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Realism vs Idealism. Ross and Castberg. Paths of a dispute upon Law and human rights

Alessandro Serpe
University of Naples
Federico II
Naples – Italy
alserpe@yahoo.it

Abstract

In Scandinavia, an animated debate arose in the 40's between the Swedish legal philosophers supporting Hägerström's "theory of reality" and some Logic Empiricism's postulates and, in opposition, a moderate attempt to re-propose Natural Law and the normative concept of Law, represented by the Norwegian Frede Castberg. This study focuses on the theoretical differences between the Scandinavian Realism and the Idealism, mostly by highlighting Castberg's normative Idealism and his programme of 'modern' Natural Law. It follows a deepened analysis of Castberg's criticism toward Ross's 'realistic' approach concerning democracy, freedom, equality and human rights. By taking these two contrasting viewpoints into account, this study pays attention to the very colourful Norwegian theoretical debate on human rights by describing the contribution of some authors which, although theoretically inspired by Realism, Pragmatism and Analytical Philosophy, seem to reap the harvest of Idealism's efforts. The research main role is to clarify, through methodological comparison, the different traditions of Realism and Idealism as to the epistemological foundation of the concepts of Law and human rights. Moreover, this study, through an investigation of a large parts of literature, sheds light upon the implications of such theories within the field of the practice of human rights.

Key words: Idealism, realism, democracy, freedom, equality, human rights.

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Realismo vs Idealismo. Ross and Castberg. Senderos de una Disputa acerca de la Ley y los Derechos Humanos

Resumen

En Escandinavia, surgió en el período de los 40, un debate animado entre los filósofos jurídicos suecos que apoyaban la "teoría de la realidad" de Hägerström y algunos postulados de la lógica empírica y, en oposición, un intento moderado de re-proponer la ley natural y el concepto normativo de la ley, representado por el noruego Frede Castberg. El presente artículo se enfoca en las diferencias teóricas entre el realismo e idealismo escandinavo, principalmente al enfatizar el idealismo normativo de Castberg y su programa de ley natural "moderno". De allí, sigue un análisis profundo de la crítica de Castberg para con el enfoque "realista" de Ross en lo que concierne la democracia, la libertad, la igualdad y los derechos humanos. Al tomar en cuenta estos dos puntos de vista contrastantes, este estudio presta atención al muy colorido debate noruego acerca de los derechos humanos al describir la contribución de algunos autores, los cuales, aunque fueron inspirados teóricamente por el realismo, el pragmatismo y la filosofía analítica, parecen cosechar los esfuerzos del idealismo. El rol principal de esta investigación es el de aclarar, por medio de un cotejo metodológico, las diversas tradiciones del realismo y del idealismo en cuanto al fundamento epistemológico de los conceptos de la ley y los derechos humanos. Además, este estudio, por medio de una investigación de grandes partes de la literatura, alumbra las implicaciones de dichas teorías dentro del campo de la práctica de los derechos humanos.

Palabras clave: Idealismo, realismo, democracia, libertad, igualdad, derechos humanos.

> "*If we wish to engage in seeking an answer to the question of what is right Law, we cannot get past the demand for justice and consequently the problem of freedom of will*" Frede Castberg, *Problems of Legal Philosophy*, London, 1947, p. 101.

1. Realism *vs* Idealism

In 1941, on 'Tidsskrift for Rettsvitenskap', the Swedish Ivar Strahl published his article titled *Idealism och Realism i Rettsvitenskapen* (Strahl, 1941:302-330). For the very first time the terms "Realism" and "Idealism" were used to indicate the two main Nordic legal philosophical movements

starting from the 30's (Eckhoff, 1953: 87). Two poles: Realism on one hand, not Ørsted's and Schweigaard's Realism (1) but Hägerström's Realism with important implications in Olivecrona's and Lundstedt's thoughts; on the other hand a normative Idealism upheld by the Norwegian legal philosopher Frede Castberg.

1.1. What do "Realism" and "Idealism" mean? Torstein Eckhoff *vs* Frede Castberg

An attempt to classify the main characteristics of the two currents could seem arbitrary and limited. This was also the viewpoint of Torstein Eckhoff, Norwegian legal philosopher (2). Though different from an epistemological point of view among the supporters of the same movement, some divergences could arise whereas there might be similarities among the supporters of different schools of thought (Castberg, 1953: 87). It can be undoubtedly asserted that realists considered Law as part of a sensitive reality where actions, words, thoughts could be investigated and described as psychological and sociological *facts*. In other words realists would never provide explanations concerning legal phenomena by adopting methods going beyond what is perceivable through the senses (Ibid: 37). A remarkable idealistic characteristic is indeed to relate to two different worlds: a "*real world*" (*en virkelighetens verden*) and *a "validity world*" (*en gyldighetens verden*). Law belongs to both worlds at the same time. The methods can be the same as those adopted by Psychology and Sociology but they are not enough to provide ontological answers. Idealists maintain that there is always something which goes beyond the reality of the external world namely validity. What do idealist mean with the "*validity of Law*"? To assert that Law belongs to the world of validity perhaps means that it is not a sufficient reason for formulating psychological assumptions concerning what crosses the jurists' minds when they think, speak or write? Or does it mean that psychological and sociological methods are inadequate? Eckhoff questioned. Idealists were not the only ones who seemed to base their assumptions on postulates but also realists such as Strahl and Ross did the same thing: the idea of chess and bridge rules and the idea of a system of rules as a "whole" clearly proves an argumentation grounded on postulates. It follows that every discussion concerning their validity can not be scientifically demonstrated (Ibid: 38-41). Many divergences between realists and idealists are also connected with "*the use of language*". In this respect Eckhoff prefers a realistic language as it eliminates magical or religious legal representations and it better demonstrates that the object of cognition ex-

ists independently of perception and finally that the external world is not a "*pre-structured*" entity (Jørgensen, 1939: 31).

Frede Castberg also emphasized other points which differentiate Realism from Idealism. Castberg wrote a realist would assert that normative propositions containing words such as "*shall*", "*ought to*", "*obliged to*" cannot lead to logical conclusions thus legal science propositions are not normative but indicative. An idealist would on the contrary assert that, through logical operations, one may reach logical conclusions (Castberg, 1953: 87). For instance: "*Theft is punished with three years of prison*" (main premise); "*This action is a theft*" (minor premise); "*This action will be punished up to three years of prison*" (conclusion). A realist would attribute validity to a legal system only if "*observed in fact*"; an idealist, on the contrary, identifies legal validity with moral validity by maintaining that no moral obligation exists in order to demand respect for Law, but the acceptance of the legal system does not seem to provide a satisfactory answer. It's significant to assert, indeed, that legal norms are valid on the assumption that higher norms (Constitution and customs) are valid. In his works Castberg wrote that a realist considers it the role of legal science to predict the Courts behaviour and to indicate, through technological means the necessary tools to fulfil legislative goals. Instead, idealists declare that scientists after accepting the internal objectives of legislation should tell the Courts how they *should* actually judge. There is also a divergence of the two concepts in the legal-semantic field. Realism asserts that representations on "*just*", "*just Law*" are nothing but "*expressions of subjective feelings, affections, wishes*" (Ibid: 87-89). Idealism, on the other hand, even presuming that these representations are metaphysical, cannot but assume that something is objectively "right" in conformity with the evaluations of social interest. Castberg kept his distance from concepts which claimed that legal terms were the product of "*supernatural powers*" and considered them shallow and provoking. He wrote that realists only misinterpret their opponents when classifying them as creators of magical representations (Castberg, 1955: 400).

