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Counteracting with healing antidotes. Beyond Kelsen, towards Ross

Contrarrestando con antídotos curativos. Más allá de Kelsen, aproximación a Ross.

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Resumen

Mi objetivo en este ensayo no es comparar todos los aspectos del pensamiento de Norberto Bobbio y Alf Ross. En lugar de ello, me propongo examinar algunas áreas clave de su filosofía legal donde se puede, razonablemente, ver cómo Bobbio responde o es influenciado por Ross, o cuáles comparaciones entre sus teorías son particularmente interesantes. La comparación toma un especial interés con respecto a las obras de Bobbio de los años sesenta en las que el kelsenismo, junto con todos los intentos de fundar la ley en una norma fundamental presupuesta y de purificar la ciencia jurídica, fracasa, en su opinión. En particular, la necesidad de claridad científica y adherencia a la realidad apelando a los principios básicos de la filosofía analítica y el empirismo lógico muestran niveles de aceptación de Ross. A pesar de que el positivismo jurídico kelseniano continua figurando en el pensamiento jurídico de Bobbio mucho después de que rechazó la tesis de pureza de Kelsen, las devotas discusiones de Bobbio sobre el positivismo jurídico y la doctrina de la ley natural, sus posteriores estudios sobre las normas legales y sobre la interacción entre la ley y la fuerza, pueden ser vistos como algunas de las formas más importantes en que él integra valiosa información sobre los puntos de vista de Ross en su propia teoría.

Palabras clave: Bobbio; Kelsen; Ross; positivismo jurídico; realismo legal.

Abstract

My aim in this essay is not to compare the thoughts of Norberto Bobbio and Alf Ross on all matters. Instead, I intend to examine some key areas of their legal philosophy in which one can reasonably see Bobbio as responding to or influenced by Ross, or in which comparisons between their theories are particularly interesting. The comparison is especially purposeful with regard to Bobbio's sixties works where Kelsenism, along with all attempts to ground law in a presupposed grundnorm and of purifying legal science fail in his view. Particularly, the need for scientific clarity and adherence to reality by appealing to the basic tenets of analytical philosophy and logical empiricism display levels of approval for Ross. Although Kelsenian legal positivism has continued to figure in Bobbio's legal thought long after he rejected Kelsen's purity thesis, Bobbio's devoted discussions on legal positivism and the doctrine of natural law, his later studies on legal norms and on the interplay between law and force, may be seen as some of the more significant ways in which he integrates valuable insights of Ross' standpoints into his own theory.

Keywords: Bobbio; Kelsen; Ross; legal positivism; legal realism.

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INTRODUCING THE TOPIC

Italian philosophical culture during the first ten years after the Second World War was dominated by Spritualism and Marxism in the wake of the German Idealism. This sharp conceptual distinction underwrote a sharp division of legal-philosophical labor. Legal philosophy came for a long while to be conceived of as including only normative issues, and the non-cognitive metaethical claims were not the appropriate concern of the legal philosopher or something he or she could be expected to deal with. In part under the influence of the dominant Catholicism, Neo-spiritualists displayed remarkable agreement on the criticism towards legal positivism accused of not having raised substantive moral questions and of complicity in recent history of nazism. The Catholic cognitivists, by and large, viewed the foundations of law on the divine origin of human nature very narrowly. Besides those strong forms of cognitivism, most non-Catholic legal scholars did not deny a foundationalist epistemology according to which our moral and legal knowledge is based ultimately on facts and properties metaphysically independent. Not surprisingly, boths trends in legal philosophy recalled and connected to the basic assumptions of the doctrine of natural law[1].

In that environment made of thinkers sharing the same basic tenets of natural law and working through their implications, Norberto Bobbio made his own way as a theorist of a different kind. After his apprenticeship in Phenomenology which proved his need to establish a distance from Idealism and Existentialism and to rescue law from political ideology by founding law in trascendental legality, Bobbio raised his hat to legal positivism. Already from the 1950s the driving forces behind his works were a striving towards scientific clarity and adherence to reality. Kelsen, for Bobbio, became a cardinal figure to whose inexhaustive rich source of ideas he stood fast. Kelsen and Bobbio both rejected rhetorical philosophy and without exception shared the assumption that the framework of a general legal theory is to be confined to the normative structure of law and ignore any question of values[2]. Although his interest in Kelsen's formalism had bashfully emerged in his previous writing on Phenomenology[3], the pivotal moment of the conversion came in the first quarter of the 1950s. Those years represented a crucial fracture within his intellectual life and marked the inception of a significantly fruitful interface between analytical philosophy and Kelsen's pure theory of law.

Just as Bobbio strove to provide a scientific account of law, he attempted to fight the decline toward legal positivism and Kelsen's legal theory accused of having dangerously decreased the anxious concern for values and the defense for democracy and pacifist ideals against imperialism and dictatorship. It is worthy of mention that the two Italian translations of Kelsen's works – *Lineamenti di dottrina pura del diritto* (1952) and *Teoria generale del diritto e dello Stato* (1952) came late within the obscure scene of dread of Kelsen's pure theory blamed for being only apparently ideologically neutral and of the thirst of revenge for both the Catholic supporters of the natural law doctrine and the sociologists[4].

In the manifesto-work of Kelsenism, *Scienza del diritto e analisi del linguaggio*, Bobbio adamantly rejected the traditional legal theory unfavourably influenced by metaphysics and declared his

1 See, amongst the others, some of the Italian defenders of the natural law doctrines such as C. Antoni, G. Quadri, G. Capograssi. On the issue, see the pioneristic contibution of PATTARO, E (1976). "Il positivismo giuridico italiano dalla rinascita alla crisi", in: *Diritto e Analisi del Linguaggio*, Milano, pp. 451-452.

2 See, for instance: BOBBIO, N (1954). Studi sulla teoria generale del diritto, Torino (especially the essays written between 1949 and 1954); Id., *Teoria della norma giuridica,* Torino 1958. Id., Teoria dell'ordinamento giuridico, Torino 1960.

3 See, for instance: *La consuetudine come fatto normativo*, Padova, 1942.

4 Compare: NICOLOI, R (1951). "Formalismo e storicismo del diritto", *Rivista Italiana di Scienze Giuridiche*, pp. 293-329; CAPOGRASSI G (1952). "Impressioni su Kelsen tradotto", *Rivista trimestrale di Diritto Pubblico*, pp. 767-815. For a more detailed reconstruction on the issue, see my work *Il filosofo del dubbio: Norberto Bobbio. Lineamenti della sua filosofia del diritto nella cultura giuridica italiana,* Roma 2012, pp. 41-47, 93-110; English translation: Id., *The doubting philosopher: Norberto Bobbio. Outlines of his legal philosophy within Italian legal culture,* Oslo 2008, pp. 10-15; Spanish translation: Id., *El filósofo de la duda: Norberto Bobbio. Bosqujos de su filosofía del derecho en la cultura jurídica italiana*, Ed. Astro Data, Maracaibo, 2012, pp. 34-40. See, also, SERPE, A (2008). "La "guerra fredda" dell'essere e del dover essere. Capograssi, Kelsen, Bobbio", in: MARINO, G (edited by) (2008). *Ricordo di Capograssi. Studi napoletani,* Napoli, pp. 243-265.

devotedness to the methods practised by logical empiricism and analytical philosophy. This was the road he followed to adjust Kelsen's pure doctrine to the new European trends in philosophy. Or, more precisely, the contemporary fundamental philosophical positions provided support for there being certain connections with the Kelsenian ideals of purity and neutrality in the study of law. Such interplay will not last very long. Shortly afterwards, the thread will break, as I shall come back to later.

In the first part of this work (1.2.3.) I shall bring into focus the different conceptions and meanings of legal positivism purported by Bobbio and Ross and their readings of Kelsen's legal positivism. After this, I shall focus on Bobbio's own *primary* Kelsenian concept of legal science and its *further* development (4.5.6.). Lastly, I shall look at the certain significant issues that might possibly be adavanced in support of convergences between Bobbio's and Ross' views. In so doing, I shall make use of the relationship between primary and secondary rules and of the connection between law and force (7.8.). In the background of the present reconstruction, Bobbio's theoretical shifts are shown in the light of his varying needs of finding new antidotes in order *to heal* Italian legal-philosophy. Formerly, from the prevailing metaphysics and natural law doctrines by means of a revisited Kelsenism, and at a later time from Kelsenism by means of the new European trends in the philosophy of law. With regards to the latter aspect, Bobbio' s views are a thread of not pure and simple interplay with Ross.

1. LEGAL POSITIVISM ARMED TO THE TEETH

Bobbio's University lectures on legal positivism held in the years 1960-1961 and originally published as pamphlets can be conceived as theoretical and historical commentaries of the contents of his previous courses *Teoria della norma giuridica* (1957-1958) and *Teoria dell'ordinamento giuridico* (1959-1960). It is worth mentioning here that in *Teoria dell'ordinamento giuridico* Bobbio displays some level of approval for Kelsen's theory of *Grundnorm*. In those lectures Bobbio had stated that any legal norm presupposes a normative power; from this assumption it follows that behind the constitutional norms there must be a constitutional power conceived as the last power, the supreme original power which in turn presupposes a power-producing norm. Bobbio argued that such a norm could not be anything but a basic norm[5].

At the very beginning of the sixties Bobbio shares Hart's and Ross' views that it would not make any sense at all to blame or praice someone for being defender or accuser of legal positivism by remaining entirely outside the investigation of its historical meaning and nature. Particularly, in his essay *Sul positivismo giuridico* dated 1961, one may see more than a nuanced inspiration form Hart's work of criticism toward Lon. L. Fuller *Positivism and Separation of Law and Morals* and Ross' English edition *On Law and Justice*[6].

Bobbio gives a mixed verdict to questions about whether or not legal positivism can be so easily regarded in a negative meaning as mere rejection to natural law doctrine. He argues that not all concerns can be so easily reduced to such a contrapposition. In particular, he provides support for the argument according to which even a rigorous legal positivist can handle the belief in those values upon which positive law can be approved or disapproved. And such a belief does not constitute reasons for a positivistic theory of law to give up the very conceptual core of legal positivism. The view is perhaps not very original but his concern with the historical account on the different meanings of legal positivism illustrates the contradictions into which the

5 BOBBIO, N (1993). *Teoria Generale del Diritto*, Torino, p. 190.

6 On summer 1960 Bobbio together with Alessandro Passerin d'Entrèves and Renato Treves organised a two weeks-seminars on legal positivism at Villa Serbelloni di Bellagio on the initiative of the Rockfeller Foundation. Hart and Ross took part in it. See, BOBBIO, N (1979). *Il positivismo giuridico,* Torino, p. 2; Id.,(1961). "Sul positivismo giuridico", *Rivista di Filosofia,* p. 14.

opposers fall when one fails to recognise its own historical limits. It is known that a couple of years before also Hart had identified through the means of the historical search the different meanings of legal positivism. With a view to Bentham' and Austin's Utilitarianism, and in order to sweep away the bandied ambuigity of the label "positivism" he pinpointed five main theses which are in short: 1) the contention that laws are commands of human beings; 2) the contention that there is no necessary connection between law and morals or law as it is and law as it ought to be; 3) the contention that the analysis (or study of the meaning) of legal concepts is worth pursuing and to be distinguished from historical and sociological inquiries and from the moral criticism or approval, or otherwise; 4) the contention that a legal system is a "closed legal system"; 5) the contention that moral judgments cannot be established or defended ("noncognitivism" in ethic)[7].

