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### **“This cannot be its meaning in the mouth of the judge” (The case for the new English language translation of Alf Ross’s On Law and Justice forthcoming on Oxford University Press)**

*“Esto no puede ser su significado en la boca del Juez”  
(El caso de la nueva traducción al inglés de Sobre la Ley y la Justicia de Alf Ross  
editado por Oxford University Press).*

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#### **Resumen**

La segunda edición en inglés de la obra principal de Alf Ross Sobre el derecho y la justicia será próximamente publicada por Oxford University Press. En lugar de simplemente volver a imprimir la traducción existente al inglés de 1958, la nueva edición contiene una nueva traducción completa. Este artículo del editor de la nueva edición desarrolla el argumento a favor de esta decisión. Este argumento se centra en el papel altamente negativo de la influencia crítica de H.L.A. Hart para la recepción de la obra de Ross sobre la filosofía del derecho anglo-americano. Se afirma, en primer lugar, que la crítica de Hart pierde esencialmente su validez, y que en última instancia es un hombre de paja. Sostiene además que, a pesar de que Hart fue, al menos en parte, responsable de esta mala interpretación, la traducción al inglés de 1958, ciertamente no ayudó. Debido a una serie de errores, omisiones y decisiones terminológicas problemáticas, de la primera traducción se puede decir, al menos, que invita al lector poco atento o menos caritativo a incurrir en el tipo de lectura errónea en la que el propio Hart incurrió.

**Palabras clave:** Alf Ros; realismo jurídico escandinavo; H.L.A. Hart; sobre el derecho y la justicia; ley válida; traducción.

#### **Abstract**

The second English edition of Alf Ross’s main work On Law and Justice is forthcoming on the Oxford University Press. Instead of simply reprinting the existing English language translation from 1958 the new edition contains a full new translation. This article by the editor of the new edition unfolds the argument for this choice. This argument focuses on the highly negative role of H.L.A. Hart’s influential critique for the reception of Ross’s work in Anglo American legal philosophy. It claims, first of all, that Hart’s critique essentially misses the mark, and that it is ultimately a straw man. It further argues that even though Hart was at least partly responsible for this misreading the 1958 English translation certainly did not help. Due to a number of errors, omissions and problematic terminological choices the first translation can be said to at least invite the inattentive or uncharitable reader to arrive at the kind of misreadings Hart arrived at.

**Keywords:** Alf Ross; scandinavian legal realism; H.L.A. Hart; On Law and Justice; valid law; translation.

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“The task of making more exact a vague or not quite exact concept used in everyday life or in an earlier stage of scientific or logical development, or rather of replacing it by a newly constructed, more exact concept, belongs among the most important tasks of logical analysis and logical construction”.

CARNAP, R. (1947). *Meaning and Necessity: A Study in Semantics and Modal Logic*. Chicago, Illinois: The University of Chicago Press, pp.7-8.

## 1. INTRODUCTION

Recent years have seen a strong revival of interest in Scandinavian Legal Realism generally and in Alf Ross's legal philosophy in particular. Prestigious journals publish articles on or by Scandinavian Realists<sup>2</sup>, entire special issues are devoted to the topic<sup>3</sup>, and a few years ago the Oxford University Press decided that the time was ripe for a new translation of Alf Ross's *On Law and Justice*<sup>4</sup>.

One driving factor in this development has been the increasing realization that the Scandinavians may, philosophically speaking, be more modern and topical than commonly thought. Originally, Scandinavian Realism was conceived on the basis of very austere empiricist general philosophical theories from the first half of the 20<sup>th</sup> century – in Alf Ross's case on the basis of logical positivism as originally conceived in the Vienna Circle. However, since logical positivism is largely moribund today and more or less has been thus considered since the middle of the 20<sup>th</sup> century, legal philosophers seemed in many years to be in the habit of drawing the conclusion that Scandinavian Realism was moribund too<sup>5</sup>.

Within roughly the last decade, however, this perception seems to have changed, and it seems to have done so as a result of a development in relation to *American* Legal Realism initiated a few years earlier by Brian Leiter. Thus, in 1997 Leiter launched a convincing and soon to become hugely influential argument that the American Realists could be read as a kind of philosophical naturalists in the sense attributed to that term by W. V. Quine in his seminal article “Epistemology Naturalized”.<sup>6</sup> A decade

2 Cf. e.g. ENG, S (2011). “Lost in the System or Lost in Translation? The Exchanges between Hart and Ross”. *Ratio Juris*, 24 (2 June), pp.194-246. doi:10.1111/j.1467-9337.2011.00482.x; HOLTERMANN, J v H (2015). “Getting Real or Staying Positive-Legal Realism(s), Legal Positivism and the Prospects of Naturalism in Jurisprudence”. *Ratio Juris-An International Journal of Jurisprudence and Philosophy of Law*. doi:1111/raju.12071; ROSS, A (2011 [1936]). *The 25th Anniversary of the Pure Theory of Law*. Paper presented at the Oxford Journal of Legal Studies.

3 Cf. e.g. this issue and BRUNET, P; ERIC, M & MERCIER, J (Ed.) (2014). *Scandinavian Realism in All of Its Forms*. Special issue of *Revus: Journal for constitutional theory and legal philosophy*, Vol. 24.

4 ROSS, A (Forthcoming 2016). *On Law and Justice*. Trans. U. Bindreiter & J. v. H. Holtermann Ed. Rev. Ed. /and a new introduction for this edition by J.v.H. Holtermann (Ed.). Oxford, Oxford University Press.

