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The Philosophy of Scandinavian Legal Realism

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Abstract. The jurisprudential movement known as Scandinavian Legal Realism was grounded by the Swedish philosopher Axel Hägerström and the Danish philosopher and jurist Alf Ross dedicated to destroy the distorting influence of metaphysics upon legal thinking and to provide the secure philosophical foundation for scientific knowledge of the law. I shall present Hägerström's philosophical theory and argue that he is committed to the metaphysical 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 behavioural regularities among human beings and legal knowledge as an empirical inquiry into the causal relations between legal rules and human behaviour. This approach is followed by his pupils, the Swedish lawyers A. V. Lundstedt and Karl Olivecrona whereas Ross appeals to logical positivism. The naturalistic approach should be taken seriously since it leaves no room for the normativity of the law and for legal knowledge in terms of reasons for belief and action.

1. Introduction

The jurisprudential movement known as Scandinavian Legal Realism was founded by the Swedish philosopher Axel Hägerström (1868–1939), who held the chair of practical philosophy at the University of Uppsala from 1911 to his retirement in 1933, and the Danish philosopher and jurist Alf Ross (1899–1979), who held chairs in law at the University of Copenhagen from 1933 until his retirement in 1970. They shared the view that it is vital to destroy the distorting influences of metaphysics upon scientific thinking in general and legal thinking in particular in order to pave the way for the scientific understanding of the importance of law and legal science for the life of human beings within a state. Hägerström's philosophy informs his jurisprudential approach in terms of a naturalistic approach to law and legal knowledge that is further pursued by his pupils the Swedish legal scholars

A. V. Lundstedt (1882–1955), professor of law at the University of Uppsala from 1914 to 1952, and Karl Olivecrona (1897–1980), professor of law at the University of Lund from 1934 to 1964. Hägerström also made an impact upon Ross as acknowledged by Ross's statement that Hägerström "opened my eyes to the emptiness of metaphysical speculations in law and morality" (Ross 1958, ■■). However, Ross does not yield to Hägerström's authority and grounds his view of law and legal science upon his commitment to logical positivism and holds that "all science is ultimately concerned with the same body of facts, and all scientific statements about reality—that is, those which are not purely logical-mathematical—are subject to experimental test" (Ross 1958, 67). Ross's adherence to logical positivism may explain why he is seen as the most important Scandinavian Realist, not only abroad but also in the Nordic countries.

The philosophy of Scandinavian Legal Realism can be addressed from the perspective of what is dead and what is alive in their views concerning the approach to law and it seems that the former is an American perspective, claiming that Scandinavian Realism, unlike legal positivism, survives "only in the museums of jurisprudential archaeology" (Schauer and Wise 1996–1997, 1081). The rejoinder is that it may be worthwhile to visit museums not only in order to learn about the past but also as a source of reflection upon activities in future. It is easy to relegate the Scandinavian realists to the past but this is to ignore that their ideas are still a challenge to the understanding of various issues concerning law and legal knowledge.

One issue is the importance of the law in society. As Hägerström puts it, "the law is undeniably a condition of culture itself. Without it, as the Sophist Protagoras already saw, we should never have been able to win the lordship over other species" (Hägerström 1953, 262). It is this that matters in order to arrive at a proper understanding of the law and that raises another issue concerning the philosophical foundation for the understanding of law and legal knowledge that Hägerström addresses in his philosophy. I shall present an overview of Hägerström's philosophy concerning reality and knowledge that informs his inquiries into the nature of morality and law. The Scandinavian realists stress the relation between philosophy and jurisprudence in their conceptual analysis of fundamental legal concepts, bringing the questions of reality and knowledge into focus, in order to establish the secure foundation for the scientific understanding of law and legal knowledge in terms of a naturalistic approach that is still an important jurisprudential issue.