In short, Bobbio distinguishes three aspects of legal positivism: a) as an approach to the study of law (*method* of investigating law); b) as a *theory* (conception of law); c) as an *ideology* (of justice).

As a *method,* legal positivism must be regarded as based on the strong distinction between what law is and what law ought to be. The standpoint he associates here is that law can be investigated regardless of the value judgments, *Wertfreiheit*, and in accordance with laws of science. Law is the actual valid law, that is the whole of the norms in force issued according to determined procedures, regularly followed by the individuals and implemented by the Courts within a determined community. Thus, establishing law as a system of only positive norms allows us not to reject the existence of an ideal (natural or rational) law but to avoid conflicts between the two types in the identification of law and, not less importantly, to confine legal science itself to scientific method.

As a *theory*, legal positivism is connected to the historically modern conception of the State conceived as a "whole" representing its members and endowed with force. This broad conception is linked to a series of sub-peculiar theories considered as typical of legal positivism such as the imperativistic theory, the coactionistic theory, the legal sources theory, the theory of declarative interpretation of law, the theory of legal system considered as a structured whole whose semantic features are completness, consistency and decidability.

Finally, as an *ideology* legal positivism pertains to the belief in certain values to which positive law corresponds regardless of its conformity to an ideal law. From the fact that positive law is law by the will of whoever made it and it is just as such, it follows that legal norms reflect a moral duty commitment and a propensity not to act contrary to them. Duties of respect to law are required since the in/validity criterium for the identification of law perfectly coincides with the one applied to assess its own in/justice.

Once he has distinguished such aspects in which legal positivism has historically manifested, Bobbio condemns all the attempts at removing all the inner peculiarities generally included in the very core of the notion. The three aspects of legal positivism are grounded on three different reasons or judgments which are, for a) reasons of opportunity (taking law as it is and not law as it ought to be into account better serves the task of legal science of providing decision schemes for Courts); for b), factual judgments (it is a fact that the actual law is a whole set of norms of conduct directly or indirectly issued by the State); for c) value judgments (form the fact that the law has been issued according to formal criteria and by the will of whoever, it follows its positive value and, regardless of the content, obedience to the law is unconditional.

In what has now been outlined there are some fundamental lines of comparison between Bobbio's legal positivism and Ross' innovative approach within the North-European tradition of the early fifties. As a point of entry into the comparative perspective I shall continue by taking the three-fold differentiation of legal positivism as a starting point.

As to c). Besides the historical fact that not only legal positivists but also traditional supporters of natural law had advanced the argument of the moral duty of obeying the positive law (i.e. the Resistence

7 HART, HLA (1958). "Positivism and the separation of law and morals", *Harvard Law Review,* pp. 601-602.

theory of the early modern period grounded on the existence of predate natural rights), Bobbio argued for the distinction between an extreme legal positivism and a moderate legal positivism. The former is based on the central assertion that positive law is just as such; the latter is grounded on the moral duty of obedience on the assumption that positive law, irrespective of its content, serves to fulfill *values* such as order, peace, certainty and legal justice. The latter is a fundamental piece in Bobbio's main point – in opposition to the defenders of new natural law who had misinterpreted legal positivism as a divulger of seditious ideas of dictatorship – that one must keep such a differentiation in mind. The historical explanation for this difference is no doubt that such values were formulated in the 18th century by the classical liberal doctrine – with Montesquieu and Kant at the forefront – and this would prove that the ideology of legal positivism can be neither conceived as a means of invigorating the 20th century dictatorships nor as a means of weakening individual freedom and equality.

The question of whether, and if so to what extent, the emphasis on empiricistic principles and scientific method and the transcending of the realm of the spirit and values had entailed a sort of "*moral torpidity and complicity in the abominations of the Hitler regime*"[8] was also taken up by Ross. More particularly, his argumentation may be seen as directed against elements in natural law doctrines and the supposition of certain constituents of reality, the values, which we have access to through sense-experience. Under the influence of the models elaborated in the Vienna Circle and Logical Positivism of the inter-war period, Ross argued against the belief in the existence of natural law as all law is positive and such a denial is nothing more than the consequence of the non-existence of any ethical cognition at all. Both Ross and Bobbio clearly place great weight on the appeal that law cannot be understood in terms of metaphysical interpretation and described if not through a sufficiently clearly distinction between natural law and positive law. However, Ross' thesis is stronger than Bobbio's. Ross' argumentation based on the the meta-ethical view that moral judgements do not express facts and lack of truth-value is particularly significant. By denying the existence of other levels of non-empirical reality, he rejects the existence of a moral law independent of all sense-experience[9].

Sharper and more comparable with Ross' is Bobbio's concept of legal positivism as an *approach* to the study of law (a). This can find correspondence in Ross' usage of the term "positivism" as designating an anti-metaphysical attitude to problems of legal philosophy and jurisprudence in opposition to the approach of the natural law doctrines. As a step in his theory of valid law Ross puts forward the empirical characterisation of the methodology of legal science as grounded on the factual observation of social facts regardless of the appeal to morals or natural law.

Although for Ross social facts to be observed and interpreted are human behaviour and attitudes, this methodological thesis – which has the Austinian dichotomy of the factual existence of law and its merit and demerit as background – brings Bobbio closer to him. As shown earlier, Bobbio's formulation of legal positivism as an approach or *method* to legal problems (a) is the core thesis to which he has constantly adhered during his own intellectual life. Nevertheless, and quite unlike Ross, some years later Bobbio stated that the legal positivism and natural law approaches to legal knoweledge are not in contrast, but possibly combinable. Even if this alternative should be used deliberately, the contrast is, however, manifestly inadequate in relation to the fact that the general natural law demands of justice can be accounted as a demand of critique of law. In other

8 ROSS, A (1961). "Validity and the conflict between legal positivism and natural law", *Revista Jurídica,* Buenos Aires, p. 46. On the issue, compare also, Id., "Naturret contra Retspositivisme", in: *Tidsskrift for Rettsvitenskap*, 1963, pp. 497-525 (Italian translation: "Giusnaturalismo contro positivismo giuridico", *Rivista trimestrale di Diritto e Procedura Civile,* 1979, pp. 701-723).

9 Compare, on the matter, amongst the others, his earlier works: ROSS, A (1931). "Retskilde- og Metodlære i realistisk Belysning", *Tidsskrift for Rettsvitenskap*, pp. 241-301; Id., "Virkelighed og Gyldighed i Retslæren", in: *Tidsskrift for Rettsvitenskap,* 1932, pp. 81-106; Id., *Kritik der sogenannten praktischen Erkenntnis. Zugleich Prolegomena zur einer Kritik der Rechtswissenschaft*, Copenhagen, 1933; Id., "Den rene Retslære 25-års Jubilæum", in: *Tidsskrift for Rettsvitenskap,* 1936, pp. 304-331.

words, the rigorous application of scientific method does not prevent the positivist legal theorist from carrying out a substantive critical attitude on law in view of a better systematisation, mutation and evolution of law. One thing is to carve out a valutative definition of law in terms of justice, it is wholly another thing to investigate law as a fact dis/approved on the basis of determined value criteria assumed as such[10]. The latter aspect does not weaken the scientific commitment of a legal positivist to the study of the enacted law. Such a view formulated by the later-Bobbio contains the seeds of self-criticism which in turn leads directly to a theoretical discrepancy with Ross' well-known account on the strict separation between legal policy and pure legal science[11].

Another main area of comparison through factors is theory-resemblance concepts of legal positivism. In both Bobbio and Ross' language and argumentation there is seldom any basis for strong agreements regarding the variagate set of theories derived from the core separation-thesis of legal positivism. Stronger than Bobbio, but like-minded, Ross stated he wanted to limit himself to a descriptive characterisation of Austian interpretation of law as it is not expected to cover other implications or misleading conceptual reductions such as the imperative theory, the theory of force "behind" the law and the mechanist theory of the judicial process[12]. Here one must take into account the common blame, for both Ross and Bobbio (b), for the persistence of negative deviation of the pure concept of legal positivism and its incorrect application in relation to other views put forth by others in the name of legal positivism. To go into greater depth, Bobbio emphasises that while legal positivism is the dogmatic elaboration of legal voluntarism from which the above mentioned thesis derives, from natural law – as the doctrine according to which the fondation of conduct norms is to be found in the the eternal human nature – descends a set of theses regarding different aspects of the legal experience. Although not systematised, these theses such as norms are not imperatives but *dictamina rectae rationis*, the nature of the thing as the main legal source, the incompleteness of the legal system and the discretional power of the judge are to be considered theoretically poles apart from legal positivism[13].

2. WHAT IS MEANT BY NATURAL LAW? KELSEN AND THE IDEOLOGY OF LEGAL POSITIVISM

Finally, there is the question of what they meant by natural law and of whether and how naturalists and postivists theoretically clash.

Parallel to but partly different from Ross' identification of the main features of natural law, is Bobbio's view. In several works he has taken up his concept of natural law and has clarified its standpoints. One important clarification is that natural law does not represent a peculiar system of moral principles as the word "nature" does not say anything about the content of the moral prescriptions. Lacking any axiological basis, "natural law", and more specifically the term "nature", designates either the source or the foundation of law. So, natural law is nothing but a theory of morality and the common ground for all natural law doctrines is merely an objectivistic conception of ethics based on the assumptions that a part of the rules of conduct are not the product of human activity and that a part of them are axiologically superior to all other norms. Bobbio's analysis discloses the unsustainabilty of natural law and includes historical arguments (different natural law systems have been differently structured on different validity criteria of "nature") and logical arguments (from the assumed fact that nature is a valid criterium of distinction of human tendencies there cannot be entailed

10 BOBBIO, N (1965). "Giusnaturalismo e positivismo giuridico", in: Id. *Giusnaturalismo e positivismo giuridico,* Roma-Bari, 2011, Cap. VII, pp. 120-124.

11 On the relationship between science and politics to which I shall come back later to, see the chapter XIV of his *On Law and Justice*. With regards to the Italian translation, see: ROSS, A (1965). *Diritto e Giustizia*, Torino, pp. 280-308.

12 ROSS, A (1961). *Op. cit.*, p. 54.

13 BOBBIO, N (1965). *Op. cit.*, pp. 120-122.

any value judgments). What can one use the concept of natural law for? Bobbio's historical approach comes into play again. Natural law in its being an objective theory of morality has served to philosophically ground individual freedom and state-power theories[14].

Beyond the specification, the conceptual core of the matter is quite similiar in Ross. He asserted that in many formulations of natural law there is one central and common idea directly or indirectly claiming the existence of non-empirical but universally valid principles governing the life of a man in a civil society. For this reason, natural law belongs to the domain of general moral philosophy, ethics (or morality in the broad sense) but it differs from morality in a narrower sense which deals with the ultimate end of a man.

Ross knowingly draws this theoretical distinction on Verdross[15]. It is quite interesting to notice that also the main area of connotation specification of the legal positivism term is likewise taken by Ross from a passage contained in Verdross' book *Abendländische Recthsphilosophie* where he distinguishes between a dogmatic (extreme) version of legal positivism and a hypothetical (moderate) one. In his view, the former is grounded on the moral assumption of non-ethical cognition and on the implication that positive law possesses absolute validity which renders any legal system, if established, morally binding. According to the latter, legal positivism leaves the question on the moral cognition open and it designates the attitude of legal science to be largely engaged in the empirical study of law without appealing to any natural law principles. The crux of the matter here is that while Bobbio's reaction to discrepancy between the dogmatic legal positivism on the one hand and the moderate one on the other ends up with his adherence to the latter version, the same does not occur with Ross. For the concept of legal positivism as outlined in the account given, Ross not only claims it is unecessary to take a specific moral standpoint in the account of law, but to the greatest possible extent, it is necessary not to take any standpoint at all for the mere fact that the existence of natural law is denied as lacking, as any natural morals, ethical truths. It should be particularly emphasised in Ross that the existence of natural law and, more in general, of any moral judgments, is rooted in meta-ethics and is of no consequence for the practice of values itself[16].

