion for identification of legal rule is its acceptance, and the secondary criterion of less relevance would be its application. Application of a norm is in that case a result of its being recognized by the judges. In order to verify whether a certain norm is valid, it is crucial to establish if within a certain group there exists a conviction that the rule is a legal rule, and because of that it should be observed. According to Ross such internal conviction or belief relates to incentive effect of the rule. The rules are psychologically effective when they become an element of judge's motivation, when he acts in his capacity as a judge, and decides a case. So in this approach it is not important whether the rule was established in a right procedure. If the judges would not recognize a rule (even properly established) as a component of their motivation, it would not be possible to state that this rule is a valid legal rule. Thus Ross distinguishes the formal and the legal aspect of validity and the legal aspect is of much bigger importance. A formally valid (properly established) legislative act becomes legally valid (valid in proper sense) when it is effective within social relations. In psychological interpretation such effectiveness means that the judges actually use the rules in their decisions because they feel bound by them, and this feeling appears in each single judge as well as in the entire community of judges. According to Ross, future judicial behaviour can be understood and predicted due to the hypothesis concerning the existence of shared normative ideology that motivates judge's actions, and which is shaped by the sources of law. Sources of law provide a coherent normative ideology, which is not just a subjective feeling. Such shared normative ideology is possible only on the assumption that each judge has a strong experience of being bound by the rules. At the same time those motivating rules provide a scheme of interpretation that allows understanding of judge's actions and predicting them. This scheme has an intersubjective character. In order for this picture to be coherent and precise, it would be important for Ross to present this transition from subjective feelings to intersubjectively valid law. Ross however did not elaborate fully on that matter.

The psychological aspect is crucial for legal validity, however it is not alone sufficient, and because of that Ross is critical of the theories that focus only on this perspective. Such a view on legal validity can be found for instance in Karl Olicvecrona's legal theory. Assuming that the law is – as Olivecrona claimed – a phenomenon of individual psychology it is hard to explain the coherence and intersubjectivity of the norms creating the legal system. If one agrees that the system of valid norms is individualized to subjective beliefs, it wouldn't be possible to explain the unity of legal system, which is crucial for the proper functioning of the entire system. Ross cannot agree with such interpretation if only because the law being a scheme of interpretation requires certain shared beliefs at its foundations.

In behavioural interpretation law is valid because it is applied. Norm is valid when there are sufficient reasons to state that the judges will use it as the basis for their future decisions. Such conception can be found in the legal theory of American legal realists. It was clearly expressed by Oliver Wendell Holmes who claimed that: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law" [10]. It is a clear expression of the thought according to which the law is valid because it

10 HOLMES, OW (1897). "The Path of the Law", *Harvard Law Review,* 10, pp.460-461.

is being applied. Such theory also isn't sufficient for Ross. It is not possible to predict future decisions only through observation of judicial customs, because the law is not just a habitual way of conduct. In fact judges act as they do because they have a shared feeling of being bound by the rules. As it was mentioned before, Ross stressed the need for the existence of shared judicial ideology, thus his theory joins both interpretations of legal validity: psychological and behavioural. The relations of the two mentioned aspects are apparent in the following quotation:

> To arrive at a tenable interpretation of the validity of the law is possible only by a synthesis of psychological and behaviouristic views (...). The view is behaviouristic so far as it is directed toward finding consistency and predictability in the externally observed verbal behaviour of the judge. It is psychological so far as the consistency referred to is a coherent whole of meaning and motivation, only possible on the hypothesis that in his spiritual life the judge is governed and motivated by a normative ideology of a known content[11].

To summarize briefly: the utterances stating that a rule is a valid national law are predictions to the effect that a given rule will be a basis for the future judicial decisions. Legal validity for Ross is a probabilistic concept, as predictability is a matter of degree, which means that, depending on a context it is more or less possible to state that a given norm will be used as a basis for judicial decisions. But in order to formulate clear an unambiguous criteria for such predictions, it is crucial for the judges to be motivated by objective factors. As it was already pointed out before, predictions based on subjective factors, as individual psychology of the judge would have a very low probability and be, as a matter of fact, completely useless. Thus the basis for the prediction must be a shared judicial normative ideology, that is the shared normative beliefs and attitudes within the law[12].

