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VITENSKAPELIG PUBLIKASJON

On consequential and normative analysis of law

A critical view of Alf Ross's legacy

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SUMMARY Two views, inspired by Alf Ross, are sometimes raised against law and economics. One is that consequential analysis has no role in legal science, the task of which is to predict court verdicts. The other is that normative criteria involving fairness or social welfare are meaningless. I argue that the former view rests on a misreading of Ross, who in fact called for the development of law and economics. As for normative criteria, I argue in favor of a pragmatic approach, which inquires whether normative concepts can affect our views of the desirability of a legal rule or verdict.

KEYWORDS Alf Ross, law, economics, pragmatism

1 Introduction

In the Danish discourse on law and economics, the views of Alf Ross are still influential. An older generation of legal scholars were raised on his teachings, and some of his views also live on in the younger generation. In this article, I address two views that are taken from or that are thought to be taken from Ross. One is that the proper task of the legal scientist is only to consider what is valid law or law-in-force. This view excludes consequential analysis of law as part of the domain of legal inquiry. The other is that the normative concepts employed within law and economics, whether concerning fairness (or justice) or social welfare, are essentially metaphysical or unscientific and therefore have no place in legal inquiry.

On the first view, I argue that it is a narrow reading of Ross to view his theory as discarding consequential and normative, scientific analysis of law. I cite Ross to

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the effect that it is the role of the legal analyst to make conditional normative statements, i.e. to relate how given ends can best be achieved by legal means. On a closer reading, Ross in fact called for the development of law and economics, of a science that studies how law affects behavior.

On the second view, Ross was indeed critical of normative concepts. I discuss in particular his view that the normative concepts revealed a hidden natural law element. While purporting to be objective, the normative concepts are ideological in nature, according to Ross, chosen subjectively by the analyst to further his or her political views. As part of natural law, the concepts should be discarded from legal science, he thought, along the lines of logical positivism. I put forward the view that there may in some instances be a subjective element in the choice of fairness or social welfare concepts, but that even then it can be illuminating to consider a legal rule or verdict in the light of any subjectively chosen normative concept. Different scholars can apply different normative concepts and thereby enhance our understanding of what a rule or a verdict entails in terms of alternative notions of what is desirable. My point can be expressed by saying that the concept of meaning in logical positivism is too narrow for the purposes of legal analysis. In pragmatic philosophy, meaning is connected with usefulness; the question is whether a concept can affect our decisions. I argue that in this pragmatic sense, various normative concepts are indeed useful even if they do not refer to an absolute or objective truth and even if each concept only has a limited domain of applicability.

Thus, my point will be that conditional normative analysis of law, which formulates some normative criterion and analyzes the extent to which a rule or a verdict lives up to the criterion, should be judged concretely on the extent to which such analysis informs us (including how much we learn from criticism of the application of the criterion).

The article[1] is structured such that I shall first address Ross's views on consequential analysis of law, and then address his skepticism towards the concepts of fairness and social welfare. Finally, I address how I believe these concepts can be useful within a flexible approach to understanding and prescribing law.

2 Ross's view of consequential analysis of law

Ross is sometimes interpreted as viewing the domain of legal science as being narrowly concerned with the prediction of how courts will apply legal sources to disputes. However, he in fact saw it as the role of the legal analyst to explore the social

1. Part of the article is based on "Alf Ross and the Functional Analysis of Law" In: *Erhvervsretlige emner: 1917–2017*. . ed. /Vishv Priya Kohli; Peter Arnt Nielsen. København : Djøf Forlag 2017, p. 43–67.

consequences of court rulings and legal rules. Such consequences would be important not only to legislators, but also to courts. Thus, he (Alf Ross, *On Law and Justice,* 1959/*Om ret og retfærdighed*, 1971, p. 98, 118) wanted to make it:

> "clear how unrealistic the kind of juridical positivism is which limits law to comprise no more than such norms as have been made positive and which believes that the activity of the judge consists only in a mechanical application of these."

According to Ross, the judge interprets the law in light of his or her culturally determined evaluations, and in light of his or her understandings of the real world. Evaluations and understandings merge in the judge's attempt to find a rule that has "purpose and meaning".[2] However, pressure of time will often preclude the judge from a closer study of real world consequences, but then:[3]

> "it is precisely the business of doctrine in consideration de sententia ferenda (concerning how the judges should decide; my insertion) to assemble and systematize that insight and evaluation of social facts and associated circumstances which can make a valuable contribution to the growth of law through the practice of the courts."

