

**EPISTEMOLOGY AND LAW ACCORDING TO
AXEL HÄGERSTRÖM**

BY

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I. INTRODUCTION

The Swedish philosopher Axel Hägerström (1868-1939) was a genius, Folke Schmidt has asserted in a recent paper in *Scandinavian Studies in Law*.¹ In his paper Folke Schmidt deals with Hägerström's lectures and writings through which Hägerström puts forward an original and antimetaphysical theory concerning the nature of law. Hägerström's thesis is that just as the Roman legal system was composed of magical powers and bonds, so also are contemporary legal systems. Modern legal systems simply have no basis in reality, since there are no such things as legal rules.² Fundamental legal concepts such as right, duty, contract or ownership are founded and maintained by the use of magic, which can be utilized and made to work in the world of facts if the appropriate acts are performed. Still there is a mysterious connection between the act of buying fish-and-chips and the result of ownership brought about by that act.³

Modern legal science is of no use whatsoever since it does not properly describe and explain these magical phenomena. Legal science is not a scientific discipline at all but rather a string of metaphysical sentences devoid of any meaning.

As a philosopher Hägerström claims that his philosophical thought can unravel the metaphysical nonsense by showing that we are dealing only with words behind which there are no thoughts. It is rational to claim what is real, but it is neither thinkable nor sayable to claim what is not real. The task is to put law and knowledge on the secure path of a science. Hägerström takes all knowledge to be within his province and claims to present the only tenable view concerning knowledge and man's place in the world.

When Hägerström's jurisprudential writings were translated into English by C. D. Broad and published under the title *Inquiries into the Nature of Law and*

¹ "The Uppsala School of Legal Thinking", 22 *Sc.St.L.*, pp. 151-75 (1978).

² Cf. A. Vilhelm Lundstedt, *Legal Thinking Revised*, Stockholm 1956, p. 17.

³ Cf. Axel Hägerström, "Vergleich zwischen den Kraftvorstellungen der primitiven und der modernen Kulturvölker", in *Festschrift tillägnad Arvi Grotenfelt*, Helsinki 1933, pp. 63-84. At p. 84 Hägerström concludes: "Es wird ein Zusammenhang zwischen diesen der sinnlichen Welt angehörenden Erscheinungen und der geistigen Welt gedacht, der jeder Anschaulichkeit ermangelt. Dass ein solcher Zusammenhang magischer Natur ist, und dass wir also, soweit uns die populäre Auffassung vom Eigentumsrecht beherrscht, Magie üben, wenn wir z.B. Fische auf dem Markt kaufen, kann nicht bezweifelt werden."

Morals,⁴ they aroused interest and were subjected to scrutiny. Thus Geoffrey MacCormack has argued that "the accounts of rights and duties in *Inquiries* can be properly understood only against the background of the results reached by Hägerström through his investigations into Roman law".⁵

I would rather claim that neither Hägerström's impressive writings on Roman law nor his various jurisprudential articles published in his "*Inquiries*" can be properly understood unless Hägerström's epistemology is taken into account. My thesis is that Hägerström's jurisprudential writings must be read in the light of his epistemology, according to which cognition determines what is real.⁶ For Hägerström it is the knowledge relation between man and the world which provides the key to Reality.⁷

In this paper I shall try to present an outline of Hägerström's thinking. In section II a condensed version of Hägerström's theory of knowledge will be offered. In section III some implications for Hägerström's inquiry into law are presented. Finally, in section IV, I shall comment briefly on the approach followed by Hägerström's pupils.

II. HÄGERSTRÖM'S THEORY OF KNOWLEDGE

1. *The Personal Background*

Martin Luther abandoned his proposed career in law and decided instead to devote his life to intensive studies of the Bible and to compose his commentaries on the Epistles. The outcome was the complete new theology in terms of which Luther turned upside-down and split the whole Catholic Church.

Axel Hägerström was brought up in a religious atmosphere. His father was a devout Lutheran minister and his mother was also a devout Christian, deeply influenced by Pietism. Axel Hägerström was destined by his parents to study theology. But Hägerström revolted against his parents. In contrast to Luther, Hägerström abandoned his proposed career in theology and decided to study

⁴ Uppsala 1953. References in brackets in the text are to this book.

