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“Why Democracy?”

*On the Importance and Actuality
of Alf Ross' Views Upon
Representative Democracy*

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Summary

The purpose of this graduate thesis is to discuss the concept of democracy as conceived of by Alf Ross in his book “Why democracy?”, one of the most important works on democracy that appeared in the 20th century. Further, the thesis aims to establish whether or not Ross’ views, seen against the background of modern Swedish democracy, might still be of interest in our days. According to Ross, democracy is a method of governing, and democracy as an Ideal Type can serve as a tool in examining actual government structures in order to determine the level of democracy, i.e. the democratic factor. With respect to this factor, Ross differentiates between three entities, namely: Intensity, which refers to the breadth of the eligible electorate; Effectiveness, which refers to the degree to which people are given the possibility to realize their wishes; and, finally, Extent, which refers to the number of government organs under the control of the people.

By applying Ross’ Ideal Type to that concept of democracy which emerges from the final report of the “Swedish Democracy Commission” (2000), it can be established that modern Sweden is almost ideally democratic. Indeed, in some respects - mainly concerning the principle of human equality and the trust in the people’s capacity to understand complex political issues, to form a well founded opinion on them and to take active part in the political process - Swedish democracy seems to be considerably more “up-to-date” compared to Ross’ views. While Ross in some respects adhered to thoroughly modern and humanistic ideas, he does not, in other respects - mainly concerning his ambiguity with respect to the principle of human equality - emerge as democratic as we would have wished the classical theorist of democracy to be. Nevertheless, Ross’ concept of democracy – democracy as a matter of degree - stands out as highly interesting and will presumably continue to do so even in the 21st century.

Svensk Sammanfattning

Syftet med detta arbete är att diskutera Alf Ross demokratibegrepp, såsom han presenterar det i sin bok *Varför Demokrati?*, ett av de viktigaste bidragen till demokratidiskursen på 1900-talet. Vidare syftar arbetet till att klargöra huruvida Ross syn på demokratin, sedd mot bakgrund av det moderna svenska demokratibegreppet, fortfarande är relevant.

Enligt Ross är demokrati en metod för hur staten kan organiseras och styras och termen idealdemokrati ett verktyg, som kan användas för att mäta graden av demokrati i en befintlig struktur, vilket kallas den demokratiska faktorn. Denna kan delas upp i tre delar, nämligen Intensitet som syftar på hur många röstberättigade det finns och vilka krav som ställas för att en enskild individ ska få delta i valprocessen, Effektivitet vilket syftar på i vilken utsträckning de röstberättigade medborgarna har möjligheter att kunna göra sina åsikter gällande för att kunna påverka beslutsprocessen; och slutligen Extensivitet vilket hänför sig till hur stor andel av den statliga förvaltningsapparaten som medborgarna har möjlighet att ha kontroll över.

Genom att applicera Ross term *idealdemokrati* på det demokratibegrepp som presenteras i den svenska demokratiutredningen (2000), kan det fastslås att modern svensk demokrati är näst intill ideal. Inte minst då det gäller jämlikhetsbegreppet och förtroendet för medborgarnas förmåga att förstå komplexa politiska frågeställningar samt att initierat förhålla sig till dessa och att aktivt delta i den politiska processen, framstår den svenska demokratin som mer i linje med ett modernt tänkesätt och visar ett större förtroende för människans kompetens i olika avseenden. Även om Ross i viss avseenden uttrycker genomgående moderna och humanistiska idéer framstår hans ambivalens vad gäller principen om människors jämlikhet inte så demokratisk som man kanske skulle önska av den klassiske demokratiteoretikern. Likväl, framstår Ross demokratibegrepp som högst intressant och kommer sannolikt att fortsätta vara det även in på 2000-talet.

Preface

I want to express my deepest gratitude to Professor Uta Bindreiter, whose thoughtful, very inspiring guidance and understanding has not only provided me with inspiration and hope in accomplishing this thesis, but also with a much deeper understanding in the field of Jurisprudence.

Lund, August 2008

Rasmus Tideman

Abbreviations

SFS

Svensk Författningssamling

SOU

Statens Offentliga Utredningar

1 Introduction

1.1 Presentation of the Subject

Democracy, defined as "government by the people in which the supreme power is vested in the people and exercised directly by them or by their elected agents under a free electoral system",¹ has been used for thousands of years since it was first practiced in ancient Greece. However, democracy is not immutable. The institutions of democracy are fragile in the sense that they take a long time to build up, but may collapse very quickly, not least through violence. Without anyone really wanting it to happen, the institutions of democracy can lose their efficacy and their norms. This can take place by negligence or by political representatives consciously or recklessly misusing the confidence of citizens.

Therefore, the concept of democracy seems to be in frequent need of a redefinition or a new consensus. This need was particularly evident in Europe immediately after the ending of World War II, when the facts of the holocaust and the destruction of Europe, caused by a man who had been elected democratically, had to be addressed. In this turbulent time, the Danish legal philosopher Alf Ross published his work "Why Democracy?" regarded as a classic work on the subject of democracy. There Ross presented his concept of democracy and what he believed the advantages of applying it were. In his opinion, the word "democracy" denoted a certain constitutional or organizational form, a method for expressing the public will or exercising public authority. Democracy, to Ross, meant popular government with the administration or governing power residing in the people as a whole, rather than in one person or a small group.

In Sweden, the concept of democracy has recently been the object of governmental inquiry, with the view of reaching a new consensus on the future development of democracy. There, much concern has been raised over the state of modern democracy and the ability of the citizens to influence policies and decision-making processes. In my view, this effort creates an excellent opportunity to establish whether or not Ross' views on democracy might still be of interest in today's discussions.

¹ Democracy (2008), in *Merriam-Webster Online Dictionary*: <http://www.merriam-webster.com>

1.2 Purpose of the Thesis and Problem Formulation

The general purpose of this graduate thesis is, to discuss the concept of democracy as presented by Alf Ross in his work “Why democracy?” (1946), considered one of the most important works on democracy presented during the 20th century. Specifically, the thesis deals with the problem if, and to what extent, Ross’ views on democracy as seen against the background of Swedish democracy might still be of relevance.

1.3 Delimitations

As mentioned above (1.2), The general purpose of the thesis is to discuss Ross’ concept of democracy. To accomplish this purpose, Ross’ work “Why democracy?” seems to be the most appropriate choice of literature. Certainly, Ross dealt with democracy even after 1946, but to include this work would fall outside the scope of this thesis. For the same reason, I have restricted myself to Ross’ legal philosophy as presented in his work “Towards a Realistic Jurisprudence” (1946).

1.4 Material and Method

The sources for the present thesis has been, on the one hand, two major works of Ross’, namely, “Why Democracy” (1952)^{*)} and “Towards a Realistic Jurisprudence” (1946) and, on the other hand, an official publication: In order to illustrate the state of modern Swedish democracy, the final report of the “Swedish Democracy Commission” (2000) was chosen, since it is the most recent work in this field and, what is more, had been requested, and democratically approved, by the Swedish *Riksdag*. Therefore, one may assert that this report represent the official perspective of Swedish democracy.

^{*)} Since Ross ’’*why Democracy?*’’ is available both in Swedish, Danish and English, I decided to use the English version in order to reduce the risk of misapprehension.

The method that was employed falls under the term traditional legal – dogmatic: While Chs. 2 and 3 are mainly descriptive, Ch. 4 (Analysis) is evaluating and characterised by a comparative method.

1.5 Structure

The graduate thesis can be said to fall into three major parts (Chs. 2-4) The *first* part (Ch. 2) offers a brief summary of Ross' biography and considers several aspects of Ross as a legal philosopher around 1946. Also, this part reflects upon, the ideas that influenced Ross' thinking: Did he acquire his views on value relativism from his Austrian mentor Hans Kelsen or, perhaps, from his Swedish mentor Axel Hägerström, from whom Ross also overtook several ideas, which affected his position among his contemporary Swedish colleagues?

The *second*, and central part of the thesis (Ch. 3) is devoted, partly to the way in which Ross looked upon the concept of democracy, partly to the modern Swedish concept of democracy as described in the final report of The Government Commission on Swedish Democracy (SOU 2000:1). This commission was set up in 1997 in order to shed light on the new conditions, problems and opportunities facing Swedish democracy in the 21st century.

The *third* part of the thesis (Ch. 4) contains the analysis. Here, the different aspects of Ross' concept of democracy are placed, so to speak, like a raster on the above mentioned, official efforts in this area. My conclusion will be depending on the consequences of the confrontation between the different dimensions of Ross' concept of democracy and the current dimensions of Swedish democracy.

2 Aspects of Alf Ross as a Legal Philosopher

2.1 A Short Biography²

Alf Ross was born in Copenhagen in 1899. After graduating from high school, he began to study law at the University of Copenhagen and got his law degree in the summer of 1922. After having graduated, he took up employment as a trainee in a law firm. As he felt that, he was not satisfied with the life of a barrister he decided to devote his time to further studies in the field of law. Due to his remarkably good study results he was granted a two year scholarship for studies abroad, and in 1923 he set out on a study tour, a journey that would last for two and a half years, taking him to France, England and finally to Austria, where he came to study for professor Hans Kelsen.

The purpose with Ross' travels had been to learn as much as possible about foreign law and foreign law systems, and the result of his two and a half years abroad consisted in his treatise "*Theorie der Rechtsquellen*". This work was submitted as a doctoral dissertation to the faculty of law at the University of Copenhagen as a doctoral dissertation in 1926. The dissertation was not accepted there, however, and therefore he turned to the University of Uppsala in Sweden and in particular to Axel Hägerström, famous professor of practical philosophy, and known as the founder of the so-called Uppsala school of philosophy. In Uppsala, Ross was finally awarded a doctoral degree in philosophy in 1929. In the same year, his treatise was published in Hans Kelsen's series "*Wiener Staats- und Rechtswissenschaftliche Studien*". Following upon his stay at Uppsala, Ross published two major works on the concept of law: "*Kritik der Sogenannten Praktischen Erkenntnis*" in 1933, dedicated to Axel Hägerström, and "*Virkelhed og Gyldighed i Retslaeren*" (Reality and Validity in Jurisprudence) in 1934. The latter work finally earned him a doctoral degree at the University of Copenhagen.

² Waaben, Knud, Alf Ross 1899–1979: A Biographical Sketch, in *European Journal of International Law*, volume 14 (2003) pp. 661 - 674.

Ross' earlier academic achievements had mainly concerned the subject of jurisprudence. In the late 1930's, however, he also began to teach constitutional law, and in 1938 he was appointed professor in International law. In 1950 one of Ross' older colleagues and former opponent, Fredrik Vinding Kruse retired from the faculty and Ross started to teach jurisprudence. In 1953, Ross published his most important work, entitled "*Om Ret og Redfaerdighed*" (*On Law and Justice*). In many respects, this book marked the peak of Ross' career in presenting new ideas in his field of interest, although another important work "*Directives and Norms*" was published in 1968.

Ross retired from the faculty in 1969, but he continued to publish articles on a wide range of subjects, mostly about current legal and social issues, both national and international. Even though concerned with the political debate, he never played an active part in the political life as a politician. In 1945 he had proclaimed his support for the Social Democrats. Twenty years later he declared himself no longer able to vote for that party because he feared it would enter a coalition with the Socialist Party. Alf Ross died in 1979 at the age of 80 years

2.2 Ross' Theoretical Position around 1945

For a characterization of Ross' development as a legal philosopher and of his standpoint around 1946, when he presented his work on democracy, different sources of information must be adduced. First, the legal philosophical approaches of his mentors, Kelsen and Hägerström must be described. Then, some aspects of Ross' publications "*Towards a Realistic Jurisprudence*" and "*Lehrbuch des Völkerrechts*", published in the 1940's, will be highlighted, since these works will shed some light on the ways in which Ross' two mentors have influenced his perception of legal philosophy. In "*Towards a Realistic Jurisprudence*", Alf Ross locates his theoretical position as influenced both by Kelsen's "pure theory of law" and the perspective of the Scandinavian realists.