To the fulfillment of this task, i.e. for analysis de sententia ferenda and *de lege ferenda*, Ross saw the need for "legal-sociological knowledge of the causal connection between the enactment of laws and human behavior". He continued:[4]

> "The knowledge relevant for legal politics proper is concerned with problems such as, for example, the following: What influence does the formulation of the rules of damages have upon the caution people exhibit in various situations? What part is played in this connection by facilities for insurance against liability?"

Ross noted that legal sociology in its state then did not furnish answers to these questions, which led Ross to call for the development of a new science (which has become law and economics). He noted that constructing such a science is[5] "*an urgent but difficult task ... (it) would study the general mechanics of motive by which the law influences the conduct of men*". He asked:[6]

2. Alf Ross, *On Law and Justice*, 1959/*Om ret og retfærdighed*, 1971, p. 99, 118.
3. Alf Ross, *On Law and Justice*, 1959/*Om ret og retfærdighed*, 1971, p. 100, 119.
4. Alf Ross, *On Law and Justice*, 1959/*Om ret og retfærdighed*, 1971, p. 332, 422.
5. Alf Ross, On Law and Justice, 1959/Om ret og retfærdighed, 1971, p. 332 422.
6. Alf Ross, On Law and Justice, 1959/Om ret og retfærdighed, 1971, p. 328, 418.

> "Where then is the place for specific legal politics to be the domain of the lawyers? Perhaps we might feel that such a domain might comprise, for example, contracts, purchase, the law of torts, matters of insurance, registration, matters of marriage, majority inheritance, penal legislation, and other subjects that by tradition are the main territory of lawyers. When it is, however, accepted that the law does not exist for its own sake in these spheres either but must be evaluated according to its function in relation to objectives and attitudes lying outside law, it then seems that also these political problems must be a task for non-legal experts of various kinds. For example, are not the laws of tort and the insurance law closely connected with economic problems?"

Hence, Ross did not resist normative analysis of law; he wanted legal analysts to analyze how *objectives and attitudes lying outside law* could be realized through legal means. What he disliked was analysis that hid its own value premises; it should make its objectives clear from the outset. He wrote (p. 3) that legal scientific arguments should be based on hypothetically accepted evaluative criteria, not on the analyst's own thinly disguised political views.

On the basis of this account, one might expect him to have cherished a role for fairness (or justice) and welfare concepts in the scientific analysis of law, since by such concepts the analyst can make his or her normative criteria explicit. When he mentioned that the judge's evaluative criteria are culturally determined, one might expect him to have included in this the judge's sense of fairness or justice (or the judge's conception of generally held fairness or justice notions in society), and so one might expect him to have advocated an analysis of how different conceptions of fairness could best be realized through legal means. Similarly, one might expect him to have advocated the expression of the analyst's hidden value judgments through the use of social welfare functions. But such expectations would be frustrated. Rather, he was in fact highly skeptical of these concepts, considering them scientifically meaningless. I first discuss his view of the role of the concept of fairness and then of social welfare.

3 Ross's dismissal of the concept of fairness

Ross considered the concept of fairness as void of independent meaning (p. 358, Danish version). He wished to establish the study of law on the basis of scientific (i.e. verifiable) concepts and to discard what he viewed as metaphysical remnants of natural law. In this he was strongly influenced by logical positivism, as is apparent when he writes that any statement concerning the fairness of a rule or verdict

is tantamount to the expression of a mere feeling or preference. Thus, he wrote (p. 358): "A says: I am against this rule because it is quite unfair. He should say: This rule is unfair, because I am against it." Ross went so far as to say that statements of unfairness are only attempts at emotional pressure, and therefore have no role in rational debate, let alone in legal analysis. To substantiate his point, he noted that the idea of fairness in the form of equality, i.e. in the form of the statement that equals should be treated equally, is empty, for the substantive question in any concrete context is what should be treated as equals. Everyone agrees with the abstract maxim, but there may be substantial disagreement about what qualifies as equals. For instance, women and men may not be considered as equals in a given culture and equal pay may therefore not follow as a demand from the requirement of equality in that culture. To argue on rational grounds in favor of one notion of equality over another would hence, in Ross's view, require pointing to real-world consequences of either notion, whereas no such rational discussion can be conducted concerning the basic postulate of what should be counted as equals. Hence, according to Ross (p. 359 (my translation)): "*To state the demand for equal pay for men and women as a demand for fair equality is to provide no justification.*"