1.2. Castberg's programme of "modern" Natural Law. The notion of Law and the postulate of validity

Although Castberg's position was doomed to be isolated in Scandinavia from the very start it nevertheless contributed to animate the debate centred on Nordic and Scandinavian Realism (Serpe, 2007: 99-112). It represented a sort of voice of disagreement within the Nordic legal-philosophical scenario. Castberg was defined "a lonely swallow" (*en enslig*

svale) flying against the wind and meeting on his journey realists and non-empiricists who disagreed to his programme of "modern" Natural Law. Castberg's figure (1893-1977) had been dominating Constitutional Law, International Law and human rights fields for years whereas his contributions regarding legal-philosophy were considered unprofessional. He was a politician and Professor in Law at the University of Oslo for about thirty-five years: his works exerted a remarkable influence over the local and international environment: in Paris, Uppsala, Hensingfors and Minnesota with special concern to the Public Law. It is important to remember his *Norges Statsforfatning* was for decades adopted as the handbook for Norwegian students and source of information for lawyers and constitutionalists. Legal advisor at The Ministry of Foreign Affairs and later Secretary (1921) in the same year he became Assistant-Professor; from 1952 to 1957 he was Rector of the University of Oslo (Andenæs, 1963: 1-9).

As a young boy Castberg was fascinated by legal and methodological issues which was unusual for Norwegian lawyers. In 1936, during a celebration of the academic year in his opening remarks he complained that there was a lack of research in legal philosophy in Norway. Only faint waves of legal-philosophy from Denmark and Sweden began crashing the Norwegian coasts at the end of the 19th century (Ibid:: 4). Perhaps Castberg's contributions cannot be said neither original or innovative but for certain they were attempts aimed at involving the Norwegian legal-philosophical environment of that time.

Castberg occupied himself with issues concerning the notion of Law: is it – Castberg wondered – a notion to which men gave life to by observing the external world or is it present in our minds independently from the experience? Even if the psycho-physical reality were taken as a departure point, it would not refer to the "system of understanding" reality, but to the world of ideas (Castberg, 1947: 22). The step from psycho-physical realities (i.e. statutes, sense of observance) to the acceptance of a binding norm always implies an a-priori element. The validity of a norm cannot be observed empirically therefore reference is unavoidable. Law cannot be taken into account "*except by means of the postulates of validity*": form the validity of the Constitution, customs and a set of legal principles the validity of the individual legal norms derives. "*The idea of validity is the a priori element of the notion of Law*" (Ibid: 22-23) it is important to note that Castberg avoided using the word "*axiom*" or "*logical axiom*" which could have easily led to misunderstanding. Validity as a postulate and "*factuality*" (*faktisitet*) (Castberg, 1965: 44-45). To attribute validity to the legal system did not mean, in Castberg's mind, to uphold a metaphysical thesis: validity runs

through the legal system and the observance of a valid norm is justified by the validity of a higher norm.

1.2.1. The application of Law. The demand for justice and freedom of will

Kelsen's *Allgemeine Staatslehre* constituted Castberg's background on legal philosophy: the Norwegian persevered in the correlation between the postulate of validity expressed in the "*grunn-norm*" and the social acts: the validity of Law cannot be explained only through the validity of the postulate but also through its correspondence to the general juridical convictions and to the acknowledgment of the consociates (Castberg, 1947: 46-47). As a consequence, Law is a system of binding norms held tightly together to a postulate of validity and the application of Law is a "*demand for justice*" (*rettfardighetskrav*) which presupposes freedom of will (*viljefrihet*) (Strahl, 1941: 318-319). Law based on the idea that every human being is a psycho entity to whom personality and a certain freedom of will is attributed. His ideas – Castberg persevered – could be easily labelled as metaphysical as they look upon each human being as a psyche unit or rather a "*personality*". Therefore it follows that as they are individuals with "personality" and endowed with a free will the Law will consider them as receivers of duties and rights. *Demand of justice* and *freedom of will* represent Castberg's coordinates, which, together with the *principle of causality* concerning human events, provide the justice of a Law. Freedom of will can be understood if placed within a framework of natural events. He went on to explain that every decision is influenced by motives acting as psychological forces pulling in the direction of a decision. According to the strength a decision will be said more or less free. Castberg's studies in Law and Psychology were influenced by the physicist Knud Krabbe with particular regard to the theory of motives and decisions (Castberg, 1947: 93-105). It is important to follow his well known example about "*Buridan's ass*". It seems obvious – Krabbe asserted – to expect that a thirsty desert wanderer, animals included, who encounters a fountain will automatically drink and no other spiritual element could possibly curb this instinct. Nevertheless, the uncertainty of the relationship between instinct and action remains high. Buridan's ass, for instance, died of hunger between two bundles of hay as it did not have a valid reason to eat one or the other. Krabbe's conclusions were that: "*in the case of the desert wanderer, the reason of action approached infinity in the case of this imagined ass, the difference between the motives of action approaches zero*" (Krabbe, 1936: 94). This story sheds light upon the wavering relations among action, freedom of will and instincts.

Returning to legal issues Castberg maintained that the need for justice is rooted in the mind of human beings as well as the mind's logical connections: it does not imply that the content of justice is unchangeable but the principle driving the evaluations will be *a priori*. The "*objectively right*" can also be imagined but it is a necessary idea: it's a question of belief to uphold the existence of objective norms valid for a certain community in a certain historical period (Castberg, 1947: 111). The belief in Natural Law thus in a complete and unchangeable legal system inspired by eternal principles of justice sounded naive: nevertheless Castberg spoke about a "*droit naturel av contenu variable*" adaptable to the development of life and subject to objectively valid valuations curbing subjective convictions. It is fundamental to respect an "*ethical minimum*" if norms are to be considered valid. It would not make any sense for instance to consider the Russian legal system valid in the days of Aleksander, Tsar of Russia, at the end of the First World War when he was dethroned and exiled in France Castberg's thoughts showed inconsistency (Castberg, 1965: 45). What did he mean with "validity of Law"? It is not enough to maintain the existence of an aprioristic validity without providing any explanation about its content. Eckhoff, one of his most authoritative critics, accused him of having based his argumentations through postulates and more explicitly his normative concept is based on a "*shall be-sentence*" (*skal setning*) and a "*should be-sentence*" (*bør setning*) both unverifiable (Eckhoff, 1953: 39).

Ivar Strahl advanced his criticism toward Castberg by asserting that his "freedom of will" concept was pretty foggy: what did he mean by "freedom" (*frihet*) and by "lack of freedom" (*ofrighet*)? A dog in chains, trapped and forced to obey? What element does the will effectively differentiate from? And the motives? (Strahl, 1941: 319). Indeed, this seems to be one of the darkest points within Castberg's legal philosophy.