2.2.1 Hans Kelsens' Influence

Around 1923, Ross met the Austrian jurist and philosopher of law Hans Kelsen (1881-1973) at Vienna and soon became interested in Kelsen's type of positivism. Kelsen is famous for the most rigorous development of a 'positivistic' theory of law, i.e. a theory that rigorously excludes from its analysis any social, ethical, political, historical etc. considerations. Kelsen claimed, that the traditional legal philosophies of the time, were hopelessly contaminated with political ideology and moralizing or with attempts to reduce the law to natural or social sciences. The legal order as understood by Kelsen – a hierarchical system of “higher” and “lower” norms - is based on a “*Grundnorm*” or basic norm, the validity and binding force of which is taken for granted, and once presupposed, endows all the lower norms of the system with validity.³ The basic norm is no usual norm. It has no content or intention; it merely establishes the validity and the effectiveness of the legal system. Legislation has not created the basic norm; the people who perceive the law just presuppose it. The basic norm is the norm behind the constitution. It says that the constitution ought to be obeyed and, consequently the legal norms established in conformity with the constitution.⁴ According to Kelsen, legal science does not deal with the actual events (what *Is*) but with norms (what *Ought* to be). The legal relation contains the threat of a sanction from an authority in response to a certain act. The legal norm is a relation of condition and consequence: if a certain act is done, a certain consequence ought to follow.

Obviously, Kelsen inspired Ross when he wrote his doctoral dissertation “*Theorie der Rechtsquellen*”. It ought to have been evident that Ross's analysis of French, English and German doctrines on the sources of law was a remarkable intellectual achievement.⁵ Ross based his approach to the concept of law on literature concerning the sources of law. He engaged in a study of the philosophical question of “*Sein und Sollen*” in law from this angle. From his anti-metaphysical starting-point Ross refers to the method, he pursued, along with a historical method, defining it as ‘*Die Immanent-Kritische Methode*’. Ross, in his dissertation,

³ Bindreiter, Uta, Why Grundnorm? A Treatise on the Implications of Kelsen's Doctrine (The Hague-New York: Kluwer Law International, 2002) p. 3.

⁴ Kelsen, Hans, *Reine Rechtslehre*, 2nd Edn. (Vienna: Deuticke Verlag, 1960); transl. by Max Knight under the title ‘Pure Theory of Law’ (Berkeley, California: University of California Press, 1967), p.6

⁵ Waaben, Knud, Alf Ross 1899–1979: A Biographical Sketch, in *European Journal of International Law*, volume 14 (2003) pp.661-674, pp. 661-662

was very close to the conclusion: Law has – like morals – no other “validity” than an empirical one.⁶

2.2.2 Axel Hägerströms’ Influence

Axel Hägerström (1868-1939), on the other hand, represented a different school of thought. He is considered the founding father of the Scandinavian school of legal realism.⁷ Influenced by the Neo-Kantianism of the Marburg school, he rejected metaphysics in their entirety. Paraphrasing Cato, his motto was: *"Praeterea censeo metaphysicam esse delendam"*. In Hägerström’s view words such as ‘right’ and ‘duty’ were basically meaningless since they had no correspondence in reality. Also, Hägerström regarded all value judgments as mere emotional expressions using the form of judgments without being judgments in the proper sense of the word. This position caused his critics to characterize his philosophy as "value nihilism". Hägerström’s intention was to destroy the distorting influence of metaphysics upon legal thinking and to provide the secure philosophical foundation for scientific knowledge of the law. He was committed to the view that the world in time and space consists of causal regularities between things and events devoid of any values that is related to his epistemological view that what there is can be known by experience. Hägerström’s philosophy advances a naturalistic approach that conceives the positive law as a system of rules in terms of behavioral regularities among human beings and legal knowledge as an empirical inquiry into the causal relations between legal rules and human behavior. The naturalistic approach leaves no room for the normative of the law and for legal knowledge in terms of reasons for belief and action.

2.3 Ross’ View on Law and Legal Philosophy

Not surprisingly, Ross’ own view on law and legal philosophy was influenced by both his mentors. The influence from the positivist theory of law was supplemented by the ideas of legal realism and value nihilism, ideas that corresponded with Ross’ anti-metaphysical

⁶ Ibid. p. 662

⁷ Bjarup, Jes, The Philosophy of Scandinavian Legal Realism, in *Ratio Juris*, volume 18 (2005) pp.1-15. p.1

critique of sources of law and with his interest in different aspects of human behavior. In his work “*Towards a Realistic Jurisprudence*”, Ross acts on the presumption that all legal rules refer to “definite actions, performed by definite persons”.⁸ What and who these are, can be found out by analyzing the rules of a given national legal system.

Ross divides the norms into two groups: norms of conduct, and norms of competence or procedure. The first group comprises those norms which prescribe a certain course of action, whereas the second group comprises those norms which create a competence (power, authority) – they are directives to the effect that norms which come into existence in conformity with a declared mode of procedure shall be regarded as norms of conduct. Thus, a norm of competence is an indirectly expressed norm of conduct. The norms of the constitution concerning legislation, for example, are indirectly expressed norms which prescribe behavior in accordance with the further norms of conduct which come into being by way of legislation.⁹ Ross regards legal norms of both kinds as directives to the courts and only indirectly as directives to the individual. Law, according to him, consists (among other things) of a body of legal rules regulating the exercise of physical force against a person by some public authority and law determines itself *what* authority.¹⁰

2.3.1 Normative Phenomena

There are, according to Ross, three kinds of normative phenomena: *Firstly*, law (legal system) containing norms for the regulation of psychical force (norms of conduct and norms of competence); *secondly*, normative phenomena of an institutional construction similar to law, but not sanctioned by psychical force (private associations, rules of games, international law); and, *thirdly*, morality and convention.¹¹ In his comparison between law and morality, Ross above all emphasizes that the former has objective characteristics which give it an

⁸ Ross, Alf, *Om Ret og Retfærdighed. En Indførelse i den Analytiske Retsfilosofi* (Copenhagen: Nyt Nordisk Forlag Arnold Busck, 1953); transl. by Margaret Dutton under the title ‘*On Law and Justice*’ (London: Stevens, 1958 [hereinafter: LJ], p. 33.

⁹ Ross, LJ p.32.

¹⁰ Ross, Alf, *Towards a Realistic Jurisprudence. A Criticism of the Dualism in Law* (Copenhagen: Munksgaard, 1946 [hereinafter: TRJ], p. 96.

¹¹ Ross, LJ p. 59.

institutional character (law-giver, courts and judges, a non subjective system of legal norms etc) whereas morality according to Ross means subjective attitudes of the individual.¹²

2.3.2 Jurisprudential Idealism

Ross distinguishes between two kinds of jurisprudential idealism, *material* and *formal*. According to *material* idealism, there is a specific idea of “justice” which is not only an ideal pattern for law but also the constitutive principle of it, or what makes it “valid” as law. Nothing, consequently, is law unless justice belongs to its content as the validity making content (as the validity making property). This view, Ross points out, has dominated Natural law in all times.¹³ *Formal* idealism, on the other hand, which has found its most striking expression in Kelsen, is above all characterized by its acceptance as law of any given social order, without the ethical reservations of natural law. To be aware of a norm as legal is, to be aware of it as “valid”. Legal validity cannot be inferred from natural facts, only from a superior norm. Legal science is not a social theory but a doctrine in norms, all of them derivable from a basic norm. Ross characterizes Kelsen’s *Grundnorm* as “an initial hypothesis whose sole function is to invest the constitution with validity.”¹⁴

2.3.3 Jurisprudential Realism

Jurisprudential realism, which Ross adheres to, interprets legal knowledge in conformity with modern empiricist philosophy: it rejects metaphysics. According to realism, there is no *a priori* knowledge of law; all knowledge which is not purely logical-mathematical, and thus also the cognition of law, is empirical. Validity must according to Ross be defined in terms of social activity.¹⁵ One of the greatest difficulties of idealism is, he says, to explain “how it is

¹² Ross, LJ p. 61.

¹³ Ross, LJ p. 66.

¹⁴ Ross, LJ p. 66.

¹⁵ Ross, Lj p. 67.

possible that the act of legislation as a social phenomenon can produce anything more than social effects, namely, valid obligations of an a priori nature¹⁶.

In his work *Towards a Realistic Jurisprudence*, Ross strongly emphasizes that in the principal theories of law, positivistic as well as idealistic, there is a fundamental dualism between “reality” and “validity” manifested in antinomies which, according to him, must be overcome “by showing that reality and validity, rightly interpreted are not irreducible categories, excluding one another”¹⁷; law belongs at the same time to the world of empirical facts and the super-sensual world of the eternal ideas, the realm of validity”.¹⁸ Ross characterizes legal theory as “a branch of the doctrine of human behavior” and, therefore, presupposes that “the legal phenomenon must be found within the field of psycho-physical phenomena constituting the domain of psychology and sociology” and that “every extant theory of law is in its foundation characterized more or less by three elements. Firstly, the element of reality, more precisely defined as an actual element of compulsion, secondly, the element of validity; and thirdly, a logical interdependence of these elements”.¹⁹ As the fundamental assumption, Ross put forward “that these three elements in the theory of law actually correspond to and symbolize the following three factors in the psycho-physical realities of law; 1) an interested behavior attitude more precisely determined as an impulse of fear of compulsion; 2) a disinterested behavior attitude having the stamp of validity; and 3) an actual, inductive interaction between these two factors in such a way that the existence of the former tends to cause and stabilize the existence of the latter, and vice versa”.²⁰ This, being in contrary to the view that compliance with legal rules is conditioned solely by fear and that the legal system is merely a system of compulsion.

2.3.4 Ross and Kelsen - a Philosophical Interplay

Step by step, Ross had acquired an approach to legal philosophy which he could hold as his own. Accordingly, he gradually became prepared and motivated to criticize his mentor. Since there are several disagreements between Kelsen’s Pure Theory of Law and the Scandinavian

¹⁶ Ross, LJ p. 67.

¹⁷ Ross, TRJ p. 77.

¹⁸ Ross, TRJ p. 32.

¹⁹ Wedar, Sven, Realism and Validity. Studies in the Legal theory of Alf Ross, in *Monographs in Practical Philosophy* (Höganäs, Tryckeri AB Höganäs, 1985) p.15.

²⁰ Ross, TRJ p. 78.

realism, it is not surprising that an intellectual exchange of the two legal philosophers arose around their different positions towards legal science, the relationship of reality and validity, the legal duty, the character of legal and scientific propositions and the concept of validity. With respect to the subject matter of the relationship of reality and validity, Ross strongly emphasizes the dualism of reality and validity and criticizes Kelsen for basing his concept of law only on the validity part, because law, according to Kelsen is all about *Ought* and never about the concept of *Is*. He also claims that Kelsen totally disregards social and psychological facts when it comes to his presupposition of the basic norm. Relating solely to the form of law, Kelsen also disregards the content of the law. According to Ross, Kelsen is wrong when he only interprets law logically and free of all pragmatism, because the idea of the concept of law is an exposure of: “What is valid in the world of reality”.²¹ Also, Ross claims that Kelsen only transfers the *Ought* directed to the individual to an *Ought* directed to the authorities: this directive, however, could then be examined and transferred in the same way leading to an infinite regress; every norm is the expression of a certain normative functional relation.²² Further, the concept of a legal duty deriving from norms as directives to authorities resembles the idea of legal obligation due to moral consciousness.²³ Relying on the dualism, Ross argues that jurisprudence should systematize what is actually given in positive law.²⁴ Jurisprudence itself is not normative but a science of facts of legal phenomena.²⁵ Although appreciating Kelsen’s theory for its logic and brilliancy, Ross insists that validity is not an object of scientific cognition: the study of law is a study of social phenomena.

2.3.5 Ross and Hägerström

From the above, it can be seen that Ross, with regard to some aspects of his legal perceptions, was inspired by the Scandinavian realist Hägerström. Both Ross and Hägerström distrusted

²¹ Ross, TRJ p. 44.

