THE UPPSALA SCHOOL OF LEGAL THINKING

BY

FOLKE SCHMIDT

Professor Emeritus of Private Law,
with special reference to Labour Law,
University of Stockholm

I. INTRODUCTION

1. In Sweden it is Hägerström, Lundstedt and Olivecrona that we have in mind when speaking of the Uppsala School of legal thinking. When speaking of Scandinavian realism we should include several others, such as the Danish scholar Alf Ross and the Norwegian Torstein Eckhoff.

Axel Hägerström was born in 1868. For many years he held a chair in practical philosophy at Uppsala; he was appointed in 1911, retired in 1933, and died in 1939. Vilhelm Lundstedt was born in 1882. He became professor of private and Roman law in 1914, retired in 1948, and died in 1955. Karl Olivecrona was born in 1897. He was assistant professor of private law at the University of Uppsala during the years 1928–33, before being appointed professor of the law of procedure at the University of Lund, and has remained in Lund since his retirement in 1964.

I may mention parenthetically that Hägerström, Lundstedt and Olivecrona were all teaching in Uppsala during the period when I was reading for the bachelor of law degree, staying on later as a postgraduate student (1927–38).

Lundstedt considered himself a pupil of Hägerström with the mission of developing some of Hägerström's basic ideas. A similar relationship existed between Olivecrona and Hägerström. It should be added, however, that Olivecrona was also Lundstedt's pupil; the latter was his supervisor during the preparation of his doctoral dissertation. Although Hägerström, Lundstedt and Olivecrona differed from one another in temperament and had different views on politics—Olivecrona, at any rate, differs from his two colleagues in this respect—all three were close friends.

2. It has been said that four prerequisites must be present if a scholar is to be considered a genius: (1) he must be different from others; (2) he must

During a period as Goodhart Professor in Legal Science at the University of Cambridge 1973–74, the present author delivered two lectures on the Uppsala School. The manuscript of these is published here with minor corrections.

I have not taken into account the writings of philosophers and jurists on Hägerström and his followers. For those interested the following works, in particular, should be mentioned: S. Strömholm and H. H. Vogel, *Le "réalisme scandinave" dans la philosophie du droit,* Paris 1975; Enrico Pattaro, *Il realismo giuridico scandinavo. I. Axel Hägerström,* Bologna 1974; Silvana Castignone, *La macchina del diritto. Il realismo giuridico in Svezia,* Milan 1974.

himself be absolutely convinced that he has something very important to say; (3) there must be certain difficulties in understanding what he is saying, partly because this calls for a lot of hard work and, partly, and above all, because varying interpretations are possible; and (4) he must, of course, in fact have something important to say.

3. Let me give you some recollections of Hägerström as a teacher. Certainly he was different. He was a small thin man with a big head of hair like that of some of the young men of today, and that was something very unusual in those days. He was not grey although at that time he was close to 65. As in addition he had a high-pitched voice, he made a feminine impression. When reading his lectures he sat with his head bowed deep over his manuscript, never looking up. His audience was no ordinary one, at least not to a person used to the large classes at the faculty of law. There were usually about twelve persons present and of these only two or three seemed to be students attending as part of their professional training or for the purpose of passing their examinations. The rest were people of mature age who appeared to have followed Hägerström's teaching from year to year.

Hägerström was himself very much aware that his ideas were new and revolutionary. A great deal of his life was devoted to studies in Roman law. In his first work on Roman law[1]—it dealt with the Roman concept of obligation and was published in German in 1927—Hägerström starts his preface with a declaration that he intends to prove that Roman law—and legal writing on Roman law—was based on superstition ("Aberglaube"). He adds: "If the opinion presented here is correct, then it is evident that modern legal writing, as being influenced by the ordinary ideas of Roman law, has no ground in reality."

The view that Hägerström had something fundamentally new to say was also shared by Lundstedt and Olivecrona. Lundstedt repeated again and again that he was no philosopher and that the great thinker was Hägerström. Lundstedt says in one of his writings: "[having met Hägerström] I soon understood that nothing was tenable of those basic principles upon which I had built before".[2] Olivecrona declares in an article in *Scandinavian Studies in Law* 1959[3] that "in the nineteen-twenties, under the influence of

[1] Axel Hägerström, *Der römische Obligationsbegriff im Lichte der allgemeinen römischen Rechtsanschauung*, vol. 1, 1927.

[2] Lundstedt made this statement in his book *Det Hägerström-Lundstedtska misstaget*, 1942. I am here following Olivecrona, "Vilhelm Lundstedt 70 år", *Sv.J.T.* 1952, p. 498, since I have not been able to find the quoted passage in the book referred to.

[3] Karl Olivecrona, "The legal theories of Axel Hägerström and Vilhelm Lundstedt", 3 *St.L.*, pp. 125 ff. (1959).

Axel Hägerström (1868–1939) and his friend and follower Vilhelm Lundstedt (1882–1955), legal theory in Sweden took a new turn".

Hägerström's lectures were not easy to follow, at least not for me, whose knowledge of Kant and the other great philosophers of the 18th and 19th centuries came mostly from second-hand sources. It is not easy to read his books. His style is extremely complicated. Professor C. D. Broad of Trinity College, Cambridge, has translated selected parts of Hägerström's writings in a volume *Inquiries into the Nature of Law and Morals,* 1953. Broad explains in the translator's preface that it was sometimes hard to understand Hägerström's meaning and that it was very often difficult to express it in tolerable English. The main practical problem had been to break up long sentences into a series of shorter sentences which would at the same time exhibit the links that bound together the various clauses in the original sentence. Olivecrona, who was the editor of the *Inquiries,* regrets[4] that Hägerström's writing on Roman law has been largely ignored by scholars and attributes this in part to the difficulty of understanding Hägerström's language. Olivecrona holds, on the other hand, that Hägerström's oral teaching was of a different character.[5] Students were welcome to his home. "Sitting before the log fire in his old-fashioned home, puffing at his long pipe and constantly relighting it, he generously put his immense knowledge and treasure of ideas at the disposal of his interlocutor." This picture may be true. However, I was too young and shy to take advantage of this open invitation.

Personally, I think that the difficulty in understanding Hägerström lies less in his language, with its complicated sentences, than in the fact that Hägerström presses in many directions simultaneously. Logical arguments are interrupted by sociological and psychological observations. Sometimes there are arguments which seem to have a normative character. What is the meaning of the following statement, which will be referred to again later on? "A command which does not reach its addressee is no command because it was not given to him." Does Hägerström intend to make a normative statement or to present a definition? I do not know.

II. HÄGERSTRÖM

What Did Hägerström Have to Say?