5 Thus e.g., the following passage: “Scandinavian Realism [survives] only in the museums of jurisprudential archaeology”. SCHAUER, F & WISE, VJ (1997). “Legal Positivism as Legal Information”. *Cornell Law Review*, 82, p. 1081.

6 Cf. LEITER, B (1997). “Rethinking Legal Realism: Toward a Naturalized Jurisprudence”. *Texas Law Review*, 76, 2, December, pp. 267-315; QUINE, WVO (1969). “Epistemology Naturalized”, in: QUINE, WVO (Ed.) (1969). *Ontological Relativity and Other Essays*. New York, Columbia University Press, pp.69-90. Leiter has later expanded and refined the argument in several articles. A collection of the most important are found in: LEITER, B (2007b). *Naturalizing jurisprudence: essays on American legal realism and naturalism in legal philosophy*. Oxford, Oxford University Press.

later, in an interview replying to the question: "To which problem, issue or broad area of legal philosophy would you most like to see more attention paid in the future?", Leiter suggested that perhaps this whole philosophical maneuver of naturalizing the American Realists could also, *mutatis mutandis*, be carried out with the Scandinavian Realists:

Scandinavian Realism deserves a sympathetic reconsideration, along the lines of what I have tried to do for its (distant!) American cousin. It is true that the Scandinavians suffer from the vice of being motivated almost exclusively by logical positivist doctrines in semantics, epistemology, and ontology, doctrines which are largely moribund (for good reasons) in philosophy. Yet the general naturalistic conception of the world that animated their theoretical writings is not moribund, and the question of how to accommodate norms within such a world view is very much a live one. Perhaps the Scandinavians still have something to teach us? Certainly they have not yet received sympathetic scrutiny within Anglophone jurisprudence<sup>7</sup>.

Unbeknown to Leiter the first modest steps in this direction had in fact already been taken at the time, although they had been taken in ignorance of the highway laid out by him a decade earlier.<sup>8</sup> Soon, however, more works would follow that would directly engage with and build on the thoughts developed by Leiter.<sup>9</sup>

Focusing for current purposes on Alf Ross, it is quite likely that the actual feasibility of this exercise – i.e. of dismantling the central tenets of his realistic legal theory from their commitment to logical positivism and reinserting them into a fundamentally different, but modern and viable philosophical framework – has been conducive to the present growth of interest in his work.

One tangible result of this interest has been the abovementioned decision of the Oxford University Press to publish a new, 2<sup>nd</sup> edition of Alf Ross's main work *On Law and Justice*. Instead, however, of merely basing this edition on a reprint of the first English edition published in 1958 it was further decided to devise a full new English language translation of the first Danish language edition *Om ret og retfærdighed* from 1953<sup>10</sup>. Comprising a total of 472 pages in the Danish original this decision calls for an explanation and the present contribution is devoted to this task.

As we shall see in the following, the main reason for the decision has to do with the fact that it was not only Alf Ross's original philosophical allegiance to the waning philosophy of logical positivism that impacted negatively on the reception of his work in the English speaking countries. The quite problematic character of the existing translation also played a central role. In order to see how, I shall proceed in three steps. First, I take a step back and briefly follow the Anglo American reception history of *On Law and Justice* a little closer focusing in particular on the role played by H.L.A. Hart's influential critique; second, I explain why this critique can be said to be based on a straw man; and third and finally,

7 LEITER, B (2007a). "Brian Leiter: Interview about legal philosophy", in: NIELSEN, ME (Ed.), *Legal Philosophy: 5 Questions*. Automatic Press / VIP., pp. 143-151.

8 HOLTERMANN, J v H (2006). "Ross og erkendelsesteorien", in: HOLTERMANN, J v H & RYBERG, J (Eds.). *Alf Ross - kritiske gensyn*. København: Jurist- og Økonomforbundet., pp. 37-62.

9 HOLTERMANN, J v H (2014). "Naturalizing Alf Ross's Legal Realism: A Philosophical Reconstruction". *Revus. Journal for constitutional theory and philosophy of law*, 24, pp. 165-186; HOLTERMANN, J v H (2015). *Op. cit.*; MAUTNER, T (2010). "Some Myth about Realism". *Ratio Juris*, 23, 3, pp. 411-427; SPAAK, T (2009). "Naturalism in Scandinavian and American Realism: Similarities and Differences", in: DAHLBERG, M (Ed.) (2009). *De lege. Uppsala-Minnesota Colloquium: Law, Culture and Values*. Uppsala,ustus förlag, pp. 33-83.

10 ROSS, A (1953). *Om ret og retfærdighed: En indførelse i den analytiske retsfilosofi*. 1. ed., Kbh: Nyt Nordisk Forlag. Arnold Busck A/S. After having been out of print in his home country for a couple of decades, a second edition of *Om ret og retfærdighed* was published in: ROSS, A (2013). *Om ret og retfærdighed: En indførelse i den analytiske retsfilosofi*. HOLTERMANN, J v H (Ed.), 2. ed. / and a new introduction for this edition by J.v.H. Holtermann(Ed.). København: Hans Reitzels Forlag.

I illustrate why, even if based on a straw man, the English translation in the first edition can nevertheless be said to be at least partly responsible for inviting misunderstandings of Ross’s Realism and hence for the actual success of Hart’s critique. This concludes the argument for devising a new translation of *On Law and Justice* instead of merely reprinting the existing version.