Shared ideology is a subject of a doctrine of the sources of law, which for Ross is a descriptive doctrine. The aim of such descriptive theory of the sources of law is establishing and identifying all the sources of law in the developed legal systems. According to Ross "a realistic doctrine of the sources of law must be a doctrine concerning the ideology which actually animates the courts, actually motivates them in their search for the norms to be taken as the basis for their decisions – an ideology which can only be discovered by studying the actual behaviour of the courts"[13]. He also points out that:

> The ideology of the sources of law is the ideology, which in fact animates the courts, and the doctrine of the sources of law is the doctrine concerning the way in which the judges in fact behave. Starting from certain presuppositions it would be possible to evolve directives concerning how the judge ought to proceed in making their choice of the norms of conduct on which to base their decisions. But it is clear that unless they are identical with those, which are in fact followed by the courts, such directives are valueless as bases for the determination of what constitutes valid law. Any such normative doctrine of the sources of law, which does not square with facts, is nonsensical if it pretends to be anything else than a project for a different and better state of law. The doctrine of the sources of law, like any other doctrine concerning valid law, is norm-descriptive, not norm-expressive- a doctrine concerning norms, not of norms[14].

Ross defines sources of law as a set of factors, which influence the shape of the norm on which the judge bases his decision in concrete case[15]. The influence of the sources of law on particular

11 ROSS, A (1959). *Op. cit.*, pp.73-74.
12 *Ibid.*, p. 75.
13 *Ibid.*, p. 104.
14 *Ibid.*, p. 76.
15 *Ibid.*, p. 77.

decision can vary. There are the sources, which provide a judge with a ready rule leaving a little space for interpretation. Ross refers to such sources as fully objective. Provisions of certain acts belong to such sources. There exist also the sources to which Ross refers as partially objective. These sources require interpretation and clarification from the judge. Such sources are custom and precedent. There is also a third source, the un-objective reasons based on the tradition of culture. The objectivity of these sources varies significantly. As a result fully or significantly objective sources form the basis for strong predictions, while less objective sources allow for weaker predictions. Depending on a source the prediction can be more or less certain, and the rule itself more or less valid.

3. CURRENT RESEARCHES ON THE PSYCHOLOGY OF JUDICIAL DECISION-MAKING

In the previous section I have briefly outlined some basic assumptions of Ross' concept of legal validity. Now, I will elaborate more closely on the question of its actuality in terms of current empirical research. Some of Ross' critics point out that his vision of science resulted in a distorted picture of legal phenomena[16]. Namely, Ross declared that his scientific doctrine of law should be empirical, but he never consequently expanded upon his own assumptions. He presented a narrow set of objective factors motivating judicial decisions. However – as it was mentioned before – he had a reason for such a limitation. Firstly, Ross aimed at formulating sound and certain predictions of future judicial behaviour. Only by relating to such predictions it is possible to state which rules are in fact valid legal rules. Therefore he had to demonstrate that the judges form their decisions based on objective factors – namely the sources of law. Secondly, by the time Ross wrote *On Law and Justice*, there were no empirical studies available that would validate or falsify his theory. Although Ross required science of law to be empirical, he didn't elaborate on a coherent psychological theory. Having that in mind, he claimed that scientific theory of law ought to be based on the sources of law, and not on subjective and individual psychology of the judge. This last claim requires to be developed in more detail. Statements concerning the law actually in force need to be verifiable, just as other scientific statements. The ground for such verification is behaviour of the judges. In Ross' theory, predictions concerning norms that will be the basis for future judicial decisions are possible only under the assumption that there exists a common and shared judicial ideology, and that each judge treats it as his own ideology. All of the judges must be motivated in equal degree by the same factors. Only under such assumption formulating plausible predictions is possible. Yet human actions are complex and shaped by various factors, many of which are not even realized. In order for his theory to be coherent, Ross had to ignore that complexity of human behaviour. He had to omit considering those individual experiences, biases etc. that underlie human actions, as they have no practical significance for predictive theory of law, because they cannot form the basis for certain and secure predictions[17].