1.2.2. Castberg's criticism towards Scandinavian Realism

Castberg's major criticism turned towards Scandinavian Realism. Hägerström, in Castberg's mind, contradicted himself because on one hand he deprived legal notions of their juridical characteristics and on the other hand the idea that legal system could restrict Court activities by asserting that such belief was "*a chimera, as the whole of the refined extract of old superstition which is embodied in the idea of Law as determining rights and duty*" (Hägerström, 1931: 74). To look upon the legal norms – Castberg replied – as an expression concerning duties and rights does not imply the existence of metaphysical notions and neither does it mean to open the door to magic and religious worlds. These expressions have only something to do

with pure formal *ought to be* concepts (Castberg, 1965: 27). Legal rules, though not belonging to Morals, present the same characteristics, namely expressions concerning duties and rights (3). Legal norms are not general directives neither technical directives with indicative functions but rules demanding observance the legislator must indicate the purpose (*formål*) to fulfil (the need of the ought) so that Courts can enforce the norm (Castberg, 1965: 67).

Olivecrona's realistic-psychological approach is also criticised by Castberg. His definition of norm as an independent imperative is incomplete: the deontic terms can certainly relate to independent imperatives as negations and affirmations but the form of "*independent imperatives*" does not provide clear explanations as to the content of legal norms (Castberg, 1965: 27) Even harsher Castberg's criticism towards Lundstedt. He went on to say that legal rules are nothing but – as Lundstedt asserted – statements which indicated how State institutions act in certain singular situations. Castberg took his distance from Lundstedt's idea that the assertion "*this rule is binding*" lacks in content and cannot be perceived by the mind as legal notions have a "*chimerical nature*" (Lundstedt, 1923: 74). Castberg upheld the opinion that Law cannot be reduced to predictable sociological calculations which will absorb the *ought to be* and would confine legal science to the factual and descriptive functions. Legal science as well as the Courts will engage in drawing normative conclusions from normative material. Although legal notions were metaphysical it would be misleading to try to cleanse them since they are practical and technical milestones (Castberg, 1947: 32). Legal right, for instance, is a normative concept presupposing a referring legal system. Legal thinking is a normative as it develops starting from norms and involving juristic and judicial argumentations which are not only descriptive but normative as they concern the legal system (Castberg, 1975: 323-337).

2. Realism *versus* Idealism. Democracy, freedom, equality, human rights

2.1. A Scandinavian Unrealism? More explicitly: does non-cognitivism in moral philosophy lead to a practical nihilism?

Swedish realists were frequently accused of having strongly reduced the protection of human rights because they denied the existence of rights and duties. To assert that rights and duties were nothing but objectifications of similar and dissimilar feelings would have exposed these very

rights to danger (Sundberg, 1984: 171-189). If rights and duties were only mere tools used by the machinery of Law to direct social behaviour it would mean the negation of their existence even before positive. Consequently, sheer violence would be the only driving force involved in the tormented struggle behind the quest for the right of every single individual (Castignone, 1995: 343). Swedish Realism though demolishing old beliefs based on the idea that positive Law provided protection for human rights undoubtedly incited hesitation and uproar. Non-cognitivism supported by Hägerström, Olivecrona, Ross and Lundstedt according to which values and expressions concerning rights and duties are neither true or false does not indeed lead to practical nihilism. To discuss old concepts and legal-philosophical truths does not necessarily mean to profess indifference toward values and incite people to behave dishonestly. Ross in his *Naturrett contra Rettspositivisme* (1963) was one of the first to defend himself from this criticism by writing: "*one may be a convinced assertor of Moral and values not objectivity and be at the same time brave allied in fighting terror, corruption and inhumanity*". The identification of moral nihilism and practical nihilism was a big misunderstanding supported by a great majority of philosophers and interpreters of Swedish Realism. Ross had previously raised his objections against this criticism when engaging in controversy with Theodor Geiger who wrote *Debat med Uppsala om Moral og Ret* (1946) where he accused Swedish moral nihilism (from a sociological point of view) of leading to fallacy. Geiger, Professor of Sociology in Aarhus, went to Uppsala to carry out research concerning Swedish moral and legal philosophy. "*Good idea* – Ross wrote sarcastically – *to approach to Hägerström's concepts less good was to have written a book on it*". How did the sociologist contribute to the debate?

In Ross's opinion, there was nothing remarkable worth remembering, as Geiger's criticism was founded on an enormous misunderstanding regarding the Uppsala philosophy (Ross, 1946: 259). Geiger stretched out Hägerström's assumptions and arrived to the conclusion that value expressions were illusory (*illusoriske*): in his interpretation the value representations as well as the "centaur" representations had a determined content and a logical meaning but no reference whatsoever to reality. Affirmations containing "centaur" and "values" as the object are thus illusory because though presenting quite clear contents and logic they cannot be confirmed by experience. In Ross's view, Geiger had equivocated Hägerström's philosophy in his interpretation, whereby value or duty expressions lack meaning and the object from a logical point of view. A Swedish scholar would have never asserted that this expression cannot be said true, as Geiger maintained. On the contrary they can be said true as well as false be-

cause what they express are feelings and exhortations going far beyond the field of true-false predicates. Geiger's erroneous interpretation provoked the misunderstanding in the conclusion that moral nihilism leads to practical nihilism and as a consequence that moral nihilism supporters become "*immoral individuals which will only comply with their instincts and sense of utility*"(Ibid: 263). An Uppsala scholar would have never admitted that the "Good" is chimerical. Indeed moral life originates from social pressures and psychological mechanisms which are social facts thus the value propositions are rationalisations of irrational experiences. In a passage of his *Hvorfor Demokrati?* Ross wrote: "*To assert that denying the values scientific acknowledgment means to block up a road going to the Good and the Evil and float in an indifferent passivity is a foolish remark*" (*Ivi, op. cit.*: 263-264).

2.2. Ross's analytical approach concerning democracy

As evidence of his human and political task aimed at promoting values such as democracy, equality, freedom and justice, in 1946 Ross wrote *Hvorfor Demokrati?* where he questioned "*What does it actually mean to be democratic?*" and "*Can we be sure that democracy actually is so obvious a thing, and that its feature development is marked out clearly, as so many of us would like to believe?*" (Ross, 1952). Ross's work was far from being an attempt to indicate which attitude was right or not open to the various possibilities and motivations hidden behind the phenomena of democracy and dictatorship. What is democracy? What differentiates it from other forms of government? What are the human ideas and the purposes behind the political forms of democracy? Which factors and forces operate pro or against a form of popular government and what kind of influence do men exert?

At first Ross analysed the word "democracy" and concluded that it denotes both a form of government and a complexity of norms (the Constitution) indicating which institutions have the power and competence (Ross, 1969: 95). Democracy in a formal sense indicates the way political decisions are taken independently from the contents therein. On the other hand, from a content point of view, the real or economic democracy (*økonomisk eller reelt demokrati*) aimed at levelling all economical privileges and class differences is considered. Economic democracy is correlated with the concept of "organized economy" (*planøkonomi*). In a broader sense one can consider democracy as a form of life (*livsform*), a general attitude which goes beyond economical, political or national and international spheres. To these three distinctions correspond a democracy in a political, economical or human sense. When one approaches democracy – Ross wrote – for the sake of co-

herence and clearness and to avoid making it an empty word it is always fruitful to explain the meaning. First of all, this word should be related with *present linguistic usage* so that it is comprehensible to everyone. Ross retained it would be a mistake to believe that a single definition can be the only truth as each definition can be only verified as "*justified as expedient*" in accordance with the above criteria. Ross sheds a light upon analytical philosophy and puts up a fight against old concepts full of definitions of concepts such as "state", "justice", "democracy" with the purpose of grasping the essence. Nevertheless, men fill the words with meaning and it is only a question of doing it in the most scientific way. Above all in the political or human rights field the sphere of meaning for each single of word is easily expanded or altered in order to penetrate the emotional side of people and make them blind. Ross had nurturing memories of Hitler when Denmark was invaded in few hours. Nazi propaganda was founded on verbal acrobatics and on linguistic seduction so that the actual meaning of words such as "democracy", "freedom" and "constitutional state" expanded and were open to interpretation. Indeed, from a sociological point of view, they were necessary to present the Nazi regime as a *real* democracy, *real* freedom and a *real* constitutional state: a clear example of "*political motivated distortion of ideas*" (Castberg, 1952: 77). For this reason it was important to preserve a semantic-linguistic analysis and avoid that words contrasted with their traditional meanings.