To sum up: in Bobbio and Ross it is equally clear that natural law is an erroneous attempt to disguise the reality of law by wrapping law in the veil of authority of religion, or of tradition, or of the strongest historical ideology. What both were anxious to assert were that the criteria that are relevant for tenability assessment of natural law have historically varied (Cosmos, God, rational being of man, history) and practically served to defend or attack a diversity of political systems, from extreme conservative ones to revolutionary ones. Further, they present their own way of using the term "legal/positivism", which in their view leads to anti-dogmatism.

On the basis of the assumption of such non-empirical features of natural law and of its being vindicated by different naturalists for different political purposes, Bobbio and Ross' views regarding Kelsen's

14 BOBBIO, N (1965). "Argomenti contro il diritto naturale", in: *Giusnaturalismo e positivismo giuridico,* ed. cit., pp. 140-154; Id., "Il giusnaturalismo come teoria della morale", in: *Giusnaturalismo e positivismo giuridico,* ed. cit., pp. 157-170.

15 ROSS, A (1961). *Op. cit.*, p. 50.

16 On his view about the difference between the theory and the practice of values, compare his contributions: ROSS, A (1946). *Hvorfor Demokrati?*, København (English translation: *Why Democracy?*, Cambridge 1952); Id. *Hvad er Demokrati?*, in: ROSS, A & KOCH, H (edited by) (1946). *Nordisk Demokrati,* pp. 191-206; Id., "Sociolog som Retsfiloso", in: *Juristen*, 1946, pp. 259-269; Id., *Direttive e norme* (original title: *Directives and norms,* London 1968), Milano, 1978, p. 124. In particular, and besides the above mentioned works, on the concept of democracy and on his life-commitmment as non-cognitivist philosopher with regard to the practice of democracy and human rights, compare also: Id., *Hvorfor jeg stemmer på Socialdemokratiet,* in: Social-Demokraten, 25-10-1945; Id., *Kommunismen og Demokratiet,* København, 1946; Id., "Socialismen och demokratin", in: Tiden, 1947, pp. 392-404. I also resort to: SERPE, A (2013). "Su democrazia libertà eguaglianza. À propos del Ross di Hvorfor Demokrati?", in: i-lex, 20, pp. 453-478. For a deeper understanding of his later reflections on democracy, see the collection *Demokrati, magt og ret. Indlæg i dagens debat,* København, 1974, of which an Italian translation with an introduction edited by me is now being printed - Giappichelli Publisher. Lastely, of course, his numerous works on International law often contain significant insights on the issue. In 1939 Ross became Professor of International Law at the University of Copenhagen and from 1957 until 1971 he was appointed as a judge at the European Cort of Human Rights. See, amongst the others, his mostly known monographs: Id., *Lærebog i Folkret. Almindelig Del,* 2, 1946; Id., *Constitutions of the United Nations. Analysis of structure and function*, København 1950; Id., *The United Nations. Peace and Progress*, Bedminster 1966. Especially the first two works mentioned are theoretically based on the main tenets of his legal-philosophical viewpoints of both *Kritik der sogenannten praktischen Erkenntnis* (1933) and his shortly-after published *Towards a Realistic Jurisprudence* (1946).

own legal positivism clash. As is apparent from the discussion above, both philosophers distinguished two versions of legal positivism, the moderate and the extreme one. With no doubt, Bobbio's reading on Kelsen's pure doctrine of law does not reveal any parallel with the extreme version of legal positivism.

Already at the very beginning of the fifties, in his *defensio* addressed to denying the misinterpreted accusations propounded by the Italian main hostile opponents to Kelsen's pure theory (sociologists and naturalists), Bobbio ascribed Kelsen to the former version of legal positivism. He stated that the assessment of Kelsen's critique of the distinction between validity and value in order to safeguard the purity of law is, however, important to be kept conceptually separated from the supposed ideological set up of such a theory and the senseless conclusion that the task of his legal theory consisted in justifying any value system[17]. More unreflectingly, some Italian Catholic natural law supporters had asserted thay it would be impossibile to take content within law apart and that such terminology, stood up to closer reflection, expressed a feeble *petit bourgeois* ideology. This was a term for what Kelsen had apparently called *neutral* ideology his pure doctrine. Bobbio held on to Kelsen's arm. On the one hand, he drew his attention to the significance of a specific normative science whose task was to investigate law as a whole structuring and qualifying social reality regardless of the sociological, moral and psychological facts; on the other hand, he broke down the accusation of having reduced justice to the will of the strongest and of moral fidelity to law by recalling Kelsen's brave defense of democracy and pacifist ideals against imperialism and dictatorship. In the light of Bobbio's future distinction between moderate and extreme legal postivism, we may say that already at that time he had placed Kelsen in the former version.

A few years later Bobbio took Kelsen as a clear example of how his pure doctrine was a product of legal positivism as a theory which mirrored the formation of the modern State and was not shrouded in mystification of the State as expressed in the metaphysical view of Hegel's philosophy. As pointed out before, Bobbio built up three specifications of legal positivism terms a), b), c), and this point here is concerned with the derived questions of the possibility of the boundaries between legal positivism as a theory and as an ideology. Clearly enough, Bobbio's interpretation of Kelsen goes in the direction of the absence of such a parallel and this means the absence of the moral duty of obeying the positive law as required by the supporters of the ethical theory of State. Once again, Bobbio's conclusion was that none of the arguments put foward by naturalists or positivist-opposers could justify the assertion that legal positivism as ethics of legality, peace and legal certainty could not belong to the range of the democratic conception of the State. Parenthetically, Kelsen's view had provided an incontested insight[18].

3. ON ROSS. FIGHTING KELSEN ON ALL FRONTS.

Ross' passionate interpretation of Kelsen's legal positivism was grounded on the demand that a *true* theory of validity should be thought afresh on the question of the interconnection of law and reality. The grave mistake of a number of writers considered "postivists" had consisted in falling into a sort of 'naturalist' trap. Instead of deriving the validity of law from human nature or immnent rationality as naturalists do, plenty of "positivists" had placed law under the concept of authority of the State. The misconception that law "possesses" a validity of a different "nature" still remained deeply embedded in their views.

Quasi-positivismus, *Kripto-Positivismus* are expressions used by Ross for identifying his struggle over the *false* positivism, and for the empiricism which he assumed to be the *true* positivism[19].

17 See, for instance, his first defense of Kelsen: BOBBIO, N (1992). "La teoria pura del diritto e i suoi critici" (1954), in: Id., *Diritto e potere. Saggi su Kelsen,* Napoli, 1992, pp. 15-39. On the issue, I refer to the previous n. 4 of the present work.

18 BOBBIO, N (1961). "Sul positivismo giuridico", *Op. cit.*, pp. 22, 33.

19 Compare: ROSS, A (1933). *Kritik der sogenannten praktischen Erkenntnins,* Cap. XII; Id., *Om Ret og Retfærdighed* (1953), with the introduction of J.v.H. Holtermann, København, 2013, pp. 339-344.

Unlike the current expositions of valid law and from the viewpoint of Ross, "validity" is netiher an aprioristic quality to which it corresponds the moral duty of obedience nor a term meaning the legal effects of a determined normative act. "Validity" corresponds to the actual existence of a norm while valid law (*gædende ret*) is the law actually in force. The analysis conducted of the concept of "valid law" places Kelsen within the former mistaken conception of validity. For this purpose he attacked Kelsen's ways of understanding and using the term "validity" that lead to a distorted, or at least incomplete version of legal positivism. In order for legal doctrine to be a science of valid law or to have a character of scientific assertions, it must develop its own methodology for which validity is to be intended as the mere actual existence and this can only be demonstrated with reference to empirically observable (socio-psychological) facts. Kelsen, by asserting that valid norm does not only refer to its real existence but that possessing validity means "*that the individual ought to behave as the norm stipulates*", had drawned his *pure* legal doctrine in moral philosophy as revitalised the Hegelian roots of Idealism[20].

It is worthy of mention that in this respect, Ross not only refers to the conceptual apparatus of Kelsen's *General Theory of Law and State*, but also to his later inquiry into the concept of justice. More particularly, in his review to the volume *What is justice?*, Ross had shown his disagreement with regards to the Kelsenian concept of validity in so far as it lays down a concept of morality in terms of obedience to the legal authorities and the implied fallacy of ethical absolutism. For Ross, the lack of logical meaning of the idea of "validity" invests the concept of basic norm in so far as it is an absurdity to ascribe truth value to a norm without shuffling science and ideology[21].

This questions mentioned can in many connections be seen as two different perspectives on what Ross' criticism on Kelsen's *pure* approach to law, and on what Ross' *own* "legal positivism" consist of. Let's take a closer look.

In several works Ross showed his deep appreciation for Kelsenian contribution to legal theory. In 1924 and for about two years, Ross visited Vienna and attended the private seminars held by Kelsen at the well-known *Wiener Rechtstheoretische Schule*, a School which was influenced by – although not being a part of – the *Wiener Kreis* of philosophers intended to reconceptualise the empiricism through the means of formal science and logic method. Ross was entrhalled by Kelsen's project to purify law from political ideology and bend legal science to scientific method of clarity and neutrality. *Theorie der Rechtssquellen* is the Kelsenian-inspired Doctorate thesis which Ross submitted to the evaluation Committee at the University of Copenhagen in 1926, then vehemently criticised and rejected as considered somewhat extraneous to the Danish legal culture tradition. Ross' admiration for Kelsen perpetuated over the years in spite of his adherence to the main tenets of the Swedish legal realism and of the logical empiricism. By way of illustration only, Ross had always praised his: "*purely intellectual admiration for a lifetime's work*", "*passionate love for uncompromising truth*", "*work of rare monumentality and dimension*", "*renewed interest in the fundamentl problems of legal theory*"[22], and his "*trasparent clarity of style*", "*the merciless consistency*"[23]. Not less appreciative comments are contained in his masterpiece *On Law and Justice*. In a place he stated that *Reine Rechtslehere* was the most unique example from the modern philosophy of law capable of becoming a major attraction for several legal scholars of the XX's. The power of attractiveness, in Ross' view, laid on the impeccable attempt of developing the premisses of

20 ROSS, A (1961). *Op. cit.*, p. 80.

21 ROSS, A (1957-1995). "Hans Kelsen. What is justice? Law and Politics in the Mirror of Science. Collected essays", Berkeley and Los Angeles, California, University of California Press, 1995, *California Law Review*, pp. 567, 568.

22 ROSS, A (2011). "The 25th Anniversary of the Pure Theory of Law ", Translation from 1936 in: *Tidsskrift for rettssvidenskap*, 304-331, *Oxford Journal of Legal Studies*, Vol. 31, pp. 243, 244.

23 ROSS, A (1957-1995). *Op. cit.* p. 564.

legal positivism by means of logic in such a way for the notion of validity to gain independence from ethical postulates and, for legal theory to be cleansed of sociology, ethics and politics[24].

The passages quoted above have a value of shorthand expressions of admiration for Kelsen. Nevertheless, Ross' engagement in criticism of Kelsen's normativity thesis and, in wider terms of his concept of legal norm and legal system far exceed all the praises. In what follows I shall point out that and for the sake of brevity, the task will be limited to an accont of passages of some of his main works. And here we come to the second question.