Imagine, however the situation when one of a few judges deciding a case reports a dissenting opinion. All of the judges are influenced by one and the same judicial ideology, which consists of the sources of law in the proper hierarchy. Ross' theory seems to be quite powerless in such situation, as it does not consider individual factors motivating the judge, which must have influenced a dissenting opinion. It seems that American legal realists managed to avoid that problem underlining the significance of individual factors motivating the judges, though they faced another difficulty – namely they focused

16 AAMIO, A (2011). *Essays on the Doctrinal Study of Law,* Springer, New York, p. 83.

17 ROSS, A (1959). *Op. cit.*, p. 44.

on those individual factors, while ignoring the existence of shared normative ideology. The proper theory ought to include both motivations: shared ideology and individual factors. Ross faced a problem of similar kind. He focused only on one aspect of motivating factors, namely the objective ones. Ross' theory is thus vulnerable to a similar objection as the theory presented by the American legal realists. He proposed a limited vision of factors determining the process of judicial decision-making.

Having recalled Ross' basic assumptions it will be now possible to analyse the current psychological research into the judicial decision-making, and see if author's assumptions are challenged or reinforced. Current psychological research point that the judicial decisions are influenced by many factors beside the normative ideology (like personality, attitudes, and experiences). Naturally focusing mainly on subjective factors would also be a mistake if only because the judicial decisions are influenced, alongside individual factors, by education and professional training. Judge's behaviour is also determined by the law and must fall under it. He must be aware that if his decision does not correspond with the law: bills, precedents etc. The possibility of its undermining will be much greater when the case will hit the court of second instance. So the psychologists involved in the processes of judicial decision making ought to consider if the judges reach their decisions in the same manner as layman do, or if the specifics of their profession, especially the studies and practice, substantially affect these decisions. American legal realists claimed that judges reach their decisions like laymen do (obviously they made the reservation that legal reasoning in based on specific methods). Ross claimed something quite the opposite, namely that judicial decisions differ from these made by laymen, as they are shaped by the specific normative ideology, which does not concern extra-legal reality.

In the context of dispute about the actuality of Ross' theory of legal validity it seems reasonable to point at some current psychological research. Most of them seem to reinforce the thesis that the judges base their decisions also on the individual factors. However it is not quite clear whether such conclusion is legitimate.

Current psychological researches seem to indicate, at least *prima facie*, that the judges reach their decisions as laymen do. They are equally prone to biases, like for instance religious or political motives, racial or sexual intolerance and so on. Professional training weakens these biases only in a limited scope. The research conducted by J. Segal and H. Speath seems to confirm that the ability to weaken bias by training is limited. They claimed that knowledge of judges ideological profile is a stronger basis for predictions of judicial behaviour than reasons and arguments presented for a given judgement [18]. Many other researchers tried to establish to what extent professional training and legal restraints affect these individual factors underlying the decisions. In their research Landsman and Rakos examined the decisions of the judges and laymen in cases of product liability[19]. In the first variant of the experiment subjects were presented proofs, that are inadmissible under the law, but they have not informed that the proof is inadmissible. In the second variant the same facts have been presented, but this time the subjects were informed that the proofs are not admissible under the law, and therefore should not be the basis for a decision. This experiment proved that in both groups, judges and laymen (mock jurors) based their decisions on inadmissible facts, although they have been informed about their inadmissibility. Landsman and Rakos showed that „judges and jurors may not be very different in their reactions to potentially biasing material"[20]. Such thesis was also defended in the research conducted

18 SEGAL, J & SPAETH, H (2003). *The Supreme Court and the Attitudinal Model Revisited,* Cambridge-New York, p. 323.

19 LANDSMAN, R & RAKOS, F (1994). "A preliminary inquiry into the effect of potentially biasing information on judges and jurors in civil litigation", *Behavioral Sciences and the Law*, 12, pp. 113-126.