²² Ross, TRJ p. 45.

²³ Ross, TRJ p. 45.

²⁴ Ross, TRJ p. 101.

²⁵ Ross, TRJ p. 107.

the *a priori* contemporary law of pseudoidealistic positivism and both engaged in an empirical causal ideology critique of concepts such as sovereignty.²⁶

Hägerström also stresses the importance of observing the impressions of objects on one's consciousness. His analysis is a psychological description of the origin of ideas in relation to social facts. This provides a realist framework for a search for obligation. The aim of this more psychological approach was to demythologize the concept of sovereignty. Scandinavian realism is part of what Ross sees as a necessary struggle for modernity against the mystical tendencies behind claims like that for an absolute sovereign within the state holding authority directly from God, thereby replacing the authority of Pope and Emperor. Ross assures us that such a concept of sovereignty is only an apparent concept; it makes no sense to ask, by what law the existing law is valid, i.e. to provide a further or metaphysical grounding for the law. Psychologically seen, the concept of law is a rationalization of a particular internal compulsion experienced as a feeling which accompanies positive law (*Lehrbuch de Voelkerrechts Kolhammer, 1951*).

With respect Ross to his doctrine of the sources of law, Ross continues his anti-metaphysical critique. He emphasizes that the sources of law are to be found in socio-psychological facts within the realistic perspective. To illustrate his perception of legal philosophy in general and his doctrine of sources in particular, Ross adduces an example of law in practice by the judge in his court room. The sources of law are the general factors which influence the judge in determining the content of his judgment; he does not only rely on formulated rules as they merely express interests, goals and ideas of the community. The judge, as a member of the community, is not an automaton, but a living member of the society, who tries to develop the living tendencies of the same. Custom plays a large role as the judge does not simply follow rules formulated by the authorities, but also looks to the regularly followed social order, recognizing the normative power of the factual. Everything which influences and motivates a responsible individual in a concrete situation may be taken into account.²⁷ However, the bias is in favor of objectivity and away from the spontaneous and individual. Rather than as a

²⁶ Accordingly, in his work "Why Democracy?", Ross claims that democracy is incompatible with the idea of giving more political power to some individuals discriminating others: "Democracy denies every criterion in support of granting political power to certain persons in preference to others. It denies the absolute King's divine right and the leader's "call to leadership", it denies aristocratic privileges whether these based on birth, education, possession, or party allegiance (Ross, 1952, p. 132).

²⁷ Ross, Alf, *Laerebok i Folkeret*, (Copenhagen: Munksgaard, 1942 [hereinafter LF]), pp. 77-79

manifestation of individual taste, the judge has to see matters `with the eyes of the community`.²⁸

2.3.6 “Why Democracy?” A Brief Background

“*Why Democracy?*” was the title of the work, where Ross presented his ideas regarding his belief in the benefits of applying democracy in society. The work was published in 1946, i.e. only one year after the end of World War II, at a time when Europe was scattered and shaken by five years of war, destruction and inconceivable human suffering. In perspective to the axis powers both Franco and Mussolini were dictators in the basic meaning of the word, usurpers with absolute power, who had come to power by brute force. With respect to Hitler, however, the matter was ambiguous, for although he showed the same characteristics as the other dictators concerning absolute power he had been elected democratically. Europe had come to realise what evil dictatorship could mean, like the evil deeds of Franco in Spain and later on of Stalin in former Union of Soviet, all of which resembled the crimes Hitler, a leader elected by the people in a democratic election, had been responsible for throughout Europe. The bitter conclusion was that democracy could not prevent cruel and inhuman actions. The danger of surrendering power to an unreliable person, or even a group of persons, as in a democratic parliament elected by the people had become evident.

In his book Ross asked questions like the following: What is the inner meaning of being a democrat? Is democracy really the best way to govern a society? Is democracy here to stay? etc. He did not give any definite answers or even attempted to do so, this due to the simple and widely accepted fact that there is no scientific answer to what the concept of democracy really means. Greater outlines, which render a common consensus regarding the concept, may be identified, like the crucial element that democracy must rest upon the influence of the people. However, even this quite modest requirement on what must be an ingredient of democracy, gives rise to several questions. For example, shall there be differences in who shall be considered as the “people” in terms of age, gender, social position, intellectual ability etc? Shall the influence be absolute in all matters and if so, is this an effective way of ruling a society? From this starting point Ross did not try to argue or mediate an absolute answer to

²⁸ Ross, Alf, LF p. 80.

what the concept of democracy really means, not even what it should be. Ross tried to inspire a debate about democracy and its content, in order to make the public aware enough to make their own choices, and to consider what those choices can mean in a longer perspective.

To establish Ross' meaning of the concept of democracy, one must, according to Ross see it as a method of structure, i.e. a method applicable to understand and analyse the organization of a particular state and the way it is governed. The purpose of organising a state as a democracy is, to provide the people (the state's subjects) as a whole with influence regarding political issues and the exercising of state power within their particular state (in contrast to an autocracy where a certain individual or a distinguished group of people alone has the greatest influence or the decisive power). In a democracy, the people (or subjects) are to be considered as the sovereigns, but only if seen as a whole body.

3 Ross' concept of Democracy and the Swedish Democratic System

3.1 Ross and Democracy

In the present part of the thesis, a traditional legal dogmatic analysis, Ross' work "*Why democracy?*" is used to exemplify different aspects of Ross' concept of democracy. Some of the key concepts of the book are more thoroughly presented, in order to create an understanding of Ross' concept of democracy.

3.1.1 Sub Concepts of Democracy

Ross separates democracy into *three sub concepts*, which he calls *legal or formal democracy*, *actual or economic democracy* and *democracy as an attitude or way of life*.²⁹ For the purpose of this thesis, it is useful to further investigate into, what Ross means by the different concepts, with main focus on that of legal or formal democracy and how it is applicable.

a) The legal, or formal, concept of democracy is a means to establish the current political will, but only the will expressed by the people. This formal concept of democracy does not concern itself with the merits of the actual will; its only purpose is to provide a tool, or method for, establishing it. Thus, legal democracy presupposes an election where the will of the majority shall prevail. This provides a simple rule for, how to settle a certain matter, but it does not and shall not concern the actual merits or the purpose of the decision taken by the majority.

Ross presupposes that the people as a whole must be considered as the sovereign who shall be in command of the initiative over the power of the state and its political alignment. One way to accomplish such an order is to give the people direct influence over every decision

²⁹ Ross, Alf, *Why Democracy ?* (Cambridge, Massachusetts: Harvard University Press, 1952 [hereinafter: WD]) pp. 75-77

affecting the particular state's actions and doings by continuous referenda. However, this order, democratic as it may be, has its insurmountable problems.

It would not be practically realizable to hold referenda in every matter concerning the state, legislative or administrative. Such a system would crumble on its own ineffectiveness. Therefore, Ross puts direct democracy on one extreme of the democratic "spectrum", in sharp contrast to representative democracy, which he carefully analyses and examines with respect to the fulfilment of the demands of the legal, or formal concept of democracy. The question he sets out can be formulated thus: is it possible to consider the people as the sovereign although each individual cannot have his or her particular opinion expressed in every matter concerning the state?

Ross' answer, is "yes", and explains this by *first* examining the police and the courts, which both constitute illustrative examples of state interventions, which in some cases, are contradictory to the interest or will of a particular individual. This is to say that a particular individual (also being a member or a part of the sovereignty of the state), who is affected by the intervention of the police or the court, is being intervened against, involuntarily and against his interest. Thereby, Ross establishes that the demands of the formal, or legal, democracy are satisfied. He argues that the police and the courts, when exercising their public authority given by their offices, do so under, and in accordance with the will of majority.

The only purpose of legal democracy is to provide a tool, or a method for establishing democracy. The police and court shall not, and do not act on behalf of their own interests, nor on behalf of their own subjective values or in the interest of separate individuals. Their only prerogative is to fulfil the guidelines provided by the law, and everyone shall have equal rights and obligations with regard to the law. This leads to the assumption that the legislative authority, providing the law, must be considered as superior to the police and the courts. In continuation, Ross considers which the legislative instance ought to be in a democracy. The legislator, he says, is the parliament, but from where does parliament derive its legislative powers? The people, of course, and therefore, parliament must answer to the people as the sovereign. This argumentation led Ross to the following conclusion:

"While direct democracy firmly holds to the basic democratic ideas of autonomy, self-determination and personal responsibility, representative democracy signifies a modification of these by linking them with the idea of leadership in recognition of and confidence in the

greater knowledge and ability of others. Here of course science cannot decide the issue. Every one must make up his own mind; I choose representative democracy”³⁰

Through the people, may public elections alter the composition of parliament, in order to better correspond with the alignment of the public, but it is clear that the business of “governing” is the task of the politician: “It is not the task of the man in the street to govern the country or to form an expert opinion on all the problems of government. What is expected of the common man in a democracy is that he shall make up his mind about the political problems in their broad generality, lay down in broad outline the course to be followed, and make sure that people’s representatives exercise their mandate satisfactorily in accordance with that course”.³¹

Ross concludes that the people, through their representatives in parliament, have the necessary influence over the exercise of power, and that modern democracy accordingly is organized in such a way as to fulfil the demands of the formal, or legal, concept of democracy: “In every state it is indeed thus, that through legislation, administration, and dispensing of justice, a number of decisions are made which are regarded as universally binding”.³²

Ross stresses, however, that in order for this reasoning to be acceptable from a democratic point of view, the people’s influence over parliament must not only be real but effective as well. In order to define the legislative body as an actual representative of the people, certain criteria must be met. Ross illustrates this by referring to the Swedish constitutional order, according to which public elections to parliament (the highest legislative body in Sweden) are held every fourth year, thereby giving the elected members a mandate seat for four years. In Ross’ view, this must be considered democratic, even if the members were to be elected for six years, perhaps even for longer time than so, it could be considered as democratic. On the other hand, however, Ross also reflects upon the benefits of a two year electorate.³³ The point is that it should be carefully considered for how long a period of time it is possible to delegate power and still consider the process effectively democratic, i.e. reflecting the actual will of the people.

³⁰ Ross, WD p. 210.

³¹ Ross, WD p. 161.

³² Ross, WD p. 75.