The rejection of the possibility of strictly distinguishing between reality and validity, *Sein* and *Sollen* and the need of going beyond the strict version of legal positivism had been upheld by Ross, inter alia in 1933, in one of his main works, *Kritik der sogenannten praktischen Erkenntnis. Zugeleich Prolegomena zu einer Kritik der Rechtswissenschaft*. It is worthy of mention that *Kritik der sogennanten* was Ross' first work to be known to the Italian audience through the later critical review of Bobbio in 1937. Unsurprisingly in those years, Bobbio, persuaded by Kelsen's normativism, pointed out the difficulties of denying the possibility of a genuine practical reason and the consequent new angle of the psychological world of law[25].

This was the fundamental view that Ross has subsequently shown in several works, and systematically delved deeper as from his further *Towards a Realistic Jurisprudence. A Criticism of the Dualism in Law*, 1946. In this monography, he claimed that what is crucial is not whether validity is relevant in relation to the perspective and topic of legal science, but first and formost the impossibility of any objective normativity thought as a world distinguished from the spatio-temporal one. What exists behind the expressions of practical modality are solely psychological phenomena in time and space. In the light of this, validity as well as value or duty has no meaning, they are simply words. The subjective experience of such notions in our minds rationalises the idea of validity and generates the illusion that validity is something objectively given.

Therefore, no (validity) reality discrepant from the spatio-temporal reality exists. Ross puts it in this way: "*Viewed from the angle of the analysis of consciousness there exists no notion of validity at all, but merely conceptually rationalised expressions of certain subjective experiences of impulses* (…) *the "notions" of validity mean certain peculiar disinterested behaviour attitudes*"[26]. From these assumptions it follows that the legal system is a social order whose foundations are characterised by peculiar behavioural attitudes based on an intercation between compulsion and validity. Ross points out that such behaviour attitudes "*are at the same time expressions of interested and disinterested impulses, and have taken thier rise, developed, and established themselves by an inductive interaction between two motives, a fear of compulsion, and a belief in authoritative validity*". More specifically, the interested behaviour attitude consists in the fear of compulsion, whereas the disinterested behaviour attitude consists in notions of validity induced by the social suggestive power of custom. In short: behaviour attitudes (compulsion) and authority or competence (validity) are threaded together[27]. The said reduction of the validity to an experience of validity is in itself important in the assessment of the concept of law which is based, in Ross, on ontological

24 ROSS, A (1965). *Op. cit*., p. 65.

25 BOBBIO, N (1937). "Alf Ross, Kritik der sogenannten praktischen Erkenntnis, Zugleich Prolegomena zu einer Kritik der Rechtswissenschaft", Leipzig, Felix Meiner, 1933, p. 456, in: *Giornale critico della filosofia italiana*, XVIII, 1937, n. 1, pp. 73-75, re-published in: TARANTINO, A (a cura di) (1984). *Scienza e politica nel pensiero di Alf Ross. Atti delle giornate di studio su Alf Ross*. Lecce 14-14 maggio 1981, Milano, pp. 257-261.

26 ROSS, A (1946).*Towards a Realistic Jurisprudence. A criticism of the dualism in law,* Copenhagen, p. 77.

27 *Ibíd.,* pp. 76-93. See also, Id., "Retskilde – og metodelære i realistisk belysnin", in: *Tidsskrift for Rettsvitenskap,* 1931, pp. 241-301, especially p. 295.

naturalism rejecting any dualism in jurisprudence[28]. The anti-dualistic approach is a necessary condition for an anti-metaphysical and empirically oriented study of law. Thus, law and legal phenomena must be understood in terms of social facts and the study of law must be unconditionally conceived as a ramification of social psychology. With respect to what sort of definition of *realistic* tendency he is referring to, Ross wrote: "*by this I mean a conception which in principle and consistently considers the law as a set of social facts – a certain human behaviour and attitudes connected with it*"[29]. Accordingly, law is analyzable in factual components being ascribable to certain empirical perceptible phenomena of a psychological kind.

The aspects concerning law and legal phenomena that Ross' inquiry points to lie on another plane from the Kelsenian anti-empirical approach, which came under criticism in a number of works. Already in his early work dated 1936, *The 25th Anniversary of the Pure Theory of Law*, in wondering whether the propositions of law have meaning, Ross emphasised his criticism towards the Kelsenian system of norms for the reason that it is of great importance that normative propositions and normative claims are linkable to expressions of the speaker's subjective feelings and attitudes, so that the said propositions and claims allow themselves to be empirically checked. As is well known, Ross' critical discussion of the Kelsenian doctrinal exposition of law was closely linked to his adherence to a strict emotivist version of non-cognitivism slavishly acquired by Hägerström's moral philosophy during the time he spent in Uppsala where he received his doctorate in philosophy[30]. Ross stood fast on this view in his later and more illustrious monographs *On law and justice* (1958) where in some places he discussed justice from the viewpoint of emotivism characterizing justice as emotional expression[31], and *Directives and Norms* (1968) where in mapping what types of basic positions in moral philosophy are commonly-held, he explicitely stated his commitment to the meta-ethical view of emotivism[32].

The emphasis that the legal positivists à la Kelsen placed on the fact that the doctrinal propositions of law are statements in which a *Sollen* is expressed, not a *Sein* is heavily rebutted by Ross. In *On law and Justice*, Ross stated that in Kelsen's *Reine Rechtslehere* a *Rechtsnorm* and a *Rechtssatz* was *de facto* reduced to the same category of *Das Sollen*. For Ross, the mistaken lack of differentiation was then defeated by a lack of clarity in his later *General Theory of Law and the State* where Kelsen attempted to distinguish the legal norms themselves and the theoretical propositions about these norms by unhappily calling the latter "rules of law", i.e. statements in which a *Sollen* is expressed. In so doing, Kelsens' yearning to discern *Seinswissenschaft* from *Sollenswissenschaft* broke up into little pieces[33]. Already in his one year earlier review to Kelsen's *What is justice?*, Ross had more extensively put forth his hefty critique based on two level arguments on the whole Kelsenian theory of positive law. First, that the *logical* content of a legal norm is an ought-proposition (what Ross calls *directive*), that is neither true nor false and to which a theoretical doctrinal proposition corresponds whose *real* content may be empirically checked by observing the effectively regular behaviour of both the judges and officials. Second, the idea of validity

28 On this point, see the insightful work of SPAAK, T (2008). *Naturalism in Scandinavian and American Realism: Similiarities and Differences,* 25-year Anniversary Uppsala-Minnesota Conference, available at: SSRN: http://ssrn.com/abstract=1354154, p. 41.

29 ROSS, A (1946). *Op. cit.*, p. 9.

30 On Ross' vicissitudes concerning the rejection of his first Doctoral thesis at the University of Copenhagen, his later doctoral defense at the University of Uppsala and the influence of the figure of Hägerström upon his accademic life, see the in-depth biography of J. Evald, *Alf Ross- et liv,* København 2010, especially Chapter III and IV. I aslo resort to my work: SERPE, A (2008). *Realismo nordico e diritti umani. Le 'avventure' del realismo nella cultura filosofico-giuridica norvegese,* Napoli, pp. 21-41; Id., "Il realismo giuridico in Danimarca e Norvegia", *Materiali per una storia della cultura giuridica*, 1/2008, pp. 63-90.

31 ROSS, A (1953). "Om Ret og Retærdighed". ed. cit., pp. 357-386; Id. (1965). *Op.cit.,* pp. 253-279.

32 ROSS, A (1978). *Direttive e Norme*, Milano, pp. 124-127.

33 ROSS, A (1965). *Op. cit.*, pp. 10-11, n. 4.

depends on the social facts of effectiveness and it is identical and not only *conditioned,* as Kelsen has repeatedly stated, by such facts. The said premise in Kelsen that such facts can verify the "existence" (validity) of a norm provides a basis for the exceedance if not the insignificance of the notion of "validity" itself[34].

One year later, Ross wrote as follows: "*the real content of the juridico-scientific assertion* [that a norm] *is valid law is a prediction to the effect that* [the norm] *under certain conditions will be taken as the basis for decision in future, legal disputes* (…)". This is the core of his prediction theory. The prediction can be possibile because of the fact that the judges arrive at a legal decision being guided and governed by "*a process determined by attitudes and concepts, a common normative ideology* (…) *this ideology is the subject of the doctrine of the sources of law*"[35]. Finally, the conclusion is that the doctrinal propositions of the science of law can be empirically tested, namely verified, through observation because they are predictions based on such an ideology being nothing but the doctrine of the sources of law.

Furthermore Ross linked his critique of Kelsen's doctrinal exposition of law to his ideal of purity of doctrinal interpretation. Kelsen's own preoccupation laid in the more general notion for which science and politics must be taken apart without exception in order to provide a scientific basis for legal doctrine. Although he reckoned that the doctrinal interpretation might be guided by pragmatic considerations, the task of the legal scientist is confined to applying the tools of logical-linguistic analysis and carrying out practical consequences. Legal science as science cannot take place in the actual application of law. Such an inexorable assumption leads in Kelsen's view to the purity of legal science.

Kelsen wanted to ensure that a purely logical interpretation *fully* devoid of any pragmatic aim is illusionary, but, most importantly, that the purity of science in the way it is tradionally understood is not violated as the border between science and politics is clearly demarcated. Claiming that legal science is science is possible and the requirements for scientificity must be made through the methodological self-understanding of the legal scientist. The standpoint that legal doctrine ought to take in order to be able to use the term "science" for its own activity, is not to deceptively banish all the evalutative and emotive attitudes of which the scientific doctrinal exercise is actually made of, but rather to consciously disclose them as explicit premisses. This is to say that the doctrinal propositions seemingly have the status of descriptive propositions once the premisses are forthright and unequivocally expressed and the practical conclusions are presented as recommendations for judges rather than postulates[36].

3.1. ON SCIENCE AND POLITICS IN ROSS

Controversies over the word "science" play an important role. The reason for a difference here is grounded in the motivation-psychological aspects of norms and legal doctrine. Ross is not rejecting his adherence to an ideal: the purity is an aim to fulfil and it does not clash even when the legal scientist professionally pursues politics and science concurrently. For an adequate picture of Ross' reflection of the role motivations and emotions play in legal scientists' argumentation it is of significance to refer to other Scandinavians whose views persuaded Ross to step out from the shadow of Kelsen and take shelter elsewhere. One example is the Swedish economist, scholar and politician with an international reputation, Gunnar Myrdal. Although basing his views upon the value nihilism thesis of the common Mentor Hägerström, Myrdal had consistently stated the possible link between science and policy. One of his core ideas was that although a social scientist should not replace the politicians in setting goals and fighting for their implementation, he or she might do it only on

34 ROSS, A (1957-1995). *Op. cit.* pp. 566, 567.

35 ROSS, A (1958). *On Law and Justice*, London, pp. 75, 76. The translation is slightly altered.

36 ROSS, A (1965). *Op.cit.*, pp. 319-312.

the basis of a sober and long lasting knowledge of social problems[37]. His early work *Vetenskap och politik i national-ekonomien* (1930) displayed considerable understanding of modern political science. Through an analytical-critical reconstruction historically oriented on the role that the political speculation had played in the national economy over the centuries, he unveiled the misleading confusion of science and politics and explained how the economy would become practical science without being doctrinal. With the means of modern social psychology, the Swede claimed that the historical reproduction of dogma is so widely reflected in the mentality of the scientist as to infest the domain of social sciences. Nevertheless, Myrdal's intent was not to flush out science from emotional prejudices. Being aware of the attitude laying behind the scientific concepts and having made them explicit and accepted as pre-conditions of his own research, the scientist can formulate objective-hypotetical conclusions serving as recommendations for the pursuit of practical ends. In simple terms, this was Myrdal's project of social engineering (*social ingeniørkunst*).