⁵ "Hägerström on Right and Duties", in *The Juridical Review* 1971, pp. 59-78, at p. 59.

⁶ Hägerström's epistemology is printed in his *Das Prinzip der Wissenschaft. Eine logisch-erkenntnistheoretische Untersuchung I. Die Realität*, Uppsala 1908, summarized in his own *Selbstdarstellung*, Leipzig 1929. The latter work has been translated into English by Robert T. Sandin and published in Axel Hägerström, *Philosophy and Religion*, London 1964. References in brackets in the text, prefixed by P, are to this book.

⁷ The importance of Hägerström's epistemology or theory of knowledge for the proper understanding of Hägerström's approach to moral and legal discourse is the subject-matter of the present author's dissertation, "Reason, Emotion and the Law. Studies in the Philosophy of Axel Hägerström", submitted for the degree of Doctor of Philosophy, The University of Edinburgh, awarded November 1982. Unpublished and deposited in the library of the University.

philosophy, where he devoted his life to reading the great German philosophers, who influenced his way of writing. Hägerström's approach to philosophy is based upon the inherited terminology of German transcendental philosophy, and in this respect Hägerström is by no means a revolutionary philosopher. Hägerström uses, however, the pre-existing terminology to present something quite new, or so he claims. This is expressed in his most important book, *Das Prinzip der Wissenschaft. Eine logisch-erkenntnistheoretische Untersuchung I. Die Realität*, which Hägerström later summerized in his own *Selbstdarstellung*.^{7a} In these works Hägerström claims to have inaugurated a Copernican Revolution within epistemology which were to have important consequences for man's life in society as well as in nature.

What is common to Luther and Hägerström is, the present author submits, that they both believe that they have a mission in life, that is to say to preach the Gospel: "The Truth shall make you free".⁸ But then there is a vital difference between the Gospel preached by Luther and that preached by Hägerström. Luther's final word is always based on the word of God and man's faith in God. By contrast, Hägerström's final word is always based on the word of the philosopher and his reason.

Thus Hägerström's revolt is to stress the intellectual powers of man as opposed to reliance on faith. Reason is for Hägerström what Grace is to the Christian. The proper function of man's reason has been corrupted by Christian theologians who elevate faith and feeling above reason. Hägerström's revolution is in part a revolution against his own personal upbringing. But he still retains the belief that he has a mission in life, but this is to preach philosophical, rather than religious, tenets as the foundation for man's place in the world.

2. The Social Background

Hägerström's philosophy can be seen as a revolution against the prevailing philosophical and scientific views, but must also be seen against the background of the flux and turmoil of events taking place in philosophy, science, and politics. In the political arena there was the Russian Revolution, in Sweden there was a general strike and lockout in 1909, and later on the First World War broke out. Hägerström was deeply interested in political and social problems, but his attitude was that of the keen observer, not that of the active participant. Hägerström never conceived his mission to be an active political leader. He was rather the contemplative philosopher for whom practical affairs as such are unimportant. What is important is to strive for understanding of

^{7a} See footnote 6, *supra*.

⁸ *The Bible*, John 8.32.

the truth of the matter and to grasp the inner coherence in what happens. In this respect Hägerström was deeply disturbed by Albert Einstein's famous paper from 1905 on the theory of relativity, which upset the Newtonian picture of the world and has become the leading theory among physicists.

Equally unacceptable to Hägerström is the philosophical view put forward by Ernst Mach according to which concepts are nothing but human constructions referring ultimately to sensations. Mach wishes to eliminate metaphysics, to take away the magic of things, from the conduct of life and construct science as the most economic adaption of our ideas to our conceptions. The same applies to voluntarism, expounded for example by Arthur Schopenhauer, for whom the real is regarded as the embodiment of man's will to power. For Schopenhauer the proper task of philosophy lies in removing the veil of deception that reality is the incarnation of rational order and setting the truth in a clear light, viz.: that reality has the character of an endless, and in the last analysis meaningless, struggle for existence, in which all is stress, conflict and tension.

Hägerström certainly shares Mach's goal to eliminate metaphysics, but according to Hägerström Mach's position is a piece of metaphysics, since it eliminates the concepts of space, time and causality. Hägerström also shares Schopenhauer's conviction that the task of philosophy is to remove the veil of deception and set the truth in a clear light. But then Hägerström parts company with Schopenhauer and stresses that reality has the character of an ordered logical structure. The failure of Einstein's principle of relativity is to realize the existence of a real, unchangeable and independent world.