4 Ross's criticism of the concept of social welfare and of utilitarianism in particular

Ross was equally dismissive of concepts of social welfare, such as those incorporated in social welfare functions, which attempt to measure the overall well-being of individuals by aggregating their welfare in some manner. He saw the concept of social welfare as *a chimera – an illusion or fabrication of the mind,* and accordingly criticized the role economists (e.g. Frederik Zeuthen (1954)) played in prescribing policy based on it.[7] Again, what was at stake was Ross's attempt to rid legal science of superstition in the form of metaphysics. He stated in the introduction (p. 4):

> "Equally, I believe in the domain of legal politics to have overcome the reminiscences of moral-metaphysical imaginations, that have been expressed in the doctrine of 'social welfare' as guiding star for legal policy."

To substantiate, he first argued that while individuals can be better or worse off, society is not an entity that can possess welfare. Second, economists were, he

7. Frederik Zeuthen, "Professor Ross om politik og videnskab – samt lidt om nutidig økonomisk velfærdsteori", *Nationaløkonomisk Tidsskrift*, 1954.

thought, hiding their own value judgments behind an apparently scientific or objective standard of social welfare. As mentioned, Ross warned against statements that purported to be objective, but were really based on unspoken value premises. Third, concepts of utility functions and social welfare functions entailed maximization of incommensurable variables. Just as the individual must make choices among incommensurable goods (buying shoes or going to the opera), so society must choose among different kinds of goods and utilities that cannot be gauged along a single measure of social utility.

Since Ross viewed both fairness and social welfare as empty concepts, it will come as no surprise that he was also highly skeptical of utilitarianism, which seeks to combine fairness and social welfare in the solution that maximizes the sum of people's utilities. Ross saw utilitarianism, whether in the old form of Bentham or in more modern forms such as that of Leonard Nelson (1917), which he analyzed at length in "Kritik Der Sogenannten Praktischen Erkenntnis" (1933), as a masquerade for value judgments or hidden interests.[8] While Ross admitted that utilitarianism in the way proposed by Nelson corresponded to common intuitions about fairness or justice, he added that this only made it all the more important for him to refute it (p. 278).

I shall now argue against these views. My view will be that fairness and social welfare concepts can usefully be applied to legal analysis, both to understand law as it is and to prescribe better law.

5 On the role of the concept of fairness in the analysis of law

Ross may be right that statements about what is fair are expressions of preference, not something that has intrinsic truth value. This may be what he meant when he spoke so strongly against fairness arguments. But his words seem to have been taken to mean that there is no room for fairness in the analysis of law. However, preferences matter, and statements concerning preferences are not vacuous. Concrete notions of fairness can, as preferences, be part of conditional normative statements and may as such be meaningful. It is e.g. not meaningless to discuss how labor law should be devised from the premise that there should be equality between the sexes in terms of remuneration.

Similarly, the following fairness norms make sense to most people: sanctions should be proportional to the harm done by an offense, and by extension the innocent should not be convicted. These are fairness norms that are continually

8. Leonard Nelson, *Kritik der praktischen Vernunft*, 1917, Vol. 1, Рипол Классик.

traded off against other aims, such as optimal deterrence. If one adopts a high sanction in the form of a large fine for a given infraction, one can economize on enforcement effort, and so efficiency and fairness must sometimes be traded off against each other. Similarly, for some crimes it would be detrimental to deterrence if a very high burden of proof were applied to avoid innocent conviction, and so again, a trade-off must be made that requires analysis. The analysis might consider how strong the fairness preferences are in the population and how much harm is caused (through less prevention of crime) by a given standard of fairness (one attempt is Henrik Lando (2009)).[9]