Myrdal's perspective won great support in Ross to such an extent that in *On Law and Justice* and in a number of earlier works[38], Ross declared himself in agreement with him. He assimilated Myrdal's lesson whose joint influence may be felt in his forties' works on the concept of democracy and social democracy[39] and in his fifties' works on the concept of legal science. Firstly, from his early reflections on democracy, Ross had consistenlty stated that humanity needed a rational guide of experts, technologists, whose task was to point out what means can really enable the realization of political aims[40]. One might say that his concept of a modern democracy was formed also on the basis of such views. Secondly, as regards the concept of legal science, as illustrated above and from the passages quoted, Myrdal's view on the interplay between politics and science may be slightly reflected in Ross' discussion on the fluid boundary between the legal-theoretical intention and the legal-political intention in doctrine[41]. The Kelsenian sharp contrast between legal dogmatics and legal politics is liable to be too unreasonably indeterminate. More realistically, such a boundary sounds, in Ross' view, more like wishful thinking.

The analysis conducted here, however, takes as a point of departure, the Kelsenian ideal of pure science and develops into a criticism. The tendency to regard science as Weberian *wertfrei* also contributed to illuminating the ideal of purity but it did not help to facilitate a real understanding of how legal science in fact operates. In order not to continue in the vain attempt of idealising legal science but still preserve the survival value of scientific objectivity it was necessary to consider take joint-alternatives to soundness of mind. The Hägerströmian theoretical nihilism was not irrespective of the modern efforts of Vienna Circle exponents to shake reality from "myths" and turn aside all that was not susceptible to observation and verification. As we have seen, the rejection of straighforward metaphysical commitments and the possibility of analytically distinguishing science and politics was subsequently upheld by the Hägerströmian Myrdal. A reformulation of the scientific project of legal science in the vulnerability of the strict normative legal positivism meant that philosophical assumptions and valutative and emotive attitudes, if consciously introduced, are necessary parts of the study of law. Law cannot be studied through highly polished and shimmering lenses.

37 MYRDAL, G (1939). *The defence of democracy,* in: Id., *Maintaining Democracy in Sweden – Two articles by Gunnar Myrdal,* New York; STRANG, J (2010). *Why 'Nordic Democracy'?* in: STRANG, J (Ed.,) (2010). *Rhetorics of Nordic Democracy,* Helsinki, p. 107.

38 In *On Law and Justice*, Ross expressed his agreement with some tenets of Myrdal's view. Compare, for instance ROSS, A (1965). *Op. cit.*, pp. 300-306; Id., *Om Ret og Retærdighed* (1953), ed. cit., pp. 385, 386, pp. 407-413. Already in the thirties, Myrdal's reflections on social science and politics gripped the Dane. See: ROSS, A (1931). "Socialvidenskabernes krise", in: *Tilskueren*, 1931, pp. 62-63.

39 For some literature on the issue, I refer to the previous n. 16. It should be added that Herbert Lars Olaf Tingsten's viewpoints served to contribute the shaping of his concept of democracy. See, for instance, the concept of democracy as *"överideologi"* (over-ideology) propouded by Tingsten in: *Demokratiens problem*, Stockholm 1945 to which Ross resorted to into in his monograph *Why Democracy?*, pp. 64-65, 119.

40 ROSS, A (1931). *Socialvidenskabernes krise*, ed. cit., p. 65; Compare, also, Id., *Kommunismen og Demokratiet*, ed. cit; Id., *Socialismen och demokratin*, ed. cit.

41 ROSS A (1958). *Op. cit*., p. 140.

4. BOBBIO ON THE CONCEPT OF LEGAL SCIENCE

In connection with the purpose of the present work which is to pinpoint the ways in which comparisons between Bobbio' and Ross' theories are particularly interesting, I should remind the reader that Bobbio's fight against metaphysics and his purport to lay down the conditions which govern our understanding of legal doctrinal statements do not mirror or take influence either from the basic tenets of Scandinavian legal realism or from Ross' attitude in this respect.

I previously referred (introduction) to Bobbio's *Legal science and analysis of language* (Scienza del diritto e analisi del linguaggio) which is unanimously considered relevant in the setting up of the criteria of his Kelsenism. Put pointedly, but already symptomatic of the existence of a more or less conscious intuition of the weakness of Kelsen's pure doctrine of law, Bobbio had declared the adoption of logical empiricism and analytical philosophy methods within the legal field as tools apt to rescue the inquiry of the formal structure of law. The concept of modern science was rooted on the assumption that scientific propositions were not unconditionally true in the sense of reproducing a presupposed truth. Empirical research, as well as formal research, was recognised as a science whether propositions constituted a coherent and understandable system of utterances expressed through rigorous language or not[42]. The bases of both Kelsenism and the neo-positivistic concept of science could be combined and the conclusion that the legal doctrinal activity consists in explaining and, more particularly, in transforming by means of the analysis (purification, completion and systematisation) of a language legislative prescriptive discourse in a rigorous discourse.

This was of course not the same as assuming that legal science was a formal science like mathematics and logic since its object is the determined content of a determined discourse. Legal science is also something more than a purely empirical science as the legal professional does not undertake the task of observing legal phenomena in order to verify truth through experience. The analysis of language carried out in the same way as practised by empiricists and analytical philosophers from Russell to Wittgenstein and the Viennese School is what characterises legal science. It is clear that Bobbio's concept of legal science is ripe with Kelsen's logic concerned with the structure of the legal system, namely with the whole set of concepts and principles regarding the production and the extinction of norms and the solution. Moreover, in this perspective, one might agree in claiming that while Bobbio's conception of legal sociology is that of an empirical research, his legal theory is e *mélange* of the theory of legal sources and the theory of prescriptive language[43].

Bobbio is of course aware of the significance of Kelsen's theoretical distinctions. The merger, on the one hand, of the conceptual apparatus of logical empiricism and anaytical philosophy and, on the other hand, of the Kelsenian theoretical reconstruction of the legal system became one of the cardinal points of Bobbio's well known works *Teoria della norma giridica* (1958) and *Teoria dell'ordinamento giuridico* (1960) and several other contributions of those years such as "analogia", "norma giuridica", "principi generali del diritto", "fatto normativo", "consuetudine" contained in *Novissimo Digesto italiano* and in *Enciclopedia del diritto*. Such works have played a central importance in the formation of numerous Italian legal scholars.

The advantage of establishing a powerful connection between logical empiricism and analytical philosophy and Kelsenism did not endure forever. Soon, such a merger proved to be a failure. The neo-positivistic premisses revealed to be "*a sort of a Trojan horse within the Kelsenian fortress*"[44] and demonstrated the fragility of Kelsen's version of legal positivism. Although the formalism of Kelsen's legal theory cannot cover all the meanings of the expression "legal formalism", it still regards legal science as the

42 BOBBIO, N (1976). "Scienza del diritto e analisi del linguaggio", in: SCARPELLI, U (Ed.,) (1976). *Diritto e Analisi del Linguaggio*, Milano, pp. 299-302.

43 This is the view held by GUASTINI, R (1996), "Bobbio, o della distinzione", in: *Distinguendo. Studi di Teoria e Metateoria del Diritto,* Torino, p. 45.

44 I borrow this captivating expression from: PATTARO, E (1976). *Op.cit.,* p. 464.

only science based on objective values, the *Sollen*. By way of illustration we can look at some passages. In *What is justice?*[45], Kelsen had sharply distinguished moral value judgements from normative (legal) value judgements and stated that while the former are for their very nature subjective and cannot be verified by facts, the latter are objective. With regard to normative legal judgments, Kelsen adopoted a cognitivistic approach in that normative statements are statements of a binding force or of the value it institutes. In Kelsen's words: "*there is an essential connection between the concept of "value" and that of a "norm". A norm constitutes a value*"[46]. Thus, while moral values are not accessible to scientific knowledge, legal values are. From the viewpoint of logical empiricism and analytical philosophy, Kelsen's understanding of normative values, be it legal or moral, is fraught with serious difficulties.

A neo-empiristic philosophy is based on the assumption that no objective knowledge of value is possible at all, no matter which field. Bobbio's revisitation of Kelsen accordingly did not any longer permit a rational juncture with the new trends in philosophy and thus was doomed to fail. Hence Kelsen's characterisations of law and legal system stood on their own more unsteady feet as they could not satisfy such a requirement.

It might perhaps have passed unobserved if it had not been made more precise and determinate by authors such as Ross and Hart whose contributions rapidly made inroads within the Italian legal environment. Taken together, their standpoints on the anti-empirical concepts of legal validity, binding force and *Grundnorm*, may be seen as examples of parallel needs in the reconstruction and redefinition of law in the light of the main tenets of the purely empirical and analytical philosophical tradition. The outlined difficulties of the *pure* doctrine of law and its discrepancy with the *pure* assumptions of analytical philosophy and logical empiricism had already been treated in greater depth by Ross in the forties. Of course, Hägerström's realistic philosophy placed also significant weight on the Rossian assessment of the weaknesses of Kelsen's thought. Nevertheless, the epistemological background of the Uppsala School is for the most part in line with the spirit of the main thesis of logical empiricism. In this regard, Jørgensen stated that after a relatively different view on the types of reasoning and questions confronted, the two movements were both anti-metaphysically oriented and shared the view that the main task of philosophy was to undertake language analysis. By rejecting subjective idealism and its ontological implications, both declared that cognitivism was a false direction in moral philosophy and adhered to the view that moral notions and propositions are not rationally defensible, serving only as emotive signs expressing our attitudes[47]. For the sake of completeness, it should be added that while both share the idea that no one has rational access to the truth of value judgments, only the most radical logical positivists and British analytical philosophers such as Ogden, Ayer and Stevenson endorsed the meta-ethical view of emotivism[48]. That Ross himself ascribed great significance on the one hand, to the reality thesis and the analysis of language and, on the other hand, to non-cognitivism and emotivism in meta-ethics, in the sense that they better equip us towards a clearer insight into the legal material and the law itself, is something I have earlier given an account of.

Hence the defeat of Kelsenism was perpretated by the vitriolic action of logical empiricism and analytical philosophy so that Italian legal scholars became increasingly prone to the empirical approach to the study of law. At the same time as both philosophical currents developed in Italy, Scandinavian legal realism, by sharing some crucial viewpoints with them, took root. The three currents, as outlined above, are thus not to be

45 KELSEN, H (1957). *What is justice?*, Berkeley, Los Angeles, pp. 212-229.

46 KELSEN, H (1956). "A "Dynamic" Theory of Natural Law", *Louisiana Law Review,* 16, p. 602.

47 JøRGENSEN, J (1958). "Origini e sviluppi dell'empirismo logico", in: PEDUZZI, O (Ed.,) (1958). *Neopositivismo e unità della scienza*, Milano, p. 35 et seq. Cfr., PATTARO, E (1976). *Op. cit.,* now in: OLIVECRONA, K (1972). *La struttura dell'ordinamento giuridico*, Milano, pp. 25-37.

48 See, for instance, AYER, AJ (1936). *Language, Truth and Logic,* London; STEVENSON, CL (1937). "The emotive meaning of ethical terms", *Mind, New Series,* Vol 46, No. 181, pp. 14-31; Id., *Ethics and Language*, Yale University Press, 1944.

seen as delimited by sharp boundaries, but as specifications of an area essentially in common. One may say that the Italian ground was fertile and plowed for Scandinavian realism to be sown[49].