Hägerström's philosophy is a revolt against these views since if they are carried through this implies folly and fancy and the debasement of man's reason. So there is a need for a philosophy which can put science on the secure path of knowledge by providing a single, basic principle as the foundation for knowledge of reality.

This is Hägerström's revolution against the prevailing epistemological views and his mission is to invite us to follow his way of thinking based upon the principle of non-contradiction.

3. Hägerström's Principle of Knowledge

I believe that it is crucial for understanding Hägerström's philosophy that he is deeply influenced by the Platonic and Aristotelian view of the conceptual primacy of the end or goal. The end or goal needs to be known in order to understand anything. The question then is: what is the end for Hägerström? The answer is, I submit, that Hägerström's supreme end is order in nature and

peace in society. This end is, in turn, the foundation for his more specific aims, which can be classified as follows,

- a) to discover the truth about man and nature,
- b) to promote personal happiness,
- c) to achieve social order or peace.

These three aims do not require the concept of certainty which Hägerström holds is the criterion of genuine knowledge, which is so vital, in a quite literal sense, for human beings. Hägerström has, therefore, yet one further aim, viz.:

d) to establish a rational method of forcing agreement amongst contending parties.

Hägerström claims to possess this rational method and also that it has a proper foundation. This foundation is based upon reason since what holds for reason is “necessarily and universally valid”, to quote I. Kant.⁹

In contrast to Kant, Hägerström’s view is that reason does not invent the order, but it finds the order in reality, since it is basic for Hägerström that “the real as such is something constant” (P 288, cf. 37).

For Hägerström the foundation or starting-point is “the logical point of view” or “the scientific view of reality” which is tantamount to “a clear materialistic world-view” where man as the psycho-physical organism stands in relation to the external order and perceives it, has feelings connected with it, and entertains desires towards it (P 216, 282, 301, 292).

The illogical or incorrect starting-points are “subjectivism” or “epistemological idealism”, on the one hand, and “epistemological realism” or the ordinary consciousness, on the other hand (38). They are both concerned with the genuine problem of providing a proper foundation of knowledge but they both fail to provide an adequate solution. Their solutions are inadequate since the conceptual schemes offered are inadequate.

The scheme offered by epistemological idealism is based upon the principle of self-consciousness. Its starting-point is mind, its doctrine says that judgments are fundamental for the expression of claims of knowledge. Then, however, judgments are about the workings of the human mind. This leads to the view that reality is mind or spirit.

What Hägerström maintains, if I understand him correctly, is that epistemological idealism is true in so far as it stresses that knowledge is expressed in judgments. It goes wrong, however, giving rise to falsity, by claiming that these judgments are only concerned with the contents of our consciousness. This is the basis for Hägerström’s contention: “the proposition which is regarded as self-evident in the history of philosophy *as well as in general*, viz. that consciousness itself is the only immediately given, is false” (P 36, my italics).

⁹ I. Kant, *Critique of Pure Reason* (translated by Norman Kemp Smith), London 1966, p. 158 (B 140).

This is a basic point for Hägerström's claim to have initiated a Copernican Revolution. Of course this contention is true, since this proposition is not regarded as self-evident "in general", if by this is meant the view of the common man in the street. But then Hägerström has a peculiar conception of his consciousness, to which I shall return below. Next, if the meaning of Hägerström's contention is that this proposition has been regarded as self-evident by all previous philosophers, then it is false. So Hägerström's refutation of epistemological idealism cannot be considered to be a Copernican Revolution as establishing a new way of thinking. Hägerström evidently thinks so, writing "subjectivism *I refuted* by showing that in no consciousness can the consciousness itself be given. That which is apprehended is always something other than the apprehension" (P 38, author's italics).

