

Ross' Concept of the Legal Consciousness and the Deliberate Normative Change

Ross' theory of law is based on several theoretical positions. Two of them - the monistic ontology¹ on law and the scientific approach to law - are usually seen as the realistic propositions in opposition to some legal positivist theories. Ross' scientific approach to the law can be seen in the way as consisting of two phases: a) explaining the existing activities of the participants in different practices connected to law and b) describing these practices through the model of science.² According to Ross what distinguishes scientific from a non-scientific model of the reality description is a possibility of the descriptive theory to be falsified.³ The presentation of the existing practice through the scientific model can be applied not only to the legal scientists' practice but also to the practice on norm creation and norm application.

The concept of legal consciousness has several functions in the Ross' theory.

- 1) The normative language of practitioners of the law is connected with the factual world in time and space through legal consciousness, and thus ontological monism is confirmed.
- 2) The legal consciousness is suitable, under the assumption on adequate conditions for the scientific research, for the empirical testing which enables theories on practices connected to the law which rely on the legal consciousness, to be characterised as falsifiable and thus as scientific theories. It should be pointed out, however, that according to Ross the theories on the normative content of the particular legal system are already falsifiable by the very possibility of courts to make the final decisions. Although the falsifiability based on the research of the legal consciousness is the 'secondary' in this sense, it nevertheless strengthens the scientific position of the legal theories by providing the possibility of testing for a broader scope of factors that influence law applying decisions. In the analysis of the process of changing the legal system the empirical research on the legal consciousness is even of greater importance.
- 3) The concept of legal consciousness contributes to better understanding of the law as it explains the causes of the particular legal institutions and different forms of the legal systems.
- 4) The concept of legal consciousness contributes to the understanding of the process of changing the legal system and the possibility of normative influences on this process.

In this research, we will expose the Ross' concept of the legal consciousness and particularly its importance for the understanding of the process of changing the legal system and possibilities of the normative influence on this process (function 4). Through the clarification of the specific elements of Ross' concept of legal consciousness, some additional thesis and more detailed explanations will be provided. We will first elaborate the concept of the legal consciousness and continue with the specific

¹ Ross declines the jurisprudence which considers the world of ideas as entities separated from the physical and psychical phenomena in time and space. Alf Ross, *On Law and Justice*, The Lawbook Exchange, Ltd, Clark, New Jersey, 2004, at 65.

² According to Jakob v. H. Holtermann, "Ross' goal is epistemological, i.e. to show how the doctrinal study of law can be possible as a science. Unlike Hart, he is not interested [or not only] in ordinary usage of legal terms per se". Jakob v. H. Holtermann, *A Straw Man Revisited: Resettling the Score between H.L.A. Hart and Scandinavian Legal Realism*, 57 *Santa Clara L. Rev.* 1 (2017), at 21.

³ Karl Popper's response to the demarcation problem between science and pseudoscience was the falsifiability of the theory. Karl Popper, *The Logic of Scientific Discovery*, Routledge, London and New York, 2002.

role of this concept in the explanation of the normative change and deliberate changing of the legal system.