4. Hägerström's works focus upon the possible meaning of basic legal concepts such as ownership and right, duty and obligation. He was fasci-

[4] *Inquiries into the Nature of Law and Morals,* 1953, p. xv.
[5] *Ibid.,* p. xxvi.

nated, too, by the notion of law itself. "Is positive law an expression of will?" ("Är gällande rätt uttryck för vilja?", 1911) was the title of one of his earlier works. Hägerström considered that in order to understand present-day thinking we have to go back to Roman law and particularly to its more primitive forms. His approach is historical, and at the same time it is philosophical-analytical. Hägerström devoted a great deal of his time to thorough and penetrating studies of the Roman concept of obligation. As mentioned before, a first part of *Der römische Obligationsbegriff im Lichte der allgemeinen römischen Rechtsanschauung* was published in 1927. A second volume was completed just before his death and published posthumously in 1941.

In the introductory chapter to vol. 1 of his study of the Roman concept of obligation,[6] Hägerström gives an analysis of the modern concept of a right of property which I think is fundamental and at the same time throws much light on his mode of reasoning. I shall try to reproduce his analysis in simple words. Hägerström purports to reveal the facts behind a situation when a person is said to have a right of property. Assume that I have a right of property in a certain house. According to Hägerström the actual fact seems to be that the state guarantees me a certain protection provided that I have not taken an action by which I have lost possession, e.g. by mortgaging the house and failing to pay the debt for which it was pledged. But at once difficulties arise. We know that the state does not step in and grant me specific restitution unless I have actually lost possession of the house, i.e. unless it is in the possession of another person who cannot base his case on any relevant legal act. With these observations Hägerström claims to have demonstrated that the right could not mean the protection of my possession, since my loss of possession is a prerequisite for action by the state.

Next Hägerström points to the possibility that the right of property means a right to the thing itself, i.e. a right to retain possession which is valid against any other person. But even this explanation is unsatisfactory. For whether an action will be sustained or not depends upon the owner's ability to prove his right.

Here he introduces a new element by adding an observation regarding a child's primitive notion of ownership. He observes that a child who asserts a right of property in a toy is certainly not thinking of protection by the state, or even necessarily of protection by his parents.

Having exhausted different ways of describing the social situation, he turns to another, more juridical method of explaining the right of proper-

[6] *Der römische Obligationsbegriff*, vol. 1, pp. 2 ff.

ty.[7] It is said that the state issues a command to all others, who are not entitled to the possession of this thing through special legal acts. In the event of disobedience to this command, the state threatens to take coercive measures for the benefit of the owner if he should so desire. But even the idea of a command fails to explain what is involved. Consider a dispute about property where both parties believe that they are in the right. No one here has been disobedient, for disobedience implies that one is aware of the command. I have never received the command; thus the situation is the same as if it had never been given to me.

Hägerström sums this up as follows.[8] The factual basis of a right to property cannot be found either in protection guaranteed or commands issued by an external authority. Hägerström continues: We cannot find any other fact of which it could be said that it corresponds to our idea of a right of property. We are therefore forced to suppose that there are no such facts and that we are concerned with ideas which have nothing to do with reality.

Thereupon yet another element is introduced into the reasoning.[9] The right of property is related to our moral intuitions of right and wrong. The owner alone is entitled to use the thing for his own purposes. He is the only one who does no wrong if he uses the thing. According to the common view the owner's right to do what he will with the thing is a mere consequence of the fact that the thing belongs to him. The idea that a thing belongs to a person cannot mean that the thing belongs to his personality as a limb belongs to the body. It must be something external to the body and this can be nothing but a power. Relying upon his earlier reasoning, Hägerström holds that this power must be something else and something which is independent of whether the owner has the actual power.

Now we are very close to a basic idea in Hägerström's teaching. A right as we conceive it has nothing to do with reality, it refers "to forces which belong to another world than that of nature, and which legislation and other forms of law-giving merely liberate".[1]

Hägerström's analysis of the notion of a duty follows similar lines; it will not be repeated here.

5. Hägerström has a vision of the state with its legislature, its courts, its prosecutors and its police as a piece of machinery, in which the cogs are

[7] *Ibid.*, p. 3.
[8] *Ibid.*, pp. 4 f.
[9] *Ibid.*, p. 5.
[1] *Ibid.*, p. 6.

men. This machinery is set in motion by certain acts. But how can this happen?[2]

With the help of certain legal acts, rights and duties are created, transferred or extinguished. Generally we assume that this is done by the will of the person who sets the machinery in motion. Our modern ideas of the functioning of the legal machinery are, however, not fundamentally different from those prevailing in ancient Rome. How did the Romans look upon transfer of property? Among them the acquisition of property by means of *mancipatio* took place in the following way. The buyer took hold of the slave and read out the following formula: *Hunc ego hominem ex iure Quiritium meum esse aio isque mihi emptus est(o) hoc aere aneaque libra.* ("I proclaim this man to be mine according to the law of the Roman citizens and to be bought by me through this piece of copper.")[3] At the same time he threw a piece of copper on to a scale, possibly at the behest of the man who held the scale. By this act the buyer became the owner of the slave, provided that the previous owner did not undertake any countermanding acts. The *mancipatio* was not a declaration of the fact that the slave belonged to the buyer, nor was it a declaration of his intention to become the owner. The act itself created his ownership like words pronounced by a sorcerer.[4]

Olivecrona[5] has described Hägerström's view of Roman law as follows. The right of property was a mystical power over the spirit inherent in the object. This power was created, and transferred, by means of magical acts. An obligation was a mystical bond, created in the same way. The ancient Roman law, embodied in the law of the Twelve Tables of the 5th century B.C., was a system of rules for the acquisition and exercise of mystical powers. All the ancient legal acts belonging to the original Roman law were magical acts.

6. It may seem as if Hägerström wanted to reduce concepts like legal rights and duties to an absolute zero. This is, however, a mistake. It is true that a right or a duty is not something objective, which can be described in the same way as a chair or a table. According to Hägerström, it is rather a feeling, like the feeling that something is beautiful or ugly or morally right or wrong. Hägerström developed these ideas in a paper "On the percep-

[2] Cf. on this point *Inquiries into the Nature of Law and Morals*, p. 354.

[3] See Hägerström, *Der römische Obligationsbegriff*, vol. 1, pp. 36 f. The translation is taken from Olivecrona, "The legal theories of Axel Hägerström and Vilhelm Lundstedt" in 3 *Sc.St.L.* (1959), p. 132.

[4] *Der römische Obligationsbegriff*, pp. 40 f.

