Lost in Translation or Lost in System? The Discussion Between Ross and Hart

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1. The issues. My main thesis

Time line (for details concerning the particular works, see the list of references at the end):

1953: Alf Ross, *Om ret og retfærdighed*.

1958: *Om ret og retfærdighed* appeared in English, entitled *On Law and Justice*.

1959: H.L.A. Hart, ‘Scandinavian Realism’. This is a review of *On Law and Justice*.


1961: Alf Ross, ‘Validity and the Conflict between Legal Positivism and Natural Law’.


Two main sets of question in the discussion between Ross and Hart

First, did Hart misunderstand Ross’s theory of “valid law”? If so, was this due to the translation of Ross’s “gældende ret” as “valid law” or a careless reading of Ross on Hart’s part?

Secondly, what was the relationship between the views of Ross and Hart on the substantive issues that are related to the translation issue? Put pointedly: Given what Ross takes to be the correct rendering of his key terms in English, was Hart correct in perceiving there to be a theoretical gulf between his own views on norms and normativity and those entertained by Ross?

My main claims

My conclusion of the linguistic discussion has two parts: The linguistic data do not ground a claim to the effect that the translation of “gældende ret” as “valid law” is plainly wrong. Still, there are meaning components in the Scandinavian family of terms “gjeldende” relating to the efficacy of the norm that are not fully brought over with the term “valid” (section 4 cf. 5.1).

With respect to the second set of question, my conclusion will be that Ross was right in claiming that he and Hart were on all “essential points” in complete agreement – with the necessary continuation that by “essential points” I shall understand basic philosophical positions concerning the ontological status of normativity and the existence of a specifically practical reason (section 5.2).
I submit that many claimed differences of theoretical principle between Hart and Ross are non-existing. Instead of such differences closer analyses reveal surface differences stemming from the fact that they approached the issue of the validity of law from two very different contexts (sections 6 cf. 5.2).

My main submission, covering both sets of question, may be put simply: Rather than himself being lost in translation Ross should have pointed to Hart’s being lost in the Hartian system.

2. The adjective “gjeldende”
In the Scandinavian languages (Norwegian, Danish, and Swedish) we find the terms “gjeldende” (Norwegian), “gældende” (Danish), and “gällande” (Swedish). These terms are adjectives. The negations result from joining the adjective with a preceding “ikke” (Norwegian, Danish) or “icke” (Swedish) (cf. English: “not”, German: “nicht”).

The differences between the Scandinavian languages with respect to “gjeldende”, “gældende” and “gällande” seem to lie at the lexical level only. We may therefore speak in the singular form with the definite article of “the adjective” or in the singular form with a demonstrative of “this adjective”. For the sake of simplicity it is convenient to use one of the Scandinavian terms as a placeholder for all three. Since I am myself a Norwegian, I shall be using the Norwegian term to fulfill this role. This means that in what follows, if nothing else is explicitly stated or clear from the context, the Norwegian term “gjeldende” serves as a variable in the place of which the reader may substitute any of the Scandinavian terms.

The adjective “gjeldende” has the following linguistic properties:

- No corresponding noun
- The attributive use is the primary use
- Mainly used of general norms, not of individual norms
- The main connotation is efficacy
- A common feature of the claim to efficacy is the excluding function
- A variety of empirical application criteria of efficacy

The last property leads us to:

Ross’s application criteria of efficacy.
3. The adjective “gyldig” and the noun “gyldighet”

The adjective is “gyldig” [“gültig”, “valid”], the noun is “gyldighet” [“Gültigkeit”, “validity”]. The negations result from affixing a “u” [cf. German: “un”, English: “in”]: “ugyldig” [“ungültig”, “invalid”] and “ugyldighet” [“Ungültigkeit”, “invalidity”] respectively.

These terms may be used in various contexts, in corresponding various senses:

1. the validity of an issued norm, that is, a norm created through the exercise of competence;
2. moral, religious or other kinds of normative tenability, assessed from a standpoint external to any empirically efficacious forms of normativity (be it law, morals, religion, or other forms in their empirical aspect);
3. the tenability of propositions in general, from whatever realm of discourse;
4. the tenability of a logical argument.

5.1. Did Hart misunderstand Ross’s theory of “valid law” on linguistic grounds?

[Quotation 1] Ross 1961, p. 162 (Ross’s italics unless otherwise stated): “The way the problem [of the meaning of the assertion ‘D is valid Danish law’] is raised and treated leaves doubt that the issue discussed is what Hart treats under the heading of the existence of a legal rule or a legal system. ... I am now aware that the Danish ‘gældende ret’ should not have been translated into English as ‘valid law’. I regret my lack of sufficient feeling for English usage, but, at the same time, I believe that had Hart been a little more attentive, he would have noticed that the problem I treat under ‘validity’ is altogether different from the problem he considers under the same heading [my italics]. Had he understood this, there would have been no basis for his criticism, namely, that the statements about legal validity have nothing to do with predicting judicial behaviour. It is interesting that when these misunderstandings are eliminated, there seems to be no disagreement between our views as to what is involved in the question of the existence of a legal system.”.