Scandinavian and British philosophy slowly gained ascendency over Bobbio but there is no simple way to classify all the influences on his general account of law that can trace their roots back to Ross' legal philosophy. But it is certain that Bobbio's triumph in partly overcoming Kelsen eagerly availed itself of the new empirically oriented doctrines and served as an opening of Italian legal culture towards the new approaches coming from beyond the Alps. Authors such as Hägerström, Lundstedt, Olivecrona and Ross were quite unknown to the Italian audience. Neo-empiricism and analytical philosophy allowed Bobbio (as had occurred with Ross since the late thirties!) to propose partial adjustments of Kelsen's doctrine and subsequently on the introduction of the new Anglo-Saxon and Scandinavian sophistication which expressed the analytical setting even more openly. This is, however, sufficient, to show that his new lines of thought functioned as an important step in freeing Italian legal culture from the grip of both Kelsenism and new natural law doctrines from the early sixties onwards. One might say it was a new antidote for counteracting the effects of new poisons.

5. NEW ANTIDOTES AGAINST NEW POISONS. A 'NEW' LEGAL SCIENCE GAINS GROUND

Bobbio's first buds of a new conversion within his legal-philosophical inquiries can be half-seen in his relevant volume *Giusnaturalismo e Positivismo giuridico* (1965). The buds fully bloomed in 1967 at the International Congress of social and legal philosophy titled *Is and ought within legal experience* held in Milano-Gardone. Bobbio's contribution was aimed at introducing the debate concerning the state of art of legal positivism at that particular time.

Just one year before, in a round table Conference held in Pavia, signs and symptoms of crisis were exhibited as he declared so: "*I take note of legal positivism is in crisis not only as ideology and a theory but also as an approach to legal issues*"[50]. On that occasion, Bobbio referred – as I pointed out in the earlier account of his own legal postivism – to the tripartition of meanings that the term 'legal positivism' covers and identified a widespread perplexity about the legal positivistic method, too. In 1967 the fog thinned out and in his opening speech, Bobbio clearly overturned the theories he had until then supported. The fifteen years of strategic alliance between legal positivism on the one hand, and analytical philosophy and logical empiricism on the other one came to an end. Bobbio recalled Kelsen's *Hauptprobleme der Staatsrechtslehre, entwickelt aus der Lehre von Rechtsaatz* to underpin his conclusions. Let us now follow his line of reasoning.

Bobbio's aim was to link the term "descriptive" with the term "normative". One central question in Kelsen's contribution was, for Bobbio, that he did not oppose the term "normative" to the term "descriptive" but to the term "explicative". On the other hand, in Kelsen's last writings, he did not oppose the term "descriptive" to "normative" but to the term "prescriptive". Because the "normative-explicative" and "descriptive-prescriptive" couples are not synonymous, it would not be wrong – in Bobbio's view – to state, as Kelsen did, that legal science was at the same time *normative* and *descriptive*, normative in the sense that what it describes are not facts (*Is*) but norms (*Ought*) and descriptive in the sense that its aim is not to prescribe[51]. On the basis of this basic argument, Bobbio raised two questions. Firstly, the task of legal science. A critical reflection

49 It deserves to be reminded that the first attention paid to Scandinavian legal-philosophical culture traces back to the Italian legal scholar Luigi Bagolini in 1949. In his work he delt with the issue of values from the viewpoints of Lundstedt and Olivecrona. As previously mentioned, *Kritik der sogennanten* was Ross' first work to be known to the Italian audience through the critical review of Bobbio, earlier in 1937.

50 BOBBIO, N (1967). *Norberto Bobbio's participation at the round-table.* Conference, Pavia, 2nd May 1966, Pavia, p. 73.

51 BOBBIO, N (2012). "Essere e dover essere nella scienza giuridica (1967)", in: Id., *Studi per una Teoria Generale del Diritto*, Torino, pp. 121-124.

on the tasks of legal science – what Bobbio called ***metajurisprudence*** – would demonstrate through the descriptions of the methods actually practised by different legal scientists whether jurisprudence is either ***normative*** or ***descriptive***, to put it simply, whether legal science in fact prescribes what jurists ***ought to do*** or whether it describes what in fact they ***do***. The result was that jurisprudence, as well as metajurisprudence, fulfils its task within an historical context. Therefore the jurist as well as the legislator and the judge actively participate in the formation and transformation of a determined legal system. This implied, in Bobbio's view, that in order to answer the question concerning the real function of jurisprudence, it was necessary to go beyond the statements of legal sources (i.e. jurisprudence is excluded by the range of legal sources) and take the ***real*** sources of law into account. The main conclusion of this first question is thus that legal science exerts a crucial influence on the legal system.

The second question concerned what Kelsen actually meant by saying that the task of legal science was ***descriptive***. Should it to be understood – Bobbio wondered – in the sense that legal science describes or must describe? In a few words, did he want to show what ***happens*** in the everyday life of the jurist or what actually ***should happen*** in order to conform legal science to a scientific (or political) ideal he considers desirable? Bobbio's sharp response was that as one follows Kelsen, the task of legal science consists in describing the existing law. But this would mean that description is nothing but an ***aim*** to achieve. The question whether legal science in Kelsen's doctrine was descriptive or not might clearly enough be answered using a captivating formula of Bobbio: "***legal science prescribes to describe***"[52]. The vaunted ***Wertefrei***-inspired model of legal science is not a point of departure, but perhaps and most wishfully, a finish line.

The analysis conducted of the concept of "legal science" gives ground for asserting that legal positivism was undoubtedly in crisis. Legal science is not a neutral science, indeed it belongs to the legal sources. Moreover, in Bobbio's view, legal science may be considered normative as it refers to norms, but is aimed at fulfilling social tasks, namely qualifying behaviour as permitted, prohibited and obligatory by using methods of observation and revision of norms. The whole and long road which Bobbio lays through the new definition of "legal science" seems in retrospect to have its foremost reason in the social and political changes of the society at that time and in the growth of the social state and welfare. From a Kelsenian-inspired "pure" theory of law, Bobbio turned to an "impure" sociologically-oriented theory of law.

Nevertheless, Bobbio's discussions in his later works cannot be regarded as denials of Kelsen's structural analysis of law or of the organic conception of law where law as a whole is investigated by the systematical understanding of every single piece. The in-depth studies on logic deontology are further proof of the fact that the structural analysis of law was handed down to the new though narrow generation of Italian legal scholars[53]. Nor does Bobbio's discussion provide any denial of the tasks of legal theory and its independence from other fields of research. The view that the ***structure*** is the specific characterisation of law which differentiates it from other normative systems and that a legal norm can be considered to belong to a legal system if and only if it is issued according to the formal procedures regulated by a higher legal source are still the fundamental points of his theory[54]. Nor was it Bobbio's intention first and foremost to change legal dogmaticians' way of arguing.

52 *Ibid.,* pp. 127, 128.

53 A.G. Conte is widely considered to be the Italian leading figure in Deontic Logic. For a brief and not thorough presentation of Conte's works, compare to n. 78 of the the present work. Of works that take up the topic of Ross' pioneristic investigation on Deontic Logic before the world-known work of G.H. von Wright, *Deontic Logic* (1951), may be mentioned the contribution in which R. Guastini traced back the origin of an insightful discussion on the nature of the nomative propositions to Ross' *essay Imperatives and Logic,* published in Theoria in 1941 (p. 53-71). See, GUASTINI, R (1981). "Questioni di deontica in Ross. Con un'appendice bibliografica sulla fortuna di Ross in Italia", *Materiali per una storia della cultura giuridica*, 1, pp. 481-506.

54 BOBBIO, N (1992). "Struttura e funzione nella teoria del diritto di Kelsen", in: Id: Diritto e potere. Saggi su Kelsen. ed cit., pp. 79-81.

He wanted to spur legal science on the grounds that it might develop an interest in more "impure" norms. The theoretical questions of the structure of law recede into the background, that is to say that what legal scientists ought to engage in should not consist in an exclusive inquiry into the structural elements of law but also their *functions*. The protective and repressive-oriented theories of law nestled in the traditions of Austin and Jhering. Kelsen offered an oversimplified picture of what law is *in reality* and became too homely and inadequate to reflect the social and economic *reality* of the times. In other words, Bobbio opened legal theory to empirical sociology[55].

In what follows, I provide an overview of the multifarious features with regard to legal science that are relevant in the present discussion and that make it a conceptual representation of Bobbio's new standpoints possible: a) *the social task of legal science*: scientific reasoning and argumentation are situated in a social context; b) *Wertfreiheit is an ideal limit*; c) *the discretionary interpretation of legal science*: the interpretation of legal science means the attribution of meaning to norms and this depends on the intention of the jurist; c) *the object of legal science is intentional facts*: in interpreting, legal science has to track back to the legislator's intention and interpretation of legal material; d) *the legal system is a whole of ius conditum and ius condendum*; e) *the tasks of legal science are linked to the the language function and its effects on receivers*: the same doctrinal statement can produce different effects depending on the contexts, the speakers' and the receivers' attitudes; f) *the conclusions of legal science are not preacepta but consilia for legislators and judges*: the role of legal science is not authoritative as it is not imperative, but it holds substantional weight as it presupposes authoritativeness and deserves respect for its inherent reasonability[56].

6. NEW WAYS OF DEFINING LAW. A PREAMBLE

From the very end of the sixties, Bobbio considered it was necessary to fine tune the study of law to the changes of the contemporary society. As outlined above, his need to supplement the current definition of legal science with a conceptual model more directly aimed at linking sociology to political theory was an example suited to capturing these aspects. In his later analysis of fundamental legal concepts of "sanction", "legal norm", "primary and secundary norms", he carried out studies in the same spirit of the Anglo-Saxon and Scandinavian innovative inquiries and dealt with topics frequently treated in modern European legal philosophy. Was it the time to find new antidotes for removing new poisons and neutralizing unwanted effects?

It is a matter of dispute whether Ross' overall influence over Bobbio was actual and successful at that time. However, the importance within Bobbio's milieu of figures such as Hart and Ross should not be obscured and likewise the fact that these parallels should not obscure significant contrasts and partly distinctive doctrines. There are some areas in which there is a reason to have an awareness of the similiarities. In this last section I would like to provide a closer examination on two important legal issues where allusions to the differences and similiarities are an arguable claim.

Form the end of the sixties onwards, at a safe distance from Kelsen, Bobbio invested a lot of work in undertaking the aim of investigating the concepts of "norm" and of "primary norms and secundary norms". That he devoted himself to the study of legal norms and legal system over the years, has been discussed earlier. But at this point it might be helpful to higlight that his new inquiries undergo a profound mutation in so far as they conveyed the theoretical proposals of Hart and got a great foothold in Ross' perspective. More particularly, his new argumentation may be seen as directed against elements in a lot of classical liberalism from Hobbes, to Kant and Spencer and up to the legal positivism tradition of Thomasius, Austin, Jhering and

55 GUASTINI, R (1996). *Op. cit.,* p. 57.

56 BOBBIO, N (2012). "Essere e dover essere nella scienza giuridica", *Op. cit.*, pp. 140-148.

Kelsen. A number of the elements mentioned are found, inter alia in his inquiry into the concept "sanction". In the light of social and economic progress, any attempt to carry out the logical analysis as formal logical analysis of the concepts "norm" and "sanction" was utterly unsuitable and full of gaps. A new model had to be taken up and elaborated in compliance with the shift from a negative (liberal) conception of State to a more positive (post-liberal) one. It was not time to consider the legal system from a protective and repressive point of view. Law, therefore, is not only acting through "disincentives" (penalties, amends, reparations, fines, etc.) aimed at impeding socially undesirable acts[57]. The term "sanction", only denoting "negative sanctions" as measures of discouragement, should be supplied with the new meaning of "positive sanctions" as measures of encouragement. While the former are expressible through the formula "if you do A, then you *must do* B" or "If you do not want A, then you *must do* B", the latter are expressed, correspondingly, with the formula: "if you do A, then you *can do* B" or "if you want A, then you *must do* B". The latter are expedients for achieving a good action so the *premium* is a reply to a good action. Positive sanctions can cluster into *recompenses* and *facilities* depending on whether they are consecutive or preventive to a performed behaviour[58].