2. Hägerström's Philosophy of Reality and Knowledge

Hägerström is rightly considered to be the founder of Scandinavian Realism and is known for his rejection of metaphysics. As he puts it, "we must destroy metaphysics, if we ever wish to pierce through the mist of words

which has arisen out of feelings and associations and to proceed 'from sounds to things'" (Hägerström 1964, 74). Hägerström's philosophy of reality and knowledge is grounded in reason that holds that there is only one world, the world in time and space that is there to be known by means of experience (see Bjarup 2000 for an overview). Thus Hägerström rejects metaphysics in the sense of the existence of a meta-physical or supernatural world beyond the existence of the physical or natural world in time and place. However, it is often overlooked that this implies that Hägerström is committed to a metaphysical view of reality that maintains "the completely logical character of sensible reality" (Hägerström 1964, 37). Hägerström's metaphysical view implies that reality is intelligible not in terms of an idealistic metaphysics as a spiritual reality, but in terms of a realistic metaphysics as a material reality consisting of things and their properties and causal relations between them that exist apart from the human mind. Hägerström calls his philosophical approach "rational naturalism" in opposition to "rational idealism" advanced by the Swedish idealist philosopher C. J. Boström (1797–1866), leading Hägerström to advance the naturalistic approach as the only scientific or realistic approach to the study of the nature of the world. Thus he rejects idealism in the sense of ideal-ism that holds that ideals of perfection are found in nature, but he is firmly committed to idea-ism that holds that ideas or concepts exist independently of the human mind as embedded in nature in the various kinds of things that confront human beings. Thus the logical character of the sensible reality implies that everything in the world is what it is since the causal relations between things and events are necessary relations that are manifested in natural laws. Thus things or concepts make a causal impact upon the minds of human beings as spectators using their senses to arrive at knowledge that is expressed in meaningful words in terms of concepts that can be used in meaningful sentences to express true judgments since the truth of a judgment is the reality of the thing.

Hägerström presents his naturalistic approach in a philosophical dialogue between a philosopher and a botanist representing the scientists that shows that Hägerström is more interested in the classification of things than their measurement since botany is a classificatory science concerned with the quality of things, as opposed to quantitative sciences such as physics concerned with the measurement and movement of quantities. This fits with Hägerström's view that the sensible reality cannot be described and explained in mathematical concepts but only in naturalistic or empirical concepts referring to natural properties and their causal relations. The truth of a judgement is the reality of the thing and this accounts for the difference between judgements made by ordinary people and judgements made by scientists since scientists have more experience and are in a better position to arrive at the truth than ordinary people who are carried away by feelings whereas scientists are dedicated to the search for truth as neutral and

judicious spectators facing the impact of the world upon their minds to be recorded in the use of descriptive concepts and scientific judgements. Thus Hägerström stresses that people can rely upon the authority of scientists informed by Hägerström's rational naturalism.

3. Hägerström's Moral Philosophy

Hägerström's rational naturalism also informs his inquiries into the nature of morality. What is important is Hägerström's metaphysical view of the completely logical character of the sensible reality since this implies that reality is devoid of any values. It follows that there can be no moral reality in terms of moral or normative concepts embedded in the nature of things or in human beings and their actions. Hägerström rejects naturalism in ethics since moral concepts cannot be analyzed and defined in non-moral concepts in terms of empirical facts of sensations of pain and pleasure. Hägerström subscribes to Kant's view that "when we have the course of nature alone in view 'ought' has no meaning whatsoever. It is just as absurd to ask what ought to happen in the natural world as to ask what properties a circle ought to have. All that we are justified in asking is. What happens in nature? What are the properties of the circle?" (Kant 1976, A547-B575). However, Kant holds that the meaning of "the ought" or morality can be established by reference to the will or practical reason to account for the fact that human beings are persons having the capacity to create rules of conduct grounded in moral obligations and natural rights to govern their actions as manifested in the making of positive laws to govern the conduct of human beings as free and responsible agents. Hägerström rejects Kant's appeal to practical reason as the foundation for the creation of positive laws since Hägerström confines reason to theoretical reason concerned with the conceptual analysis of concepts used within the sciences to describe and explain what there is. Since physical nature is devoid of any values, values can only be located in the minds of people, not in terms of moral beliefs and the use of moral concepts to express moral judgements but solely in terms of moral feelings as expressed in moral utterances in terms of requests and commands.

Hägerström's metaphysical view of physical reality is a version of realism that holds that concepts are embedded in nature. Hägerström's metaphysical view of morality is a version of nominalism that holds that there are no moral concepts but only moral words that are used to express various feelings or sensations of pain and pleasure, as well as to regulate human behaviour in relation to other human beings and to physical reality. Since morality is only a matter of using words to express human feelings, it follows that there can be no moral knowledge in terms of moral judgements. As Hägerström puts it in his inaugural lecture, "moral science cannot be a teaching in morals but only a teaching about morality" (Hägerström 1964, 96).