Another example that fairness may matter and that it can be meaningfully analyzed can be found in tort law. When two injurers contribute to a victim's loss, the question becomes how much each should pay in compensation to the victim. It is well known that this may represent difficulties, e.g. when each injurer's negligence is sufficient and each is not, therefore, a necessary cause of a given harm. Some analysts have claimed that simple fairness considerations in this latter case lead to the result that they should both bear some proportion of the loss. It is not always made clear which fairness notion this builds on and it does not provide an answer as to how these proportions should be fixed. Game theorists have attacked the problem in a more fundamental manner by setting up axioms of fairness for how two (or more) injurers should split a loss to which they have both contributed. One axiom in their analysis is that the rule should not discriminate against any injurer: if he or she has acted in the same manner as the others, he or she should be treated the same. This means that the identity of the injurers does not matter, only their acts. It is Ross's equality maxim in the form that only acts matter and equal acts should be treated equally. Another axiom is that compensations should be determined according to marginal contributions to harm, and nothing else. These marginal contributions are what each injurer has contributed given different assumptions of how the others act. A third axiom is that the victim should be fully compensated if the victim has not contributed to the harm. It can be shown that these axioms provide a uniquely correct attribution, known as the Shapley value (Samuel Ferey & Pierre Dehez (2016)).[10] No doubt, this fundamental approach to causation, based on fairness axioms, is not easy for courts to apply, but the point here is that fairness issues are not beyond scientific analysis.

9. Lando, H. "Prevention of Crime and the Optimal Standard of Proof in Criminal Law", 2009, Review of Law Economics, *5*(1), 33.
10. Samuel Ferey & Pierre Dehez, "Multiple Causation, Apportionment, and the Shapley Value", *J. Legal Stud.*, 2016, 45(January), p. 143–171. https://doi.org/10.1086/685940

A third example can be found in contract law. If a seller of a good breaches a contract because he has obtained a better offer from a third party, it has been shown (Maria Bigoni et al. (2017)) that the buyer tends to feel more aggrieved than if breach is caused by an unexpected increase in production costs.[11] If one takes the view that contract law should cater to the interests of contracting parties, one must also conclude that judges should attempt to take such fairness preferences into account when interpreting contract law The fairness norm may e.g. affect the court's stance on the application of a rule of tortious interference in contract.

In sum, conditional normative statements involving fairness are not meaningless, but can be relevant not only to legislators, but also to courts.

6 On concepts of social welfare in the analysis of law

I shall now argue that there exist notions of social welfare that, like fairness concepts, can be part of meaningful, conditionally normative statements and that can also be of help in understanding law as it is.

I address three concepts of social welfare: Pareto optimality, Kaldor-Hicks efficiency and the utilitarian optimum.

6.1 The concept of Pareto optimality

A rule or verdict is Pareto-efficient or Pareto-optimal when there is no other rule or verdict that makes one person better off without making another person worse off. Note that this concept does not fall prey to Ross's criticism of the concept of social welfare that one cannot weigh people's welfare against each other, as it does not require such weighing.

Its usefulness for understanding the law arises mainly when the law concerns parties that are in a contractual relationship, as the following example illustrates. Consider person A who possesses wealth, but no entrepreneurial ideas, and person B, who possesses an entrepreneurial idea, but no wealth. A may lend to B, but unless B can commit to repaying, A will not lend. In this situation, the State may set up a system of enforcement backed by the State's monopoly on the exercise of physical force. Force may be necessary to seize B's assets if B does not repay, such that B can effectively commit to repaying the loan. If such a system is established, A will know that it will generally be in B's interest to repay the loan, because his assets will otherwise be sold off and the proceeds handed over to A. Such State

11. Maria Bigoni et al., "Unbundling Efficient Breach: An Experiment", *Journal of Empirical Legal Studies*, 2017, 14(3), p. 527–547. https://doi.org/10.1111/jels.12154

enforcement is plainly in the interest of both parties, for if it were not for such commitment, it would be optimal for B to borrow and not repay (barring ethical and reputational concerns), and anticipating this, A would not lend to B. B would then not be able to finance his project, and A would not be able to share in the proceeds from the project. In this sense, the general rule that B's assets act as security enhances the welfare of lenders and borrowers alike, and this seems like a very plausible explanation for its universal application across legal systems. The explanation works whether the median voter is a borrower or a lender, and it would not be correct to say that the system exists to protect the powerful and rich, who are lenders, against the powerless and poor, who are borrowers. Going a little deeper, one can in the same way understand why the system of bankruptcy is set up, protecting the borrowers' assets from being sold off by individual creditors. When there are many creditors, it is in the interest of creditors as a group to prevent a race between themselves to be the first to liquidate assets that are often more valuable together in a going concern. *Ex-ante*, it is Pareto-efficient for all involved that assets are protected from premature liquidation; such protection is afforded by a borrower declaring bankruptcy.

By the same Pareto logic, it is possible to explain the main features and the details of contract law, company law, and other areas of civil law where the parties are in contractual relationships. Of course, reality will only broadly correspond to Pareto efficiency, and some aspects of law cannot be so explained (and, in some cases, may need revision). However, considering law through the prism of Pareto efficiency nevertheless provides a key to understanding it, and also for improving it.