## **2. THE ANGLO SAXON CRUSADE, HART’S CRITIQUE AND THE PERMANENT SETBACK**

During the 1950s in what Alf Ross’s biographer Jens Evald has described as “the golden time”<sup>11</sup>, Ross had largely conquered the Nordic countries with his particular logical positivism-based version of Scandinavian Realism. As witnessed by the optimistic and confident preface to the 1958 edition of *On Law and Justice* the English translation was meant to be the first step on the way to, if not conquer then at least exert a considerable influence also on Anglo Saxon jurisprudence<sup>12</sup>.

Unfortunately for Ross, however, things would not go quite that way. Even though he clearly managed to exert some influence, this influence was in the end undoubtedly less than he had hoped for and expected when he first embarked on his Anglo Saxon crusade. One very significant factor in this regard was to be a review of *On Law and Justice* published in 1959 in *The Cambridge Law Journal* by another shooting star in legal philosophy, the newly appointed Professor of Jurisprudence at Oxford University, H.L.A. Hart.<sup>13</sup> Hart’s review was, to be sure, fundamentally respectful and it also contained (measured) praise of Ross’s work – as well as of Scandinavian Realism more generally. Indeed, the fact that it was written in the first place by a professor of Hart’s stature instead of *On Law and Justice* simply being passed by in silence testifies to the importance of Scandinavian Realism at the time, and it probably also contributed further to consolidating the school’s position on the map of jurisprudence for future generations<sup>14</sup>.

On one particular – and particularly important point, however, Hart expressed clear and unremitting critique. He flatly rejected Ross’s predictive analysis of statements of valid law. This critique is well known, and I shall not go deep into the details of the contents here but only give a rough outline. In *On Law and Justice* using an arbitrary article from the Danish Bill of Exchange Act, Ross gives the following predictive definition of expressions of valid law in any given jurisdiction:

The real content of

P = (§ 28 of the Danish Bill of Exchange Act) is currently valid Danish law is a prediction that if an action in which the conditioning facts, given in § 28 of the Danish Bill of Exchange Act, are considered to exist, is brought before a court; and if in the meanwhile there have been no alterations in the circumstances which motivate P, the directive to the judge contained in § 28 of the Danish Bill of

11 EVALD, J (2014). *Alf Ross - a life*. Chap. 10. Copenhagen, DJØF Publishing.

12 ROSS, A (1958). *On law and justice*. London, Stevens, pp. x-ix

13 HART, HLA (1959). “Scandinavian Realism”. *The Cambridge Law Journal*, 17, pp. 233-240.

14 Most respectable historical accounts of jurisprudence contain a chapter on Scandinavian Realism. Thus, a reference text book like *Lloyd’s Introduction to Jurisprudence* devotes around 50 pages to an account of Scandinavian Realism and a selection of extracts of their writings (FREEMAN, MDA (2008). *Lloyd’s introduction to jurisprudence* (8. ed.). London, Sweet & Maxwell, three of these extracts are written by Ross, one by Hägerström and one by Olivecrona thus testifying to Ross’s prominent role in the school).

Exchange Act will form an integral part of the reasons for the court's decision<sup>15</sup><sup>16</sup>.

In his review, Hart objected to this analysis stating in a memorable passage that:

[...] this cannot be its meaning in the mouth of a judge who is not engaged in predicting his own or others' behaviour or feelings. 'This is a valid rule of law' said by a judge is an act of recognition; in saying it he recognises the rule in question as one satisfying certain accepted general criteria for admission as a rule of the system and so a legal standard of behaviour<sup>17</sup>.

Hart would later develop further and elaborate this critique in some of the most celebrated passages of *The Concept of Law*. In a nutshell, Hart found Ross guilty of the same sin which he attributed to the American Realists, i.e. of providing an analysis of valid law that made it impossible to differentiate between two distinct social phenomena: habit-based convergent behavior (like going to the cinema on Saturday nights) and rule-governed behavior (like men taking their hats off when entering a church). Hart further attributed this failure to Ross's alleged failure to acknowledge an internal aspect of social rules in addition to their external aspect in terms of observable regular behavior.

This critique was to become hugely influential and it undoubtedly had a strong adverse effect on the reception of Ross's work in the UK and the United States. Indeed, one gets an apt impression of the long-term impact of Hart's review on the perception of Ross's analysis of valid law from the *Stanford Encyclopedia of Philosophy's* entry on "Naturalism in Legal Philosophy" laconic conclusion on the matter: "Hart famously demolished this analysis."<sup>18</sup> To be sure, this does not mean that Ross disappeared completely. But on the big scene he was for several decades effectively reduced to the ungrateful role of being an extra in the great H.L.A. Hart show – or, as Schauer so aptly expresses the point in relation to the effect of Hart's work on Realism generally: "In Great Britain and much of the rest of the common law world, Legal Realism is taught mostly as a joke, or at least as a convenient foil for demonstrating the wisdom of H.L.A. Hart"<sup>19</sup>.

