Conspicuous Absence and Mistaken Presence. A Note on the Ambiguous Role of Scandinavian Legal Realism in Nordic Approaches to International Law

*Jakob v. h. Holtermann*

There is an ambiguity in the term ‘positivism’. It can both be defined as ‘what is based on experience’ and as ‘what is formally established’. The reaction against positivism is justified with respect to the latter, but not with respect to the former meaning. A realistic doctrine of the sources of law is based on experience but recognises that not all sources are positive in the sense that they are ‘formally established’.

*Alf Ross*

1

Introduction

By way of introduction, I should briefly situate this chapter. Unlike most contributors to this volume, I did not participate in the conference in Oslo with a distinct paper on Nordic approaches to international law. I was part of the

---

1 I am grateful for comments from and discussion with participants at the conference on “A Nordic Approach to International Law?”, held 27–29 August 2015 in Oslo, Norway. I remain particularly indebted to the convenor of the conference Astrid Kjeldgaard-Pedersen, and to Dan Priel and Alessandro Serpe for helpful suggestions. Furthermore, I would like to thank participants at the conference “Still Exceptional? Nordic Countries Constitutional Tradition in the 21st Century”, held 16–17 May 2016 at the European University Institute in Florence, Italy. Section 4 of this contribution draws closely on the paper “Scandinavian Realism and Nordic Exceptionalism – a Philosophical Mismatch?”, which I delivered there. This research is funded by the Danish National Research Foundation Grant No. DNRF105 and conducted under the auspices of the Danish National Research Foundation’s Centre of Excellence for International Courts (iCourts).

closing round-table, the aim of which was to round up and suggest further perspectives on the many rich and thoughtful discussions that had taken place during the three days in the beautiful surroundings of Lysebu. The convenor Astrid Kjeldgaard-Pedersen had invited me for this panel not as an international lawyer, but as a legal philosopher – and, in particular, as one who has spent quite some time studying the scholarship of Scandinavian Legal Realism and notably the works of Alf Ross.3 If beside the notion of a possibly distinct approach to international law, there is anything in law for which our small region has gained international renown, Scandinavian Legal Realism seems to be the best candidate.4 Kjeldgaard-Pedersen was therefore interested in exploring whether or not, at the closing of the conference, it might be possible to discern traces of congeniality between Scandinavian Realism and Nordic approaches to international law.

At the conference, I therefore made my closing remarks from that perspective, focusing on two main issues, on which I shall also focus in the following. Before doing so, however, I presented some more general methodological reflections in light of the conference discussions and main conclusions on Nordic approaches to international law; reflections on the virtues and vices of the conference’s predominant “approach to the approach” so to speak. These remarks did not strictly relate to Scandinavian Legal Realism as such. I shall nevertheless briefly recapitulate the main idea in Section 2 (“Approaches to

3 Besides exegetic work on Ross (cf. e.g. J.v.H. Holtermann, ‘A Straw Man Revisited – Resettling the Score Between H.L.A. Hart and Scandinavian Legal Realism’, 57:3 Santa Clara Law Review (forthcoming, 2018)) I have written introductions to and edited new editions both in Danish and English of his own main work (A. Ross, Om ret og retfærdighed: En indførelse i den analytiske retsfilosofi, 2nd ed., and a new introduction for this edition by J.v.H. Holtermann ed. (Hans Reitzels Forlag, Copenhagen, 2013); and A. Ross, On Law and Justice, trans. Uta Bindreiter, rev. ed., and a new introduction for this edition by J.v.H. Holtermann ed. (Oxford University Press, Oxford, forthcoming 2017) respectively. In the following, I shall occasionally be referencing passages from On Law and Justice/Om ret og retfærdighed that Ross for unknown reasons decided to exclude from the 1958 English translation. I have therefore chosen to quote from the new complete translation of the forthcoming 2nd English edition. For consistency, I have further chosen to do so throughout the chapter, i.e. even when quoting passages that Ross did include in the 1958 edition. Since the forthcoming edition has not yet been typeset, this means that I can only refer to Ross’s § numbers.

4 It is telling of the continuous influence of Scandinavian Realism that a standard textbook and -compilation like Lloyd’s Introduction to Jurisprudence contains a separate chapter comprising 42 pages on and by the Scandinavian Realists (cf. M.D.A. Freeman, Lloyd’s Introduction to Jurisprudence, 8th ed. (Sweet & Maxwell, London, 2008), pp. 869–910). The current plans of the Oxford University Press publication of a full new translation of Alf Ross’s main work Om ret og retfærdighed/On Law and Justice counts to the same effect.