This is Hägerström's moral nihilism that holds that there are no moral obligations or any moral or natural rights for anybody to do anything, but Hägerström is at pains to stress that this does not imply that people should act immorally, and moral vocabulary can still be used to control and coordinate the behaviour of people. But his moral nihilism implies that there can be no moral knowledge as expressed in normative concepts and judgements of what is right or wrong or good and bad as reasons for beliefs and action. To be sure, there can be scientific inquiry concerning morality in relation to the use of a moral vocabulary by various people to express their moral feelings, but this is moral science based upon the naturalistic approach that is concerned with the description and explanation of the causal relations between words and human behaviour. Hägerström rejects moral knowledge in terms of normative judgements and their justifications as reasons for belief and action, since this is metaphysics failing to realize that "in reality there is for consciousness nothing but words, whose meaninglessness from a conceptual standpoint one does not see clearly" (Hägerström 1964, 68).

Hägerström's moral nihilism is advanced from a conceptual standpoint and located within the area of meta-ethics, to use a contemporary phrase introduced by Alfred Ayer. But Hägerström's moral nihilism is not confined to the conceptual analysis of moral concepts but has practical implications since it rules out that there can be any moral teaching in terms of moral reasons for belief and action. The moral implication of the lack of any moral knowledge is that there can be no moral criticism of the positive law. This has in turn political implications concerning "the bitter strife between capital and labour" that he mentions in the lecture (Hägerström 1964, 78). This strife is grounded in moral beliefs that people are prepared to fight for either peacefully by the use of arguments or by using violence and going to war. As Hägerström puts it in his introduction to his book on Roman law, "one fights better if one believes that one has right on one's side" (Hägerström 1953, 5). Now, if it can be demonstrated that moral beliefs are illusions from the conceptual standpoint that Hägerström occupies, the implication is that the strife is in reality based upon illusions held by people, in which case the strife is ridiculous, if not irrational. Hägerström's moral nihilism implies that nothing is morally right and wrong and this implies that the strife cannot be solved by the appeal to moral reasoning grounded in universal principles to arrive at political solutions that aim to create a just society among human beings as citizens. It is also a fact that Hägerström sympathizes with the Marxist idea of a classless society but this is not to be brought about by people taking violent action against factories or by any appeal to war. Hägerström rejects the Marxist call for a violent revolution in favour of a peaceful revolution to end strife by bringing human beings to their senses that they are not only social but also intelligent animals with the capacity to use scientific knowledge to introduce and maintain the appropriate social structure by means of positive law.

4. Hägerström's Legal Philosophy

This leads to Hägerström's concern with the conceptual analysis of the law and the related theories of law advanced by natural law and natural right theories on the one hand and legal positivist theories on the other that are dismissed by Hägerström as conceptually confused and condemned as morally pernicious. Hägerström grants that the law is introduced by the will of human beings in general and the legislator in particular but he denies that the will is embodied in the content of the law to account for the conceptual meaning of the legal vocabulary used in positive laws. Thus Hägerström faces the Euthyphro question as to whether what is right is willed by the legislator because it is right, that is the intellectualist position, or whether what is right is so because it is willed by the legislator, that is the voluntarist position. The intellectualist position holds that the conceptual meaning of what is right and wrong is found by reason and located in moral reality, either embodied in the nature of things or in persons and their actions, that serves as the foundation for the making of the positive law in terms of normative propositions that are willed by the legislator because they are just. Hägerström was sympathetic to the intellectualist position in his earlier writings, but in his final version his philosophical position is based upon his metaphysical view that rejects the existence of any moral reality in terms of normative facts or concepts. The intellectualist position is endorsed by theories of natural law and natural right that are rejected by legal positivists holding that there are only positive rights based upon positive laws made by the will of the legislator.