For instance, it is common belief that democracy is a form of government where power belongs to the people as a whole and not to a group of specific persons (democracy as sovereignty). Yet, it raises a doubt. Political power is not tangible: to what extent can individuals as an "organized unity" be considered to belong to people or to a group. It is not up to the people to decide the contents of the law, arrest criminals and condemn them. This is the competency of other individuals embodied in the institutions, legislators and judges. Thus Ross put forth the following question: what makes us to believe that democracy as above intended exists despite the different institutions in power? (Ross, 1969: 99). The answer lies in the fact that judicial and executive powers are subordinated to the legislation and the legislative bodies are elected by people. Ross challenges this statement by saying that during Nazism and Fascism the dictator was said to represent the people through a commission. What leads to risky conclusions is therefore reasoning mysticism. The mystical and metaphorical ideas of representation and legitimacy originate from the conclusion that sovereignty belongs to the people. One imagines a sort of power of enforcing laws which originally belonged to the people and that with the passing of time the authorities put

into practice. This illusory picture of the power of "translation" can fit different political situations from democracy to dictatorships.

2.2.1. Democracy. *Ideal-types* and *real-types*

The task of a legal scholar is to eliminate allegorical and metaphorical terms from reasoning (*halvmistiske, billedelige vendinger*) (Ibid: 101) and to investigate their juridical and functional relationship. Fundamentally it is important to argue in terms of "reality". Ross proposed a definition of democracy taking as a departure point an ideal model: through logical operations one can indicate a line representing a *set* of concepts which runs from the most extreme to the last extreme form of democracy. A yardsticks for democracy is an "*ideal-type*" which will not necessarily come into existence but is still meant to provide descriptions for "*real-types*" of democracy (Ibid: 105). The real-types distanced from the ideal-type represent the *real* grade of democracy. A state can be considered more or less democratic according to the degree of political power granted to the population: the influence over the power of authority can change with reference to three democratic factors: the *intensity* which indicates the quantity of persons who are given the right to vote (from a moderate democracy to oligarchy); the *actuality* indicating the degree of freedom of expression of the people through referendum, elections and real control on political life (from a moderate democracy to a nominal democracy); and lastly the *extension* denoting the degree of influence of the people on legislative, executive and judicial powers (from moderate democracy to a partial democracy) (Ross, 1949: 199). The ideal-type democracy is the form of government where political functions are carried out by people with higher intensity, actuality and extension (Ross, 1946: 107). Ross's analytical approach removed the confused concept of "*economical democracy*" (*økonomisk demokrati*) and focused on two elements, a demand of governmental regulation of production relations and a demand of economic distribution for most individuals. In this sense democracy might be easily confused with socialism. For the same reasons Ross maintained that the concept of "*cultural democracy*" (*kulturelt demokrati*) is also misleading if it is considered as the same access to cultural goods such as science, literature, art, theatre and sport. This type of democracy, like the other, could be based on these two elements as above, running the risk of being confused with socialism (Ross, 1949: 205-206). No statement concerning democracy and freedom could be considered scientific. Ross believed that faced with the "enemies of freedom" in the name of science the enemy should pose the question as to what democracy *is* and then compare the response with the widespread interpretation of freedom.

Science can be engaged in investigating the consequences for or against democracy but it cannot make the final decision (Ross, 1952: 93).

2.2.2. Ross's concept of freedom

From Ross's pages it clearly appears that the danger of subjectivism is constantly under fire and Ross's intention was to discover the trap consisting in debating democracy by referring to one truth. Ross's concept of democracy is a human value indispensable for humankind and expressed through freedom and equality (Ibid: 168). Ross in *Hvorfor Demokrati?* wrote: "*Freedom! there is no other word so cheap, praised and weirdly used*"(4): freedom is an irrational expression which reverberates more in the heart than in the brain. By analysing the idea of freedom Ross arrived to the conclusion that it also hides a negative aspect: it indicates a restriction. More explicitly, the person acting freely feels as the unconstrained action originates by itself, whereas the person who is constricted feels as if the action was imposed by external factors. Which circumstances influence freedom or constrain feelings? Freedom is the state whereby there are no conflicts among contrasting wishes: "*I cannot eat a cake and save it at the same time!*" (5). If one wanted both things one should choose and one of the wishes would in any case be contrary to the other. To allow freedom to exist no social influence should generate incompatibility among different wishes. In moral or juridical terms it is explained as the absence of individual or collective commands. In this sense Ross's concept of freedom is a "*freedom materially conceived*". As absolute social freedom does not exist, material freedom will fragment into a set of individual freedoms where no social constraints will penetrate and contrast with individual wishes. The relationship between democracy and freedom conceived in this way are expressed in terms of "*personal freedom*" (*personlige frihet*) and "*freedom of expression and organisation*" (*ytrings og organisasjonsfrihet*) (Ibid: 118). Furthermore, the forms of constraints can indicate cases where one feels constricted to act against oneself restraining one's own freedom. It may happen that the individual who obeys his conscience saves his freedom and subsequently feels that the action is his own "*at the bottom of his heart*" (Ross, 1952: 102). In this case the constraint is only on the surface: who obeys his own conscience has self-control and consequently is free This analysis of the concept of freedom so is "*freedom formally conceived*" (*formelle frihetsbegrep*) (Ross, 1946: 119).

2.2.3. Equality as not a foundation for democracy

Even more ambiguous and indefinite is the idea of equality and its relationship with democracy. Equality as the equal distribution of advantages

does not imply concrete equality among individuals and differences still remain. As Ross wrote "*nobody would consider as freedom violations the differentiations between married and singles, bakers and smiths when enforcing legal norms*" (Ibid: 142). The idea of equality only precludes "*arbitrariness or unreasonable differences*": it means that arbitrariness comes if the treatment is not in conformity with a general clause. As far as equality is concerned, Ross distinguished between "*formal equality*" which requires respect of norms and a "*material equality*" which requires that the contents of the observed norm expresses certain acknowledged values. Regarding the relationship between democracy and equality, Ross distinguished political equality from social, economical and cultural equality. The former takes shape in the principle of majority with respect to the right of vote: there will never be complete political equality in democracy in the sense that political power is exerted by a small group of elected leaders.