[5] Olivecrona in *Sc.St.L., loc. cit.*, p. 133.

tion of duty" ("Om pliktmedvetandet"), which was published in 1934 in a periodical called *Presens.*[6] The article was intended for popular reading.

Hägerström analyses the situation which arises when a person has given a command to another person. The person who commands uses the imperative form in order to instigate the other to undertake a certain action. Because of the suggestive power of the imperative the other person will relate an idea of compulsion to the command. Such compulsive ideas are the effect of social training. Parents, teachers and other persons in the environment exert pressure upon the individual in a certain direction. When the persons in command have lost their immediate influence, their commands still remain within you.[7] When a certain action comes to your mind you will be aware of the imperatives, either positively or negatively. Hägerström defines the perception of a duty as an instigating compulsive idea with an imperative sign as content. He rhetorically asks the reader whether this definition gives the impression of a person in a state of mental illness. But it is not the instigating compulsive idea that is unhealthy. On the contrary, considering our common social goals, a person who is not subject to the compulsive ideas of social life is an unhealthy person. He is abnormal as not being susceptible to such social instigations, which are the characteristics of the human being as a social animal.[8]

Hägerström claims to have proved that laws and regulations are not expressions of the will of a certain person or group of persons. Nevertheless the imperative form used by the drafters is of psychological importance for the stability of the legal order.

7. Relatively late in his career Hägerström put forward a more general theory on the prerequisites for the maintenance of a legal system. This was in an article with the title "On fundamental problems of law", published in 1939 in the law review *Svensk Juristtidning.*[9]

There Hägerström argued that the maintenance of a legal system presupposes, in the first place, what is called a social instinct in the same sense as the instincts found in those animals which form communities; the difference lies in the fact that in human societies the instinct can attach itself to laws which have been consciously created. Secondly, the social instinct is not altogether reliable when a person has a direct interest in an action which falls outside the limits of the laws. Hägerström notes that the

[6] *Presens,* January 1934, pp. 55 f.
[7] *Ibid.*, p. 58.
[8] *Ibid.*, p. 59.
[9] *Sv.J.T.* 1939, pp. 209 ff., also in English in *Inquiries into the the Nature of Law and Morals,* pp. 348 ff.

main reaction of the outside observer contemplating another person's illegal action is one of moral disapproval in so far as the action has taken place by deliberate intent or through carelessness. The invididual responsible for the action is also checked by his own feelings of duty. Hägerström speaks in this connection of a general moral disposition.

But the social instinct, together with the ethics of legality which depend on it, is not the only factor that is necessary for the maintenance of legal order. It is, thirdly, a part of the rules in question that the so-called authorities charged with the observance of law shall intervene. Both the authorities and the public are disposed to uphold rules of coercion. Here there enters a new element, namely the individual's fear of external coercion.

Hägerström comes to the conclusion that there are three preconditions which are always necessary for the maintenance of a legal system, viz. a social instinct, a positive moral disposition, and a fear of external coercion.

8. It is not easy to evaluate Hägerström's thinking. In order to do justice to it one should have a profound knowledge of the philosophy of his time. One should consider, too, contemporary jurisprudential writing, *inter alia* of the great American realists, like O. W. Holmes and Roscoe Pound. I am not myself a trained philosopher, nor have I an extensive knowledge of jurisprudential writing. I think, however, that there is a weakness in Hägerström's method of proving that concepts like those of a right or a duty have nothing to do with reality. He does it by pointing to a number of possible or traditional explanations which one after the other he shows to be false. Thus he rules out the possibility that a right of property is protection guaranteed by the state as well as that it is something which is the effect of commands. Having seemingly exhausted all traditional explanations, Hägerström asserts that the right of property refers to forces which belong to another world than the world of nature.

One of my objections to this way of reasoning is that a right of ownership can be part of many things even though it cannot be explained by reference to one of the suggested alternatives. Thus actual power is one of the possibilities that is ruled out. However, actual power, e.g. the fact that a person has lived in a house or cultivated a piece of land for a considerable time, may in certain situations be a legal ground why a person is to be considered the owner of the house of the land concerned.

Another objection is that Hägerström has not paid sufficient regard to the way in which lawyers—*inter alia* judges, prosecutors, officers of public bodies, practising attorneys—actually use terms like the right of ownership. Basically they look upon them as tools which they use in playing their

allotted parts in the legal machinery. Their approach is rational. For centuries legal scholars have expended much energy in the attempt to reshape old concepts in order to make them more adequate as tools. They have also invented a number of new concepts, such as, e.g., the juridical person, copyright and industrial property, the collective agreement.

These objections are not very important. The originality and the richness of Hägerström's thinking seem to me indisputable. Whatever one may think of his theory that our basic legal concepts have their background in primitive magic rites and that we are still influenced by such ideas—and on this point I am inclined to believe that he is right—this theory is a challenge. Hägerström's claim that there is no worldly reality behind concepts like those of rights and duties is closely related to the claim that a sharp distinction must be made between statements regarding norms and statements of fact. According to Hägerström it is the ideas about norms, and not the norms themselves, that belong to reality and therefore can be objects of knowledge. Today this fundamental distinction between facts and norms is generally acknowledged, though not always observed. It was not so in Hägerström's days.

Hägerström must also be given credit for sociological theories. His theory of the basic conditions for the maintenance of a legal system, outlined above, is very forceful. Of particular importance is his insistence that human beings are social animals. Often Hägerström gave only a hint or a suggestion of the relevant cause. Part of his greatness was his capacity to attract followers who were deeply devoted to his ideas. He influenced Lundstedt and Olivecrona and many others.

III. LUNDSTEDT

9. My exposé of Lundstedt's thinking will be short. Lundstedt, at the time when I first met him in 1928, was a man in his mid-forties, tall and good-looking. He had the air of a virile movie actor. Like many of us, Lundstedt was happy when he achieved recognition. He was rather naïve, and therefore it was easy to flatter him. Generally he was friendly and intimate in his relations with students, but he was very touchy and gave short shrift to anyone who openly declared that he had other views, as I was to learn to my cost on more than one occasion.

Even in his writing Lundstedt was different. The other professors were dry and formal, but Lundstedt was personal in his style, and was fond of paradox.

Lundstedt strongly believed that he had something important to say. For a long time he held himself out as being the only law professor who tried to make jurisprudence a true science.