But Hägerström is not entitled to claim that he is the first modern philosopher who refutes idealism by relying on the distinction between an act of consciousness and the object of that act. The thesis of the intentionality of consciousness has been formulated by A. Meinong and F. Brentano, and Hägerström is familiar with their writings. So what it shows is Hägerström's self-sufficiency and lack of appreciation of the efforts of other philosophers. It also shows the perils of Hägerström's ignoring contemporary philosophy, since the distinction between consciousness and object is the foundation for G. E. Moore's paper "The Refutation of Idealism" published in *Mind* in 1903.¹⁰

The scheme offered by epistemological realism is based upon the principle of an unknown reality. Its starting-point is the individual's sense-experiences of an external world, its doctrine says that our sense-experiences are fundamental for knowledge of objects in the world. What we immediately perceive are not the objects in the world, but only ideas of them in our minds. This leads to the view that reality as it is remains unknown and unintelligible.

For Hägerström ordinary consciousness, i.e. epistemological realism, is right in so far as it stresses that there is an external world distinct from and confronting human consciousness. It goes wrong, however, in claiming that consciousness in this confrontation is only aware of sensations in the form of ideas in consciousness, rather than the external objects themselves.

This theory is radically defective according to Hägerström. His objection is that sense-experiences of sight and touch as the only foundation for knowledge-claims presuppose real existing external objects. These real existing objects cannot be identified with sense-experiences. To do so is to confuse the distinction between acts of consciousness, e.g. touch and sight, with objects touched or seen.

¹⁰ See on this point Konrad Marc-Wogau, *Studier till Axel Hägerström's filosofi*, Falköping 1968, pp. 19 f. Here the question whether Hägerström's colleague Adolf Phalén is not to be credited with the refutation of idealism in Sweden shall not be discussed.

The world does not depend for its existence on our senses, it is rather the other way round, the world presents itself to our senses of touch and sight. This is the core of Hägerström's objection—in his own words—"Hume, Kant, John Stuart Mill, Oseen und die Vertreter der Wiener Schule haben offenbar solche Empfindungen gehabt, da sie ja so felsenfest von ihrer Existenz überzeugt sind. Aber ich habe niemals derartige Empfindungen gehabt, und ich fordere alle auf, deren Vorstellungsweise nicht durch sensualistische Gedankengänge beeinflusst worden ist, die Frage zu beantworten, ob sie jemals derartige Empfindungen gehabt haben."¹¹ Basing the world upon these sense-experiences (Empfindungen) is to Hägerström a psychological impossibility, and, he thinks, to everyone else too. It is pointless to dispute with sensationalists and logical positivists, since Hägerström is confident that they can easily be disposed of by pointing out that they are inconsistent.

For Hägerström, the solution to the problem of the foundation of knowledge can only be found by transcending epistemological idealism and epistemological realism and their inadequate conceptual schemes, which must be replaced by a higher principle as the basis for an adequate conceptual scheme. The higher principle, and this is equivalent to the only foundation of knowledge, is the realization that the objectivity of knowledge "must lie in the very nature of what is apprehended, in the very nature of the object" (P 36). The very nature of the object, in turn, is "a determinate object or thought", or "that which is real as such is always one and the same" (P 43, 288). This object is "immediately given" or "intuitively given" in a judgment expressing knowledge (P 50 f.).

Hägerström's principle of knowledge is that "reality as self-identity is the very validity of all knowledge and in this sense the immediately given" (P 51). This is Hägerström's key to understanding the world and man's place in nature and society. Everything in the world obeys necessary causal laws. The problem is only to discover them, once the true foundation of knowledge has been firmly established. To provide this foundation is precisely what Hägerström has done by combining the truths of epistemological idealism and epistemological realism and avoiding their errors.

The result of Hägerström's inquiries into the proper foundation of knowledge is the theory known as "naïve realism" or "direct idealism". This theory holds that objects exist independently of our cognition, and that cognition is straightforward confrontation or contact with external objects. If Hägerström claims that this theory constitutes a Copernican Revolution he is wrong.¹² It is

¹¹ Axel Hägerström, "Erkenntnistheoretische Voraussetzungen der speziellen Relativitätstheorie Einsteins", in *Theoria*, vol. 12, 1946, pp. 1-68, at p. 33.

¹² See e.g. Thomas Reid, *Essays on the Intellectual Powers of Man* (1785) (B. Brody ed.), London 1969, p. 151, and John Passmore, *A Hundred Years of Philosophy*, London 1957, pp. 196, 245, 260.

perhaps also of some interest to notice that Lenin claims that naive realism is in perfect accordance with materialism. Lenin writes: “‘Naive realism’ is the instinctive, unconscious materialistic standpoint adopted by humanity, which regards the external world as existing independently of our minds”. Lenin also says: “The ‘naive realism’ of any healthy person who has not been an inmate of a lunatic asylum, or a pupil of the idealist philosophers, consists in the view that things, the environment, the world exist independently of our sensation, of our consciousness, of our self, and of man in general ... Materialism deliberately makes the ‘naive’ belief of mankind the foundation of its theory of knowledge.”¹³ This is a very apt rendering of Hägerström’s Copernican Revolution.