³³ Svensson, Palle, Ross og Demokratiet, in *Alf Ross. Kritiske Gensyn* (Copenhagen: Jurist- og Ekonomiforbundets Forlag, 2006) pp. 106-26 121

Summary: The legal or formal concept of democracy refers to a form of government or an arrangement of the state according to which the people as a whole, and not just a single individual or a smaller or larger group of individuals, possess the supreme or decisive influence over the exercise of public authority. It designates a method for the establishment of the political will, not its object, end, or means.

b) Ross' second sub concept of democracy is the concept of economic or real democracy. Economic democracy means something in the nature of an economic order or structure that strives for a levelling of economic privileges and reducing differences between the classes, by in economic terms favouring the disadvantageous social classes. Economic democracy is in this way closely connected to the concept of planned economy. This, according to Ross, would presuppose that the means of production or at least the vast majority of those would be under control of the people. The control would be exercised through public officials in order to secure that a greater part of the profits should come to benefit the people and the common interests of the society, rather than increase the profits of private investors. While Ross states that political equality is a prerequisite for democracy, he also states that economic equality is an expression of socialism: "Democracy is a political method, a supraideology, not a norm or regulation regarding the substance of the system of social conditions. One can be a democrat without being a socialist. Of course one can also be both: a Social Democrat. But the combination is not a necessary one".³⁴

Summary: Ross clearly distinguishes between democracy as a form of political organization, which does not directly concern itself with its content, and the economic policy this method leads to. Democracy indicates a *how*, not a *what*. Political ideology, relating to content, defines the *what*.

c) Ross' third sub concept of democracy manifests itself as an attitude or a way of life, which appears not only in state and society, but also in family life, social relations, and in the upbringing and education of children, which means that this facet of democracy manifests

³⁴ Ross, WD p. 134.

itself in the classrooms and in everyday family life, as well as in other contexts of human relations. Here, Ross gives some interesting examples that are illustrative of his humanistic views:

“Let us now consider a few examples of non-political democracy. The parent-child relationship, for instance, may be based on autocratic or democratic principles. In the former case, authority, especially the father's, is used to enforce obedient submission and discipline. The child is regarded as a thing to be shaped, not in its own spirit, but in the image of its parents, a willing and passive means of realizing their objectives. There is no discussion, no appeal to the child's understanding, but an abundance of commands and force, physical as well as spiritual. Democratically oriented education on the other hand respects the child's own personality and strives to provide the best possible conditions for his development. It stimulates independent action and judgment; an effort is made to reach agreement and understanding by explanation and rational discussion. Compulsion and force are employed as little as possible. The democratic parent, like a gardener, prunes the tree only to enable it to grow stronger and yield more fruit. His aim is to render himself superfluous as soon as possible, to bring up a free and responsible individual capable of taking his fate into his own hands. Thus wherever there is guidance or leadership it may rest either on dictatorship and force or on freedom and mutual understanding. The office manager may turn his staff into a collection of trembling puppets, or approach them with understanding and respect as partners occupying different positions in a joint enterprise. The husband may become the tyrant of the household or he may treat his wife as a true partner and friend. A headmaster may pontificate at his teachers' meetings or content himself with the position of *primus inter pares*. The Roman Catholic Church is typically autocratic, the Protestant Churches relatively democratic in their relations with their congregations. It is worth remembering in this connection that democratic ideas in England grew out of the demand for a popular church constitution”.³⁵

Summary: In describing this aspect of democracy Ross proclaims his view, that the basic feature of the democratic mentality is respect for the moral personality of the individual, which demands that one should always regard humanity, in oneself and in others, as an end as well as a means. Ross' view corresponds very well with the description of democracy made by his contemporary, the Danish theologian, Hal Koch.³⁶

³⁵ Ross, Alf, What is Democracy? In *Scandinavian Democracy: Development of Democratic Thought and Institutions in Denmark, Norway and Sweden*. (1958) pp. 48-57. p. 48.

³⁶ See Koch, Hal, *Hvad er Demokrati*, 3rd Edn. (Copenhagen: Gyllendal, 1991)

3.1.2 The Concept of Ideal Democracy according to Ross

According to Ross, it is impossible on objective or scientific grounds to give a clear answer to the question whether a particular state is a democratic state or not. It is only possible to answer to what extent a state can be considered democratic. What he means is that the concept of democracy is not suitable as a benchmark or classification tool, which could be used as a template in order to classify a structure of governing. Instead, Ross' view of democracy appears as an ideal structure, a structure that is as democratic as it possibly can be.³⁷ This ideal structure can serve as a blueprint concerning existing structures of governing. The existing structure could then be laid upon the ideal, which would provide a tool for measuring the degree of democracy in that particular structure. The further away the examined structure is from the centre of the ideal, the lesser is the degree of pure democracy concealed in that particular structure. Although Ross mentions the word "ideal" it is not his intention that the ideal should be striven for in real life; rather "ideal" is meant to be a tool to examine real structures of government in a utopian perspective. For Ross, the ideal could be said to contain all the democratic qualities and values a modern democracy possesses to a greater or lesser extent, but within the ideal, all these elements are combined to perfection. In Ross' view, it is not interesting to investigate into the issue, whether or not a certain form of government is a democracy: it is impossible to answer this question on scientific grounds. Rather, the crucial issue is to determine the level or degree of democracy within a given structure. Doing this, it is not enough to conclude that the people can be considered as the sovereign of its democracy; it should also be considered to what extent this might be the case, to what degree the people could influence power. Ross states: "Indeed, democracy indicates, not a quite definite form of government having definite characteristics but something fluid determined in relation to an unreal ideal type".³⁸ As Ross points out, this can be measured by establishing the real influence of the people on the exercise of public authority according to the three following entities:

a) *Intensity*

Intensity refers to the breadth of the eligible electorate. At the one extreme, there is equal and universal adult franchise. At the other extreme, there is the further a democratic system

³⁷ Ross, WD pp. 86-90.

³⁸ Ross, WD p. 94.

departs from the first-named, pure extreme, the more it approaches an oligarchy. The very restricted suffrage, which prevailed in England during the eighteenth and nineteenth centuries, is a case in point. Ross states: “We attach ourselves to the principle, that the measure of the degree to which a form of government is democratic is the principle that the political decisions are determined by the will of the majority as expressed through the vote, or in short, the majority principle. The opposite is the qualified minority principle, that is, the principle according to which political power is vested in a precisely determined minority pointed out by certain characteristics, for example, the rich, the intelligent, the noble, the strong”.³⁹

b) *Effectiveness*

Effectiveness refers to the degree in which the people succeed in effecting their wishes. Effectiveness is at a maximum in a direct democracy, where all matters are decided by direct vote. In a system based on representation, effectiveness depends upon the extent of popular control over the representatives or instruments of policy; and this, in turn, depends chiefly on the length of the intervals at which such control is exercised (length of term of office). If control is weak, democracy becomes merely nominal in the sense that power, although exercised in the name of the people through delegation or representation, rests in reality with the representatives rather than with those represented.

Ross means that the concept of representation is valid only in so far as the representatives power to act is legally restricted by the wishes of the represented, and to the extent that the represented are able to ensure by legal means that their wishes are represented. This is called *the principle proxy*, which has provided the model for this line of thought.⁴⁰ The person who gives these powers instructs his proxy how to act; and there are certain legal means by which he can ensure that the proxy does in fact follow his instructions. To apply the same principle to the state would mean that the people prescribe certain political rules to be observed by their representative in the performance of his task. It would also mean setting up methods of control by which the people at any time could satisfy themselves that their instructions were obeyed. It is easy to imagine a sliding scale illustrating a diminishing degree of effective representation. The realities underlying the concept of representation may differ considerably

³⁹ Ross, WD pp. 77-78.

⁴⁰ Ross, WD pp. 82-83.

from case to case. The difference lies in the degree of effectiveness with which the people are able to bring their influence to bear.

c) *Extensiveness*

Extensiveness refers to the extent to which popular influence and control are extended to include more or less of the various ramifications of government. Extensiveness is greatest where the people control not only the legislative, but the executive and judicial powers as well. Where popular control is only partial, democracy becomes more or less restricted. A typical example is the constitutional monarchy where legislative power is partly under aristocratic and partly under monarchical, and the executive under monarchical, influence.

Summary: Democracy as an Ideal Type can serve as a tool in examining actual government structures in order to determine the level of democracy, i.e. the democratic factor. With respect to this factor, Ross differentiates between three entities, namely: Intensity, which refers to the breadth of the eligible electorate; effectiveness, which refers to the degree to which people are given the possibility to realize their wishes; and, finally, extent, which refers to the number of government organs under the control of the people.

3.1.3 The Concept of Political Liberty

He starts out by examining what liberty is and arrives at the conclusion that: “Liberty seems to be a negative concept, it indicates the absence of something that is regarded one way or another by the acting individual as a fetter, a limit, a restraint. He who acts freely feels, as it were, that the action, unrestrained and harmonious, appears out of himself. He under compulsion thinks, on the contrary, that the action is forced on him, as it were, by factors outside of himself”.⁴¹

Ross identifies two aspects of liberty, the *material* and the *formal* concepts of liberty.⁴² The *material* concept of liberty means general absence of compulsion and of such demands on the part of society that may collide with the individual’s wishes. Ross acknowledges that since absolute freedom cannot exist as a concept of its own, because life in society always implies

⁴¹ Ross, WD p. 99.

⁴² Ross, WD pp. 101-103.

commitments, which bind or contradict the absolute will, the material freedom dissolves itself into a series of individual liberties, such as freedom of expression and organization.

The *formal* concept of liberty means that the individual not is subject to other demands or obligations than those enshrined at the bottom of his heart. Those who listen to their own conscience and act in accordance with their best intentions are free, whereas those who are guided by impulses and act against what they feel to be right, will be slaves.

Ross also regards the concept of *formal* freedom as autonomy, explained in reference to situations where the individual is free from external control, free from boundaries implied by others, not anchored within her own beliefs and conscience. In other words, she is only loyal to such principles of law, which she herself has agreed to. This, Ross explains, does not mean that the individual can revoke such rules whenever she chooses to, once accepted they must be obeyed. On the psychological level, Ross argues that even if they contradict the individual's will for the time being she still will feel free regarding her own conscience while obeying them because she once was involved in formulating these rules. This will give the individual a sense of being the master of her own fate.

Ross further ties the concept of autonomy to democracy in the sense that "Democracy is the form of government which gives the individual the outmost level of political freedom in the sense of autonomy for the citizens. This maximum is obtained precisely by the majority principle".⁴³ "Democracy is the form of government in which voluntary support rooted in the individual's autonomy is greatest".⁴⁴

Ross also identifies another usage of the term liberty, namely in respect to legal security which means the security of the individual regarding random infringements on his person inflicted by the government.⁴⁵ It is of outmost importance for democracy to guarantee the people legal security, a necessary condition per se in terms of political liberty.

Democracy therefore depends on a number of freedoms, such as freedom of the press, freedom of speech, the right of free organization and legal security.⁴⁶ He also recognises the right of the people to criticise their leaders and to have an uncompromising right to speak freely about their elected politicians, the government, the prevailing ideology and different societal matters, without risking to be punished in any form.

Accordingly, the freedom of speech must be considered as a fundamental part of the concept of democracy and Ross states: "Unrestricted freedom of speech ought to be a sacred

⁴³ Ross, WD p. 104.

⁴⁴ Ross, WD pp. 107-108.

⁴⁵ Ross, WD p. 127 -130.

⁴⁶ Ross, WD p. 111.

principle”.⁴⁷ There has to be freedom to propose any political opinion whatsoever and to agitate for it irrespective of its substance, but on condition that the propaganda does not make use of inadmissible means, nor aim at using violence. Ross states: “A vote that does not arise out of free debate but in which only certain groups of the population have had an opportunity to assert their point of view can naturally not be taken as an expression of the people’s will”.⁴⁸ However, from the democratic point of view, according to Ross, public security must be an absolute necessity. Indeed, it is the guarantee of the freedom of expression: “Freedom of expression is not worth anything if it is not combined with the security that expression of political opinion, not agreeable to those in power, does not involve the risk of a visit early in the morning by the secret state police”.⁴⁹

Summary: Ross argues that democracy is the best system or at least a better system as compared to others in terms of safeguarding the political liberty, in the sense of autonomy for the citizens. It depends, however, on a number of freedoms, such as freedom of speech, which has to be combined with public security. In addition, the individual has obligations; accepted rules must be obeyed.

3.1.4 Ross’ Views on Equality

While the relationship between democracy and liberty is clear and straightforward, the situation is quite different with regard to equality. Therefore, this section carefully scrutinises Ross’ views of equality, which expresses a puzzling inconsistency.

On one hand, Ross undoubtedly professes himself an adherent to the idea that all human beings are equal, an idea with deep roots in Christianity:

“Democratic mentality means respect for the moral personality of man. This is an attitude that has its roots in the traditions of Christianity and humanism. Christianity has given expression to this feeling in its doctrine of the infinite value of every man in the eyes of God. Kant has expressed the same in more philosophical terms in formulating his categorical imperative, which commands one always to act in such a manner as to regard humanity,

⁴⁷ Ross, WD p. 243.

⁴⁸ Ross, WD p. 111.