This sounds as evidence of the fact the equality, unlike freedom, is not as important for democracy as freedom. The guiding idea for democracy is indeed political and personal freedom so that democracy can exist although political equality is partly restrained as long as freedom is untouched (Ross, 1952: 131-133): "*Freedom is the aim in itself*" (6). The connection between democracy and equality assumes a form of pre-requisite for the existence of democracy. Who professes equality and feels little affection for freedom does not support democracy: an unrestrained passion for equality is a danger for democracy. The idea that equality is a basis for democracy is undoubtedly a political inclination: perhaps the Christian doctrine of brotherhood and an antecedent of God's equality has generated the relationship between democracy and equality. Ross is of the opinion that democracy is deeply rooted in Christian ideas yet it does not have anything to do with social equality but only with the idea of the sacred character of man. Ross's analysis of equality comes to the negative conclusion that equality does not sustain democracy if not in the measure equality is already enclosed in the concept of freedom (Ross, 1946: 148).

2.3. Castberg's Idealism. Equality as a foundation for democracy

Ross's analytical approach concerning democracy, freedom, justice and equality is different to Castberg's Idealism. Freedom, Humanitarianism and observance of law constituted his priority on his personal scale of values (Andenæs, 1963: 8-9). His contribution regarding the practice of human rights in Norway has been remarkable and although his works

were not brilliant his capability of theorizing and stirring a debate on the subject is still topical. In order that legal norms can be said valid, Castberg's opinion was that they should protect most social interests: if a legal system only protects a small group of individuals it "*cannot be considered as valid*" as it does not embody the ideal validity of Law. He also rejected the concept whereby the legal system has to protect its members' interests: the widespread motto throughout the 18th and 19th century in England "*Right or wrong is my country*" sounded absurd for Castberg whose intentions were to develop international feelings of solidarity. Every legal system should pursue aims such as "*calculability*", "*peace*", "*certainty*", "*welfare*". Calculability and legal certainty are the direct product of the fundamental pillars of a civilized country as they offer the individual the possibility to predict future behaviour in connection with others and the society as a whole.

Castberg also indicated a "*demand for justice in Law*" (*travet til rettens rettferdighet*): formal justice as the *correct* implementation of valid norms. Normative statements cannot be expressed in true-false terms since such predicates only refer to the external empirical world and not to the world of validity which orbits around correct-incorrect terms (Castberg, 1965: 108-110). Does the demand for justice in the contents of norms mean rationality or correctness? In Castberg's opinion, the demand for justice in content goes far beyond this concept (*materiell rettferdighet*). Justice is equality, equality is absence of arbitrariness: "*arbitrariness is the first enemy for justice*" (7). The assertion that a legal norm is right or wrong is not simply an expression of mood or feeling. Ross, who accused the Norwegian philosopher to advocate a popular philosophy (Ross, 1940: 292) had maintained that to "*invoke justice is the same as to strike a punch on the table*" (Ross, 1953: 358) (8). The demand for justice does not imply a reference to a postulate or merely express feelings. Although this affirmation is not verifiable and appears figuratively as a feeling of exclamation it opens the issue on how the legal system should be structured: an affirmation concerning material justice or injustice will always be considered as an affirmation on the rationality or irrationality of a social system. The validity of Law intends to pursue aims which the competent authorities will put in force and to guarantee respect for human rights. Moreover, the fact that statements concerning the objectivity of the law are not scientifically proven does not stop one from believing in the objective validity of some fundamental principles inspiring positive law. In these principles lie the "*legal-ethical minimum*": it is neither absolute nor valid forever and everywhere but as a *quality* legal system, it will guide the changeable social needs embodied in various legislations. The ethical minimum might be compared to a casket containing

common values, sense of duties and the inclination of ordinary people in expressing the national Natural Law (Castberg, 1965: 129-131). Human rights need a normative anchorage since the ideas of human rights must be embodied in positive laws and this procedure involves the constituent, the national and international legislator (Castberg, 1965: 391). The Courts practice is constantly influenced by national Natural Law principles: the reference to the "*constitution spirit and principles*" (*grunnlovens ånd og prinsipper*) (9) as contained in the Norwegian Constitution (article 112) clearly shows the inviolable and valid principles acknowledging a sort of eternal presence of "Natural Law of variable content" within the legal positive system. A legal system can be considered democratic if it harmonizes with the demands of *real*, *formal and material justice* and *respect for human rights*. Democracy lays its foundations on *equality* (*likhet*) instead of the *principle of freedom (frightens prinsipp)*. With this affirmation Castberg kept his distance from Ross's analysis on democracy and human rights.

2.3.1. Castberg's contribution regarding human rights

The principle of *real* democracy is intimately connected with the *principle of expression*: the freedom of political expression is the milestone for democracy being the highest expression both of human rights and inviolability of equality. It is aimed at providing democratic institutions the maximum level of protection for human rights (Castberg, 1965: 168-170). In his appreciated *Freedom of speech in the West* (1960) Castberg investigated and compared freedom of expression and democratic principles in France, USA and West Germany. *What purpose is freedom of speech intended to serve? (Castberg, 1960: 421).* Free discussion and the widespread information are indispensable for democracy since they guarantee the best solution and restrain revolutionary tendencies. Freedom of speech belongs to the human rights nucleus as well as respect for human dignity. Respect for human dignity is a warning signal in a real democracy and the acceptance or the refusal of a political system embodies this principle. Castberg cannot refrain from rejecting the philosophy of realism which reduced, in his opinion, every human need or legal claim to social factuality by considering "validity" metaphysical. The great weakness of "anti-metaphysical realism" lies in the obsessed attempt to translate everything in terms of factuality. The postulate of Realism whereby the welfare of the community is the final aim of all social norms is nothing else but an ethical postulate. The "common good" and the "well-being of society" as guiding ideas are valueless. Actually, they are empty formulas which tell us nothing about the scale of values according to which conflicts between social values should be solved. Castberg opinionated that a purely factual transposition would never suc-

ceed as evaluations would always be present and thus making scientific investigation an illusion.

The enemies of freedom and democracy deserve indulgence: unlike Ross, Castberg asserted that they should not be asked what they mean by "democracy" but simply tolerated. A state grounded on freedom of speech must always allow the opposition to protest even if it is to abolish this freedom in itself. It is unavoidable to intervene to prevent violence and assuage rebellions but if the agitation for an anti-democratic system is supported by the majority of population then no restrictions can be invoked (Ibid: 424-433).

3. Norwegian theoretical contribution to the debate on human rights

3.1. Torstein Eckhoff. Pragmatism, Realism and Idealism

From the 50's onwards, the debate in Norway had been mostly splitting into two main currents, Realism and Idealism. Nevertheless, the Norwegian intellectuals involved in the field of theory and practice of human rights, had been colouring their theories with 'elements' inherited from Analytical Philosophy and Pragmatism in such a way to render their positions definitely interesting.

Justice or utility? This issue drew the line between Castberg and Lundstedt. In this respect Torstein Eckhoff tried to provide an answer. An analysis of the term "*justice*", in his view, revealed a correlation with "*social happiness*"; justice as a desire for justice as well as the eternal desire of happiness inherent to all men. This happiness cannot be discovered by the individual on his own but only as being part and belonging to a society. Justice is an idea connected to the equal distribution of something echoing in the mind and the equilibrium among relations. How does utility differ from it? To evaluate something in terms of utility, in Eckhoff's opinion, means to analyse the consequences that the object of evaluation will eventually produce. Considerations of utility look at the future and lay their foundations on notions of causality and probability: in the importance given to the consequences that utility can differ from justice. It would not be a contradiction to assert that something is unfair but useful: both can be rings logically connected to the same chain of reasoning. In several real life-situations considerations of utility appear as the driving forces whereas considerations of justice are their brakes (Eckhoff, 1963: 80-85). Both utility and justice are present instances in the agent's mind.