[Quotation 2] Hart 1961, p. 100, cf. pp. 97–107 (my italics): “To say that a given rule is valid is to recognize it as passing all the tests provided by the rule of recognition.”

[Quotation 3] Hart, 1961, 105–06/ 1994, 108–09 (Hart’s italics): “We only need the word ‘validity’, and commonly only use it, to answer questions which arise within a system of rules where the status of a rule as a
member of the system depends on its satisfying certain criteria provided by the rule of recognition. No such question can arise as to the validity of the very rule of recognition which provides the criteria; it can neither be valid nor invalid but is simply accepted as appropriate for use in this way. To express this simple fact by saying darkly that its validity is ‘assumed but cannot be demonstrated’, is like saying that we assume, but can never demonstrate, that the standard metre bar in Paris which is the ultimate test of the correctness of all measurement in metres, is itself correct.”

5.2. Was Hart correct in perceiving there to be a theoretical gulf between his own views on norms and normativity and those entertained by Ross?

The level of normative entities other than the members of the rule of recognition

(2) “The internal point of view”, “Hart’s hermeneutic method”

[Quotation 4] Ross 1958, p. 36/ 1953, p. 49 (my italics): “[T]he legal system forms a whole [...]. Fundamentally, validity is a quality ascribed to the system as a whole. The test of the validity is that the system in its entirety, used as a scheme of interpretation, makes us to comprehend, not only the manner in which the judges act, but also that they are acting in the capacity as ‘judges’. There is no Archimedes point for the verification, no part of the law which is verified before any other part.”

[Quotation 5] Ross 1958, p. 37/ 1953, p. 50 (my italics): “A behaviouristic interpretation [...] achieves nothing. The changing behaviour of the judge can only be comprehended and predicted through ideological interpretation, that is by means of the hypothesis of a certain ideology which animates the judge and motivates his actions. Another way of expressing the same thing is to say that law presupposes, not only regularity in the judge’s mode of action, but also his experience of being bound by the rules.”

The level of the rule of recognition

(1) Hart’s rule of recognition and the Scandinavian doctrine of the sources of law

[Quotation 6] Hart 1965, p. 1293/ 1983, p. 360 (Hart’s italics): “The reason for still speaking of ‘a rule’ ... is that, notwithstanding their multiplicity, these distinct criteria are unified by their hierarchical arrangement.”

[Quotation 7] Ross 1961–62, p. 1186, at and in note 8 (Ross’s italics): “The reader will understand that Hart under the label of ‘rules of recognition’ is concerned with what usually is called the sources of law. It is assumed that when a plurality of sources are recognized, they will be ranked in an order of relative subordination and primacy. [...] Because of
this hierarchical structure, it is possible to consider the various rules of recognition as integrated logically in one and only one rule: the rule of recognition. In this way the logical unity of the system is guaranteed. Th[is] much cherished logical unity [...] is more a fiction or a postulate than a reality. The various sources in actual fact do not make out a logical hierarchy but a set of co-operating factors. Custom and precedents, says Hart, in the British system are subordinate to legislation. I believe that Hart, if he tried to verify this assertion, would find that is squares better with a confessed, official ideology than with facts.”

(2) Hart and Ross on the ultimate reality basis of normativity

[Quotation 8] Ross 1958, p. 75–76/ 1953, p. 91: “[T]he mental process by which the judge decides to base his decision on one rule rather than another is not a capricious and arbitrary matter, varying from one judge to another, but a process determined by attitudes and concepts, a common normative ideology, present and active in the minds of judges. ... This ideology is the subject of the doctrine of the sources of law. It constitutes the foundation of the law system and consists of directives which ... indicate the way in which a judge shall proceed in order to discover the ... directives decisive for the question at issue. ... This ideology is the basis for the predictions of the doctrinal study of law. ... The ideology of the sources of law is the ideology which in fact animates the courts. ... The doctrine of the sources of law, like any other doctrine concerning valid law, is norm-descriptive, not norm-expressive.”

[Quotation 9] Hart 1983, p. 359 (my italics): “The existence of [the rule of recognition] is manifested in the acknowledgement and use of the same set of criteria of legal validity by the law-making, law-applying, and law-enforcing officials and in the general conformity to law so identified.”

References


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