⁴⁹ Ross, WD p. 128.

within oneself as well as in every other person, as an end and never as a means only. In all humanity, there lives the idea that man is sacred. The lack of respect or at least the insufficient respect for man is nevertheless characteristic of all forms of autocracy”.⁵⁰ *On the other* hand, Ross expresses the opinion that “Equality can indeed be deviated from, but not freedom or autonomy, it appears that equality is a democratic idea of a subordinate and dependent character only”.⁵¹

He also distinguishes between *formal* and *material* equality.⁵² *Formal* equality means that a certain common rule shall be followed i.e. equality before the law means in that sense, that the law purely and simply is applied regularly according to its content. *Material* equality means that the rule, which is followed shall, in its substance, be in keeping with certain values, so that it does not make the differences conditional on criteria whose importance cannot be recognized. Although Ross means that equality is inferior to freedom as an important democratic principle, he still recognises equality as a prerequisite of democracy: “The leading idea is freedom, political and personal. It is further assumed that this freedom is to be granted to everyone, and in as far as democracy demands equality, equality in freedom. But it is freedom that is the end in itself, the demand for equality has only the relative meaning that the benefit of freedom should not be withheld from anyone”.⁵³ In this context, Ross speaks about democracy as a form of “government for mature and grown-up peoples who demand that their fate be in their own hands”.⁵⁴ On one hand, Ross also gives expression to what he calls a more temperate evaluation of the capacity and will of the people, and states that “Man is not essentially a rational being. The great masses are predominantly sluggish and conservative, full of prejudice and traditions, suspicious of everything new. The people require leadership. The idea of individual self-determination and responsibility is linked with the idea of trust in leadership. Along with the urge for independence, there lies in man the urge to put his faith in the leadership of those who are wiser and more competent than himself”.⁵⁵ Ross allocates a special democratic value to the circumstance that an elite represent the people: “The representative organs are something different and more than a technical necessity. They perform an independent and desirable function, they are the expression of an elite that better and more correctly than the people itself, directs the needs that stir within the people”.⁵⁶

⁵⁰ Ross, WD pp. 137-138.

⁵¹ Ross, WD, pp. 132-133.

⁵² Ross, WD p. 131.

⁵³ Ross, WD p. 133.

⁵⁴ Ross, WD p. 106.

⁵⁵ Ross, WD p. 209.

⁵⁶ Ross, WD p. 209.

However, Ross points out what he sees as political equality; he argues for an absolute *material* equality between adult individuals as to their right to vote. This Ross explains is the most important effect of the idea of equality in perspective to democracy. He admits that the government's power emanates from the people, but the people do not wield it. Ross clearly states that it would be wrong to say that the common citizen has the same power to influence the decisions, as has his elected member of parliament. Here, the idea of equality is subordinated in favour of the individual's freedom or autonomy; the unconditioned right to vote is just a means to express and to exercise his free will.

Ross also examines the element of equality in perspective to economy and socio-cultural aspects. He draws the conclusion that it is not possible to apply the ideas of equality to these areas, by referring to the fact that democracy is a method that is not concerned with its contents. Whether resources shall be redistributed, and if so how, is solely a question of political ideology.

Summary: Ross has an ambiguity with respect to the principle of human equality. On the one hand, he trusts the citizens to act with authority and maturity; on the other hand, he mistrusts them to understand complicated political matters, consequently being in need of an elite, that more accurately, than the people itself, is capable of interpreting the needs of the people.

3.1.5 Majority and Minority within a Democratic Framework

The sense of autonomy among the citizens in a democracy is maintained through the principle of majority.⁵⁷ It is safe to say that consensus on every issue within society cannot be achieved, but that by following the principle of majority, there will always be a greater part of the citizens who are content with the decisions made. Through the principle of majority, democracy guarantees that a greater part of the population will feel that their opinions have been respected and have influenced the decisions.

Ross also reflects on the role of the minority, that is, those whose apprehensions were not regarded in the decision-making.⁵⁸ He believes that the minority, although initially opposing the decision, gradually will identify and accept it because it has come into being in

⁵⁷ Ross, WD p. 105.

⁵⁸ Ross, WD p. 105.

accordance with the principles of democracy: “In every state it is indeed thus that through legislation, administration, and dispensing of justice, a number of decisions are made, which are regarded as universally binding”.⁵⁹ In order to make a state work in the interest of everyone, there has to be a sense of solidarity: “The outvoted subordinates his particular point of view in the interest of serving the common cause and therefore also accepts the majority’s opinion as the basis of continued cooperation”.⁶⁰ Thus, a majority decision has been made, as it were, according to the rules, that have been generally accepted.

A decision made within a democratic framework is not a question to be considered right or wrong; rather, it is a question about ascertaining the general will of the people for the time being, nothing less or more. Obviously, however, the majority principle has no real meaning unless elections are conducted in complete freedom, after an open discussion allowing every opinion to be heard. Free interchange of ideas makes possible the integration into a common policy of differing points of view. The individual should make up his mind only after having heard what everybody else had to say about the matter. Otherwise, a majority decision cannot claim to represent the collective will; the minority has no reason to feel that the decision is in a sense also theirs and elections degenerate into a camouflaged power struggle. Without these guarantees, elections become little more than hoodwinking, of the type so familiar in totalitarian countries.

Ross acknowledges that such a theoretic approach to democracy, where the minority must set their emotions apart in a particular issue, demands of the people an ability to judge. He recognizes this problem as a rather grave one, since democracy, in order to function, demands a certain educational level among the citizens. Such a level of education and enlightenment cannot be achieved without a certain economic standard. In other words, Ross believes in democracy as the better form of government for every society in the longer perspective, but he admits that democracy is not something that can be materialized overnight. Some states must “grow into” democracy through a process that requires quite a long time.⁶¹ In regarding democracy as a method expressed by the principle of majority, Ross points out that it has to be linked to the individual’s sense of autonomy.⁶² The principle will not be valid if the individual cannot control her own autonomy. Therefore, Ross concludes that democracy should be seen as an overarching ideology: by that, he means that it is possible to consider yourself, and to be, a democrat whatever your political beliefs may be. The conservative, the

⁵⁹ Ross, WD p. 75.

⁶⁰ Ross, WD p. 105.

⁶¹ Ross, WD pp. 106 – 107.

⁶² Ross, WD pp. 104.

liberal and the socialist have a common ground in the possibility of being democrats whatever political direction they have.⁶³ Ross argues that a democratic system, in order to be valid, is dependent upon popular influence and control (the essence of democracy) presupposing a technique for ascertaining the "will of the people". In practice, the majority principle provides the nearest possible approximation to individual self-determination and is the only alternative to a rule based on brute force, or on the absolute authority of one single individual.

Summary: Ross argues that through the principle of majority a sense of autonomy among the citizens in a democracy is maintained as it guarantees that a greater part of the population will feel that their opinions have been respected and have influenced the decisions. The minority, although initially opposing the decision, gradually will identify and accept it because it has come into being in accordance with the principles of democracy.

3.1.6 The Element of Discussion

The element of discussion is another aspect of the concept of democracy discerned by Ross.⁶⁴ As he states, it is one thing to call yourself a democrat, but quite another thing to actually live and act as one (whatever political ideology one adheres to). He adduces a drastic example, mentioning the quite common mock elections held by dictators, which give them all, or nearly all, of the counted votes. This is merely to give their autocratic regime a polished surface. Such elections are by definition not democratic, whatever the regime proclaims them to be. Ross here upon gives another example, borrowed from Koch:⁶⁵ A community board consists of ten politicians, of whom seven belong to the same political party and the remaining three belong to another party. These two parties have altogether different views on a particular issue, which is up for decision by the board. The majority (of seven) have already before the meeting agreed to vote in favour of the issue in question: they know that they are in a majority and that their opinion will prevail, but in order to meet the demands of democracy, the issue must be discussed first and then voted upon. Consequently, there is an open discussion, where the minority is free to submit their arguments. After a while, the majority suggests that the

⁶³ Ross, WD p. 108 .

⁶⁴ Ross, WD pp. 111-113.

⁶⁵ Ross, WD pp. 112-113.

matter now shall be decided upon. The issue in question wins by seven votes to three. In this example, the majority did not at all consider the arguments proposed by the minority because they already had decided upon the matter, assured that they would prevail in accordance with the principle of majority.

Ross asks himself if this is how democracy really ought to be. To be sure, the decision had been taken in accordance with the method of democracy, the issue had been discussed in a free debate, and the majority had prevailed. The majority however, was not at all influenced by the opinion of the minority. The free debate or discussion, Ross believes, must be taken more seriously and “add something” to the matter: The discussion itself is more or less useless unless the parties really have a genuine will to understand their opponents and, what is more, are willing to compromise in some respects in order to respect their opponents. This, Ross argues, is the essence of democracy.⁶⁶

The compromise is defined, by Ross, as a complicated mental operation involving tolerance, respect for the values of others as well as understanding of, and a belief in, common human values which stand above disagreements in single matters. In short, it is all about respect for one’s fellow human beings and their autonomy. Accordingly, Ross believes in a deepening of the democratic discussion, but he also sees the necessity of putting certain limits to it. Ross does not realize the necessity of, nor does he trust in the people’s capability of conducting a profound political discussion: “It is probably illusory to believe that the man in the street will be able to master with more involved political problems”.⁶⁷ Thus, Ross advocated a representative democracy, with a people governed by an elite of political leaders who more accurately than the people did itself could interpret the will and the needs of the people. He proposed, “The people’s elected representatives, constitute a leadership elite which, to a higher degree than the man in the street, possesses breadth of view, circumspection, and expert knowledge”.⁶⁸ Such leaders were the ones to make the wise decisions and the compromises in order to respect their opponents. Ross undoubtedly, connects the element of discussion tightly to democracy but he refuses to establish discussion as the most essential part of democracy: “This idea of discussion is so essential, that it is not uncommon for people, like Hal Koch, simply to define the essence of democracy as discussion or debate in order to reach a common understanding with mutual consideration of the opinion and wishes of others. Since in the meanwhile this idea, from the nature of things, does not allow a formulation into

⁶⁶ Ross, WD p. 118.

⁶⁷ Ross, WD p. 178.

⁶⁸ Ross, WD p. 178.

a legal claim, it appears to me most obvious to define the concept of democracy merely in terms of the majority principle, and transfer the idea of discussion to the methods by which the ideals of democracy may be realized”.⁶⁹

Summary: Again, Ross views are inconsistent. The free debate or discussion, he believes, must be taken seriously and “add something” to the matter. The discussion itself is useless, unless the parties really have a genuine will to understand their opponents and, what is more, are willing to compromise in order to respect their opponents. On the other hand, Ross believes in the necessity of putting certain limits to the discussion; this latter remark, being in accordance with his elitist view.

3.1.7 Defending Democracy

As previously described, Ross looked upon democracy as a core method of organizing the state, as a political method, the best-known method of government. Although being the best-known method, he admits, it is only the best alternative in comparison to other forms of governing. This way of looking at the concept of democracy could very well be considered as symptomatic of Ross and his positivistic views. As a positivist, he does not believe in rights or wrongs given by nature. Instead, he believes that a certain rule, law or even form of governing derived its legitimacy by the sheer number of people who considered a certain rule, law or system as being valid. According to Ross, the law derives its validity from the extent to which its existence is recognized and acknowledged by the people, i.e. by the subjects obeying under that specific law. The same applies to different forms of governing.

It is not possible for Ross as a scholar to say that democracy is a better system of governing than for example autocracy, at least not based on scientific evidence, which he stresses throughout his entire argumentation even though he personally strongly favours democracy. Even though his work “Why democracy?” could be considered as a work on behalf of democracy and probably is looked upon as such, it does not purport to convince the reader of democracy being the best form of government based on scientific evidence.⁷⁰ Ross regards democracy as the best means to achieve a peace-oriented society, which must be an

⁶⁹ Ross, WD p. 111.

⁷⁰ Ross, WD p. 92.

assumption for prosperity and welfare. He recognizes, though, that whether a state is considered a democracy or an autocracy, there will always be those who are not pleased with the system of government. For the state which is governed as an autocracy, this could either be a minority or majority of the population, whereas in a functional democracy this could only be a minority. For these people or certain groups of dissidents, violence could be an alternative to manifest their dissatisfaction or even as a mean to overthrow the system of their dislike. For systems considered autocracies, often nations ruled by dictators, this threat of violence is not significant as a moral problem such as it is for the democratic state. The sheer concept of autocracy means that the rules of moral are no longer applicable. The rulers of autocracies can by their own choice regard every non-conformist as a potential enemy of the state, and control them through censorship or even violence if necessary.