Is justice useful for society? Utility is a meta-principle used to evaluate justice. Hence, the question: Is it useful for society to consider justice when making community decisions? In Eckhoff's opinion, the decision-making process has to be compared with other types of decision-making procedures concerning the same social situation. All the procedures should necessarily take into account the parameters of justice (Ibid: 89). The relationship between utility and justice seems to be indefinable. However, legal reasoning in terms of utility and legal reasoning in terms of justice are both somewhat limited. Eckhoff agreed with Castberg who tried to harmonize both parameters within legal argumentation. In fact he said: "*The purpose of the Law and the demand for justice are guide lines for legal thinking*" (Castberg, 1947: 75). On the whole, Eckhoff's analysis of justice and utility is easily comparable with Castberg's analysis. However, as far as the human rights is concerned the two philosophers have a completely different approach to this issue. Castberg was in favour of Idealism whereas Eckhoff favoured realism. Eckhoff's anti-metaphysical Realism is more pragmatic compared to Ross's Realism. This evinces how his intellectual distances from Castberg are deeper than Ross's distances from Castberg. Eckhoff was definitely contrary to base legal argumentations on natural law premises and to render moral evaluations objective (Slagstad, 1987: 388). Although Eckhoff was aware of the strict correlation between Natural Law and Morality, he maintained that the natural law doctrine was nothing but a special formula for moral concepts. Natural Law as an ideology was essential to build a "bridge" between positive Law and Morals as positive law presents Natural Law elements.

Part of the principles written in the Constitution are clear examples as Castberg had already asserted. Ross, in *Om Ret og Retfærdighed* had strongly defined the ideology of Natural Law "*like a trollop at everyone's disposal*" (Eckhoff, 1989: 66-67). In Eckhoff's opinion this definition was too harsh however, he agreed that Natural Law had been historically used to found various political or juridical movements. Eckhoff openly declared he was not in favour any of these ideologies and above all he refused to render moral evaluations objective in order to avoid the personal beliefs of the natural law advocates from becoming eternal truths. Eckhoff's attempt was evidently aimed at distancing himself from unilateralism and dogmatism (Ibid: 72). Nevertheless, Eckhoff's pragmatic-realistic concept becomes ambiguous as soon as the discussion on values and justice is veered to human rights issues. In his article *Filmen om Nürnbergdommen* Eckhoff seems to slide towards Natural Law doctrines. He questioned how far and at which conditions the judge should act in conformity to the Law (Eckhoff, 1962: 117). In his studies regarding the relationship between the judge and the law, Eckhoff stated

that it was necessary to question why and to what extent the judge should apply the law. Eckhoff gave four reasons: mutual loyalty amongst State institutions; legal certainty for individuals; the independence of the Courts. This third reason seems paradoxical because the independence of the Courts should become greater if they do not follow the law but – Eckhoff asserted – total independence is inexistent and the fact that the Courts have to enforce the law implies resistance towards other personal or political influences. The fourth reason consisted in the fact that the judge, by respecting the law, not only protects himself from external influences but also from his inner scruples. As a "spokesman of the law" (*en talenør for retten*) (Ibid: 117-118), he will not be emotionally involved in his decisions. Up to this point Eckhoff's Positivism is clearly evident.

However, Eckhoff maintained that there are limits concerning the respect of law and should they radically violate human values the judge is exempted from their enforcement. Most of the Law promulgated during the Hitlerian regime constitutes the most significant examples. Eckhoff did not refer to the general clauses of International Law or to Natural Law principles. The Norwegian philosopher did not find a set of norms having objective priority over the positive law. On the contrary he invoked a diffusion of values such as justice and humanity among those who founded their convictions on religious or metaphysical ideas. Eckhoff's reference to such higher principles are no doubt ambiguous. Was he a *sui generis* realist, if not positivist, who talked about human values (*menneskeverd*) and humanity (*humanitet*)?

3.2. The universality of human rights: Tore Lindholm

An explicit reference to the universality of human right appears, undoubtedly with Tore Lindholm. At first he criticised the generic definition of "*human rights*". He wondered if they existed independently from human acknowledgment or rather did they exist by themselves, or, moreover, did the expression "*human rights*" indicate different things used in different ways by different persons in different contexts (Arnegaard/Landfald, 1998: 3). His answer is strictly connected to universalism: the plurality of normative traditions implies the need for an intercultural approach among "Universalised". Human rights, in Lindholm's opinion, are on one hand the product of crisis, new tendencies and social-political needs and on the other hand the product of various historically created barriers which threaten the achievement of these new ambitions (Lindholm, 1998: 20). Human rights are the "children" of modern society only from a structural not from a cultural point of view: urbanisation, industrialisation, modern technologies, political control and

globalisation. Human rights had not been embodied before the Second World War before 1945, Lindholm felt, it seemed rather difficult to find the usage of the word "human rights". The Norwegian compares the actual term "human rights" with the expressions "rights of a man" and "natural rights" still not associated to "modern human rights" (Lindholm, 1997: 5). What is a distinctive sign of "modern human rights"? Lindholm indicates the main normative characteristics of human rights with reference to the International Bill of Human Rights (1947) and the International Conventions both on civil and political rights and economical, social, cultural rights (1976). Such characteristics are: universality; broad contents; an open package of rights; a dual state accountability (a double responsibility for the state towards individuals and other states); legal as well as moral foundations (human rights are on the one hand contemplated by constitutions and legislations and on the other hand acknowledged by a sort of "*cosmopolitan solidarity*") (Lindholm, 1998: 10-11). Lindholm asserted that throughout the history of mankind no legal system had ever satisfied all these characteristics: The Universal Declaration represents modern Western countries but not one ideology or one philosophy and religion. The Declaration lies on a "*overlapping consensus*" (Ibid: 5). Human rights have been devised in "positive" formulas so that every cultural tradition can recognize itself within one or all of the formulas. This clearly proves that universality and the open structure are distinctive signs of the Declaration.

Modern human rights can be defined by first establishing what they are not. Lindholm indicated "eight fallacies of human rights": human rights are not "a comprehensive morality" (they are not guiding principles for mankind but demands which the States should fulfil); human rights are not "a commitment to individualism" (an attempt to promote individualism but an effort aimed at spreading out solidarity and integration); human rights are not "grounded exclusively in Christianity, or Western, or Enlightenment, or Liberal, or Rationalist, or secular Humanitarian Principles"; human rights are not "measures of historical progress or of social perfection"; moreover they "do not subvert communal solidarity and traditional loyalties"; human rights "do not demean religion, comprehensive ethics, and profound philosophy" (those who profess human rights are still different from other individuals and continue to have their own personal, religious and philosophical beliefs); and least but not last, human rights "are not substitutes for significant human fulfilment": they are simply principles embodied in institutions which cannot guarantee the fulfilment of human dignity (Ibid: 16-20). The core of human rights is the effort of honouring human beings with equal dignity.