Lundstedt was appointed professor of private law and Roman law at the University of Uppsala at the early age of 32. Soon afterwards he met Hägerström and became convinced that an acceptance of Hägerström's theories would mean a complete reorientation. Lundstedt took upon himself the task of making Hägerström's ideas more widely known and of applying them to and developing them within the field of law. There existed between Hägerström and Lundstedt what can only be described as a God-to-Prophet relationship. Lundstedt published his first work as a follower of Hägerström in 1920, *Principinledning. Kritik av straffrättens grundåskådningar* ("Introduction as to principles. A critical review of the basic ideas of criminal law"). In the opening paragraph Lundstedt explains that, having been given an insight into Hägerström's philosophical and jurisprudential research, he came to realize that legal science was operating both generally and on some relevant points particularly with assumptions, the scientific quality of which was unacceptable. It may be asked whether Lundstedt's works are difficult to read. I do not think so. Such difficulties as may be found in understanding them are due more to his broad formulations and sweeping generalizations than to the intricacy of his reasoning.

10. What did Lundstedt actually say? A considerable part of his writing is devoted to analyses of the concept of right in 19th-century legal writing. Thus in his *Obligationsbegreppet,* a work in two volumes published in 1929 and 1930, he deals extensively with Savigny, Windscheid and Jhering. Basically Lundstedt follows the same scheme as Hägerström. He attacks the idea that the owner of a thing, because of his ownership, has certain possibilities of action in court, e.g. by suing for damages or for specific restitution of possession. It is wrong to believe that the legal power or the right is a primary phenomenon. According to Lundstedt, legal writers have, on account of their ideological confusion, failed to distinguish properly between cause and result. They have not taken into consideration that the owner's possibilities of action are nothing but "a collective consequence of the maintenance of the rules of law in question, and the influence of this maintenance on people".[1]

Lundstedt was not prepared to confine himself to the role of a critic.

[1] See *Legal Thinking Revised,* Uppsala 1956, pp. 78ff. (pp. 99f.), where Lundstedt has summarized his view.

Having done away with traditional legal thinking, the modern scholar should put something in its place. In his *Principinledning* of 1920 he declares that the task of the scholar is "to define legal rules and legal institutions by having regard to those purposes that from the point of view of *social welfare* ("samhällsnyttan") should be attached to them".[2]

The setting up of "social welfare" as a practical guide is not identical with Bentham's idea that laws should promote the greatest happiness of the greatest number. It is the more abstract conception of some "common weal". In his writing Lundstedt again and again refers to "security in enterprise activities" (*säkerhet i handel och vandel*—security in the economic transactions of everyday life) and "the purpose of promoting common transactions" (*samfärdselns intresse*). In his *Legal Thinking Revised* (1956), Lundstedt defines "social welfare" as comprising the general spirit of enterprise and its postulate: a general sense of security as concerns "enterprise activities" (economic intercourse) as well as other modes of action not harmful from a social point of view.[3] In the way he puts it, it seems to comprise almost everything that is good for the common production of wealth and common exchange of commodities.

Lundstedt sees the individual case from the wider perspective of security. This led him to advocate a rather conservative approach, although he considered himself a radical. (Politically Lundstedt was a member of the Social Democratic Party, which he representd in the Swedish Riksdag for a long period.) "In the provinces of the law of torts and the law of contract there must, in the nature of things, be extremely little room for any consideration of the points of view of equity and justice." For the rules within these fields "exist for the very purpose of promoting the 'common transactions' in the community".[4]

Lundstedt's conception of social welfare is not very helpful. He seems to attach different meanings to it. It can be something like a social instinct which ultimately decides all laws, good or bad. Some of his statements on the concept of social welfare in *Superstition or Rationality in Action for Peace*, 1925, can hardly be interpreted otherwise. (There he uses the terms "public welfare" or "public benefit".) He mentions that a certain class in the community may come to make use of the law for its own particular ends. In so far as this is the case, the law is naturally not in accordance with the interests of other classes. After this statement Lundstedt proceeds to argue

[2] *Principinledning*, 1920, p. 6.
[3] *Legal Thinking Revised*, p. 138.
[4] The quotations are taken from Lundstedt, *Legal Thinking Revised* (published posthumously in 1956), p. 139. Lundstedt expressed himself in almost identical words in his early work *Superstition or Rationality in Action for Peace*, 1925, p. 131.

that social welfare means social instinct. "Nevertheless, in reality it is the public benefit that decides the maintenance of a law which in itself is unfavourable to most people. The truth of the matter is that under the conditions of power actually prevailing in the community, no order can be established in any other way than by the subordination of the less powerful classes."[5] In other parts of the same work as well as in a later work, "social welfare" is defined differently. It is a practical guide comprising what is considered useful according to the estimate actually prevailing in the community.

To me the former of these two definitions is nonsense, implying as it does that social welfare is the same as the conservative view that established institutions always operate for the benefit of all of us. The latter definition, according to which social welfare means those goals which are generally accepted in the society at large, is more reasonable. But it is not a very original one. All of us are willing to subscribe to the recommendation that the legal scholar should ask: What are the goals actually prevailing in our society? Are the rules which we are now discussing effective from the point of view of achieving our goals?

11. Lundstedt's most original contribution to legal science is probably his theory on the purposes and effects of the criminal law. This theory was presented in two early works, *Principinledning* (1920) and *Till frågan om rätten och samhället* ("On the question of justice and society") (1921). It is an elegant plea for general prevention and against the trend in the criminal law of those days towards individual treatment of offenders. Lundstedt emphasizes that the individual case must be seen from the wide perspective of the interests of society at large.[6] The reason for punishment cannot be exclusively concern with the criminal act itself. Punishment of a crime is important only as a part of the administration of the criminal law as a whole. The administration of the criminal law as a whole is a necessary condition for the survival of our society, just as the punishment of a certain act is motivated by the interest in suppressing such acts.

The repressive effect is caused by the awareness of the fact that certain acts are considered criminal offences and that punishment will regularly follow upon a crime. Thus the psychological effects emanate from the criminal law and not from the punishment of an individual act. The effect is not, as is generally understood, deterrence through fear. According to

[5] Lundstedt, *Superstition* etc., p. 136.

[6] In what follows I have made use of a biographical note on Lundstedt written by Olivecrona and published in *Sv.J.T.* 1952, pp. 497 ff.

Lundstedt the fear of punishment felt by the potential offender is a subordinate factor. What is of paramount importance is the fact that the criminal law appeals to public morality. In order to be effective it has to influence morals in such a way that certain acts become condemnable. Only under such conditions will administration of criminal justice achieve its goal of repressing crime. Deeply rooted inhibitions come into play and the pressure exerted by a uniform moral opinion will reinforce these inhibitions in the mind of each individual.