The state which upholds democracy faces the same problems, however. It is reasonable to assume that in any state, however fair and just, there will be elements or fractions who are displeased with the government. Such elements could for example be found on either the extreme right or left wing, extremists who are displeased with society on ideological grounds without respect or consideration of the prosperity or virtues of that state. A democracy cannot handle such threats in the same manner as an autocracy. A democracy must allow and even in some ways encourage a debate were the non-conformers and the extreme elements in society are free to express their opinions. Ross asks himself under which circumstances a democracy will be allowed to take protective measures when threatened by violence, and he argues that a democracy should not act like an autocracy and hinder the dissidents by pre-emptive measures, such as restrictions and limitations. Instead, the democracy must rely upon that the majority of the people will still be followers of the principle of democracy, as illustrated by an example. If the majority adopts the view proclaimed by the extremists, for example to adopt a form of dictatorship, this will be in harmony with the concept of democracy; as long as the principle of majority decision has prevailed. Ross states that democracy is not meant to force people to be free.⁷¹ This holds true for a scenario where the majority adopts a non-democratic system. However, the same does not apply if the majority opposes the opinions held by the minority and the minority tries to imply their views by means of violence. Ross argues that democracy, when attacked by force of violence by a certain minority group, has the right to repel the assault with counter violence without have broken the principles from which it derives.⁷² Democracy must be allowed to defend its` existence even with violence if

⁷¹ Ross, WD p. 98.

⁷² Ross, WD p. 232.

necessary, although Ross argues that the preferable measures to avoid such grave scenarios could be to educate people about the basic principles of democracy.⁷³

Ross here outlines the important difference of usage of violence between the democracies compared to the autocracy.⁷⁴ In an autocracy, violence is a means to preserve and sustain power by oppressing the non-conformers in order to prevent them from challenging the reigning regime. For a democracy this use of power is unacceptable because it would seriously contradict the very basis democracy is built upon

In short: “Democracy ought to defend itself. As against opinions of every kind, the only weapon should be the power of the word. Unrestricted freedom of speech ought to be a sacred principle. Prohibition and force are useless and in the last analysis turn against democracy itself. But force must be met with force. Evil propaganda, too, ought to be attacked”.⁷⁵ Further “Democracy’s existence ultimately rests upon the strength and life of the people’s love for and faith in ideas of liberty, justice, and humanity, I do not believe that these ideas can be safeguarded by means of prohibition”.⁷⁶

Summary: In my opinion, Ross advocates a sensible view on the intricate issue of defending democracy. He argues that democracy ought to defend itself. In principle, the only weapon should be the power of the word. However, when seriously threatened, democracy must meet force with force.

3.2 The Swedish Democratic System

The following section is mainly based upon information from the Swedish Government Offices ([http:// www.sweden.gov.se](http://www.sweden.gov.se))

Sweden is a parliamentary democracy, which means that all public power proceeds from the people. General elections are held every four years. Sweden has three levels of government - national, regional and local. In addition, there is the European level, which has acquired increasing importance following Sweden’s entry into the European Union. At the national level, of the Swedish democratic system, the people are represented by the *Riksdag*

⁷³ Ross, WD p. 98

⁷⁴ Ross, WD pp. 98-99.

⁷⁵ Ross, (1952), pp. 242-243

⁷⁶ Ross, (1952), p. 238

(parliament), which has legislative power. The Government governs the Realm. It is accountable to the *Riksdag* (Chapter 1, Article 6 of the Instrument of Government).⁷⁷ At the *regional* level, Sweden is divided into 21 counties. The political tasks at this level are carried out on the one hand by the county councils and regions, whose decision-makers are directly elected by the people of the county and, on the other, by the county administrative boards which are government bodies in the counties. At the *local* level, Sweden is divided into 290 municipalities. Each municipality has an elected assembly, the municipal council, which takes decisions on municipal matters. The municipal council appoints the municipal executive board, which leads and coordinates municipality work.

The basic provisions defining how Sweden shall be governed are enshrined in the Constitution. The Constitution consists of four fundamental laws: the Instrument of Government (*Regeringsformen, 1974*)⁷⁸, the Act of Succession (*Successionsordningen, 1810*)⁷⁹, the Freedom of the Press Act (*Tryckfrihetsförordningen, 1949*)⁸⁰, and the Fundamental Law on Freedom of Expression (*Yttrandefrihetsgrundlagen, 1991*)⁸¹. Also, there is also a law on the working order of the Parliament: it has a special status but which does not qualify as a fundamental law, namely, the *Riksdag Act (Riksdagsordningen, 1974)*⁸²

In these fundamental laws, the relationship between decision-making and executive power is set out as well as the freedoms and rights enjoyed by the citizens. The instrument of Government contains the basic principles of Sweden's form of government, how the government is to work, what are the fundamental freedoms and rights of the Swedish people and how elections to the *Riksdag* are to be accomplished. In the Instrument of Government it is laid down that Sweden shall have a King or Queen as Head of State, but without political power. The order of succession is regulated in a special law; in 1979 the *Riksdag* decided that a woman could also inherit the throne. The Fundamental Law on Freedom of Expression was adopted in 1991 and is Sweden's latest fundamental law. Similar to the Freedom of the Press Act, it contains provisions on free dissemination of information and prohibits censorship. Fundamental laws are more difficult to amend than other laws. They can only be amended or abolished if two *Riksdagar* have adopted identically formulated decisions, with an election intervening. No other laws or ordinances may conflict with the fundamental laws. The most recent Freedom of the Press Act was adopted in 1949 although Sweden established freedom

⁷⁷ SFS 1974:152, Regeringsförordningen kap 1, § 6.

⁷⁸ SFS 1974:152

⁷⁹ SFS 1979:935

⁸⁰ SFS 1949:105

⁸¹ SFS 1991:1469

⁸² SFS 1974:153

of the press by law as early as 1766 and was first in the world to do so. Freedom of the Press means the right to disseminate information in printed form but with accountability before the law. Another feature of the Freedom of the Press Act is the citizens' right to study public documents, the principle of public access to official documents. The *ombudsman* system, which has been copied by several other countries, is important for the guarantee of transparency in the public sector. In addition to the fundamental laws, there is the *Riksdag* Act, which holds a special status between fundamental law and ordinary law. To amend this Act only one *Riksdag* decision is required but it must be adopted by a qualified majority (at least three quarters of votes and the support of more than half the members). The *Riksdag* Act contains detailed provisions on the *Riksdag* and its workings. As a member of the European Union, Sweden is also covered by the EU '*acquis communautaire*', which means that laws jointly enacted in the EU must take precedence over Swedish national laws. On joining the EU, Sweden was therefore obliged to make a few minor adjustments to the fundamental laws. The Government Offices and central government agencies and administrations are led by the Government, thus forming a politically controlled body where the Government directs the work and sets priorities. The agencies are responsible for implementing public policies, overseeing the provision of many public services and discharging a range of regulatory functions. Every year the Government decides on the preconditions for agencies' operations. This is effectuated, on the one hand, through what are known as appropriation directions and, on the other, through Ordinances.

3.3 The Swedish Democracy Commission

In 1997, on the initiative of the Government and with the full support of the *Riksdag*, the Government Commission on Swedish Democracy was set up in order to shed light on the new conditions, problems and opportunities facing Swedish democracy in the 21st century (Report of the Government Commission on Swedish Democracy, Official Government Reports-SOU, 2000:1, hereinafter: the Commission). The final report of the Commission begins by establishing a fundamental starting point for their work:

"Development is not uncontrollable. It is in the nature of democracy not to be determined by fate. Neither does it lie in someone else's hands. Therefore, it is not only individual measures,

but also the overall political will that has importance for the development of society”. Democracy is founded on a conviction that all people are of equal value. In contrast to every other idea about the structure of society, democracy accepts and proceeds on the basis that we are different and should be allowed to be so. We should not need to be adjusted. The most important word in democracy is neither spelled I nor you, but we – inter-dependence upon each other and a duty to solve our conflicts peacefully and democratically”. Further, the Commission confirmed that “Representative democracy constitutes the basis for government by the people in Sweden. It is in the interaction of representative democracy with citizens’ experiences and desires that the development of government by the people is determined. In the many meetings between citizens, the virtues and norms that a democracy both requires and aims at are formed. Our starting point is that government by the people in Sweden should contain a substantial element of self-organization, decentralization and self-administration. Thereby, scope is given for diversity in participation and a large measure of pluralism and autonomy”.⁸³ It was not ambition of the Commission to submit a number of concrete proposals but, rather, to inspire and inform the citizens by presenting some fundamental objectives for the future development of democracy and what is more, to propose a democracy policy for the long-term enhancement of government by the people in Sweden. The Commission concentrated their work on four major items, namely: The reinforcement of democratic awareness, the development of participation, the strengthening of self-government and the increase of institutional accountability. From the final report, some important examples illustrating the Commission’s way of solving their task can be extracted. In order to keep the democratic process among the people of Sweden vivid and prosperous, it is crucial to reinforce democratic awareness. It is of the greatest importance to reinforce the personal democratic values of citizens, the citizen spirit, and within this framework create the greatest possible scope for the citizens to jointly govern themselves. Citizen spirit is described as based on certain characteristic properties that citizens can cultivate and practice, for example critical rationalism (the wish to involve oneself in various issues, question and understand how others reason, etc.), civil obedience (obedience to the rule of law) and solidarity (altruistic approach to co-citizens, empathy). Everyone must be given the power to control his or her own conditions of life and an opportunity to develop skills to resolve his or her conflicts in co-operation with others in a democratic spirit. The fundamental issue that must gain broad acceptance by all, and which requires to be frequently mentioned in a wide range

⁸³ SOU, 2000:1, pp. 240-241

of social contexts, is the moral stance of 'The equal value of all people'. Teaching about democratic awareness must be further improved. Public education and research has traditionally been strong in Sweden as regards increasing knowledge about society and democracy and to nurture citizens in democratic awareness. Government by the people in Sweden continues to have a great need of independent research and independent education system. With respect to developing participation in the democratic process the Commission underlines the necessity of enhancing participation in all elections, including the European election. The Swedish welfare state is based on strong public support, which is ultimately manifested by high levels of election participation. During the past decades, however, election turnouts have continued to decline, creating a risk that democratic activities will be concentrated around Election Day, thereby reducing the legitimacy of public decision-making and jeopardizing a broad public support for the welfare state. Everyone should be given equal opportunity to participate in broad discussions, both between elections and prior to the decisions being made at different levels of political decision making. Without this possibility of continuous influence on the part of the citizens, political equality cannot be attained, and the result will undoubtedly be an elitist democratic development, where government by politicians is allowed to become a substitute for government by the people. The Commission suggests a way of exercising political influence called a participative democracy, with reinforced features of the deliberative democracy theory. In order to participate, citizens must feel that it is meaningful to involve themselves: the more the citizens see that participation yields influence, the greater the probability that they continue to participate. Also, the Commission especially points out the fundamental need to be heard and respected as an equal citizen in all situations and that it cannot yet be said that there is equal citizenship in Sweden. Citizen participation, influence and involvement differ between various groups of society. The importance is emphasized of continued equal working opportunities, ethnic integration and work to include subcultures of young people in a democratic dialogue and to give disabled people better access to society. In line with the other recommendations made by the Commission, based on the assumption of trust in the motivation and capacity of the citizens to effectively participate in the democratic process, the issue of strengthening self-government is emphasized. It seems both possible and desirable to give citizens greater direct opportunity to constructively and democratically resolve problems that prevail in the local community. Local self-government needs to be enhanced by stronger constitutional and legal regulation with opportunities for judicial review. The advantage of turning the local authorities into a more interesting and relevant arena for political influence is obvious; thereby, many citizens will

thereby be offered more meaningful opportunities for exercising influence in issues that are important to them. In line with this thinking is the idea of making it easier for citizens to use their formal opportunity to initiate local referenda.