### 3. THE STRAW MAN CHARACTER OF HART'S CRITIQUE

Already in his return review of *The Concept of Law* in 1962 Ross objected strongly to Hart's critique, claiming that it was based on a distorted reading of his realist theory<sup>20</sup>. A close study of *On Law and Justice* reveals that he was probably right. Hart's critique does indeed seem to be based on rather grave misunderstandings and although undeniably effective it ultimately amounts to a straw man fallacy. Ross on his part did not hold it against Hart but blamed the translation instead. There is a risk of

15 ROSS, A (Forthcoming 2016). *Op. cit.*, § 9 / 1953, p. 55 / 1958, p. 42). In order to make my argument I shall be making a number of references to passages from *On Law and Justice/Om ret og retfærdighed* that Ross for unknown reasons decided to exclude from the 1958 English translation (cf. below). Since most readers presumably do not read Danish I have chosen to quote from the new translation of the forthcoming 2<sup>nd</sup> edition. For consistency, I have further chosen to do so throughout the article, i.e. even when quoting passages that Ross *did* include in the 1958 edition. Since the forthcoming edition has not yet been typeset this means that I can only refer to Ross's § numbers. For ease of reference, I shall therefore include the Danish 1953 reference and also, when available, the 1958 English reference. As shown in the reference in this footnote, I use the forward slash ("/") to indicate references to the 1953 and 1958 editions respectively.

16 § 28 of the Danish Bill of Exchange Act reads as follows: "By accepting, the drawee undertakes to pay the bill of exchange on the due day for payment."

17 HART, HLA (1959). *Op. cit.*, p. 237.

18 LEITER, B (2014). "Naturalism in Legal Philosophy", in: ZALTA, EN (Ed.), *The Stanford Encyclopedia of Philosophy*, Fall 2014 Edition ed.).

19 SCHAUER, F (2011). "Editor's Introduction", in: LLEWELLYN, KN & SCHAUER, F (Eds.) (2011). *The Theory of Rules*. Chicago, The University of Chicago Press, p. 4, n 14.

20 ROSS, A. (1962). *Review of The Concept of Law*. By H.L.A. HART: *The Yale Law Journal*, 71, 6, pp. 1185-1190.

overstating this point. Hart could surely have been more attentive in his reading. A close study even of the existing translation of *On Law and Justice* arguably makes it difficult to uphold Hart's interpretation in good faith. That said it is undeniable that the existing translation is highly problematic. Due to a number of quite blatant errors and omissions and problematic terminological choices the first translation can be said to at least invite the inattentive or uncharitable reader to arrive at much the kind of misreadings that Hart did.

I shall get back to the unfortunate role of the existing translation in this regard in section 4 below. In this section, I shall focus on explaining why Hart's critique can be said to miss its mark. The fundamental mistake in Hart's critique is that Ross simply never intended his predictive analysis of statements of valid law the way Hart thought. Hart's remark that “this cannot be its meaning in the mouth of a judge who is not engaged in predicting his own or others' behaviour or feelings” cannot be a critique of Ross's predictive analysis for the simple reason that Ross never intended it as an analysis of the meaning in *the mouth of a judge* in this particular situation.

To adequately capture this point it is necessary to understand the fundamental character of Ross's philosophical project, and, in particular, to see how it differs crucially from the philosophical project Hart was engaged in. Before becoming a professor of jurisprudence, Hart had taught philosophy at Oxford, and there he had become acquainted with and greatly inspired by the so-called “linguistic philosophy” or “ordinary language philosophy”, which was the fashion philosophy of the day, and which was developed with some differences of emphasis at Oxford under J.L. Austin and at Cambridge under L. Wittgenstein. At the center of attention for ordinary language philosophy, especially in the Austin variant which exerted the greatest influence on Hart, was conceptual analysis based on a study of the actual uses of language. Thus, Hart articulated his perception of the philosophical project as follows in the preface, *The Concept of Law*:

Many important distinctions, which are not immediately obvious, between types of social situation or relationships may best be brought to light by an examination of the standard uses of the relevant expressions and of the way in which these depend on a social context, itself often left unstated<sup>21</sup>.

This contrasts sharply with the philosophical project with which Alf Ross identified, and which underlies the realist legal theory that is laid out in *On Law and Justice*. As already mentioned, Alf Ross originally based his entire theory on the philosophical program developed in logical positivism. In contrast to the agenda of ordinary language philosophy, the primary questions in logical positivism were epistemological.<sup>22</sup> They were deeply concerned with the demarcation problem in philosophy of science and focused, in this connection, on identifying the possibility conditions of knowledge. It is this project that Ross refers to in the preface to the Danish edition when he describes the fundamental philosophical position underlying his work:

This fundamental position is an *anti-metaphysical* one. It expresses the programmatic demand for legal science to be established and constructed as an empirical science, in the same relativistic spirit and after the same methodological pattern that applies to all modern science which is not purely formal-logical in nature<sup>23</sup>.

21 HART, HLA; RAZ, J & BULLOCH, PA (2012). *The concept of law*. 3rd ed. Introduction by Leslie Green (Ed.). Oxford, Oxford University Press, p.vi. On the influence of ordinary language philosophy on his work, see also Hart's introduction to his *Essays in Jurisprudence and Philosophy*, Oxford, Clarendon, p. 2.

22 Quine expresses the difference in attitude thus: “Wittgenstein and his followers, mainly at Oxford, found a residual vocation in therapy: in curing philosophers of the delusion that there were epistemological problems.” (QUINE, WVO (1969). *Op. cit.*, p. 82)

23 ROSS, A (Forthcoming 2016). *Op.cit.*, ROSS, A (1953). *Op. cit.*, “Preface”, p. 3.

Of particular importance in the present context is that these very different conceptions of the fundamental philosophical project have a significant impact on Hart's and Ross's respective approaches to and analyses of the meaning of statements about valid law. To Hart as an ordinary language philosopher, it is crucial that his analysis of the concept of law adequately captures the actual standard uses of this concept in various contexts. In this sense (though not in others), ordinary language philosophy aims to provide *lexical definitions* of the terms they study.