Therefore, in traditional literature the concept of "sanction" has been laid down in such a way as to only partly cover the denotation specification of the term, and this has led to an incomplete identification of criteria for properly distinguishing legal sanctions from other types of sanctions. This problem cannot be considered apart from that of the distinctive character of a legal norm. Neither the specific nature of the (negative) sanction as essential part in the structure of a legal norm, nor the specific content or the aim shape the very distinction between a norm and a legal norm. Bobbio acknowledges that in legal theory attempts were made to carry out the significance not only of the specific existence of a norm but also of its membership within a legal system as identification criterium. Kelsen's enterprise consisted in not abandoning the normative point of view in the passage from the study of single norms to the study of the legal system by considering the ways norms make up a system as a characteristic element of law[59]. In the wake of Kelsen who introduced the Nomo-dynamic theory as well as the Nomo-static theory, other authors such as Hart, Olivecrona and Ross claimed that it is the existence of a certain type of *legal system* and not a single norm which permits us to identify law and differentiates it from other normative phenomena.

The points outlined here touch the innermost nerve in the questions of the law as the union of primary and secondary norms and not less the one of the relationship between law and force. If a *legal norm* is not to be identified in terms of the form, or content or ends but as a part belonging to a whole of combined norms, and if the *legal system* is not to be understood as an organised body of coercive rules guaranteed by force, then a new reflection on the very content of the legal rules is unavoidable. The mutual interplay of the two issues raised here leaves enough room to discuss how the weight of the arguments of (Hart and) Ross had a significant impact on Bobbio's new perspective. Firstly, I shall emphasise the former question of the typology of legal norms outlined by Bobbio and explain the contrast and the compliance with the analyses by Hart and Ross. Secondly, I shall focus on the relationship between law and force.

7. ON PRIMARY RULES AND SECONDARY RULES

In his volume *Theory of legal norm* dated 1958, there is no account of differentiation between legal norms (rules) in terms of the more "post-Kelsen" primary and secondary rules. Bobbio adopted a formal approach on the study of legal norms and simply purported to show that norms are prescriptive propositions and as such they are irreducible to both descriptive and expressive propositions. More interestingly, he

57 BOBBIO, N (1977). *Dalla struttura alla funzione. Nuovi studi di teoria del diritto,* Milano, pp. 7-8.

58 *Ibid.,* pp. 19-21. To go into greater depth about the concept "sanction", see also, BOBBIO, N (1969). "Sanzione", in: *Novissimo Digesto,* Torino, XVI, pp. 533-536.

59 BOBBIO, N (1992). "Struttura e funzione nella teoria del diritto di Kelsen", in: Id., *Diritto e Potere,* ed. cit., p. 46.

claimed that the distinctive features of legal norms are the heteronomy and institutionalisation of the sanction that consists in its structural inner core[60].

Bobbio's interest in Hart's and Ross' theories is very terse in a later work where he gave a more precise accout of the categorisation criteria for the distinction between legal norms and other norms. Having gone through and classified legal norms in imperative positive, imperative negative, attributive and permissive norms, general, abstract, individual and concrete norms, and having rejected the imperative and the Kelsenian anti-imperative views on law, Bobbio, with Hart in mind (and Ross, indirectly) borrowed his language. He centred the discussion on the differentiation between the primary rules (norms of conduct) and the secondary rules. Nevertheless, this did not mean absolute dependance from Hart's view on these points.

Notoriously, in his masterpice *The Concept of Law*, Hart defined the secondary rules as power-conferring rules, whereas the primary rules are meant to be duty imposing rules[61]. Moreover, he enumerated three specific kinds of secondary rules: one of these is the rule of recognition which, in Hart's word: "*will specify some features or features possession of which by a suggested rule taken as conclusive affermative indication that it is a rule of the group to be supported by the social pressure it exerts*"[62]. In other words recognising the validity of a primary rule is therefore recognising that it had passed "*all the tests provided by the rule of recognition*",[63] given that the rule of recognition is the supreme criterion for assessing the validity of all norms and its own legal validity is not assessed by any other rule. Hart calls the other two rules rules of change and rules of adjudication[64]. The former empowers "*an individual or body of person to introduce new primary rules for the conduct of the life of the group, or of some class within it, and to eliminate old rules*"[65], whereas the latter empowers "*individuals to make authoritative determinations of the questions whether, on a particular occasion, a primary rule has been broken*"[66].

Unlike Hart, Bobbio clustered the secondary rules that he calls "rules governing rules or rules about rules" into two kinds: rules governing the production of rules and rules about the conservation of rules. The former are intended to establish the validity of all rules addressed to individuals and judges – and to which Hart's rule of recognition is in fact reduced inasmuch as it is useless – whilst the latter, being rules about the sanction and presupposing the rules governing the rules production, serves to render the rules once belonging to the legal system effective. The cause of Bobbio's being able to reduce Hart's triad is that also what he calls secondary rules, or rules about rules, are in fact rules of conduct in their own right for he considers the secondary rules as having recipients and an imperative content[67].

The issue of secondary rules is more extensively analysed later on in different terms. In 1968, after having gone through the various meanings of "primary" and "secondary" in the light of the traditional (Jhering), Kelsenian, and Hartian perspectives, Bobbio drew a new classification of secondary rules. In his opinion, their existence is justified by the fact that they refer to other rules. Thus he calls them "second degree rules". The new denomination serves to show the secondary character of these rules from both the functional and structural points of view and remove any misunderstanding regarding the usage of the term ("secondary" may also be attached to the evalutative meaning "of second importance"). This time such norms are diversified in

60 BOBBIO N (1958). *Teoria della Norma Giuridica,* Torino, pp. 71-99, 197-201.
61 HART, HLA (1994). *The Concept of Law*, Oxfor University Press, p. 89.
62 *Ibíd*., p. 94.
63 *Ibíd*., p. 103
64 *Ibíd*., pp. 91-99.
65 *Ibíd,* p. 95.
66 *Ibíd,* p. 96.
67 BOBBIO, N (1994). "Norma giuridica (1964)", in: *Contributi ad un dizionario giuridico,* Torino, especialy, pp. 230-232.

three classes: rules of identification, rules about the production, rules about the sanction.

It should be particularly emphasised that the rules of identification correspond only in part to Hartian's rule of recognition, although Bobbio thoroughly recognised his merit in having identified such a kind. Hart's rule of recognition can be neither valid nor invalid but it is simply accepted for the assessment of the legal validity of the primary norms and so it "exists" if it is followed in practice by Courts, officials and private persons. Bobbio knows three kinds of rules of recognition: rules about legal sources, rules establishing temporal and spacial limits of the issued norms and rules about the interpretation and application of rules. The difference may therefore be quite considerable as it lies, however, in the fact that the rules of recognition are not only plural in number but neither merely thought nor only socially accepted. They are posited by an authority through real acts of will[68]. Moreover, and more significantly, what secondary rules have in common is not their being power-conferring rules given that the rule of recognition does not confer any power, but their being rules about rules, second degree rules or, as Bobbio called them some years later, meta-rules[69].

Through the years, Bobbio's critique on Hart has taken other steps forward. The rule of changes have also been sifted through. Besides the fact that they are not present in all kinds of legal system as, for instance, the International law system, such rules are nothing but rules about legal production and as such they denotate a larger spectrum of functions: the creation, the modification and the extinction of legal rules[70]. Going more closely into the the function of the rules about the legal production, one discovers that they can be divided into: rules govering the procedure for the formation of rules; rules establishing spacial and temporal validity limits to rules; rules establishing a hierarchical order among the legal sources.

I have placed emphasis on the functional similiarity between the Hartian rule of recognition and Bobbio's rule about legal production because this contributes to determining the complete conceptual uselessness of the former. There is no need to duplicate a "basic rule" just because, all things considered, the rules about legal production are sufficient criteria for the identification of the legal rules within a legal system. In Bobbio's view the three kinds of secondary rules mutually interplay: they can be portrayed as successive rings of a chain of which the rules of conduct constitute the first ring[71].

This last passage is especially important as it does make, in an indirect way, a bridge with Ross. Firstly, in his last contributions on the present topic, Bobbio resorted more frequently to Hare with regard to the various types of discourse and the language function just as Ross had mantained years before in *Directives and Norms*[72]. Secondly, and more interestingly, he emphasised that it is of great importance that the only purely denotic operator is duty. As underlined above with regard to the relationship between primary and secondary rules, for Bobbio the rules of conduct play an important role in the whole of the law domain. Ross himself worked a great deal on developing the same conclusion. In *On Law and Justice*, Ross drew a distinction between the norms of conduct (duty-imposing rules) and the norms of competence (power-confering rules)[73] and distinguished them in norms conferring public or private power depending on the subject having the competence to issue other norms. Ross clearly defended a command-reductionist enterprise in so far as he stated: "*norms of competence are norms of conduct in indirect formulation*"[74]. He

68 BOBBIO, N (2012). "Norme primarie e norme secondarie (1968)", in: Id., *Studi per una teoria generale del diritto*, ed. cit., pp. 153-160.

69 BOBBIO N (2012). "Norme secondarie (1975)", in: Id., *Studi per una Teoria Generale del Diritto,* ed. cit., pp. 233, 234. Id., "Norma", in: Id., *Studi per una Teoria Generale del Diritto*, ed. cit., p. 204.

70 *Ibid*., pp. 238, 239.

71 *Ibid*., p. 241, 242.

72 More in detail, Ross had referred to R.M. Hare's work *The Language of Morals,* London, 1952.

73 ROSS, A (1958). *Op. cit.*, p. 32.

74 *Ibid*., p. 50.

claimed that even permissions are to be conceived as negations of duty[75]. This point was not overlooked by Ross in his later work *Directives and Norms* where he gave a more adequate picture of the significance of such a reduction admitting that "*any norms of comptence can be transcribed as a norm of conduct, whereas the converse does not hold*"[76].

In the places mentioned, both Bobbio and Ross take their points of departure in respectively Hare's inquiry on language functions and in a sort of persistent "pursuit of unity". Bobbio's perspective aroused much attention and was examined in depth with different outcomes by other Italian scholars such as Carcaterra, Conte, Azzoni, Mazzarese and Guastini[77]. Also Ross' study of such norms excercised a significant influence upon Norwegian and Danish authors such as Eckoff, Sundby, Lauridsen and Jensen[78].

8. ON LAW AND FORCE

If one looks at the discussion about the relationship between primary and secondary rules and the transcribability of norms of competence into norms of conduct as one of Ross' similarities with Bobbio, the same may be said with regard to the relation between law and force. This topic played a correspondingly greater role, that is to say that Ross' and, more expressly, Olivecrona's early theory according to which force is not a means for the realisation of law but the content of law itself, left its mark on Bobbio's thought. In what follows I shall take a closer look at the fact that if on the one hand the new view that law itself is an organisation of force has adherence in Bobbio, on the other hand Bobbio's reading of Ross' texts appeared so compelling as to lead to a possible misunderstanding which there was particolar reason to warn against.