20 *Ibid.*, p. 125.

by Wistrich, Gurthie and Rachlinski[21]. It showed that the judges also could not ignore inadmissible evidence. The only exception was the situation of inadmissible confession.

Nevertheless the results of the mentioned experiments should be approached with caution and without too far-reaching conclusions. The situation of the experiment differs significantly from the situation of judging in real life. The examined judges had very little time to reach their decision. Also the experimental setting prevented them from making themselves acquainted with the views of other participants of the case (and it is quite probable that the arguments of the defence could influence the decision).

Other experiments involved the role of racial, religious or political biases in the process of judicial decision-making. Blair, Judd and Chapeau conducted the experiment examining whether race of the defendant affects the length of the sentence[22]. The subjects were presented the description of a crime together with the photos of the convicts. Most of the subjects, while deciding the case considered mainly the kind of crime, while race had significantly smaller influence on the decision. However the results within the group of Afro-Americans differed. People with more African features have been sentenced to a much higher punishment. This experiment confirmed that even the defendant's appearance might affect the judge's decision.

The role of emotions, and their relation to purely rational and logical reasoning was also examined by neuroscientists, for instance by Antonio Damasio [23]. It can be summarized, with a great simplification and without getting into neurological details in the following way: when a certain person is in a situation which is much alike the one she had experienced previously, ventromedial prefrontal cortex automatically activates previously experienced information along with the emotional feeling that accompanied the previous experience[24]. Because of that process the person recalls previous facts together with accompanying experiences. The outcome of this process can be either conscious or unconscious. When it is unconscious, we are dealing with a bias. Whet neuroscience shows, is that the decision-making process often involves unconscious factors.

The psychological and neurological research revealed the complexity of the decision-making process. It is however crucial to ask whether these researches justify the conclusion that judges are in fact motivated, to significant extent, by these subjective factors. There are some doubts concerning this conclusion. Human actions are motivated by numerous factors, thus conducting experiments is a complicated enterprise. As it was already mentioned before, they are conducted in controlled laboratory conditions, which differ to significant extent from the real circumstances of reaching the decision in judiciary practice. It is thus possible that the subjects would behave differently outside the laboratory. The psychologists involved in such research also raised objections concerning for instance the variety of outcomes depending from the particularity of the design. For instance Ross and Nisbett elaborated on this problem[25]. Moreover, psychological experiments were criticised due to unrepresentative choice of subjects, artificiality of experimental conditions, and detachment from the institutional context [26]. Another

21 WISTRICH, AJ; GUTHRIE, C & RACHLINSKI, JJ (2005). "Can judges ignore inadmissible information? The difficulty of deliberately disregarding". *University of Pennsylvania Law Review*, 153, pp. 1251-1345.

22 BLAIR IV; JUDD, CM & CHAPLEAU, KM (2004). "The influence of Afrocentric facial features in criminal sentencing", *Psychological Science*, 3, pp. 674-679.

23 DAMASIO, AR (1996). "The Somatic Marker Hypothesis and the Possible Functions of the Prefronatal Cortex" *Philosophical Transactions of the Royal Society B: Biological Sciences*, 351, pp. 1413-1420.

24 BENNET, H & BORE, GA (2007). "Judicial neurobiology, Markarian synthesis and emotion: How can the human brain make sentencing decisions?", *Criminal Law Journal*, p. 85.

25 ROSS, L & NISBETT, RE (1991). The Person and the situation: Perspectives of social psychology, McGraw-Hill, New York.

26 SIMON, D (2010). "In Praise of Pedantic Eclecticism: Pitfalls and Opportunities in the Psychology of Judging", in: KLEIN, DE &