Henry Ussing, a Danish law professor who, as the Danish reader is likely to know, was influential in shaping Danish contract law in the last century, expressed the reasoning as follows (Henry Ussing (1967), p. 180):[12]

> "For contracts involving mutual obligations the task must here be, – as so often – to conceive rules that on average conform to the parties' interests, such that those parties who may contemplate the question beforehand in most cases will be satisfied by the rule."

The point is that the Pareto principle has significant explanatory and prescriptive power when the parties are in a contractual relationship.

What is more, the core of legal doctrine can in the area of contractual relationships be understood in light of Pareto optimality. Legal doctrine works by teaching law students certain key principles and concepts (such as causation, negligence,

12. Henry Ussing, *Obligationsretten: almindelig del*, 4th edition, 1967.

strict liability, rules concerning damages such as expectation damages versus reliance damages, etc.). These form a system that allow for somewhat predictable resolutions of conflict, but when times and values change, and in general in hard cases, the concepts and the system must be interpreted. One must then go to basic rationale of the concepts and of the entire system. Here, law and economics analysis, which seeks to understand the concepts in terms of Pareto efficiency, can provide useful insights.[13]

6.2 The concept of Kaldor-Hicks efficiency

Another concept of social welfare is Kaldor-Hicks efficiency, which simply measures how strongly different parties are affected by a rule in monetary terms, as measured by their willingness to pay. If the monetary gain is greater for those benefitted than the monetary loss to those harmed by the rule, the implementation of the rule is said to be a Kaldor-Hicks improvement. This is the principle used in cost-benefit analysis. Generally, analyzing laws and court rulings from the perspective of Kaldor-Hicks efficiency is often simply a way of considering costs and benefits that any person would be likely to consider, if the rule in question is of a mundane kind that does not call upon deontological concerns. The advantages and disadvantages are simply labelled benefits and costs in the economic analysis.

Kaldor-Hicks efficiency can have normative appeal, especially if losers and winners are not always the same, but some people benefit from one rule while others benefit from another. Over time, all may then be better off by applying the criterion. It need not have intuitive appeal, however, when rights, which should be equal for all and which should be allocated independently of one's willingness to pay for the right, are at stake, as this willingness is to a significant degree determined by one's wealth. Yet even when such objections exists, it can be informative to know whether a rule is Kaldor-Hicks-efficient.

6.3 The utilitarian analysis

To argue the usefulness of the utilitarian mode of thinking for understanding and prescribing law, I shall exemplify the version of utilitarianism developed by the Nobel Prize-winning economist John C. Harsanyi (1953).[14] Consider two neighbors, one of whom plays loud music in the garden, disturbing the other. The police

13. In *Foundations of the economic analysis of law*, Harvard Univ. Press (2009), Shavell attempts to provide a deep explanation of basic legal doctrines from a concept of social welfare, partly from Pareto efficiency.
14. John C. Harsanyi, "Cardinal utility in welfare economics and in the theory of risk-taking", *Journal of Political Economy*, 1953, 61(5), p. 434–435. https://doi.org/10.1086/257416

is called and must settle the dispute as to whether one neighbor should be told to turn down the music or the other be told to accept the noise. What would be the fair or just outcome? Imagine, first, it is 1 am on a Tuesday morning, the aggrieved party cannot sleep and must get up early in the morning to go to work, and that the noisy neighbor likes to listen to old records. The police may perhaps order the music to be turned down to a level such that the neighbor in need of sleep cannot hear it. The basis of the decision, the police might say, is that the neighbor in need of sleep is the one more strongly affected by the decision. Most people would probably agree with this decision and say that the decision is just or fair. If the police had been called on a Saturday night at 9 pm and had the noise been moderate, and had the purpose of the music been a family gathering, and had there been a promise to end the music at 10 pm, the police might have allowed it, and this again would be on the basis of a weighing of the utility consequences for the two parties.