As a logical positivist, Ross on the other hand is not really engaged in an attempt to correctly capture anything like *the* concept of law. Ross does not care about what valid law means, in and of itself, to the proverbial man on the Clapham omnibus – or to the average member of the judiciary for that matter. Precisely because Ross's project was epistemological having to do with laying down the foundations of a proper science of law, he was interested in what a legal scientist *should mean* by statements about e.g. valid law *if she wanted these statements to be able to count as science*.

Thus, where, as we have seen, Hart tests the soundness of a suggested analysis against the actual use in particular real-life situations (e.g. by a judge passing judgment in a court of law) Ross's benchmark is a completely different one:

Our analysis of the concept “valid Danish law” has purported to interpret the real content of sentences *which, according to their meaning and intention, have the character of scientific assertions that a certain rule is valid Danish law*<sup>24</sup>.

The latter half of the sentence emphasizes the scope of the analysis. He is only trying to determine the meaning which the concept should have for those who claim to be engaged in doing legal science, in making scientific assertions. And Ross clearly does not think that this includes judges engaged in passing judgement. What is more, Ross emphasizes that his predictive analysis may not even correspond to what ordinary academics whom we would normally expect to be doing science mean by statements about valid law:

Whether legal doctrine in the form it actually exists in current scholarly work concerning Danish law actually purports (according to its own meaning and intention) to present and explain assertions of this kind, is quite another question. It is *the question whether legal doctrine is, and wants to be, a science of valid law in the sense previously defined*<sup>25</sup>.

On the basis of these considerations alone, it is clear that Hart's critique misses the mark in one obvious way. Ross is simply not engaged in doing lexicography. He is not providing lexical definitions of central concepts like the concept of valid law. Ross is engaged in a reformist endeavor trying to show how legal scholarship can become a philosophically respectable science if it decides to follow his realist program. And to this purpose he is therefore rather suggesting a so-called *stipulative* definition in the meaning ascribed to that term by the prominent member of the Vienna Circle Rudolph Carnap (cf. the introductory quote to this article above)<sup>26</sup>.

In light of these considerations, one might try to rephrase Hart's objection along the following lines: Ross's analysis fails nonetheless because it leaves no conceptual room for the kind of meaning that ostensibly does attach in real life to statements about valid law in the mouths of judges engaged in passing judgement. Expressed in this way, Hart's objection refers back to the previously expressed concern about Ross overlooking the internal aspect of law, the internal point of view:

24 ROSS, A (Forthcoming 2016). *Op. cit.*, § 9; ROSS, A (1953). *Op. cit.*, p. 59; ROSS, A (1958). *Op. cit.*, p. 45 (emphasis added).

25 *Ibid.*, (Forthcoming 2016). *Op. cit.*, § 9; *Ibid.*, (1953). *Op. cit.*, p. 59; *Ibid.*, (1958). *Op. cit.*, p. 46).

26 CARNAP, R (1947). *Op. cit.*, pp. 7-8. For a further development of this argument, see: HOLTERMANN, J v H & OLSEN, HP (2013). "En definitionssandhed med modifikationer - kommentar til Jens Ravnkildes retskildebegreb". *Ugeskrift for Retsvæsen*, 34, pp. 293-310.

One of the difficulties facing any legal theory anxious to do justice to the complexity of the facts is to remember the presence of both these points of view and not to define one of them out of existence<sup>27</sup>.

The problem with this approach, however, is that only on a very uncharitable reading of *On Law and Justice* can Ross be said thus to define the internal point of view out of existence. Probably understood, it is quite clear that Ross is very clearly aware that valid law in the mouth of a judge engaged in passing judgment does indeed mean something else than what it ought to mean in the mouth of a legal scientist according to Ross's stipulative definition. In fact, his entire analysis can even be said to *presuppose* the very fact that such statements mean something different – and even something very close to what Hart claims they mean – in the mouths of judges.

I have unfolded this argument elsewhere, and intend to do so in further detail in future research, but I shall try to briefly outline the main idea here.<sup>28</sup> First, if we presuppose that the above interpretation is right, and Ross really did mean his definition of valid law as a stipulative definition, then it follows straightforwardly from Carnap, that there must, on Ross's view, still exist another “vague or not quite exact concept of *valid law* used in everyday life or in an earlier stage of scientific or logical development.” We can call this concept *valid*<sub>2</sub> in order to differentiate it from Ross's stipulated concept *valid*<sub>1</sub>. Let us further presuppose that this concept, *valid*<sub>2</sub>, means something along the lines of *true or correct*, and is a term that is specifically applied to norms, e.g. like the norms we find in legal rules like § 28 of the Danish Bill of Exchange Act.