In accordance with the cornerstones of the Swedish constitution, the Commission also states that it is fundamental to a representative democracy to be served by institutional systems that are transparent and thereby can be held accountable. The elected representatives decide about different value-laden issues – health care, school, social services and security. The decisions are then specified and distributed by complicated multi-level control. There are many different hierarchical levels as well as networks of various kinds. Confidence in the Swedish political system is largely dependent on, how efficiently these value distributions are conducted. This gives a clear indicator to citizens about the proper lines of communication, and who is to be held accountable. Also, it is also important to develop a security system that protects citizens from harm through errors and mistakes on the part of the authorities. By evaluation and audit, knowledge about how government by the people operates can be obtained. Elected persons should be examined in an impartial manner. The independence, credibility and impact of auditors are of decisive importance. In public activities, audit should be as autonomous as possible in relation to the political decision-makers. Multi-disciplinary research is important to continuously monitor and measure how political institutions fulfill the quality criteria regarding government by the people.

In addition, the commission states that there is a continuous need to develop democracy policy reforms in the interface between research and politics. Therefore it is necessary to arrange for a meeting place between research and politics. The Commission recommends the appointment of an independent group of experts, which can operate as a think tank and procure information bases for democracy reforms.

Summary: The research compiled by the Commission has pointed out the most central inadequacies in government by the people in Sweden. Election turnouts have been declining and investigations have shown that rather few citizens consider it meaningful to attempt to participate in the democratic process, partly because they consider that democratic institutions, not least those with elected representatives are inadequately sensitive. Therefore,

in order to make political participation more meaningful, among other things, local self-government shall be expanded.

Also, the democratic awareness needs to be enhanced on the part of both citizens and representatives. Confidence in the Swedish political system has been declining among the citizens. Restoring confidence by increasing institutional accountability, through different means has a high priority.

4 Analysis

It is an undisputable fact that Alf Ross' work *Why democracy?* is regarded as a classic work in legal philosophy. But what about the actuality of the book? Is Ross' view of democracy of current interest? The present (final) part of the thesis is devoted to establish, whether or not Ross' views on democracy might still be of interest to modern Swedish jurisdiction. In order to answer this question, different aspects of Ross' concept of democracy will be placed like a raster on the major fundamental objectives of democracy in Sweden as presented by the Government Commission.

The analysis starts by a brief summary of the issues established in Part II. These issues will be used in what follows. Thereupon, I shall offer some critical remarks of Ross' concept of democracy and his standpoint as a democrat, followed by a conclusion.

4.1 Short Summary

Sweden is a parliamentary democracy, which means that all public power emanates from the people. Also, it is a representative democracy, which means that in general elections, people are given the opportunity to influence which parties are to represent one. At the national level, the Swedish people are represented by the *Riksdag* (Swedish parliament), which has legislative powers. Proposals for new legislation are presented by the Government, which also implements decisions taken by the *Riksdag*. "The Government governs the Realm. It is accountable to the *Riksdag*", Chapter 1, Article 6 of the Instrument of Government (*Regeringsformen*). The basic provisions defining how Sweden shall be governed are enshrined in the Constitution. Four fundamental laws together make up the Constitution: the Instrument of Government, the Act of Succession, the Freedom of the Press Act and the Fundamental Law on Freedom of Expression. In these fundamental laws the relationship between decision-making and executive power is set out and also the freedoms and rights enjoyed by citizens.

The Government is assisted in its work by the Government Offices and central government agencies and administrations. One of the cornerstones of a democratic society such as Sweden

is the principle of public access to official documents (*Offentlighetsprincipen*). It means that the activities of the authorities are as far as possible open to insight and control. Moreover, one of the main constitutional principles is, that no one should be above the law, all people shall be considered as equals before the law.

Some fundamental objectives for the future development of democracy in Sweden were presented by the Swedish Government Commission on Swedish Democracy in their final report. The Commission chose a moral ground to defend democracy, founded on the conviction that all people are of equal value and that the dignity of every person in society must be respected as expressed in Chapter 1, Section 2 of the form of Government.⁸⁴ The commission argues for a development of a democracy with a high degree of citizen participation and deliberative elements, by reinforcing the personal democratic values of citizens – the citizen spirit, based on certain characteristic properties that citizens can cultivate and practice, for example critical rationalism (the wish to involve oneself in various issues, to question and understand the way in which others reason, etc.), civil obedience (obedience to the rule of law) and solidarity (altruistic approach to fellow citizens, empathy). Sustainable democracy requires that democratic awareness is enhanced on the part of citizens and its representatives. One of the Commission's essential recommendations was to ensure a high voter turnout as well as to increase citizen influence and participation between elections. The policy focuses on three aspects: strengthening the conditions for participation, removing obstacles to participation and creating opportunities for greater and more equitable participation. Also, it was emphasized that from the point of view of the citizens, it is fundamental that representative democracy is served by institutional systems that are open and can be held accountable.

In “*Why democracy?*” Ross argues on behalf of democracy as the best known method of government in comparison with other forms of government. Democracy is regarded as a method or a structure, applicable to understand and analyse the organization of a particular state and the way it is governed. The purpose of organising a state as a democracy is, to provide the people as a whole with influence regarding political alignment and the execution of state power within their particular state. As presented in Part II, Ross' perception of democracy appears as an ideal structure, a structure that is as democratic as it possibly can be.

⁸⁴ Regeringsformen SFS 1974:152. kap. 1, § 2.

This ideal structure can serve as a blueprint in regard to existing structures of government. The further the examined structure is from the centre of the ideal, the lesser degree of pure democracy is concealed in that particular structure. According to Ross, it is impossible to define the concept of democracy in terms of “either-or”: a state is democratic in proportion to the amount of power residing in the people. The crucial issue is to determine the level or degree of democracy within a given structure, i.e. the democratic factor. The people’s influence on the exercise of public authority may vary in intensity i.e. the breadth of the eligible electorate; also, it may vary in effectiveness, i.e. the degree to which the people succeed in making their wishes effective; and in extent i.e. the number of government organs under popular control.

Ross argues that democracy is the best system in terms of safeguarding the freedom of the individual. He praises freedom as the fundamental value of democracy, by “freedom” meaning autonomy and independence. The sense of autonomy among the citizens in a democracy is maintained through the principle of majority, which guarantees that a greater part of the population will feel that their opinions have been respected and have influenced the decisions.

Ross’ standpoint regarding the concept of equality is more complicated: *On the one hand*, Ross undoubtedly professes himself an adherent to the idea that all human beings are equal, an idea with deep roots in Christianity. *On the other hand*, he gives expression to what he calls a more temperate evaluation of the capacity and the will of the people: in his view, human beings are not merely sensible creatures but rather prejudiced and distrustful of new ideas. He further states that man, besides wanting to be independent, has an urge to be led by others who are more intelligent than himself: “common” people do not understand complex political problems and do not need enlightened understanding. They just need to cast their votes.

In the following, the attempt will be made to estimate the democratic factor of Swedish democracy by using Ross’ concept of ideal democracy as a starting point,

4.2 Swedish Democracy in view of Ross' Concept of Democracy.

Ross' first variable determining the democratic factor is intensity. He suggests that at the one extreme of intensity is equal and universal adult franchise. In Sweden general elections are held every four years, Swedish citizens who are or have been resident in the country and have reached the age of 18 before or on Election Day are entitled to stand for election to the *Riksdag*. To be elected, the candidates must represent a political party. As one of the approximately 7 million people in the country entitled to vote, one is given the opportunity to influence which parties are to represent one in the *Riksdag*, county council and municipal council.

With the exception of the age criterion, the suffrage has no restrictions. In a wider sense, intensity is strengthened by the many other ways of influencing Swedish politics, for example by taking part in referenda, joining a political party or commenting on Government reports. One of the essential recommendations made by the Commission is, to develop participation in elections and to give all citizens enhanced possibilities of participating in the democratic process, which is another evidence of the political will to enhance intensity even more. In consideration of the above, it can be said that in Ross', Swedish democracy would qualify with good measure for a high degree of intensity.

The second variable determining the democratic factor is effectiveness, which is at a maximum in a direct democracy where all matters are decided by direct vote. In a system based on representation, effectiveness depends upon the extent of popular control over the representatives or instruments of policy, and this, in turn, depends chiefly on the length of the intervals at which such control is exercised (length of term of office).

Since Sweden has a representative and not a direct democracy, effectiveness is by definition weaker than intensity. However, jurisdiction allows for referenda, and these measures have been undertaken a few times during the past decades. This strengthens the case, although Ross himself strongly opposed referenda. General elections are held every four years. Ross favored the idea of having free and frequent elections, by frequent meaning every four year. However, he has also discussed whether or not two years would be more appropriate at least in the Danish *Folketing* (*the Danish parliament*). In any case, Sweden has quite a high degree of effectiveness, although far from maximal.

Ross' third variable, extent is largest where ever the people are controlling not only the legislative, but also the executive and judicial powers. Where popular control is only partial, democracy becomes more or less restricted. From the citizens' point of view, it is essential that representative democracy is served by institutional systems which are open and can be held accountable. Basic provisions defining how Sweden shall be governed are enshrined in the Constitution. In the Fundamental Law on Freedom and of Expression and in the Freedom of the Press Act, the principle of public access to official documents is set out in order to guarantee an open society with access to information about the work of the *Riksdag*, the Government and the public agencies. This openness entitles the Swedish people to study official documents. Anyone may avail him/herself of this possibility whenever they wish. The activities of the authorities are, then, as far as possible open to insight. An institution like the committee of Constitution (*Konstitutionsutskottet*) also enhances the extent. The commission further stresses the importance of increasing institutional accountability. According to Ross' concept of ideal democracy, the extent of Swedish democracy would be optimal.

To sum up: the democratic factor of Sweden is very high, although not at the maximum, mainly because the cautious use of referenda.

Apart from the elements of Ross' "democratic factor", a further aspect of Ross' concept of democracy that would be fruitful to apply to the current situation in Sweden is the concept of equality.

Equality is the undisputed fundamental principle of Swedish democracy, distinctly expressed in the Form of Government. The Commission chose a moral ground to defend democracy, founded on a conviction that all people are of equal value, clearly stating in their final report, that the most important word in democracy is neither spelled *I* nor *you*, but *we* - interdependence upon each other and a duty to solve our conflicts peacefully and democratically. The Swedish institution of Ombudsman is an example of the principle of equality working in daily life, designed to prevent various forms of discrimination. Thus, legislation on the rights of people with handicaps (*Handikaplagstiftningen*) emphasizes that it is not the disability as such that creates the handicap but the inaccessibility of society. Discussions in 'public fora' concerning equal opportunities illustrate the broad acceptance of the concept of equality in Swedish society.

If Ross' concept of equality would be applied to Swedish democracy, the situation would be far more complex, as Ross clearly demonstrates an ambiguity in his views concerning the

fundamental principle of human equality. He neglects the potential of the citizens' participation, influence and involvement in political processes. His clear emphasis on representative democracy and his rejection of direct democracy seems to be based on mistrust in the political judgement of the people; Ross suggests an urge, on their behalf, for strong and wise political leaders.

In Ross' view, political leaders possess a larger extent of general view, consideration and expert knowledge than common people do. Although, Ross advocating a representative democracy with a people governed by an elite of political leaders who more accurately than the people itself can interpret the will and the needs of the people, Ross emphasized the assumption that these leaders were to be trusted as good, wise and judicious – and this in spite of the fact that he himself knew very well, by experience, that this was not always the case. To maintain this standpoint in spite of his experience of tyrannical political leaders, Ross must have been influenced by the conditions of his time, that is, conditions in a more patriarchal society with wider social differences as regards enlightenment, religious engagement, education and economy, with a common trend to trust authorities (not so apparent in the 21st century).