The question is why most people would consider these decisions fair. Presumably, the answer is that most people would put themselves in the position of the two neighbors, as the police likely did, and reach the same conclusion when comparing the strength of the interests. Yet, the conventional wisdom rooted in logical positivism is that interpersonal utility comparisons have no basis, that we cannot compare the parties' interests, as there is no evidence, no sensory data, on which we can base such a comparison. How, then, do we reconcile our everyday use of interpersonal comparisons of utility[15] and our views on fairness based on such comparisons with their alleged impossibility? In answering this question, Harsanyi did not deny that it is hard to measure differences in personal utility, but he insisted (1978) that we are able (to some extent at least) to put ourselves in the shoes of others and to imagine how they must feel.[16] He rejected the claim by logical positivism that only objectively verifiable statements have meaning. Listening to music at night is something we can imagine doing and we can imagine how a music lover might feel about it. Not being able to sleep and having to get up early in the morning is also something we can imagine, because we have tried it ourselves. Introspection provides meaningful information. Moreover, Harsanyi stressed that most of us want the same things: a nice place to live, travels, good food, the absence of physical pain, etc. Of course, we are also different due to different genes, upbringings, and experiences, but these are factors that we may

15. As when Helena, in her monologue in *A Midsummer Night's Dream*, Act 1, Scene 1, exclaims: "How happy some o'er other some can be!"
16. John C. Harsanyi, "Bayesian Decision Theory and Utilitarian Ethics", *The American Economic Review*, 1978, 68(2), p. 223–228. https://doi.org/10.1007/978-94-009-9532-1_8

attempt to take into account as impartial evaluators.[17] One might add to this that we are also not without information about the strength of other people's preferences. In the example, the police may be aware of the rules governing associations of houseowners (where we would expect both the interests of lovers of music and lovers of peace and quiet to be represented). Also, the decision made by the police may be met with consent, even among music lovers and sleep-deniers, which would reinforce the police's belief in the correctness of his decision. Finally, we do obtain various other kinds of information about strength of preferences; people spend more or less effort to obtain injunctions against noise; we can observe that they sometimes sell to move to a quieter place, doctors can discern the health impact of noise and sleep deprivation, etc.

Also, Harsanyi insisted that although prone to error we have to make choices based on introspection; the police cannot conclude that interpersonal comparisons are impossible and leave the scene.

Assuming, then, that we can and must put ourselves in the shoes of others, Harsanyi conceived the fair outcome as that which we should choose behind a veil of ignorance (a concept that Rawls later adopted and that built on Adam Smith's impersonal spectator). In the example this would imply that the just decision is that which we would make if we attached equal probability to being one or the other neighbor (with their particular characteristics). He showed, using a theory of rational choice under incomplete information, that we would rationally choose that outcome which maximizes the sum of the two neighbors' utilities. This analytical result gave new life to utilitarianism by providing it with a new foundation. It combines fairness and welfare in a simple solution.

Ross raised two counterarguments, which he saw as decisive against Nelson's account of utilitarianism and which built on some of the same foundations as Harsanyi's. These arguments were extracted from Ross's discussion in "Kritik der Sogenannten Praktischen Erkenntnis" (1933).[18]

The first counterargument was that the theory of weighing of interests cannot explain law at a deep level, for it must be determined which interests should be weighed, and this presupposes and such interests are defined by that legal order which was to be explained (p. 279). For instance, why would a depositor of a failed bank not want to be repaid ten times his or her deposit? This might be in his or her strong interest. When we do not consider such outcomes, it is because we take

17. An interesting question is the extent to which we can actually imagine how others must feel. Arrow touched on this in Kenneth J. Arrow, "Extended Sympathy and the Possibility of Social Choice", *The American Economic Review,* 2017 , Vol . 67, No. 1, 67(1). https://doi.org/10.1007/BF02378811

18. I found no other compelling argument in the original text.

existing rights as given and proceed to establish what is fair on that basis. But then we can never derive the basics of law, for we cannot assume something which should be proven. Ross had found a circle.

This argument is, however, not correct; the utilitarian optimum is independent of the initial assignment of rights (if one considers the parties as not exhibiting loss aversion[19]). If, for instance, two persons together possess two goods, the utilitarian optimum is where the sum of the utilities of the two persons is maximized, and this optimum exists regardless of the initial allocation of property rights. It depends only on the preferences of the two people. In the example of the two neighbors, that neighbor most affected should hold the right. In the example of the depositor mentioned above, it is easy to establish the inefficiency of paying depositors more than their deposits when banks fail; such a scheme would fail the test of Pareto efficiency as described above for the case of contractual relationships (for instance, depositors would flock to failing banks). Such schemes would also fail the utilitarian test, for to pass this test a scheme must first pass the Pareto test.