Thus described, it seems that this specific concept of *valid*<sub>2</sub> law not only comes remarkably close to the concept of valid law in the mouths of judges which Hart claims that Ross's predictive analysis “defines out of existence”. Indeed, on closer inspection it becomes clear that Ross's analysis of *valid*<sub>1</sub> law is in fact not only perfectly consistent with the parallel existence and widespread use in different legal contexts of such a concept of *valid*<sub>2</sub> law; it can in fact be said to *presuppose* the existence of *valid*<sub>2</sub> in addition to *valid*<sub>1</sub>. This is so because closer analysis reveals that a statement that a given legal norm like § 28 of the Danish Bill of Exchange Act is *valid*<sub>1</sub> is, on Ross's account, really just a convoluted way of saying that *Danish judges think that § 28 is valid*<sub>2</sub>. Danish judges think that § 28 is valid in the sense of *true or correct*, and this, in a nutshell, is the reason why we in fact have reason to make the prediction that they will act upon it. It is precisely because *they* (the judges) find it *valid*<sub>2</sub>, that *we* (the legal scientists) find it *valid*<sub>1</sub>, i.e. that we find it probable that it will “form an integral part of the reasons for their decision”<sup>29</sup>.

The only real difference between Hart and Ross on this point would seem to be that Ross, unlike Hart, would claim that the judges who use this concept of *valid*<sub>2</sub> in relation to legal rules would be wrong. While they would undoubtedly believe, when calling a legal rule *valid*<sub>2</sub>, that the rule is in some way *true or correct*, they would in fact be wrong. But this difference is not a genuine semantic difference relating to the *meaning* of *valid*<sub>2</sub> in the mouth of the judge. It is an epistemological difference relating to the *potential justifiability* of the judges' belief.

27 HART, DLA et al (2012). *Op. cit.*, p. 91.

28 Cf. e.g. HOLTERMANN, J v H (2014). *Op. cit.*; ROSS, A (Forthcoming 2016). *Op. cit.*

29 A technical way of expressing the same point is to say that statements of valid, law are in fact concealed *propositional attitude reports*. Stating that a given norm is *valid*<sub>1</sub> is in fact a statement not only about the norm but about the relation between a given human subject, *in casu* the judges in a given jurisdiction, and the legal norm (i.e. *they think that it is valid*<sub>2</sub>), cf. e.g. HOLTERMANN, J v H (2014). *Op. cit.*

#### 4. THE UNFORTUNATE ROLE OF THE ORIGINAL ENGLISH TRANSLATION

As already mentioned, it is not unfair to place some of the blame for the misunderstandings on Hart's own shoulders. Had he been a bit more attentive or even charitable in his reading of Ross one might have hoped that he would have rephrased his critique. And perhaps he would even have realized that, as I have argued elsewhere, Ross had essentially anticipated what has since been celebrated as Hart's great discovery in *The Concept of Law*, i.e. the importance of the distinction between of internal and external aspects of social rules<sup>30</sup>.

However, as also mentioned, it is undeniable that the 1958 English translation is highly problematic at a number of points, and that it can be said to at least invite the inattentive or uncharitable reader to arrive at some of the same misinterpretations as Hart did. On a more stylistic note it has been observed that the English is substandard.<sup>31</sup> The real problems, however, have to do with i) problematic terminological choices; and ii) outright omissions – both within sentences and of entire passages, sometimes quite lengthy.

The problems relating to terminology in the original translation are presumably the most well-known, and they have to do precisely with the failure to distinguish terminologically between two different meanings of valid. As already observed above, Ross's realist theory can be said to operate with two different meanings of valid law – here called valid<sub>1</sub> and valid<sub>2</sub>. As a matter of fact, this conceptual difference can be clearly expressed in the Danish language which contains two different inflections of the same root: *gældende* (corresponding to valid<sub>1</sub>) and *gyldig* (corresponding to valid<sub>2</sub>). Ross even uses exactly these two terms interchangeably precisely in a way that is generally consistent with the reading above of the significance of the difference between them. Thus, he generally uses *gyldig* when he refers to the "meaning in the mouth of a judge" (valid<sub>2</sub>), and *gældende* when he refers to the (stipulative) meaning in the mouth of the legal scientist (valid<sub>1</sub>). In the 1958 English translation, however, Ross only uses valid, and thus has no linguistic tool to express the difference between the two different conceptions applied in the text. This clearly invites the mistake Hart made of believing that one prominent instance of a different meaning of valid in ordinary use can provide a counterexample to the stipulative definition suggested by Ross.

As also pointed out in other studies, this terminological issue is indeed a problematic aspect of the 1958 translation<sup>32</sup>. It is perhaps less well-known, however, that the old translation also contains a number of seemingly inexplicable omissions that play an equally unfortunate role. It falls outside this study to go through all these omissions and discuss their significance. I shall therefore limit myself to a couple of central examples that serve to illustrate how these omissions have had the effect that the 1958 edition has failed i) to state correctly Ross's central philosophical project, and thus to express the character and scope of his analysis; and ii) to adequately represent the core thesis behind his predictive analysis of valid law.

30 HOLTERMANN, J v H (2013). "Introduktion", in: ROSS, A (Ed.). *Om ret og retfærdighed: En indførelse i den analytiske retsfilosofi*. 2 ed. København: Hans Reitzels Forlag, pp. 9-42. ROSS, A (Forthcoming 2016). *Op. cit.*. For an argument that Ross, in turn, was essentially preceded on this point by Max Weber (WEBER, M (1977). *Critique of Stammler*. New York, Free Press), see: HOLTERMANN, J v H & MADSEN, MR (2015). "European New Legal Realism and International Law: How to Make International Law Intelligible". *Leiden Journal of International Law*, 28, 2, pp. 211-230.