Hägerström, however, claims that ordinary consciousness suffers from lunacy. Why? The answer is, I think, that this is the only way in which Hägerström can elevate himself as the philosopher above ordinary men. Hägerström thus endorses Hegel’s opinion that the ordinary consciousness of men or “public opinion as it exists is ... a standing self-contradiction, knowledge as appearance, the essential just as directly present as the inessential”.¹⁴ Public opinion is unorganized and must be organized by a philosopher: his business as a philosopher is to present the truth, and to be a great man expressing the essence of his time. This is only another way of endorsing Hegel’s claim that only philosophers are capable of understanding reality as it is.

The crucial difference between Hegel and Hägerström is that for Hegel contradictions are important as the means by which society and nature progress, whereas for Hägerström contradictions are important in the sense that they are not permissible and must be eliminated, since once they are admitted society and nature collapse.

4. Hägerström’s Mission and Marxism

For Hägerström “the history of civilized man ... cannot be explained by reference to any particular temporal circumstances, but must be explained directly by reference to the human soul-life” (P 210).

Hägerström’s contention is central to the understanding of his philosophy. It expresses, at one and the same time, a rejection of Marxism, a methodological principle, and an empirical claim (cf. below section 5). For Marx the sickness of the human soul-life, to use Hägerström’s phrase, is due to man’s social conditions. By contrast Hägerström claims that the sickness is inherent

¹³ V. Lenin, “Materialism and Empiro-Criticism”, *Collected Works*, vol. 14, Moscow 1962, p. 61 and p. 69. This book was published—in Russian—in 1909. Hägerström’s epistemological works were published between 1908 and 1929.

¹⁴ G.W.F. Hegel, *Philosophy of Right* (translated with notes by T.M. Knox), Oxford 1952, p. 204 (§ 316).

in man. For Hägerström, the life of a philosopher is the activity, not so much in the practical sphere of daily affairs, as in the contemplative sphere of the study, seeking purification and perfection by means of knowledge, where thinking identifies itself with the inherent order in nature. What matters to Hägerström is the idea of order and harmony.

Hägerström, by nature also a timorous person, has every interest in upholding the necessary conventions of a rather peaceful society like Sweden. This is also what the rational person does, since he sees things as they are, in contrast to the irrational person who breaks the laws. Legal activities are indispensable for the existence of society. Or as Hägerström says, "the law is undeniably a condition of culture itself. Without it, as the Sophist Protagoras already claimed, we should never have been able to win the lordship over other species" (P 262). Where the Marxists attempt to destroy the law, precisely because the law is the lordship of the capitalist class over the working class, Hägerström arrives at the opposite conclusion: Law must be upheld but purified from foreign elements of a will behind the law. Thus, Hägerström's Copernican Revolution is by no means a social revolution in the Marxists' sense. In this respect there is an important difference between Hägerström's version of materialism and what is known as dialectical materialism. In fact Hägerström dismisses Marx as an Utopian thinker, who reads his own wishes into the necessary causal structure of the world. To understand the nature of anything is for Hägerström to fit it into the system of necessary causes and effects, of which it is a part. Hägerström's objection to Marx is that Marx allows his own feelings to interfere with his thinking. His philosophy is no more than an arbitrary projection of his own feelings and volitions into the necessary scheme of things. Thus, Hägerström dismisses Marx's materialism as "metaphysical materialism".¹⁵ By contrast, I suppose that Hägerström's materialism is scientific materialism. In this case, Hägerström "can definitely observe a development towards universality in moral ideas. That is that mode of action is good which is demanded by the well-being of the whole race" (P 303). I take it that this is not Hägerström's projection of his own feelings, but a scientific judgment. And the well-being of the whole race demands peace rather than social revolution.