Hägerström endorses the positivist rejection of natural law and natural right theories since there are no natural laws or natural rights, but then he sets out to destroy legal positivism since it does not make sense to hold that the conceptual meaning of the legal vocabulary is determined by the will of the legislator. This is the voluntarist position endorsed by John Austin and Hans Kelsen that holds that what is right or wrong is manifested in the positive laws that are just because the legislator wills them. This accounts for the existence of the legal reality of positive rights and correlative duties that can be maintained by the use of coercive sanctions, and the existence of coercive sanctions determines the conceptual meaning of legal concepts. Hägerström rejects Kelsen's theory as philosophically confused since it is based upon the existence of a legal reality of "ought" in terms of authoritative norms as a supernatural reality alongside the natural reality of "is" in terms of causal relations between social facts. Besides Kelsen is committed to the absurd view that the law creates its own existence in terms of legal norms that "have a creative power as regards that which is expressed in them" (Hägerström 1953, 276). This is surely a belief in magic since Kelsen holds that it is possible for human beings to create a legal reality of rights and duties by using concepts in legal norms. By contrast, Hägerström holds

that laws are found in the reality of social facts and this is also Austin's view. However, Hägerström rejects Austin's positivism since "it is pure despotism which serves as a model for the theory" because the sovereign is not "subject to any law" (Hägerström 1953, 35). This is not only a conceptual but also a moral objection and Hägerström questions "whether there really is a legal order" when the positive law expresses the will of the legislator.

The result of Hägerström's rejection of legal positivism is that the law lacks any conceptual content and this implies that the legal vocabulary is not a matter of using concepts as reasons for human conduct but only a matter of using empty words or noises to cause the appropriate behaviour. Hägerström is committed to what can be called legal nihilism that holds that there is no legal reality in terms of normative facts in terms of legal rights and legal duties. Hägerström substantiates his legal nihilism by his conceptual analysis into the meaning of law and legal concepts. This analysis is not a logical analysis of the conceptual relations between legal concepts but an historical inquiry into the origin of legal concepts in their historical circumstances in ancient Greek and Roman law (Hägerström 1927). The received view of Roman law is that Roman law is an expression of reason in relation to the use of legal concepts that Hägerström claims is false. This is so since legal concepts like right and duty do not correspond to something tangible in reality in time and space that can be seen or touched. It follows that there are no legal concepts but only the use of words to express various feelings and interests among human beings with respect to what the proper behaviour is, evoking the appropriate response that can be enforced, if necessary, by means of coercive sanctions. This is the magical use of words that leads Hägerström to claim that Roman law is to be seen as an expression of nonsense in relation to the use of words that are devoid of any conceptual meaning but have been used to maintain various social positions among human beings. The situation is no different with respect to modern law, but legal vocabulary is important nonsense since it is used by the appropriate authorities to maintain and enforce regular patterns of behaviour to maintain peace and security among the members of the state.

Hägerström holds that the law is undeniably a condition for human culture by reference to Protagoras (see introduction above). But Protagoras holds that the law is brought about by reason that implies that the law is conceptualized in terms of normative propositions about the reason to believe, to do, and to feel. The law is there to be taught and learnt in order to bring about proper conduct among human beings as persons. In contrast, Hägerström holds that man has risen above the level of brute animals not as "homo sapiens" but as "homo superstitious" using the magical vocabulary to bring about and control the appropriate behaviour among human beings as social animals (Hägerström 1931, 82). This magical vocabulary is used by human beings within the area of morality to express their subjective feelings and interests and as noted above this leads Hägerström to hold

that there can be no moral knowledge and no moral teaching. Morality is solely a matter of personal conscience as expressed in subjective utterances in terms of what is felt to be right and wrong or good and bad. In this respect people may agree but they may also disagree in relation to what they feel is right and wrong or good and bad and this may give rise to conflict. However, human beings are intelligent animals and find the remedy in terms of positive laws conceived as commands used by authoritative people to regulate the behaviour of their subordinates. This view informs Austin's legal positivism that stresses that the human legislator is concerned with the content of the commands as opposed to their form in order to regulate the conduct of the members of the state. Hägerström parts company with Austin, arguing that what matters is the form in terms of imperative sentences that are used by the legislator to bring about proper behaviour on the part of members of the state by means of rules of behaviour that can be enforced, if necessary, by the use of force or other sanctions to ensure compliance. In this way personal conflicts of feelings and interests among human beings are settled by means of positive laws stating the rules of public behaviour. This implies that the morality of personal conscience is replaced with positive law and "the law is the public conscience," to use a phrase from Thomas Hobbes. For Hägerström, the content of the law is devoid of any conceptual content but the imperative sentences are used by legal officials to bring about appropriate behaviour among people. Thus the meaning of legal rules is established by their effects on people to behave in certain ways and in this way "the legal order is throughout nothing but a social machine, in which the cogs are men" (Hägerström 1953, 354).