31 Interestingly, this is contradicted by Hart who actually praise the translation in one point: "He writes in a clear, interesting and at times racy style; though these felicities may be in part due to the great skill of the translator." (HART, DLA (1959). *Op. cit.*, p. 233).

32 Ross observed this problem already in his 1962 review of Hart's *The Concept of Law* (ROSS, A (1962). *Op. cit.*). Also, Svein Eng has written a very comprehensive and recommendable treatment of the problem – and of the debate between Ross and Hart more generally (ENG, S (2011). *Op. cit.*). Unfortunately it is not easily mended in the new translation. English, unlike Danish and German, simply does not have the words to express this distinction. As a result, the forthcoming edition shall presumably have to indicate the difference in the same way as done here, i.e. using valid, for *gældende* and valid<sub>2</sub> for *gyldig*.

As mentioned above, in accordance with the fundamental tenets of logical positivism, Ross's overall philosophical project was epistemological having to do with the possibility conditions of a legal science. The existence of this ambition is very clearly present in some of the key passages of the original Danish language edition. Looking to the 1958 translation, however, these same passages are, inexplicably altered and abbreviated to an extent where the real meaning is distorted or lost entirely.

The following table illustrates this problem in relation to two passages which we have already quoted. This table makes it very clear how on the one hand Ross's analysis of valid law was originally intended as a stipulative definition suggested with a view to reforming legal scholarship and paving the way for a true legal science. It simultaneously shows how the 1958 edition by no means rules out Hart's reading, i.e. that what Ross is suggesting in this analysis of valid law at least could have been intended as a lexical definition of the concept in actual use.

**Table 1.**  
**Omissions of and changes to words and parts of sentences in the 1958 translation**

1953 Danish original:	1958 English translation	Forthcoming new English translation
<p>"Den foretagne analyse af begrebet 'gældende dansk ret' har taget sigte på at tyde realindholdet af sætninger der efter deres mening og intention har karakter af videnskabelige påstande om, at en vis regel er gældende dansk ret."</p>	<p>"The foregoing analysis [of the concept of 'valid Danish law'] has aimed at interpreting the real content of propositions which [according to their meaning and intention] have the character of [scientific] assertions that a certain rule is valid Danish law.</p>	<p>"Our analysis of the concept 'valid, Danish law' has purported to interpret the real content of sentences which, according to their meaning and intention, have the character of scientific assertions that a certain rule is valid, Danish law."</p>
<p>"Et andet spørgsmål er, om den juridiske doktrin således som den faktisk foreligger i gængse fremstillinger og behandlinger af dansk ret efter sin egen mening og intention går ud på at fremstille og begrunde påstande af denne art. Det er spørgsmålet om, hvorvidt doktrinen er og vil være videnskab om gældende dansk ret i den i det foregående definerede forstand."</p>	<p>"Another question is the extent to which the doctrinal study of law in the form in which it exists in current expositions of national law systems does in fact consist of assertions of this kind. It is the question of the extent to which the doctrinal study is and will be a cognition of [a science about] valid law in the sense in which it has been defined in the foregoing analysis."</p>	<p>"Whether legal doctrine in the form it actually exists in current scholarly work concerning Danish law actually purports (according to its own meaning and intention) to present and explain assertions of this kind, is quite another question. It is the question whether legal doctrine is, and wants to be, a science of valid, law in the sense previously defined."</p>
<p>(ROSS, A (1953). <i>Op. cit.</i>, p. 59, italics in the original)</p>	<p>(ROSS, A (1958). <i>Op. cit.</i>, pp. 45-46, passages in grey are completely omitted; furthermore, observe that also the italics from the Danish original are omitted in this version)</p>	<p>(ROSS, A (Forthcoming 2016). <i>Op. cit.</i>, § 9, italics in original)</p>

While highly important, these omissions are still relatively modest in the sense that they occur at the level of single words or parts of sentences. However, as a final example of the shortcomings of the 1958 translation this edition also contains a surprisingly large number of omissions of entire passages. Not all of these passages are equally important but some are arguably very important for a full appreciation of the central tenets of his realist theory. The following table from § 2 gives a particularly grave example of this (even though this excerpt only shows a small sample of the omitted passages in § 2!). The table illustrates how, in the Danish original, Ross meticulously illustrates through several examples how, unlike in other scientific disciplines, the assertions of legal scholars cannot be read at face value. These passages thereby provide key premises in Ross's argument that, if a legal science is to be possible, its statements require reconstruction as propositional attitude reports through a stipulative definition. In other words, the table illustrates some of the premises in Ross's argument, and English language readers have previously had to live without these premises.

Table 2. Omissions of full passages in the 1958 translation.