Hägerström's own philosophy is indeed based on the thesis of Marx or Lenin that left to themselves people will never get rid of their confused notions. Unless the idea of truth and reality is put into their brains from the outside by philosophers or intellectuals, people will indulge in religion or magic. But then, I suppose, the Marxists are putting confused ideas into people's hearts, rather

¹⁵ Axel Hägerström, *Social teleologi i marxismen* (Uppsala Universitets Årsskrift), Uppsala 1909, pp. 1-72, at p. 69.

than their brains. Accepting the Marxists' division of people into two opposing classes, Hägerström also believes that it is vital to diminish this division. But it must be done by persuasion rather than by force. Minds are not conquered by force but by "the insight that everything is only a moment in an endless natural context, in which nothing is in itself higher or lower" (P 95). Rather than the Marxists' dictum that material force can only be overcome by a stronger material force, Hägerström's point is, I suggest, that people's emotions and volitions can only be overcome or removed by an emotion or a volition contrary to itself, and possessing more power in restraining emotion.¹⁶ Thus, we have legal rules "emphasizing the imperative form as such, which will break down the opposition of the will" (122).

If my suggestion is correct, then Hägerström's philosophy is rooted in feeling rather than thinking. It follows, if we use Hägerström's own definition of metaphysics, that he is engaged in a piece of metaphysics as well. His "scientific point of view" turns out to be another metaphysical view. For Hägerström "the word 'reality' is basically nothing but the expression of the feeling of certainty" (P 59).

But there is a world of difference between a judgment which is true and a "feeling of certainty" which refers to a psychological state, whose existence in no way guarantees that what Hägerström feels certain about is in fact true. Hägerström's philosophy rests upon confusing

1. *p* is true, where *p* denotes a proposition or judgment, and
2. Hägerström believes, or has a feeling of certainty, that *p* is true.

Obviously Hägerström may believe that his judgment or proposition is true even though it is not true, and his judgment may be true though neither he nor anyone else believes it or has a feeling of certainty. To take an example. The judgment "the primitive man is surrounded by invisible will powers" is "of course, a universally recognized fact" (P 233, 243). That is to say Hägerström believes that this is a true judgment although the judgment is probably false. To be a true judgment, Hägerström's beliefs must accord with the way the world is for the primitive man; the way the world is for the primitive man does not accommodate itself to Hägerström's beliefs.

The point may seem obvious, but Hägerström's writings show that he has confused the fundamental distinction between 1. and 2.

On the basis of Hägerström's epistemological theory there is an external world consisting of independent and external objects, which are fitted to the intellectual mind, exactly as they are. What is important is to purify the human mind from confused notions. The only way of obtaining knowledge of

¹⁶ See my paper "Reason and Passion", in *Rechtstheorie*, vol. 11, 1980, pp. 151-64.

man's confused ideas is to study their history. Only by a study of the origin of our ideas, conceptions and judgments is it possible to know anything about the essence of man's confused situation. It is the origin, not the validity of judgments which is important. Or to put it in another way, Hägerström returns to Francis Bacon's conviction that knowledge gives a rather accurate picture of nature if only we take care to avoid prejudices. The same applies to knowledge of society. Thus, for Hägerström, the validity and truth of judgments depend upon the pure thought of a detached intellectual mind. An example is, of course, Hägerström's way of thinking. If this is so, then there can be no epistemological problems left for the intellectual mind. And it is noticeable that Hägerström seldom enters into analyzing the methods by which judgments are tested, verified and falsified. The justification of the objective truth of judgments is for Hägerström his own reflective apprehension of reality. For this reflective apprehension facts present themselves as they are, they are there to be recognized by man's intellect, not to be made by man's mind. Consequently, intellectuals with a purified reflective apprehension can safely go ahead and explore the world, safely ignoring epistemological problems, for there are none.

Hägerström has provided the solid foundation for knowledge of objects. If Hägerström's epistemological theory is correct, then it is a mystery how error or confusion can arise. If we are directly confronted with an objective and material reality exactly fitted as it is to the intellectual human mind, then what is the basis for the fact of human error and ignorance? It takes a philosopher of Hägerström's calibre to unravel this mystery.

5. Hägerström's Method

The answer to this question is Hägerström's claim that it is man's mind which is corrupt. It is corrupt because thinking is infected or contaminated with foreign elements, viz. feelings and volitions. What the human mind needs is a philosopher to cure and purify it from these foreign elements. Philosophy is to be identified with mental hygiene, ethics and legal science with social hygiene (186 f., P 280).