Modern science also conceives the sensible world as a machine governed by impersonal or natural laws of motion leading to the adoption of the naturalistic approach dedicated to providing empirical descriptions and mechanical explanations of things and events in terms of causes and their necessary effects to the exclusion of teleological explanation in terms of purposes. The natural world can be used and controlled by human beings to serve their needs and purposes by means of scientific knowledge of natural laws. If the law is conceptualized as a machine, this suggests that human beings are governed by impersonal or positive laws of behaviour that co-ordinate their behaviour to produce peace and security. Now a machine is a human construct or artefact that lacks any conceptual meaning and purpose. In a similar way Hägerström holds that positive laws lack any conceptual content and purpose. However, both machines and positive laws as human artefacts are made to serve various purposes. Thus a machine is produced by intentional activity on the part of its constructor to serve various purposes. Positive law is also brought about by intentional activity on the part of the appropriate authority and is meant to serve as guidance for the conduct of human beings as responsible persons and free agents. Thus the purpose of positive laws is to establish reasons for belief and action.

For Hägerström, the cogs in the legal machine are men and the question is whether Hägerström conceives of human beings as human agents with the capacity to act according to reasons or whether they are conceived as human instruments determined to move according to causes. Hägerström's use of the term "cog" suggests that he holds that human beings are instruments and if this is the case there is a crucial distinction between human beings as "knowing instruments" having the knowledge to operate the legal machinery and human beings as "mere instruments" lacking this knowledge. A machine is operated by human beings who know how to do so and this also holds for the application of positive law. Hägerström clearly holds that he belongs to the class of "knowing instruments" since he has achieved the magical use of legal vocabulary. Since positive laws lack any conceptual meaning and purpose, Hägerström faces a problem concerning the interpretation and application of laws as reasons for belief and action. This raises the normative question that is the concern of human beings as responsible persons and free agents in general and judges as well as jurists in particular. Hägerström solves this problem by changing the question from a normative one about reasons for belief and action to a psychological one about the various causes of human behaviour in terms of social feelings and the appropriate behaviour as the effect of the maintenance of the rules that keep the legal machinery running.

Hägerström's theory of legal rules as behavioural patterns that are maintained by the use of force is related to his view of legal science. Legal science cannot offer any information about the conceptual content of the law since the law is devoid of meaning. What legal science can offer is information about the magical use of the legal vocabulary to express human feelings that can be represented in descriptive judgements and explained in terms of causal laws stating the relations between the use of legal language and its impact upon human behaviour. This fits with Hägerström's naturalistic approach that holds that legal science "has become one of the special sciences. Like physics and chemistry, for example, its function is merely to establish the facts within a certain region, to reach general principles by induction, and to make deductive inferences from the inductively established results" (Hägerström 1953, 299).

Hägerström's account of the scientific method may be questioned but cannot be pursued in this paper. What matters is that Hägerström's philosophical analysis leads to the view that the scientific study of law is located within the area of the natural sciences or *Naturwissenschaften* grounded in the naturalistic approach that conceives of legal knowledge as psychological or sociological knowledge. Since Hägerström holds that law is a condition of culture, this suggests that the study of law can also be located within the area of the humanities or *Geisteswissenschaften* presenting an account of the law in terms of reasons for belief and action in relation to the pursuit of various human purposes. However, Hägerström is adamant that this is

tantamount to engaging in metaphysics, that is to say “an intellectual play with expressions of feelings, as if something real were designated thereby” (Hägerström 1964, 74). Thus Hägerström rejects the existence of the human or cultural sciences as a scientific inquiry into law and morality and this implies that there can be no legal or moral criticism of the making and application of the positive law since this is not a matter of legal or moral knowledge as expressed in normative judgements or propositions but solely a matter of using words to express subjective feelings.