Lundstedt is anxious to emphasize that the criminal law should be looked upon as a unity comprising all acts which have been made criminal offences. I suppose one might compare the criminal law to a monarch inspiring feelings of devotion and submission, although Lundstedt does not use this metaphor himself. It is dangerous to bring under the criminal law acts which public opinion is not willing to condemn, for that will destroy the public's willingness to obey the law. For this reason Lundstedt criticized the idea of prohibiting hard liquor, which was a political issue in the early 1920s.

Possibly there is a good deal of truth in Lundstedt's theory of criminal law. It provides an acceptable reason for not regarding the prosecution of crimes exclusively from the aspects of how to reform the individual offender and how to protect ourselves against dangerous individuals. However, I do not share Lundstedt's idea that criminal law must be looked upon as a totality. People seem to condemn not only murder and violence but also robbery and theft, and at least in my country, drunken driving, and at the same time to be willing to take a very lenient view of offences against the tax laws. The fact that negligence in reporting income to the tax authorities has been made a criminal offence does not seem to weaken obedience to other parts of the criminal law.

IV. KARL OLIVECRONA

12. Karl Olivecrona, born in 1897, is the youngest of the three persons I am dealing with in this article. He is still an active scholar.

The reader may remember my light-hearted remark at the beginning of this paper that certain prerequisites must be present if a scholar is to be considered a genius. The first is that he must be different from ordinary persons. Both Hägerström and Lundstedt met this requirement. But Olivecrona does not. He is a person who detests theatricality and it is hard

to imagine him dressing unconventionally or making a gesture or striking an attitude in order to impress people. This may be one of the reasons why Olivecrona looks just as the student thinks a professor should look, if there is any such image in this country. He has a detached, concentrated expression, and from the look of him you may think that you are meeting someone out of an engraving by Rembrandt.

The writings of Hägerström and Lundstedt are difficult to understand and open to various interpretations. In that respect, too, Olivecrona offers a contrast to them. As commented by Dias,[7] some people are left with a feeling of dissatisfaction after reading Olivecrona's exposition. Its very simplicity raises doubts as to whether he may have overlooked some deeper and more profound thought. Like Dias, I find simplicity a great merit. Too often obscurity passes for profundity. Olivecrona writes in a simple language, which has a spare beauty of its own, even if some may consider it a little too flat. Indisputably, it is a language well adapted to convey the writer's ideas to the reader as directly as possible.

Like Hägerström and Lundstedt, Olivecrona has a strong belief that he has something fundamentally new and important to say.

Olivecrona's first scholarly work was his doctoral thesis, published in 1928. It was on company law and concerned, *inter alia,* the board's power to act on behalf of the company.[8] It contains a critical analysis of the English doctrine of *ultra vires.* Since then he has produced a large number of books and articles. Most of his works are in the fields of procedural law and jurisprudence. An examination of the catalogue of a Swedish law library would probably reveal that Olivecrona has published more extensively than almost any other Swedish legal scholar, past or present. This is admirable, considering that his legal works are all of high quality.

Olivecrona published in 1939 in English *Law as Fact,*[9] of which book a second edition appeared in 1971. *Law as Fact* won critical respect, and it is recommended reading in many law schools all around the world. As Olivecrona himself has stated, the second edition is an entirely new book. The two editions deal only partly with the same problems, but apart from the title they have it in common that they are based upon the same realistic approach.[1] A reading of the two editions of *Law as Fact* gives a clear picture of the basic ideas in Olivecrona's writing.

[7] R. W. M. Dias, *Jurisprudence,* 3rd ed. 1970, p. 542.

[8] Olivecrona, *Studier i begreppet juridisk person i romersk och modern rätt* (Studies in the concept of juridical person in Roman and modern law), 1928.

[9] The same work was published in Swedish in 1940 under the title *Om lagen och staten.*

[1] The two editions were published in Swedish under different titles, the first edition being called *Lagen och staten* (The Law and the State), 1940, the second *Rättsordningen. Idéer och fakta* (The Legal Order. Ideas and Facts), 1966.

13. There are two sets of problems upon which Olivecrona focuses his attention. In the first place, he puts the questions: What are the ideas behind a legal rule? Is the legal rule a command (an imperative), and if so, in what sense? Secondly, he tries to explain the necessary conditions for the existence of law and order within the modern state. Basically these are the same problems in which Hägerström and Lundstedt were interested. I shall deal with the two problems in reverse order, partly because the problem "What are the prerequisites for a successful working of the legal machinery?" plays a greater part in the first edition than in the second. As will be indicated later on, this can be explained by a change of opinion.

You may remember Hägerström's theory of three prerequisites for the maintenance of a legal system: (1) a social instinct in the same sense as the instincts found among those animals which form communities, (2) an attitude of moral disapproval of illegal acts, and (3) a fear of external coercion exercised by the authorities.

Olivecrona's conception of the modern legal machinery as a state monopoly of force might be considered a further development of the third of these prerequisites. It has an affiliation to Lundstedt's theory of the role played by regular enforcement of the criminal law.

It is consistent with what follows that Olivecrona should in the first part of his book of 1939 pay great attention to the situation which arises when a new legal system emerges during a revolution. A new constitution has come into force. New rules are issued in accordance with that constitution and are soon automatically accepted as binding.[2] After this observation Olivecrona continues: "Beyond the 'revolutionary' situation, two things are above all necessary to complete the change: *force* and *propaganda*. Force, to oust those who hold the key positions, to frighten their supporters, to combat resistance. Propaganda, to prepare the minds for the new imperatives. The suggestive form of these imperatives is not sufficient in itself. They would fall to the ground if the minds of the people were not being prepared to receive them."[3]

According to Olivecrona, law consists chiefly of rules about force.[4] We cannot conceive of a community which is not based upon organized force. Without it there could be no real security, even with regard to life and limb.[5] Organized force is the backbone of the community as it now stands. The role of force is chiefly indirect.[6] Olivecrona subscribes to Lundstedt's

[2] *Law as Fact*, Copenhagen 1939, p. 68.
[3] *Ibid.*, p. 69.
[4] *Ibid.*, p. 134.
[5] *Ibid.*, p. 136.
[6] *Ibid.*, p. 140.

idea that the immediate effects of individual sanctions are relatively unimportant in comparison with the pressure exerted on the minds of the people by the existence of organized force.[7] The general consciousness of the fact that irresistible force is regularly and conscientiously applied according to the law has a far-reaching effect on our whole conduct of life.