problem is a consequence of a relatively small amount of research conducted on judges. Moreover those available, focus mainly on two aspects of decision-making: pointing out the facts significant for the case and sentencing. As Schauer points out in his essay *Is There a Psychology of Judging?* when performing experimental tasks judges focus only on just a few of many tasks which they normally perform in their work[27]. They focus on actions, which are more typical for the jurists, and to a lesser degree for the judges. In fact the most typical judicial activity is interpretation – creating the law and choosing the proper rule. So it is not obvious that the judges act alike laymen, and so it should not be treated as indisputable conclusion from the presented research. In many cases what is supposed to be an element of conclusion of an experiment is its premise. Psychologists often tend to imply that the actions resulting form experience and education can tell us less about the possible decision than purely individual actions of the judge. It is than important to consider the outcomes of the research, but with certain amount of scepticism. Perhaps judicial decision-making process differs significantly from the decision-making process in untrained layman? Schauer claims so, clearly separating these two processes. He even remarks that judges decide differently than other professional lawyers. His thesis is confirmed by the research, which did not refer to the decisions of the judges, but examined the impact of expert knowledge on making a decision in the fields that required such expert knowledge. These experiments demonstrated that experts decide differently than novices [28].

It is thus impossible to state with a complete certainty whether judges make decisions in principle as laymen do. It seems that researches confirm this thesis, but the allegations raised against them indicate that they should be treated with caution. The image of decision-making process emerging from the research is a very complex one. On the one hand judges, as professionals, reach their decisions based on their knowledge and experience within the framework set by the law, on the other hand researches indicate that their decision-making process is exposed to the same biases as in case of layman.

4. CONCLUDING REMARKS

How these observations relate to Ross' theory of valid law? As it was mentioned before, he tried to base his theory on the most reliable and certain empirical data. It was possible by reference to a shared normative ideology consisting of the sources of law in the right hierarchy. This catalogue of objective factors was supposed to enable accurate predictions. Thus in his theory Ross did not take under consideration these individual and extra-legal factors, which have been analysed by the researchers recalled in the previous section. Obviously such experiments have not been conducted in the first half of the 20th century. However this is not the only reason why Ross did not involve individual and extra-legal factors in his theory. An attempt to indicate factors other than the sources of law forming a normative ideology would expose Ross' theory to a lack of precision, which he tried to avoid at all costs.

Can current psychology help to complement Ross' theory by indicating a catalogue of factors, which influence the decision-making process? It seems that it is still impossible. There are still few researches, which – at this point – do not provide a coherent picture of judicial decision-making process.

MITCHELL, G (Eds.) (2010). *The Psychology of Judicial Decision Making,* Oxford University Press, Oxford, pp. 131-147

27 SCHAUER, F (2010). "Is There a Psychology of Judging?", in: KLEIN, DE & MITCHELL, G (Eds.) (2010). *The Psychology of Judicial Decision Making,* Oxford University Press, Oxford, pp. 103-120.

28 ERICSSON, KA & WARD, P (2007). "Capturing the naturally occurring superior performance of experts in the laboratory: Toward a science of expert and exceptional performance", *Current Directions in Psychological Science*, 16, pp. 346-350.

As it was also mentioned before, there is still a discussion to what extent those individual factors condition the decisions and whether they are more important than objective factors, such as a legal rules. It is thus hard to say to what extent judges base their decisions on political and religious beliefs, experience, biases and other emotional factors. At this point psychological theories can't support Ross' theory, as they do not provide precise data for successful predictions. Conversely, they suggest rather that making such predictions is a difficult endeavour because of the complexity of decision-making processes. On the other hand mentioned experiments do not undermine basic assumptions of Ross' predictive theory of validity, for they do nor indicate clearly whether the judges decide, in principle, same as laymen. The picture that emerges from the presented research neither confirms nor contradicts Ross' assumptions. Due to this ambiguity it is hard to claim that his theory is archaic or methodologically "naïve". Even if – contrary to what Ross claimed – normative ideology alone would not allow formulating exact predictions (because of the variety of other factors determining judicial decisions) it could not undermine his theory to significant extent. It seams that for Ross the mere possibility of making such predictions is more important, than the thesis that they are guaranteed by the shared normative ideology. After all it is not unlikely that the further development of research methods in psychology will enable accurate predictions, even if it turns out that judicial behaviour is determined mainly by the individual factors.

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