5. Hägerström’s Legacy

Lundstedt and Olivecrona appeal to the authority of Hägerström’s philosophy that provides the foundation for the secure path for the scientific approach to law and legal science as opposed to other legal scholars wandering in the wilderness since they have no proper philosophical foundation for their views and are therefore lost in the mist of words that has arisen out of feelings. By contrast, Ross appeals to logical positivism to ground his scientific approach to law and legal science. It should be noted that Hägerström rejects logical positivism as another version of metaphysics and this view is followed by Lundstedt and Olivecrona, leading to a division among the Scandinavian realists. They share the view that it is an important task for jurisprudence to destroy the distorting influence of metaphysics upon legal thinking by means of a conceptual analysis of legal concepts but they differ with respect to the scope of jurisprudence and the structure of the conceptual analysis. For Lundstedt and Olivecrona, jurisprudence is concerned with the conceptual analysis as a historical inquiry into the origin of the law and the use of legal concepts in the positive law as well as within the doctrinal study of the law or legal science. By contrast, Ross confines jurisprudence to the conceptual analysis of the logical structure of the juristic language used within the doctrinal study of the law or legal science to the exclusion of the definition of the law and the analysis of the language of the law. As Ross puts it, “since it is intended to limit jurisprudence to the study of concepts which are presupposed in the doctrinal study of law, the question of a definition of ‘law’ (‘legal system’) is not one for jurisprudence. This has never been realized” (Ross 1958, 30).

Thus Ross holds that the definition or analysis of the concept of law is not a jurisprudential question, whereas Lundstedt and Olivecrona hold that this is a proper jurisprudential question to ask but that the answer presents problems. Thus Lundstedt holds that “the thought of law in the meaning of a system or body of rules lacks any real basis” (Lundstedt 1956, 31). This is the received view that the law exists as a body of normative rules to guide human beings and their actions that Lundstedt rejects as false, if not meaningless. The true jurisprudential answer is that there are no legal rules at all

and this rules out that there can be a legal science concerned with legal rules. However, Lundstedt is adamant that there are legal rules, not in the traditional sense as valid or binding rules since this is metaphysics, but in the scientific sense of regularities of behaviour informed by the method of social welfare. Olivecrona also rejects the view that legal rules are valid or have binding force as metaphysics but he does not subscribe to Lundstedt's view that is related to Lundstedt's "endeavour to replace 'the method of justice' in solving legal problems with by 'the method of social welfare'" (Olivecrona 1971, 84). For Olivecrona, "the law is a link in the chain of cause and effect. It has, therefore, a place among the facts of the world of time and space" (Olivecrona 1939, 16). Olivecrona conceives the law as independent imperatives using the imperative form to evoke the feelings that certain imagined patterns of behaviour must be put into effect by human beings by following the rules laid down by the legislator that can be enforced to maintain peace and security within the state.

Ross arrives at a similar view of the law but replaces Olivecrona's terminology of "independent imperatives" with the term "directives" that Ross defines as "utterances with no representative meaning but with the intention to exert influence" (Ross 1958, 8). Thus they agree that the law is devoid of any conceptual meaning but the linguistic sentences can be used to cause the behaviour of human beings as the effect. In this way the law exists as social facts related to the doctrinal study of law or legal science, but its objective is a matter of dispute among the Scandinavian realists.

Lundstedt holds that legal science is concerned with the law as informed by the method of social welfare as opposed to the method of justice. The method of justice is the traditional method of natural law that assumes that human beings are persons having legal rights and duties, but Lundstedt holds that legal rights and duties are metaphysical ideas that must be discarded. He even holds that "the expressions legal rights, duties, obligations, relationships, claims, and demands, properly speaking, should not be used, not even as terms or labels" (Lundstedt 1956, 17). This is a proper scientific attitude dedicated to replacing the magical or metaphysical terms used with traditional legal scholarship with proper scientific concepts having a basis in reality. But Lundstedt continues to use the traditional terms, using inverted commas to indicate that he is talking sense whereas other scholars are talking nonsense when they use the terms. The reason why Lundstedt continues to use the received terms cannot be that it is impossible to introduce new concepts, although this is Hägerström's view based upon his metaphysical view that concepts are embedded in nature. Hägerström's view may be questioned but cannot be pursued in this paper. Suffice it to say that scientists in the natural and social sciences introduce new concepts to arrive at a better understanding of nature and society. This is also possible within legal science as manifested by Ross, suggesting that the term