Although Ross had an elitist approach to representative democracy (based on his ambiguity concerning the element of equality), he also was an eminent advocate of individual freedom and individual rights. Obviously, the majority principle would have no real meaning unless elections are conducted in complete freedom, after open discussion and with an opportunity for everyone to be heard. Free interchange of ideas makes possible the integration of differing points of view into a common policy. Democracy therefore depends on a number of freedoms, such as freedom of the press, the right of free organization, as well as legal security. Ross also recognised the right of the people to criticise their leaders and to have an uncompromising right to speak freely about their elected politicians, the government, the prevailing ideology and different societal matters, without risking any form of punishment.

Those views of Ross may be compared with the Swedish Freedom of the Press Act (*SFS 1949:105*) and the Fundamental Law on Freedom of Expression (*SFS 1991:1469*) where the relationship between decision-making and executive power is set out and the freedoms and rights enjoyed by citizens are expressed. Among other things, the Instrument of Government guarantees citizens the right to freely procure information, hold demonstrations, form political parties and practice their religion. Every Swedish citizen is guaranteed the right under this Fundamental Law, *vis-à-vis* the public institutions, to express his thoughts, opinions and sentiments in public, and in general to communicate information on any subject whatsoever.

Public authorities and other public bodies may not intervene against any person on the grounds that he has abused the freedom of expression. In an international perspective concerning individual freedom and individual rights Sweden has a remarkably strong position. The standpoint concerning how to defend democracy, which emerges from the final report of the Commission, coheres very well with the views of Ross on this particular issue.

Summary: Ross clearly demonstrates an ambiguity in his views concerning the fundamental principle of human equality. He advocates a representative democracy with a people governed by an elite of political leaders who more accurately than the people itself can interpret the will and the needs of the people, clearly, an elitist standpoint.

Regarding the different aspects of freedom granted to the citizens of Sweden, these are expressed, in detail in total agreement with the intentions of Ross.

4.3 Critical Comments

Considering everything, Ross emerges as an advocate for democracy as the best method of structuring the government of a state. However, establishing to what extent he can be considered a democrat ethic is a rather intricate matter, as his argumentation in several regards seems inconsistent. A few examples may illustrate the issue.

Ross does not commit himself to the strong principle of equality and unambiguously attaches “democracy” to the representative democracy, interpreted as representative government where the elected leaders shall be granted a large amount of authority and a large field of decision-making. He strongly emphasizes the need for political leaders and proposes that the idea of the individual’s autonomy and responsibility shall be connected with the notion of trust in the government, something which can be interpreted as a disbelief in the political judgment of the “ordinary man”. This denotes an inconsistency in Ross’ concept of democracy: On the one hand, he praises “freedom” as the fundamental value of democracy, strengthening autonomy and self-government (Ross speaks of democracy as a way of government for the mature and enlightened, demanding to form their own destiny).⁸⁵ On the other hand, he says that the human being is not predominantly a sensible or mature creature, but rather, seems to be

controlled by prejudices and disbeliefs towards everything new.⁸⁶ Apart from the need for independence, it is in the nature of humans to require to be led by those who are thought to be wiser than themselves. When Ross arrives at the point of structuring democracy as a representative democracy, he applies the second, more pessimistic view concerning the human race. He seems well aware of the fact that he thereby modifies the basis of democracy, but persists to state that the primary function of the people is to choose their leaders in an open competition for the confidence of the electors.⁸⁷ Nevertheless, one might say that such a view of democracy is an elitist one, definitely at variance with respect to his otherwise humanistic views.

The reason for this might be that Ross' views on democracy were disproportionately influenced by the spirit of the time and the view of mankind in post-war Europe. As a humanist, Ross was deeply concerned by the consequences of the political events taking place in Europe in the 1930-ies, which led him to the conclusion that it was possible to manipulate the people by propaganda, and therefore the people could not to be trusted to form an autonomic opinion. This, led Ross to develop a negative, pessimistic view on man on resemblance with Schumpeter⁸⁸, and resulted in his more "realistic" perspective on democracy and its possibilities. In retrospective, it seems probable, that Ross overestimated the contrasts, when he spoke about the two contradicting basic outlooks on the nature of man in describing direct and representative democracy as two opposing poles. Direct democracy, according to Ross, relies on the immediate and spontaneous will of the people, which can be manipulated through propaganda, whilst representative democracy relies on political leaders, who, to a larger extent than the average citizen, are in possession of information and expertise knowledge. In my view, this is not only drastic and polemic, but also wrong. Both the people and the elected leaders can make mistakes, often on the same grounds, lack of understanding of the perquisites and consequences of political decisions due to change of conditions, the safeguard of special interests etc. The distinction of direct and representative democracy is not a question of either-or. However reluctantly, Ross acknowledges that the representative democracy can be designed with elements of direct democracy, but strongly opposes, what he calls "anti-representative" referenda, which could provide for the electorate a more effective participation in the political process and a greater degree of control over the agenda. This

⁸⁷ Ross, Alf, *Towards a Realistic Jurisprudence. A Criticism of the Dualism in Law* (Copenhagen: Munksgaard, 1946) p.208

⁸⁸ See Schumpeter, Joseph A, *Capitalism, Socialism, and Democracy*, (London: Georg Allen & Unwin, 1943).

creates a rather interesting paradox. On the one hand, Ross relies on the principle of majority, but on the other hand he does not rely on those who constitute the majority. The citizens elect their leaders whose obligation, among others, is to defend and respect the opinions of the minority. This fact calls for a high integrity and skills in the leaders, but how, one might ask, can the average “ignorant” citizen be capable of distinguishing such integrity and skills?

Summary: While Ross in some respects adhered to thoroughly modern and humanistic ideas, he does not, in other respects - mainly concerning his ambiguity with respect to the principle of human equality - emerge as democratic as we would have wished the classical theorist of democracy to be.

4.4 Conclusion

How democratic then, is Sweden according to Ross? When comparing Ross’ concept of democracy elaborated in the middle of the 20th century with the formulation of a fundamental approach in order to increase the citizens’ participation, influence and involvement in the future development of democracy in Sweden in the 21st Century, a multifaceted picture of Ross’ concept of, and perspective on, democracy emerges. In some respects, his ideas appear very modern, in others, he does not stand out as democratic as we would wish the classical theorist of democracy to be. Specifically, his ambiguity regarding human equality stands out as perplexing, yet even deviant.

Using his own method of estimating the democratic factor, the answer must be: very democratic - almost ideally democratic. Indeed, in some respects concerning the concept of human equality and the trust in the capacity of people to understand complex political issues and form a well founded opinion, for instance, to take part in referenda and to take a continuous active part in the political process etc. the Swedish democracy seems to be considerably more up to date compared to Ross’ views. However, it seems only fair to point out that Sweden has been fortunate enough not to be involved in a war for a very long time. Ross, on the other hand, was influenced by his experience of the occupation of Denmark to develop a more pessimistic standpoint in these matters. Apart from this, the influence of the state of things in the middle of the 20th century might have affected Ross to adopt a more

elitist standpoint, in times long before the political map was radically changed (as in the 1960-ies when authorities were unsparingly questioned).

The fact that Ross is cited as an important source of inspiration in their work with the report, by the Commission as well as by the Swedish Social Democrats on one side of the political spectrum and by the Christian Democrats on the other side speaks in favour of Ross' concept being valid and of current interest. Modern Swedish politicians, indeed, seem to be very well acquainted with Ross' theory as far as his ideas on freedom, personal autonomy and independence as basic values of democracy are concerned. This reflects Ross' views of democracy as way of governing people, who act with authority and maturity, demanding to command their own destiny.

In view of Ross' "realistic" perspective on democracy and its possibilities, one might argue that although the Swedish democracy reflects a very high ideal standard in accordance to Effectiveness etc., it does not fully reach this standard in reality. The engagement of the common people in the political process is tending to diminish both in, and between elections. In fact, it was exactly because of this that the Commission on Democracy had to be appointed. Perhaps Ross' "realistic" view on people in general was at least to some extent well founded. To do justice to the democrat Alf Ross, it is important to note his statement:

"The structure of representative democracy can be modified in different ways through institutions that originate in the ideology of direct democracy and aim to some degree at grafting its ideas and effects on to the stem of representative democracy".⁸⁹ In my view, this statement might be interpreted as a sign that Ross would have accepted to contribute, as an expert, to The Swedish Commission on Democracy.

Summary: By applying Ross' Ideal Type to that concept of democracy, which emerges from the final report of the "Swedish Democracy Commission", it can be established that modern Sweden is almost ideally democratic. Indeed, in some respects - mainly concerning the principle of human equality and the trust in the people's capacity to understand complex political issues, to form a well founded opinion on them and to take active part in the political process - Swedish democracy seems to be considerably more "up-to-date" compared to Ross' views. Nevertheless, Ross' concept of democracy – democracy as a matter of degree – in my view, stands out as highly interesting and will presumably continue to do so even in the 21st century.

⁸⁹ Ross, WD p. 203.

5 Bibliography

1 Monographs

Bindreiter, Uta, *Why Grundnorm? A Treatise on the Implications of Kelsen's Doctrine* (The Hague-New York: Kluwer Law International, 2002)

Kelsen, Hans, *Reine Rechtslehre*, 2nd Edn. (Vienna: Deuticke Verlag, 1960); transl. by Max Knight under the title 'Pure Theory of Law' (Berkeley, California: University of California Press, 1989)

Koch, Hal, *Hvad er Demokrati*, 3rd Edn. (Copenhagen: Gyllendal, 1991)

Ross, Alf, *Laerebok i Folkeret*, (Copenhagen: Munksgaard, 1942)

Ross, Alf, *Towards a Realistic Jurisprudence. A Criticism of the Dualism in Law* (Copenhagen: Munksgaard, 1946)

Ross, Alf, *Why Democracy ?* (Cambridge, Massachusetts: Harvard University Press, 1952)

Ross, Alf, *Om Ret og Retfærdighed. En Indførelse i den Analytiske Retsfilosofi* (Copenhagen: Nyt Nordisk Forlag Arnold Busck, 1953); transl. by Margaret Dutton under the title 'On Law and Justice' (London: Stevens, 1958)

Schumpeter, Joseph A, *Capitalism, Socialism, and Democracy* (London: Georg Allen & Unwin, 1943)

Wedar, Sven, *Realism and Validity. Studies in the Legal theory of Alf Ross*, in *Monographs in Practical Philosophy* (Höganäs, Tryckeri AB Höganäs, 1985)

2 Articles

Bjarup, Jes, The Philosophy of Scandinavian Legal Realism, in *Ratio Juris*, volume 18 (2005) pp.1-15

Carty, Anthony, Scandinavian Realism and Phenomenological Approaches, in *European Journal of International Law*, Volume 14 (2003) pp. 817-41

Ross, Alf, What is Democracy? in *Scandinavian Democracy: Development of Democratic Thought and Institutions in Denmark, Norway and Sweden*. (Copenhagen: Schultz, (1958) pp. 48-57.

Svensson, Palle, Ross og Demokratiet, in *Alf Ross. Kritiske Gensyn* (Copenhagen: Jurist- og Ekonomiforbundets Forlag, 2006) pp. 106-26

Waaben, Knud, Alf Ross 1899–1979: A Biographical Sketch, in *European Journal of International Law*, volume 14 (2003) pp. 661 – 74

3 Official Reports

SOU 2000:1 En uthållig demokrati! Politik för folkstyrelse på 2000-talet
Demokratiutredningens Betänkande (Stockholm: Regeringen, 2000)

4 Internet Sources

<http://www.merriam-webster.com/> (20080615)

<http://www.merriam-webster.com/dictionary/democracy> (20080615)

<http://www.regeringen.se> (20080705)

<http://www.regeringen.se/sb/d/3808/a/22274> (20080705)

<http://www.regeringen.se/sb/d/2853/a/16189> (20080705)

5 Other Relevant Literature not Cited in the Footnotes

Nergelius, Joakim, Konstitutionellt Rättighetsskydd. Svensk Rätt i ett Komparativt Perspektiv (Stockholm: Fritzes Förlag, 1996)