The legal system as a monopoly of organized force influences our moral conceptions. Olivecrona has a rather extreme view of how force can mould moral ideas. The possibilities of those in power to influence the feelings of right and wrong seem almost absolute. Even our dislike of such crimes as murder and theft is considered by Olivecrona to be basically the product of the fact that sanctions are, and have long been inflicted as a consequence of such acts. There are no innate inhibitions of a reliable character even against those acts which constitute major crimes.[8]

According to Olivecrona, the most characteristic feature of the modern state is the existence of a monopoly of organized force. Olivecrona has a vision of the administration of justice—criminal justice in particular—in which the use of power is rigidly harnessed and canalized by the rules of law.[9] The monopoly manifests itself in the fact that the individual is not allowed to use force himself, force being exclusively in the hands of the authorities; the harnessing manifests itself in restrictions put upon the authorities. The judge is not allowed to take the initiative himself. He must wait until a case is brought before him by a plaintiff or a prosecutor. The opposite party must also be given a hearing. The procedure must be conducted in public and according to rules of law, and finally the order must be given in the form prescribed for a judgment.

Olivecrona sums up as follows. The realities we have in mind when we speak of a "reign of law" (rule of law) are a state of things in which the monopolization and harnessing of force have actually been achieved.[1]

14. In the years after the publication of *Law as Fact* Olivecrona and I belonged to the same faculty. I started teaching at Lund University in 1939 and was appointed full professor there in 1944. I therefore had many opportunities to discuss with Olivecrona his theory of law, both privately and at seminars. My objection was then and is still that Olivecrona grossly exaggerated the role of organized force in the form of legal sanctions and underestimated or ignored other factors.

In the first place, Olivecrona does not take into account the existence of

[7] *Ibid.*, p. 141.
[8] *Ibid.*, pp. 156f.
[9] *Ibid.*, pp. 176ff.
[1] *Ibid.*, p. 180.

other sanctions. Every student of labour relations knows that the sanctity of the collective agreement depends above all on private sanctions. This is the case even in a country like Sweden, where the collective agreement is a contract binding at law. Secondly, Olivecrona did not in his 1939 edition attribute any considerable weight to a very significant factor in the creative process of legal rules, namely experience. People are inclined to look upon an incident in the course of which a conflict has been solved peacefully as a model and to apply the same pattern when a similar situation occurs. Fear of what is unknown and a wish for security are characteristic features of man as a social being. Hägerström might have labelled them as part of our social instinct. This fear of the unknown is a primary factor as important as, if not more important than possible indirect effects of the exercise of a monopoly of organized force. Thirdly, in his vision of the impact of organized force Olivecrona has in mind a national state with a strong centralized government. He does not take into account situations where several legal systems coexist. In making this objection I am thinking not only of federal states but also of states within the state, such as the Catholic Church with its Canon law. The different systems can be coordinated, but they can also be competing. During the war, several of the occupied countries had competing legal systems. In Norway rules were laid down and enforced by the Quisling government, which was supported by the German occupation forces. In the same period, the government in exile in London issued declarations which applied not only to Norwegians abroad but also to people in occupied territories.

15. As mentioned before, the second edition of *Law as Fact,* published in 1971, was a new book. In it Olivecrona modifies his earlier view of the role of organized force considerably. Thus he mentions *imitation* as a way of introducing new rules. What he calls imitation is in part the same as experience.

In the 1971 edition Olivecrona divides legal theories about the concept of law into two categories, namely voluntaristic and non-voluntaristic theories of law. This distinction is basic for the understanding of the Uppsala School of Law and its relation to other theories of law. Both the theory of natural law and legal positivism belong to the former category. Olivecrona ranks himself with Hägerström and Lundstedt among the non-voluntarists. He acknowledges that American realism as represented by Oliver Wendell Holmes has a non-voluntaristic tendency. Among modern English scholars, Professor Hart is mentioned.

The second edition of *Law as Fact* is devoted mainly to a descriptive analysis of legal rules, their content and actual functions. Olivecrona has

the same point of departure as Hägerström and Lundstedt, viz. that the traditional theories of law are basically false. He uses the same method of reasoning as Hägerström. He reviews a number of alternatives and shows with regard to each of them that the theory is false because it does not apply to all of the situations to which it claims to apply. Olivecrona concludes that a right as an ideal power does not belong to reality. He expresses this in the following way: "The word 'right' as used in jurisprudence, as well as in common discourse, lacks semantic reference."[2]

Olivecrona has a far more advanced theory of law than Hägerström and Lundstedt. Although it is impossible to identify the right with any factual position, Olivecrona does not give up his analysis at this point. There are subjective ideas of rights and these ideas are facts. He describes their structure and function in a very interesting way.

Olivecrona[3] takes as examples certain simple traffic rules, e.g. the rules to the effect that drivers shall keep to the right on the roads and that a driver who wants to turn must make a signal. The drafters of these rules aimed at bringing about a pattern of behaviour that would help to make the traffic flow smoothly with as little danger as possible. In order to supply an incentive for people to conform to this desirable pattern penalties are attached to any deviation from it. This implies actions by the police, as well as by prosecutors and judges. Olivecrona describes the structure of such a rule in the following way. He calls the idea of a desired behaviour pattern on the part of drivers, policemen, etc., the *ideational element* or the *ideatum* of the rule concerned. Within the *ideatum* he distinguishes two sub-elements, the *requisitum* and the *agendum*. The terms *ideatum* and *agendum* are Olivecrona's own inventions, while the term *requisitum* is well established. By the *requisitum* Olivecrona means the situation wich must exist in order that an act shall be expected. The *agendum* is the actual application of a rule in a situation corresponding to the *requisitum*. A legal rule is addressed to the ordinary citizen and/or the authorities. If I have understood it correctly, Olivecrona's *ideatum* can be represented in the following way.

	Ideatum	
	Requisitum	*Agendum*
Situation A	You are on a road. You intend to turn	Then make a signal

[2] *Law as Fact*, 2nd ed. 1971, p. 184.
[3] *Ibid.*, pp. 116 ff.

Situation B	You were on a road and turned without making a signal	The police shall investigate. A prosecutor shall take action in court. A judge shall deliver a judgment

According to Olivecrona the purpose of legislation is principally to direct people's behaviour. The legal rule, e.g. the traffic rule, tells that you *must* do this or that, or that you *must not* do such and such. Its form of expression is therefore the imperative. However, the legal imperative cannot be defined as a declaration of a will, which was the definition given by John Austin and many others. It is not, like the command of a military chief, a face-to-face relationship. The legal rule is an *independent imperative.*[4] By using this term Olivecrona seeks to indicate that the rule is an "ought" independent both in relation to the sender and the addressee.

16. Olivecrona proceeds to discuss the concept of legal rights and duties, such as ownership and obligation. With regard to the questions discussed earlier in this paper, Olivecrona was able to rely to a great extent upon the thinking of his predecessor Hägerström. On the question of what is a right, Hägerström had very little to say. He confined himself to the statement that such a concept had no basis in reality. Olivecrona pushes the analysis further. He sets out to define the use of the idea of a legal right in a working legal system. He has the advantage of being able to profit from the modern philosophy of language. J. L. Austin's ideas on performative utterances in his work *How to Do Things with Words* have been particularly useful.