“right” may be replaced with the term “tu-tu” since this term lacks the magical impact or emotive force associated with the term “right” (Ross 1956–1957). This is precisely Lundstedt’s reason for using the received terms in inverted commas that makes it difficult to follow his doublethink between thinking and feeling. However, it is quite clear that Lundstedt believes that “society itself presupposes the maintenance of what we call law or laws” (Lundstedt 1956, 17). What Lundstedt calls “laws” are empirical laws stating the causal relations between the legal words and their effects upon human behaviour. The meaning of legal vocabulary is informed and maintained by the method of social welfare to sustain the state and the good life for its members. The method of social welfare is a scientific one since it is based upon the reality of human needs and wants that are there as facts to be known by science. It follows that the making of the law is a scientific question grounded in the authority of Lundstedt’s legal science that also informs the administration of law in order to establish the Swedish welfare state as a matter of scientific paternalism.

Lundstedt’s appeal to the method of social welfare raises the question of whether it is compatible with Hägerström’s moral nihilism that holds that value judgements are strictly speaking not judgements expressing normative beliefs but only subjective expressions of feelings and interests. Lundstedt’s answer is affirmative, appealing to Hägerström’s philosophical authority and the fact that Hägerström has supported Lundstedt’s position in his public writings (Hägerström 1964, 74 and 316). By contrast, Ross dissociates himself from Hägerström’s authority and subscribes to logical positivism that leads him to hold that Lundstedt’s method of social welfare is a version of utilitarianism that must be rejected since it commits the naturalistic fallacy that defines moral concepts in naturalistic or empirical concepts (Ross 1958, 295). Ross subscribes to moral nihilism though he does not refer to Hägerström but to the emotive theory of ethics put forward by Charles Stevenson that leads Ross to hold that Lundstedt’s position cannot be scientific because moral judgements do not express beliefs but only subjective feelings (Ross 1958, 300ff.).

Olivecrona holds aloof from the dispute about the method of social welfare but he takes issue with Lundstedt’s analysis of the concept of right that holds that it refers to social facts, that is the favourable position of an owner in relation to his enjoyment and control of things. Olivecrona holds that this analysis is mistaken since the right of ownership is not identical with the actual enjoyment of possession or with the ability to set the legal machinery in motion. Olivecrona also takes issue with Ross’s analysis of the concept of right. The starting point for Ross’s analysis is the view put forward by Hägerström and Lundstedt that the word “right” cannot be used to express a concept since it does not refer to any natural facts. Thus the word is devoid of any conceptual meaning, but it can be used as a magical word that refers to supernatural forces. Ross agrees that the word “right” is

devoid of meaning but he parts company with the Swedes when they imply that people are engaged in magical activities when they use the word. Hägerström and Lundstedt trace the origin of the concept of right in metaphysical ideas but they fail to address the analytical question concerning the present use of the term within legal science. To be sure, the word "right" is devoid of any conceptual meaning, but it has a proper use as a tool of representation of various legal positions among people. Ross's conceptual analysis is advanced as a logical analysis and he appeals to the work of Wesley Hohfeld in order to substantiate his claim that the word "right" is solely a technical term used with legal science to account for various types of legal relations (Ross 1958, 161ff.).

Olivecrona holds that Ross is mistaken since his logical analysis ignores the historical background for the use of the concept of right within legal science that is the starting point for Olivecrona's analysis that shows that the concept cannot be reduced to a mere tool of representation. Besides Ross's analysis cannot account for the use of the concept in positive laws in terms of an imaginary idea of power (see Golding 2004 for an account of Olivecrona's understanding of rights).

The dispute between Olivecrona and Ross is also a dispute concerning the task of jurisprudence and legal science. Ross adheres to logical positivism and holds that the task of jurisprudence is confined to the conceptual analysis of the language used within legal science. Ross proceeds on the basis of the principle of verification, according to which the meaning of a judgement or statement is its method of verification. This leads Ross to an inquiry into the meaning of the utterances used within legal science in order to decide whether these utterances express meaningful sentences in terms of scientific judgements or whether they express meaningless sentences in terms of directives. Ross holds that the utterances put forward by the legislator in the positive laws must be classified as directives but the utterances put forward by legal scientists have cognitive meaning and express judgements or statements, capable of truth or falsity. It follows that there is a crucial distinction between the language of the positive laws and the scientific language used to talk about the law. For Ross, the language of positive law is not a mystery of supernatural forces as the Swedes contend, but a matter of using meaningless sentences as a means of social control administered by lawyers and the courts. What is important within jurisprudence is the analysis of the scientific language used to express judgments or statements that leads Ross to stress the connection between questions of meaning and truth in the philosophy of language and issues in jurisprudence concerning the verification of scientific statements about the positive law in order to establish legal science as a natural science concerned with offering information about the law. In this respect, the law in terms of directives is devoid of any conceptual meaning, but the language of the law is used to achieve some effects with respect to the proper behaviour that can be enforced by the courts.