Ross's second objection concerned the objectivity of the interest weighed. In Ross's reading, Nelson required each person's interest in an outcome to be weighed by an objective standard, not necessarily equal to how the person values the outcome himself. This criticism does not apply to Harsanyi's theory, however, and so need not occupy us here. In Harsanyi's theory we must try to put ourselves in the position of the other person, as experienced by the other person given his or her special circumstances and characteristics.

In conclusion, it cannot be said that Ross refuted utilitarianism in the form presented by Nelson, and he never addressed Harsanyi's revival of it.

I cannot go into the pervasiveness of utilitarian thinking in law in any depth. My claim would be that utilitarian considerations – the fair or welfare enhancing weighing of interests – are ubiquitous and hence of immediate value for the attempt to explain and design law. Let me only mention three examples of utilitarian considerations being at the same time important for understanding and prescribing law. The three examples are far from exhaustive, only indicative.

First, in criminal law, the level of sanctions and the amount of police resources devoted to a given crime are or should be proportional to the perceived level of harm caused by the crime. This can be justified by utilitarian reasoning where the legislator considers how the victim of the crime must experience the crime. The more harmful the crime, the more important it is to deter and incapacitate the

19. If people's preferences are shaped by their entitlements, the utilitarian analysis may lead to more than one optimal rule, but this does not negate the value of the analysis. It only reflects the fact that there may be more than one optimal rule.

offender. (I have argued above that proportionality between harm and sanction can also be seen as stemming from a fairness principle, which shows the close connection between fairness and welfare, but the same is harder to argue for the amount of police resources, which can best be understood from the concept of social welfare).

Second, libel law can be seen as weighing the utility consequences of chilling speech with the utility consequences for the person whose reputation may be harmed.

Third, taxation patterns can at least partly be understood from James A, Mirlees's (1971) utilitarian model, which seeks to minimize the distortionary impact so as to maximize the sum of people's utilities.[20]

A caveat might be in order to this defense of utilitarianism. I do not wish to deny the point made by Ross that there will always be a subjective element in determining the social good. It would be naïve to think that e.g. utilitarianism provides the answer under all circumstances, as there may well be a question of how well it applies to a given case (e.g. whether deontological concerns should be taken into account) and of how to apply it concretely. For instance, normative considerations that are not welfare-based can enter into the consequential analysis of law when it comes to the issue of what kind of utility to count as socially illicit. It is a fundamental question for utilitarianism to answer whether all utilities should be treated the same. A person might e.g. derive great satisfaction from driving too fast, and it is not clear whether this kind of utility should count as part of the social welfare. This question cannot be resolved on utilitarian grounds, for it concerns the foundation of the utilitarian analysis. For the legal analyst, this means that he or she must make clear whether or not such unsocial preference is included in the analysis, and how conclusions from the welfare analysis will be affected by its inclusion or exclusion. Again, in practice this issue does not render the analysis useless. On the contrary, the analysis can shed light on how the right choice may depend on what Ross, in my view, was right in thinking of as an irreducibly subjective, ethical consideration.

7 Concluding summary

I have made two points. First, contrary to a commonly held view, Alf Ross did not see the role of the legal analyst as only involving the study of what courts will do. He saw a role for conditional normative analysis of law and in fact called for the

20. James A. Mirrlees, "An exploration in the theory of optimum income taxation", *The Review of Economic Studies*, 1971, 38(2), p. 175–208. https://doi.org/10.2307/2296779

development of law and economics, i.e. for the consequential analysis of law. Second, that notions of fairness and of social welfare are not to be viewed as final truths about how to weigh interests in legal disputes. Rather, they are analytical tools that enable the analyst to structure the analysis and to formulate conditional normative statements. The conditional normative statements establish a connection between well-defined aims and alternative legal rules. The question is not whether the notions of fairness or of welfare are universally true; they must often be applied eclectically with a view to their limitations in a given context. Rather, the question is whether the conditional normative statements are informative to the decision maker. Ross wanted to rid legal analysis of a priori given values; he saw them as unscientific and as dangerous to society's progress (Blandhol, Sverre. "Juridisk ideologi. Alf Ross' kritik af naturretten", *Kbh* (1999)). This wish led him to adopt a logical-positivist philosophy and its narrow conception of meaning. However, on the basis of a broader concept of meaning such as that of pragmatist philosophy, one can uphold the view that social values are not given a priori and still maintain that they can be part of meaningful, scientific analysis.