Lindholm's interesting approach however automatically gives rise to some doubts. Does the definition of "human rights" by first establishing what they are not definitely avoid the risk of a "real definition"? This was not Lindholm's intention whose approach seems to elude philosophical-ontological and linguistic and semantic issues. Nevertheless, Lindholm's suggestive contribution seems to be an isolated attempt of defining human rights within the Norwegian debate.

3.3.1. Torkel Opsahl. Analytical Philosophy, Realism and Idealism

Torkel Opsahl (1931-1993) is undoubtedly a Norwegian pioneer in consolidating human rights internationally (Serpe, 2005: 75-89; Serpe, 2006: 32-55). As a lawyer and legal scholar he fought for the solid and sound enforcement of international law with respect to human rights. In a certain way he substituted Castberg. Opsahl's contribution seems to open an interesting connection between the theory and the practice of human rights, an attempt to investigate human rights by semantic and linguistic analysis (Serpe, 2002: 109-111). The Norwegian scholar was inspired by Ross and in his Ph. D. thesis entitled *Delegasjon av Stortingets mindigheter* (1956) he followed Ross's footsteps. Ross showed deep respect for Opsahl so much so that he mentioned him in the preface of his *Dansk Statsforfatningsret* (1980).

Opsahl felt an urging need to analyse and throw light on human rights as he was strongly convinced that this field was unclear According to Opsahl it was important to investigate the relationship among the ideas on human rights, the norms and the reality, as a triple process. The phase of idealisation originates from political needs and moral concepts: the main characteristic of this phase are ideologists, philosophers, politicians who all agree on the same universal achievements just like the Universal Declaration (1945). The second positivism phase is based on the national and international acknowledgement of rights and it is embodied by the promulgation of binding norms which indicate duties and indispensable legal means. In this phase there is the involvement of several regional and global institutions established by International Conventions (1950, 1961) (Opsahl, 1981: 267-275). The issue regarding the international protection of human rights leads to the third phase (phase of reality) which is definitely the most complex because of the various contrasts between the actual "*idea*" of human rights and the effective "*reality*" of human rights. This crisis is shifted from a local to an international level so as to produce new ideas and needs.

Opsahl maintained that the expression "human rights" has a double nature: one which goes beyond positive law (*utenfor gjeldende rett*) and is rooted in "idealrett" (as Castberg had previously asserted) and the other abides in positive law (*innenfor gjeldende rett*) despite not having eternal validity. According to his lights, human rights differ from all other rights because of their "*dualistic*", "*dynamic*" and "*relative*" nature: they are inalienable guarantors of freedom which the State cannot offend. Individual rights has a full meaning not only with reference to the vertical relationship "individual-State", but also to the horizontal relationship "individual-individual". It is the duty of the State to protect the individual from abuses by applying the principle whereby the freedom of every single individual should not limit the freedom of others (Ibid.: 276-280).

3.3.2. Opsahl's contributions on International obligations and National implementation. Should the Norwegian Constitution be reviewed?

Opsahl made considerable contributions on the relationship between international obligations and the national enforcement of human rights. Opsahl wondered whether the implementation of human rights within domestic law guaranteed and protected essential human rights (Opsahl, 1996: 22). This interpretation is in contrast with the typical Scandinavian attitude, whereby the implementation of international obligations is an exception and not a general rule. Opsahl wrote that from the 19th century onward the Nordic Constitutions had been founded on the separation of powers. Only Sweden (1975 and 1977) reviewed the Constitution with regard to the protection of human rights. Nordic countries had never felt the duty of implementing international obligations. Opsahl asserted that the fact that the term "human right" does not exist within a Constitution should not be a reason for anxiety. The Norwegian Government declared: "*it will often be possible to demonstrate as a matter of "visual" fact that these obligations are fulfilled*" (Ibid: 29). The implementation of international obligations would not, in Opsahl's opinion, increase the real protection of human rights: what is important is "*to respect them in fact*".

The Norwegian Constitution (17-5-1814) does not contain a list of human rights: political and civil rights are contained in the E-part of the Constitution (freedom of expression, right of ownership, the right of a fair trial). As to economic, social and cultural rights, the constitutional provisions are even less. Opsahl believed that to look at the Constitution as a pillar of the State and as the highest expression of the principal values is rather unreal and superficial. To what extent values are effectively respected by individuals and by the institutions in power is not necessarily

the consequence of a written Constitution. In this respect, Opsahl stated the following "*Constitution is a poor indicator of any social values system*" (Opsahl, 1996: 44). He actually questioned whether or not the Norwegian Constitution should be reviewed. In 1968, in an article entitled "*Bør vi modernisere individetsgrunnlovsvern?*" (Opsahl, 1968: 49-66). he debated the need for modernising the E-part of the Constitution. He said that from 1905 (when Norway won its independence from Sweden) political life in Norway had been characterised by tolerance and a lack of crisis.

3.4. From Opsahl to Jan Erik Helgesen. The possibility of a review as a "conditional no"

After thirty years, the legal philosopher Jan Erik Helgesen read Opsahl's contribution and tried to interpret it in the light of all the social changes. Helgesen, instead, in 2002, maintained that the previous "homogeneous" society inspired by tolerance and solidarity had been transformed into a "heterogeneous" society characterised by contrasting interests, criminality and pluralism. The issue of freedom of expression (art.100) had been much more discussed over the last thirty years than it had been in the years from 1814 to 1968. Moreover, Helgesen wrote: "*the "human right" concept has evolved and has been totally transformed […] there is much more overall awareness today compared to the past*" (Helgesen, 2002: 387). Opsahl had maintained that the only reason to review the Constitution would lie in the consideration of the Constitution as a "national symbol" (*et nasjonalt symbol*) which expressed "national values" (*nasjonens verdier*). Thirty years later, Helgesen asserted that the hypothesis of a review would be far more complicated: how would it be possible to list all the "national values" when the borderlines between national and international are indefinable? (Ibid: 400). In 1968 Opsahl proposed a repartition of constitutional human rights into three categories: freedom and certainty of the individuals; democratic and political rights; economic, social and cultural rights. In this respect, Helgesen replied that this division would have been useless as it would lead to misunderstanding concerning the priority of rights.

Helgesen's answer on the possibility of a review was "*a conditional no*". His argumentation was based on the idea that it would be impossible to provide an exact list of human rights to protect; every review would be unsatisfactory; several "technical" difficulties concerning the usage of a precise language would arise; a danger of discrepancies between local and international development. On the other hand, Helgesen indicated the rea-

son in favour of a review. A review might enforce the division of powers and consolidate the role of the Courts; a national list of human rights would perhaps help fight against the prejudices towards International Law and would speed up the acceptance of individual rights (Ibid: 405).

Conclusions

It is now indispensable to draw some sketched conclusions aimed at casting a closer glance at the issues analysed above. The broad philosophical meaning of *Realism* considers this movement characterized by a strong adherence to "reality" conceived as a whole. Furthermore, the very word "Realism" confirms that reality itself exists in its own right and it operates independently of the mind and its projections. The different types of realism arise as a consequence and are a reaction against schools of thought whose concept of reality is limited to the mere mind (i.e. Idealism). Within the different shades of realism there is a fight to defend reality from trends which portray reality as a product of the Ego. However, all the different types of realisms recognize that the object of experience is distinctly separate from thought. Consequently, the difficulties which arise from the duplication of reality within the consciousness are avoided. Realism considers reality as empirically verifiable and concrete.