People want to know how courts will decide cases in order to regulate their behaviour, and Ross's legal science provides the answer in terms of scientific statements that predict the outcome of judicial decisions. This is important not only for people in general but for legal scientists in particular since the legal decisions serve as the test for the meaning and truth of their scientific statements.

Olivecrona follows Hägerström's philosophy in his jurisprudential approach and has no interest in Ross's concern with the verification of scientific statements. What is important is that legal scientists are impartial spectators of what there is as expressed in descriptive judgments about the law. Olivecrona rejects the idea that the task of legal science is to predict what the courts will do, in favour of the task of informing the public in general and the courts in particular of what the law is so they may behave accordingly. This is surely important considering that positive law in terms of independent imperative is devoid of any cognitive meaning and thus offers no legal information on how to behave. This elevates the authority of the legal scientist to provide the proper information, though the information cannot be legal information about rights and duties but only social information about the enforcement of the law by the courts and administrative agencies.

By way of conclusion, the Scandinavians stress the importance of philosophy in relation to jurisprudence for the proper understanding of the law and legal knowledge. It seems to me that it is right to ask the metaphysical and epistemological questions even though they provide the wrong answers by holding the metaphysical belief that whatever does not exist in the sensible reality must exist in some supersensible reality and the related epistemological belief that confines knowledge to things which we can see and touch, and feel. This is the foundation for their naturalistic approach but the trouble is that this is tantamount to defining the crucial elements of the normativity of law and morality out of existence and to excluding the existence of moral and legal knowledge in terms of what there is reason to believe, to do, and to feel. This is in turn important for the education of legal scholars in the universities since the naturalistic approach put forward by the Scandinavians may lead to educating lawyers to behave as social engineers knowing how to operate the legal machinery while failing to address its merit or demerit in terms of the proper ends to be pursued by human beings as responsible persons and free agents.

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References

- Bjarup, Jes. 2000. Ought and Reality. *Scandinavian Studies in Law* 40: 11–72.
- Golding, Martin. 2004. Rights, Performatives, and Promises in Karl Olivecrona's Legal Theory. *Ratio Juris* 18: ■■–■■■.
- Hägerström, Axel. 1927. *Der römische Obligationsbegriff im Lichte der allgemeinen römischen Rechtsanschauung I*. Uppsala: Almqvist & Wiksell.
- Hägerström, Axel. 1931. Till Frågan om Begreppet Gällande Rätt. *Tidsskrift for Rettsvitenskap* 44: 48–91.
- Hägerström, Axel. 1953. *Inquiries into the Nature of Law and Morals*. Ed. Karl Olivecrona. Tran. Charlie D. Broad. Uppsala: Almqvist & Wiksell.
- Hägerström, Axel. 1964. *Philosophy and Religion*. Ed. and trans. Robert T. Sandin. London: Allen & Unwin.
- Kant, Immanuel. 1976. *Critique of Pure Reason*. Trans. Norman Kemp Smith. London: Macmillan.
- Lundstedt, A. Vilhelm. 1956. *Legal Thinking Revised. My Views on Law*. Stockholm: Almqvist & Wiksell.
- Olivecrona, Karl. 1939. *Law as Fact*. London: Milford.
- Olivecrona, Karl. 1971. *Law as Fact*. 2nd. ed. London: Steven & Sons.
- Ross, Alf. 1956–1957. Tu-Tu. *Harvard Law Review* 70: 812–25.
- Ross, Alf. 1958. *On Law and Justice*. London: Steven & Sons.
- Schauer, Frederick, and Virginia J. Wise. 1996–1997. Legal Positivism as Legal Information. *Cornell Law Review* 82: 1080–110.