According to Olivecrona, the concept of a right has essentially two functions: (1) a directive function and (2) an informative function.[5]

The directive function can be found in the existence of ideas to the effect that certain consequences follow upon a right with regard to correct behaviour: my freedom to use the object and a prohibition for others to use it without my permission. The directive function can be exerted in a social context only. It must have reference to a working legal system. As an isolated phenomenon the word "right" is nothing but some sounds produced by a human being, or some letters on a piece of paper.

Olivecrona's exposition of the informative function of the concept of a

[4] *Law as Fact,* 1st ed., p. 43, 2nd ed., p. 130.
[5] *Law as Fact,* 2nd ed., pp. 187 ff.

right seems to me rather questionable. A possible explanation why it is unsatisfactory will be given later on. According to Olivecrona, the phrase "A is the owner of this house" gives, on the face of it, information concerning the relation of A to the house. But as we have seen, a right is not identical with an actual power or anything which has to do with simple facts. All attempts along that line to describe the import of the information given by our phrase result in circularity. Olivecrona therefore concludes that the informative function of the statement that the house belongs to A is not the information about a right but a something which gives rise to assumptions.[6]

Olivecrona claims that knowledge of a legal right must always be knowledge by way of assumptions or by implication and that such knowledge can never be true or false. Olivecrona wants to avoid the words true and false with regard to the existence of rights and uses instead correct and not correct.[7] As I read his text, a statement that A has a right can be more or less well founded but never absolutely correct. He illustrates his view with the following example.[8] After a long period of unconsciousness a person wakes up in a hospital and is informed that the date is April 1. If he comes to think of the weather, he will probably assume that there is no snow on the ground as there was when he fell ill: in the district where he lives the snow has usually melted away before the month of April. The assumption may be correct: but it may also be mistaken, since snow does sometimes fall at a later time of the year.

Statements regarding rights are assumptions which are made within the framework of a working legal system. They presuppose that there are rules for acquisition of property which are generally respected, that therefore the legal, or ideal, distribution of property has an actual counterpart in the distribution of the actual control over things, etc. Only when a great number of such conditions are realized will the assumption be fairly well founded: only then will they serve a practical purpose.[9]

17. At the end of his work *Law as Fact* (2nd ed.) Olivecrona comes to the *performatives* in the legal language. With regard to the idea that certain legal expressions are performatives Olivecrona follows the late Professor J. L. Austin; Olivecrona quotes extensively from J. L. Austin's lectures *How to Do Things with Words* (1962). It may be sufficient to mention two of Austin's examples. In the marriage ceremony the bridegroom has to utter

[6] *Ibid.*, pp. 196 f.
[7] *Ibid.*, p. 197.
[8] *Ibid.*, p. 197.
[9] *Ibid.*, p. 197 *in fine.*

the words: "I take this woman to be my lawful wedded wife". A testator declares in his will: "I give and bequeath my watch to my brother". The meaning of these utterances is to bring about something. The woman is to become the wife of the bridegroom. The brother is to become the owner of the watch. Along with legal rules Olivecrona calls these utterances imperatives. We have therefore a special category of imperatives, namely *performative imperatives.*[1]

J. L. Austin makes a distinction between statements regarding facts—such statements he calls constatives—and performative utterances. A performative utterance cannot be said to be true or false. According to Austin, a performative utterance may go right and be said to have happily brought off our action (the persons in question have been married). On the other hand, something may go wrong and then the act (the marrying) is a failure. The utterance is, so to say, not indeed false but in general *unhappy.* Austin calls the doctrine of things that can and do go wrong on the occasion of such utterances, the doctrine of *Infelicities.* He mentions a number of conditions that must be satisfied for the "happy" functioning of a performative utterance, *inter alia:* (1) there must exist an accepted conventional procedure having a certain conventional effect, that procedure to include the uttering of certain words by certain persons in certain circumstances; (2) the particular persons and circumstances in a given case must be appropriate for the invocations of the particular procedure invoked; (3) the procedure must be executed by all participants both correctly and (4) completely.[2]

As far as I can see, Olivecrona fully accepts Austin's idea of the performative utterance as an utterance which has reference to a conventional procedure, the legal order being one or rather a conglomerate of conventional procedures. It may even be held that J. L. Austin's ingenious idea gave the link which connects Hägerström's statement that a right is not a part of reality and Olivecrona's assertion that legal imperatives give rise to feelings or assumptions which can be the object of scientific studies. Having reviewed Austin's idea, Olivecrona[3] repeats the foundation upon which his theory of law is built. The *mancipatio,* the formal transaction whereby a person acquired the property of goods, e.g. became the owner of a slave, was a magic rite. Scientifically a legal transaction cannot be explained by means of magic. Nor can a "legal effect" as in the view of

[1] There are many types of utterances that are performative. Austin has a category "behabitives" to which he assigns such expressions as "I apologize" and "I congratulate".

[2] J. L. Austin, *How to Do Things with Words,* 1962, pp. 14 f. (Here quoted from a paperback edition of 1971.)

[3] *Law as Fact,* 2nd ed., pp. 227 f.

natural law be explained as something generated by the will of the individual. However, words are tools in legal transactions. The word "right", although it has no semantic reference, is used with relative consistency according to certain rules; on the other hand, consequential ideas concerning correct and obligatory behaviour are attached to the idea that somebody has a right, i.e. that the right really exists and belongs to that person.

Here I come to the end of my account of Olivecrona's theory of law. Olivecrona does not press much beyond this point. He gives a few examples of different legal performatives but does not try to give a precise description of what really takes place when a legal transaction is performed.

18. When trying to assess Olivecrona's theories regarding legal rules and the concept of a right as contributions to legal thinking, I may take as a point of departure the statement that words are tools.

Olivecrona states that the word "right" as used in jurisprudence as well as in common discourse lacks semantic reference. This statement seems to me highly questionable. As admitted by Olivecrona, the word "right" has reference to a "working legal system". Why are we not allowed to speak of an *existing* legal system? Why are we not allowed to regard a reference to a legal system as a semantic reference?

The reason for Olivecrona's refusal to consider the existing legal system as an object of direct observations is his dependence on Hägerström. In his assertions Hägerström was negative. Rights and duties had nothing to do with reality. How could they, then, have anything to do with existing legal systems? As we have seen, this difficulty was bridged in Olivecrona's exposition by the idea that legal rules and statements regarding existing rights give rise to feelings and assumptions and such feelings and assumptions could be made the object of scientific study.