Following Hägerström's contention as a methodological principle philosophy and jurisprudence are genetic or historical inquiries into the origin of man's confused ideas. As an empirical claim it offers a history of human errors, or how man is led astray by his feelings and volitions. According to the laws of association Hägerström uses the analytic method of reasoning from effect to cause. The effect, i.e. that man's ordinary thinking is erroneous, is given as a fact. We have to look for the cause, which is found in man's feelings or volitions. This, in short, is the structure of Hägerström's reasoning.

Hägerström thinks that a necessary condition of knowledge is the ability to give a rational account of one's beliefs concerning objects. To give a rational account of one's beliefs concerning objects is, in turn, for Hägerström to discover the causes of the object and the laws by which the occurrence of the object can be adequately explained as a necessary link in the infinite chain of causes.

This is the basis of Hägerström's claim that ordinary human people suffer from confusions and illusions because they are ignorant of the causes of objects. When people do not know the cause of something, e.g. the evils of the world, they offer explanations in terms of inexplicable acts of will, e.g. the will of God or the will of man. This is inadequate just as it is inadequate to explain the fall of a stone from a roof as the result of God's will.

Thus it is the origin of ideas which matters. This explains why Hägerström's writings abound with discussion of ideas in the minds of people. This puts Hägerström in the British philosophical tradition of Locke, Berkeley and Hume. Hägerström cannot, then, claim to initiate a revolution, since Hume already makes the claim to introduce the experimental method of reasoning into moral subjects. Whereas Hume points to experience and observation, Hägerström relies on his intellectual intuition. His point is that man's thinking is often perverted by feelings and volitions. There is nothing revolutionary in this diagnosis.

What Hägerström offers, as his discovery, is that he has purified his own thinking from feelings and volitions. The present author is not quite sure whether Hägerström follows Auguste Comte and believes that human thinking goes through three stages: the theological, the metaphysical, and the positive. This idea can also be found in Sir James Frazer's *The Golden Bough*, which Hägerström had studied and used as evidence for his own theory (P 238 f.).¹⁷

What I do know is that Hägerström is convinced that he has arrived at "the positive stage" of perfect knowledge, where the "concept of reality" prevails and governs man's thinking in contrast to the distorting feelings and volitions governed by the "concept of pleasure".¹⁸ Thus Hägerström's mind is a sound mind directed at the things themselves, i.e. exposing the illusions which are deeply engrained in the ordinary human soul. The basis for Hägerström is his capacity of possessing the final truth about the mechanism of the human mind. Philosophy is, then, to sum up, a doctrine as well as an activity. It is a doctrine of scientific judgments concerning the human mind which forms the basis for the scientific activity of improving the ordinary as well as the scientific

¹⁷ See also Olivecrona's preface to *Inquiries*, p. XVIII, and for criticism G. MacCormack, "Hägerström's Magical Interpretation of Roman Law", in *The Irish Jurist* 1969, pp. 153 ff.

¹⁸ *Philosophy and Religion*, pp. 277, 41, 179 respectively. The present author does not know whether Hägerström had studied Sigmund Freud's theories.

consciousness. A comparison with Wittgenstein is illuminating. For Wittgenstein “the civil status of a contradiction, or its status in civil life: there is the philosophical problem”.¹⁹ The consequence for Wittgenstein is that philosophy is not a doctrine, but an activity where the decision between conflicting views is left to the ordinary consciousness.

For Hägerström as for Ludwig Wittgenstein the purpose of philosophy consists in “curing philosophical thought of the madness which besets it”.²⁰ In this respect they are followers of Kant. So there is nothing revolutionary about Hägerström’s philosophy in this respect. The true purpose of philosophy for Kant is “to expose the illusions of a reason that forgets its limits”.²¹ Reason prevents errors, and “this gives it dignity and authority, through that censorship which secures general order and harmony, and indeed the well-being of the scientific commonwealth, preventing those who labour courageously and fruitfully on its behalf from losing sight of the supreme end, the happiness of all mankind”.