A recurring question in philosophy of law since Jhering and Austin is whether law is definable in terms of an organised body of coercive rules and so composed of rules guaranteed by force. According to these authors and their followers, force is laid down as a means for the realisation of law. Against this view, many sought to advance an incompatibility for the reasons that there is, in relation to the very concept of law, *no room* for force (counterargument a): the general spontaneous observance of the rules); there is *little room* for force (counterargument b): the existence of rules devoid of sanctions in every legal system); there is *no room at all* for force at the summit of the the legal system (counterargument c): the impossibility of an infinite regression). On the basis of such assumptions which can be regarded as expressions of three different orientations although sharing the common view of removing coercion as an essential feature of the concept of law, Bobbio argued for the existence of coercion as *content* of legal rules.

As to the counterarguments, he objected as follows. Firstly, to a) that the spontaneous observance of the rules would be a valid argument only if the obedience were in fact general and constant. Secondly, to

75 *Ibid*., p. 164.

76 *Ibid*., p. 130. In relation to the question of the two classes of norms (directives) and to the different interpretations of Ross' concept of law within Italian literature, see the significant contribution of GUASTINI, R (1976). "Ross e i suoi interpreti italiani", *Rivista trimestrale di dDritto e procedura civile,* pp. 1065-1077.

77 Compare CARCATERRA, G (1974). *Le norme costitutive,* Milano; CONTE, AG *(ex multis)* (1985). "Materiali per una tipologie delle regole", in: *Materiali per una storia della cultura giuridica*, p. 345 et seq; CONTE, AG (1982). "Costitutività di regole", in: *Digesto delle discipline privatistiche Sezione Civile*,vol. IV, Torino, p. 42 et seq; CONTE, AG (1995). "Performativo vs. Normativo", in: Id., *Filosofia del linguaggio normativo*, II, Torino, p. 591 et seq; AZZONI, G (1988). *Il concetto di condizione nella tipologia delle regole,* Padova; GUASTINI, R *(ex multis)* (1996). "Norme supreme", in: COMANDUCCI, P & GUASTINI, R (1996). *Struttura e dinamica dei sistemi giuridici,* Torino, pp. 243-258; GUASTINI, R (1995). "In tema di norme sulla produzione giuridica", in: COMANDUCCI, P & GUASTINI, R (1995). *Analisi e Diritto* 1995. *Ricerche di giurisprudenza analitica,* Torino, p p. 303-313; GUASTINO, R (1995). "Norma giruidica (tipi e classificazione)", in: *Digesto delle discipline civilistiche,* vol. XII, Torino, pp. 1-16; MAZZARESE, T (1989). *Logica deontica e linguaggio giuridico,* Padova; MAZZARESE, T (1999). "Towards the "semantic" of constitutive rules in judicial reasoning", *Ratio Juris,* 12, 1999, pp. 252-262.

78 Compare ECKHOFF, T (1980). *Rettskildelære,* 3rd edition, Oslo; SUNDBY, NK (1972). *Om normer*, Oslo; ECKHOTT, T & SUNDBY, NK (1976). *Rettssystemer,* Oslo; LAURIDSEN, PS (1978). "Om jus og normer", in: *Tidsskrift for Rettsvitenskap,* p. 123 et seq; JENSEN, SG (1983). *Hvad er retfærdighed?*, Copenhagen, pp. 21-28.

b) that from an advanced account of the legal system in its entirety one cannot ignore the existence of the secondary rules addressed to officials (judges and executive agencies) and directly or indirectly regulating the exercise of force. This question must clearly be linked to the one outlined before on the relation between primary and secondary rules and on the view shared with Ross that the former can be transcribed as rules of conduct. And finally, to c) that the infinite regression is avoided if and only if one considers the rules at the summit of a legal system as the legal rules *par excellence* in the sense that by being power-conferring rules, they do attribute coercive power[79]. In sum: law is a whole set of rules regulating the exercise of force (or rather, rules *about* force) and fulfilling the functions of determining, in relation to force, the conditions, the persons, the procedure and the quantum[80].

In the account outlined here, Bobbio placed greater weight on the contributions of Kelsen, Olivecrona and Ross seen together as the pioneers of a "new theory". To put it more precisely, he took his departure point in some fragmented parts of Kelsen's theory of the relation between law and force. In particular, he resorted to some sentences contained in *Allgemeine Staatslehre* (1925) and in the *General Theory of Law and State* (1945). And in so doing, he emphasised the heritage and the influence of such an embryonic theory upon contemporary authors such as Olivecrona and Ross. In Bobbio's view, the common aspects concerning the idea of the legal system as a coercive order and thus characterised by rules for the exercise of force could be found in *Law as Fact* where Olivecrona claimed that "*law consists chiefly of rules about force*" and *On Law and Justice* where Ross stated that "*a national law system is the rules for the establishment and functioninig of the state machinery of force*" [81]. In other words, for Bobbio Olivecrona first, and Ross afterwards, took up Kelsen's theory. The decisive point at issue was the dispute of the paternity of such a theory. It represented the crux of the matter.

Very resentfully, in a short and sharp article, Olivecrona claimed a false paternity against Kelsen, accusing Bobbio of misinterpreting the origins of this thought. In no place in the books quoted by Bobbio there was overwhelming evidence that the new theory could be entirerly ascribed to Kelsen. In truth, the mistake was perpetrated by Alfonso Catania, another Italian scholar misled by the reading of Bobbio's contribution[82]. Unlike Bobbio, who did not quote any statements from the *Allgemeine Staatslehere*, Catania had sought a brief passage of the "new theory" in *Reine Rechtslehre* (1934, 2nd edition 1960) where he claimed *en passant* that: "*Es (das Recht)…eine bestimte Ordnung (oder Organisation) der Macht*"[83]. Indeed, a statement is distinct from a formulated theory therefore, for Olivecrona, the place pointed out by Catania could not offer any clear demonstration of Kelsen's paternity. To the extent that the literature of Kelsen is determinable, indeed there was a more specific reference in a passage of *General Therory of Law and State* where he expressively stated that law and force should not be conceived as absolutely at variance with one another as law is an organisation of force. Of this place mentioned, there was no trace within Bobbio' s discussion. Chronologically, a tangible source of the account of law and force was propounded at some length by Olivecrona himself in his *Law as Fact* [84].

There may be reason to emphasise that this topic would have made Olivecrona's name most widely known and that the quotations from Bobbio illustrate how even the most acute minds can fail to

79 BOBBIO, N (1965-1966). "Law and force", *The Monist*, XII (1966), XLIX, 1965, especially, pp. 321-341, pp. 332-334. Compare the Italian version "Diritto e forza", *Rivista di Diritto Civile*, pp. 537-548.

80 *Ibíd.,* p. 330.

81 OLIVECRONA, K (1959). *Law as Fact, London*, p. 134; ROSS A (1958). Op. cit., p. 34.

82 CATANIA, A (1974). "Il diritto come organizzazione della forza", *Rivista internazionale di Filosofia del Diritto,* pp. 371-397, especially, pp. 373-375.

83 OLIVECRONA, K (1976). "On the problem of law and force in recent literature", *Rivista Internazionale di Filosofia del Diritto,* p. 550.

84 *Ibíd*., p. 552.

ascribe the right theory to the right author. Or it may be the case that, as Olivecrona claimed, the origins of the Italian misunderstandings depended in good part upon a tricky footnote of Ross' *Om Law and Justice* (1958). In his famous work Ross, in insisting on the relationship between legal norms and force, had concluded that legal norms are not norms as they are upheld by the means of force but they are such as they do concern the application of force. In the corresponding author's footnote he acknowledged his debt to Kelsen for the insight contained in *Allgemeine Staatslehere* (1925) and reminded the reader that the same view was held by Olivecrona later on in *Law as Fact* [85]. Indeed, these two references coincided with those contained in Bobbio's *Law and force*.

Did Ross restort to a trick in order to cast a shadow over Olivecrona's paternity or was his footnote founded on a profound misperception of the root of the new theory? The struggle in which the Swede attempted to acquire his sole right to paternity, did not end then, but had further developments as demonstrated in a private letter the 80 year-old Olivecrona sent to Ross in 1977[86].

The question is whether and if so to what extent, Ross engaged himself in a conscious misconstruction. This question, of course, cannot be answered. However, even if a possible misinterpretation was in Ross' mind, the same cannot be said of Bobbio who briefly replied to Olivecrona and admitted to have learned from Ross about Kelsen's account on law and force contained in *Allgemeine Staatslehre*. Moreover, he insisted in claming that the presupposed connection mentioned had been extensively advanced by Kelsen in that work and formed its own backbone[87]. This was his versions of the events.

CONCLUDING REMARKS

The quarrel about the paternity may help to explaining, or facilitating a further understanding of how Ross' standpoints had won great support in Bobbio. On closer examination it seems likely that his theoretical formulation on the relation between law and force was likewise built on the pattern of Ross.

It is also the case that, although it is not possible to draw any boundary in principle betwen the legacies he received from the two authors, Bobbio unconsciously exploited and thus more easily engaged in the possibility of connection between Kelsen and Ross in solving particular problems in the philosophy of law. Let it be clear, as I pointed out earlier that Bobbio's criticism on Kelsen's main theses was not as strong as that of Ross. Their critical discussion on the different meanings of legal positivism of which I gave an account earlier ought to suffice. Conversely, Bobbio's perspective which partly looks past the psychological aspects of legal norms and within the role of legal science, demonstrates a perspective diversity.

Nevertheless, the absence of certain univocal connections between the two scholars is not a hindrance in finding uniform convergences. Most of Bobbio's continuous challenges to Kelsen's theory of law provide evidence for a thread of not pure and simple interplay with Ross. First, the sharing of the basic tenets of analytical philosophy and logical empiricism which undermined the Kelsenian version of legal positivism portrays more than a nuanced connection between the two figures and for which I believe many good grounds can be given. Secondly, the more specific areas of law as a whole set of interconnected legal norms is not purely interplay either. I have focused in the present work on the particular need to illuminate within this frame the relationship between primary and secondary rules

85 *Ibíd*., p. 551; Compare ROSS, A (1958). *Op. cit.* p. 53; Id., *Diritto e Giustizia* (1965). *Op. cit.*, p. 52, n. 1; Id., *Om Ret og Retærdighed* (1953), *Op. cit.*, p. 100, n. 27. In this passage, Ross referred to the Swedish version *Om lagen och staten* (1949), p.125 et seq.

86 Compare EVALD, J (2014). *Alf Ross- et liv,* København, especially, pp. 232-233; Id., *Alf Ross – a life,* København, pp. 228, 229.

87 BOBBIO, N (1977). "Ancora su diritto e forza. Replica al prof. Olivecrona", *Rivista Internazionale di Filosofia del Diritto,* pp. 414-416.

and finally, the relation between law and force. The latter inquiry has meant giving further answers to the questions of what more than nuanced connections might exist between the fundamental legal philosophical positions of Ross and Bobbio.

Lastly, one may consider Ross (and the contemporary European trends in the philosophy of law) to be fit to serve for Bobbio as new antidotes for removing the old poisons of Kelsenian unsuitableness, the same need of healing he had experienced years before when by means of the combined analytical philosophy/logical empiricism and Kelsenism he was able to nurse Italian legal philosophy back to health[88].

88 In connection with the present work I should finally remind the reader that the topics here have been investigated through the study of the most significant works with which the two authors have promoted their own views over the years.

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