If specific words, like the words of the wedding ceremony, or specific terms, like the terms marriage or property, are to serve as adequate tools, you must be able to identify them beforehand. Otherwise you will not be able to know that a legal transaction will have effect or that words uttered or put into writing in a certain context will set the legal machinery in motion and create the intended effect.

However, I cannot see any objection to a jurisprudence focusing upon the immediate relationship between statements regarding legal rules and rights and duties and a legal system. The ascertainment of a legal rule will depend upon what rules there are regarding statutory interpretation and

the use of precedents and other source material. A statement cannot always be given with complete precision, the rule may even depend upon a choice between permissible alternatives.

I do not claim that feelings created by legal rules and assumptions regarding legal rules are irrelevant. They represent, as it were, the other side of the coin. We are interested in knowing about them when we want to have a view of the effectiveness of our system.

It seems to me a secondary question whether statements concerning legal rules and legal rights or a legal status can be said to be *true* or *false* or if like J. L. Austin we prefer to call them either *happy utterances* or *Infelicities*. Olivecrona allows himself to speak of statements which are correct or not correct. Personally I have no objection to these propositions. There is undoubtedly a difference between constative statements and other categories of statements.

In my opinion Olivecrona is not very happy in his proposition that the idea of a legal right in a working legal system has two basic functions, the directive function and the informative function.

In the first place, the directive function is a secondary effect; it is derived from the assumption that a person other than the owner is not allowed to use the object and that some kind of coercion is going to be inflicted upon him if he does not abide by the prohibition. This is an effect not to be compared to the effect of a legal rule which envisages a certain desired behaviour, such as, e.g., a traffic rule. "Happily" such a rule may be said to have principally a directive function. It is interesting to note that Olivecrona considers the concept of a right to be on an equal footing with ordinary legal rules, since according to him all legal rules are imperatives. It is a paradox that Olivecrona, who claims to have a non-voluntaristic theory of law, is inclined to look upon all legal phenomena from the aspect of the imperative. Since it is not a face-to-face relationship of flesh and blood that is described, Olivecrona is forced to work with a special category of imperative, the impersonal concept of the "independent imperative". Olivecrona's terminology demonstrates a fact often noticed, namely that even the radical thinker is dependent upon his point of departure, in this case the positivist idea of the law as the expression of a will, an idea which prevailed in the early part of this century.

Secondly, Olivecrona is also unhappy with his theory of the informative function of the concept of a right. The proposition that a certain sentence, e.g. "A is the owner of this house", contains a piece of information is indisputable. However, it is not very enlightening, since it does not imply more than the assertion that the sentence is meaningful: it has a reference to something else, in this case to a working (existing) legal system. In the

same sense all legal rules and all statements regarding rights or obligations have an informative function. There is nothing that distinguishes the idea of a right from the traffic rule. Certainly, information is conveyed by the following statement: "In Britain drivers have to keep to the left of the road, while in my country, Sweden, as on the Continent, they have to keep to the right." But if you intend to define the concept of a right you have to find a characteristic of a right; you have to point to something which is different from other legal rules or at least from some other legal rules.

Any attempt to classify the basic functions of different legal rules or of legal concepts, like the concept of a right, would carry me too far. I will confine myself to a few comments which mainly concern the concept of a right, e.g. ownership. There is a striking difference between substantive legal rules within the fields of criminal law and of private law. In the former field the rules are not conceived of as dealing with rights and duties, while in the latter they ordinarily have that connotation. Moreover, whereas criminal-law rules mainly contain prohibitions, the private-law rules are of a more varying character. When they contain directives these are more often to the effect that somebody shall do this or that—e.g. that a seller shall deliver the goods or that a debtor shall pay his debt—than in the nature of a prohibition spelling out that somebody shall not do this or that. These observations lead me to the proposition that rules of criminal law have a *prohibitive function* which rules of private law generally lack. Private-law rules have, or at least have had in the past, another basic function, which I may call a *consolidating function.* This function is most clearly evident with regard to rules on registration of ownership of land and of mortgages. But it may be said to be the purpose of the law of marriage and the law of the contract of employment, too. A statement that A and B are a married couple indicates a number of legal relationships which are supposed to exist, e.g. that the spouses may live in the same apartment or house and that they have a duty to support each other. If the couple do not act in the way expected of them, there are a number of rules which may come into force for the purpose of re-establishing the *status quo.*

The concept of ownership, like the concept of marriage or of contract of employment, has an additional function which I have chosen to call the *transferral function.* The concept of a right indicates a number of legal relationships. A, as the owner of the house, may in a case of trespassing on his property call for a police investigation and a criminal procedure against the offender, he may initiate an action in tort of his own, etc. In the same way the fact that A and B are married or that A is an employee of B indicates specific legal relationships. In a study on the contract of employment which was published in Swedish about 20 years ago, I compared the

:ept of employment to a switchboard.[4] If you are an employee you have
ss to a number of lines. You are entitled not only to a salary but also to
ıtory paid holidays. If you sustain an industrial accident you are
:led to compensation in tort under specific conditions and a special
ɔnal insurance scheme comes into play. Because of this quality of being
itchboard, legal terms like ownership, marriage, and employment are
ul tools as parts of legal performatives. They can be used for a trans-
al purpose.

he rules on the conclusion of marriage represent an accepted conven-
al procedure of the kind J. L. Austin had in mind when speaking of
to do things with words. Divorce is another of those conventional
:edures. The uttering of certain words or the putting of certain words
riting by certain persons will in certain circumstances, provided that
ain other conditions are satisfied, have the effect of doing something.
ough the marriage ceremony a man and a woman have achieved a line
:h connects them to the switchboard Marriage. Through the divorce
line is disconnected. The engagement of an employee and his dismissal
be described in the same way. The transfer of property is not much
·e complicated. What happens with the help of the proper performa-
words is the disconnection of the line which the seller had to the
chboard Ownership and the establishing of a line of the buyer.

may add one comment to Olivecrona's presentation of the right as a
formative. I should feel very unhappy if, to convey to my students the
ction or legal terms just described as the transferral function, I had to
the word imperative. In my opinion *the term performative imperative is an*
licity.

Folke Schmidt, "Kring tjänsteavtalets rättskällor" in *Minnesskrift utgiven av juridiska fakulte-*
Stockholm, 1957, p. 206. When using this metaphor I am referring to a similar presenta-
by Alf Ross in his paper "Tû-Tû", first published in Danish in 1951, and later printed in
ish in 1 *Sc.St.L.*, pp. 137 ff. (1957).