1953 Danish original:	1958 English translation:	Forthcoming new English translation:
Hvorfor stiller forholdet sig anderledes for ret og retsvidenskab?	Why is the position so different with respect to law [and legal science]?	Why are things different with respect to law and legal science?
Hvorfor er rettens »natur« et problem der ligger udenfor den egentlige retsvidenskabs område?	Why is the problem of the nature of law one that lies outside the province of the doctrinal study of law, strictly speaking?	Why is the "nature" of law a problem outside the realm of legal science proper?
Hvad kan der siges om de retlige fænomeners »natur« ud over hvad der fremgår af den videnskab, retsvidenskaben i snævrere forstand, der har disse fænomener som sin genstand?	What is there to be said about the "nature" of legal phenomena beyond that which emerges from the doctrinal study of law, which has these very phenomena as its subject?	What can possibly be said about the "nature" of legal phenomena, apart from what emerges from the science – legal science in the narrower sense – whose object of study are these very phenomena?
Et udgangspunkt til besvarelse af disse spørgsmål opnås ved en sammenligning af typiske sætninger, der tilhører henholdsvis retsvidenskaben og de andre nævnte videnskaber.	[Lacking]	In order to answer these questions one might, by way of a starting point, compare typical sentences belonging to the realms of legal science and the sciences named above.
Lad os fx betragte en fysisk sætning som denne:	[Lacking]	For example, let us look at the following sentence, belonging to the realm of physics:
<i>En i en beholder indelukket luftarts tryk og rumfang, omvendt proportionale;</i>	[Lacking]	<i>Pressure and volume of a given mass of confined gas are inversely proportional.</i>
eller en psykologisk sætning som denne:	[Lacking]	Or let us look at the following sentence, belonging to the realm of psychology:
<i>Ved indlæring af et stof gennem et antal læsninger opnås det bedste resultat, når læsningerne finder sted med passende mellemrum.</i>	[Lacking]	<i>The memorising of certain material through a number of readings achieves the best results when the perusals take place at suitable intervals.</i>
Vi behøver da ikke at vide noget om de fysiske eller psykiske fænomeners »natur« for at forstå disse udsagns videnskabelige mening.	[Lacking]	We need not know anything about the "nature" of these physical or psychological phenomena in order to understand the scientific meaning of these statements.
Vi er nemlig klar over, hvilken erfaring disse sætninger refererer til, d. v. s. på hvilken måde vi skal gå frem for at efterprøve deres sandhed.	[Lacking]	The fact is that we are aware of what experiences these sentences are referring to, that is, how we should proceed in order to verify their truth.
Anderledes med hensyn til en typisk retsvidenskabelig sætning, fx denne hentet fra Ussing, Enkelte Kontrakter, s. 116:	[Lacking]	The situation is different as regards a typical juridico-scientific sentence, such as, for example, this sentence from Ussing's book Individual Contracts [in Danish: Enkelte Kontrakter], p. 116:
<i>Acceptanten er forpligtet til at betale vekslen på forfaldsdagen, jfr. vxl. § 28. 1°.</i>	[Lacking]	<i>The acceptor is bound to pay the bill of exchange on the due day for payment, cf. § 28 (1) Danish Bill of Exchange Act.</i>
(ROSS, A (1953). <i>Op. cit.</i> , p. 15)	(ROSS, A (1958). <i>Op. cit.</i> , p. 6)	(ROSS, A (forthcoming 2016) <i>Op. cit.</i> , § 2)

## 5. CONCLUSION

As already mentioned, there are quite a large number of such errors and omissions in the existing English language edition of Alf Ross's *On Law and Justice*; errors and omissions which, as illustrated by Hart's hugely influential but demonstratively mistaken reading, have quite possibly had an adverse effect on the reception of Ross's particular version of Scandinavian Realism on the international scene of legal philosophy.

As we have seen, some of the errors are the result merely of unfortunate responses to the difficulties inherently attached to the very act of translation. Others however, in particular the omissions, seem to stem from editorial choices that are simply wrong and should have been avoided. It is not easy to speculate what reasons Ross might have had for making these quite radical changes to the 1958 English translation. One possible explanation points to the fact that Ross was here addressing an entirely different audience. While the Danish 1953 edition was (at least formally) intended as a textbook for law students at the University of Copenhagen, the English 1958 edition was a work respectfully addressed to Ross's Anglo-American peers. This may have led him to omit certain passages in an attempt not to sound too didactic which may explain table 2. Another consideration regards the possible temptation to try to follow the *Zeitgeist*. By the late 1950s it must have been clear to Ross that the influence of logical positivism was gradually waning and that ordinary language philosophy was the new philosophy *du jour*. This may have led him to attempt to gloss over the more scientific sounding passages and attempt to give the whole work the appearance of closer resemblance and congeniality with the tenets of the then trending ordinary language philosophy.

Either way, the result remains highly unfortunate as it has only served to create frustrating ambiguity about Ross's work. One of the clear strengths of his philosophy can be aptly expressed with the following quote originally written about W.V. Quine:

His greatest philosophical contribution has probably been to develop in a consistent and rigorous fashion, the consequences of a set of assumptions whose appeal cannot be denied even by those who reject them<sup>33</sup>.

This is precisely where we find Ross's greatest philosophical contribution. In his work, especially in his mature defense of Legal Realism in *On Law and Justice*, we find a moderate and sophisticated articulation of the consequences for legal science of a consistent and rigorous development of a set of empiristic assumptions that, especially through the reframing in naturalized epistemology, maintains its philosophical appeal to this day.

This of course does not mean that Ross's legal theory is without flaws. It surely has many limitations, some of them precisely because of the fundamental assumptions on which it rests. But if we are to make a sober and balanced assessment of these assumptions and their implications for legal philosophy and science, it is of the utmost importance that we do not consider Ross's theory in a suboptimal version that makes it vulnerable to irrelevant objections. The new translation forthcoming on Oxford University Press intends to ensure this and thus to contribute to the continuing fruitful debate in legal philosophy.

33 HOOKWAY, C (1988). *Quine: language, experience and reality*. Cambridge, Polity, p. 3.



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