Within legal field, whilst Idealism relates to two different worlds, a "*real world*" and a "*validity world*", Scandinavian Legal Realism proposes an approach totally different to Idealism (and Natural Law doctrines) whereby *sources* of Law are transcendental phenomena. More explicitly: God's will, natural order, human reason, the idea of justice; the *content of Law* must be subject to control by justice and as a consequence Law must undoubtedly reflect common moral principles. It is unavoidable to assume that something is objectively "right". On the other hand, in opposition to the doctrine of Idealism and Natural Law, the *sources* of Law in Legal Realism lie in immanent phenomena such as customs, legislations, and human behaviour. In this respect, Legal Realism is very comparable to Legal Positivism.

Castberg's harsh criticism toward Scandinavian realists and above all toward Ross, produces an evidence as well as a significant controversy. Ross's innovative approach within the North-European tradition of legal-philosophy began by radically criticizing the unfavourable influence of Metaphysics on Western Philosophy over the years. Ross tried to liberate Philosophy and Law from historical prejudice. The Western mentality was in his opinion characterized by a speculative philosophy based on acquiring knowledge before actually reasoning. His anti-metaphysical cru-

sade began with the net distinction between intuition and observation. On one hand Metaphysics lacked scientific justification and was founded on intuition and sensations but on the other hand, Science was obsessed with observation and verification and was considered the only way of going beyond impressions and unmasking a priori conceptualism. To believe that words represented concepts or ideas whose meaning were to be defined by philosophy was an illusion according to Ross and he maintained that it was misleading and detrimental to define things. In order to link the study of these phenomena to actual experience, science had to totally refuse essentialism. Essentialism, intended as the conviction that by observation and intellectual intuition, it would be possible to penetrate and catch the "hidden essence" of "things". Or more explicitly, what actually makes a "thing" a "thing".

After having caught these "essentialities", science might – in Ross's view – have endeavoured to define a "thing". Instead, Ross stated that definitions were mere conventional proposals or mere agreements concerning the usage of a word, nothing more. Before falling into the abyss of *quid juris* issues one should question the conceptual possibilities of *quid juris*. There is no point in questioning on what a "thing" is in *reality* or in its *essence*; it is better to be aware that "things" are *in motion*.

Metaphysical Philosophy spread and also covered legal issues. The definition of words such as "Law", "validity", "binding effects" or "rights" is only a question of terminology, not an ideological fight for or against certain principles. Ross's realistic-analytical approach is the product of his intellectual background which swings from logical empiricism to the Uppsala philosophy. I am referring to: his anti-metaphysical attitude that might be read in the perspective of his analysis of concepts and to his theory according to which value judgments are not real statements but only expressions of feelings that cannot be the subject of scientific discussion and the assessment method which establishes the veracity or untruth of a term or a statement. In this way Ross overcomes the idealistic, epistemological and logical complications according to which Law belongs to a physical reality as well as to the world of ideas. The contradictions of Idealism – in Ross's opinion – seem to be quite obvious. Law cannot simultaneously belong to both worlds so that the cognition of Law needs both experience (***fact***) and a-priori concepts (validity). The dangers of this approach is *material as it is* connected to the idea of justice as a principle inherent to Law and able to surround it with a sort of mysterious binding force inspiring the content of law (*ethical minimum*).

With regard to this, Ross criticizes Castberg's Natural Law. Castberg had clearly asserted that the step from psycho-physical realities (i.e. statutes) to the acceptance of a binding norm always implies an a-priori element. Differently, Ross had maintained that *the Ought was to be transported into the social and psychological factual-empirical world*. *Ross felt that Idealism* would have only re-established subjectivism, arbitrariness through emotive ***preaching*** and poetic interpretations of reality. Natural Law had always been – in Ross's opinion – concerned with eternal values and postulates that could lead to immoral myths such as racial hatred. Nevertheless, Ross admitted the connection between moral and juridical phenomena. Moral ideas – as Hägerström had asserted – were the cause behind the evolution of Law: Law, on its part, influences Morals. What a positivist should certainly avoid, in Ross's view, was to make moral judgments concerning juridical issues. Moreover, positivists should override the fact that Law belongs to two different worlds contemporaneously, the factual normative world and the spiritual internal world, so neglecting the fusion between facts and values.

Such theoretical divergences between Realism and Idealism, sow their seeds as far as the concepts of democracy, freedom, equality and human rights are concerned, as it has been highlighted within my contribution. Indeed, besides a theoretical quarrel between Realism and Idealism, it lies a dispute between Realism and Idealism of human rights. I deem that although non-cognitivism in moral philosophy does not necessary lead to a practical nihilism (as Ross sharply argued), Realism, when applied to the theory and practice of human rights, is not itself sufficient. Realism needs the fruits and the efforts of Idealism. Although it is not necessary to invoke a set of norms having objective priority over the positive Law, still the reference to higher principles and/or values such as justice and humanity seems unavoidable (cfr. Eckhoff). Although it is healthy to elude philosophical-ontological and linguistic definitions about human rights, still the issue of "human rights" recalls the value of universality since the plurality of normative traditions implies the need for an intercultural contexts and an "*overlapping consensus*" (cfr. Lindholm). *Last but not least*, although the definition of theoretical concepts does not say anything concerning the forms of protection or the immunities which should be stated as fundamental, still the Positivism phase based on binding norms recalls a pre-phase of idealisation originated from moral needs (cfr. Opsahl and Helgesen). Realism and Idealism of human rights go behind and beyond each other within a wider plot of interrelations which also involves Pragmatism and Analytical Philosophy. In this sense, the Norwegian experience might be considered as a "case" study.

Notes

1. The Danish Anders Sandøe Ørsted (1778-1860) and the Norwegian Anton Martin Schweigaard (1808-1870) were the founders of the Nordic Realism (*Den Nordiske Realism*) which is considered the legal-philosophical background for both legal science and legal philosophy in Denmark and Norway from the 18th century. This movement arose and developed much earlier than the well-known Scandinavian Swedish Realism (*Den Skandinaviske Realism*).

2. The Norwegian Torstein Eckhoff (1916-1993) was emeritus lawyer and Professor in Legal Science at the University of Oslo. His theories still exert a remarkable influence on the Norwegian legal culture, especially his studies on legal sources (*rettskildefaktorer*) and legal interpretation. On this point, cfr. A. Serpe, *I fondamenti dei diritti umani in Norvegia* in 'Materiali per una storia della cultura giuridica', XXXVII, June 2007, p. 112.

3. On this point cfr. G. Williams, *Language and Law* in 'The Quarterly Review'/62, 1942, p. 405.

4. "Frihet! Det er neppe noe annet ord som brukes så ekstravagant, som lovprises og besynges i så høye toner".

5. "Jeg kan ikke både spise en kake og behold den".

6. "Det er friheten som er målet i seg selv".

7. "vilkårlighet er rettferdighetens absolute motsetning".

8. "å påberåbe sig retfærdighed er det samme som at slå i bordet".

9. Art. 112 Norges Grunnlov av 17. Mai 1814: "viser Erfaring, at nogen Del af denne kongeriget Norges Grunnlov bør forandres [...] Dog maa saadan Forandringe aldrig modsige denne Grunnlovs Principer, men alene angaa Modifikationer i enkelte Bestemmelser, der ikke forandre denne Konstitutions Aand [...]".

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