Kant’s therapeutic method is the critique of pure reason. Wittgenstein’s therapeutic method is the critique of language. The result of Kant’s critique of pure reason is that Kant “found it necessary to deny knowledge, in order to make room for faith”. Hägerström does not accept that it is necessary to make room for faith, which implies God, freedom, and immortality. It is faith which is the source of wars against reason which is omniscient. The result of Wittgenstein’s critique of language reaches a far more radical conclusion than does Kant’s: “knowledge is denied to make room for silence”.²²

I do not know whether Hägerström is familiar with Wittgenstein’s philosophy. But he does not accept Wittgenstein’s conclusion, since it is ridiculous to set out to cure people by being silent. And Hägerström rejects Wittgenstein’s dictum “I am the centre of the world” as a version of extreme voluntarism, which is the root of evil and disorder in the world. The result of Hägerström’s philosophy is rather to affirm knowledge in order to make room for practice, i.e. curing people by preaching the scientific gospel that reality is orderly and on its way to the supreme end, the happiness of all mankind. As Hägerström claims, “one can definitely observe a development towards universality in moral ideas. That is, that mode of action is good which is demanded by the well-being of the whole race.”

Thus, Hägerström’s programme for his therapeutic mission is rather the

¹⁹ L. Wittgenstein, *Philosophical Investigations* (translated by G.E.M. Anscombe), Oxford 1968, cf. P.M.S. Hacker, *Insight and Illusion*, Oxford 1972, p. 117.

²⁰ Cf. Hacker, *Insight and Illusion*, p. 116.

²¹ Kant, *Critique of Pure Reason*, p. 591 (B 763), and for the following quotations p. 665 (B 879) and p. 29 (B XXX).

²² Cf. Hacker, *op.cit.*, p. 26, and for the next quotation p. 82, cf. p. 204.

Platonic view: "He will restore us to our original nature, and heal us, and make us happy and blessed".²³

Hägerström's philosophy supplies the ordinary consciousness with the only possible prescription for resolving the contradiction, i.e. to accept the verdict of the Therapist. Hägerström proceeds alongside the New Testament's distinction between belief and unbelief, and the implication that it is obligatory to believe and wrong not to believe. If we believe Hägerström's judgments, then we are, by his standard, rational. If we do not believe them, this will show that we are to be considered irrational, and failing to realize the proper meaning of concepts.

Hägerström fails to notice that the fundamental principle of reason is not that it is right to believe and wrong not to believe but rather that it is right to believe or disbelieve or doubt in accordance with the balance of the reasons available, and wrong to doubt or disbelieve or believe in disregard of the reasons available. Following the latter principle I do not believe that Hägerström's theory is a Copernican Revolution nor that it constitutes the proper foundation of knowledge.^{23a}

III. HÄGERSTRÖM'S INQUIRY INTO THE NATURE OF LAW

1. *Hägerström's Method of Essentialism*

Concerning law, Hägerström's aim is, in his own words, to "throw light on the real nature of law by means of the critical investigation, and thus to lead up to an exposition of that conception of law which really covers the fact which legal theorists have in mind in their attempts at conceptual construction" (56). The wording of this passage is significant and revealing. It shows that Hägerström thinks that to have the concept of law is to know the real nature of law, to have apprehended the facts which characterize law and make law what it really is. It also shows that Hägerström thinks that having a concept of law involves a cognitive relation between a legal theorist and the object he is studying, viz. law.

The question then becomes this: How is it possible to know the real nature of law? When Hägerström refers to what legal theorists have in mind, is he then referring to the empirical psychology of their minds? This is hardly the case, at

²³ Plato, *Symposium* 193 d, quoted from Karl Popper, *The Open Society and its Enemies*, 5th ed., vol. 1, London 1966, pp. 169 f.

^{23a} Cf. *infra*, p. 42.

any rate Hägerström does not provide us with any findings resulting from empirical research. Besides, what is going on in a scientist's mind in terms of ideas is one thing; whether these ideas are true or false is quite another. Hägerström is interested in genuine knowledge about law, which implies that he must consider ideas expressed in judgments or propositions by means of notions or concepts. So Hägerström is engaged in a conceptual investigation of the real nature of law, and the method he uses is the method of essentialism.

The critical investigation which Hägerström has in mind is the philosophical or jurisprudential analysis of concepts used by legal scientists or ordinary people. As Hägerström writes, "the fact [is] that the notions which are used for describing what is actual may very well be delusive. If they disclose to analytic scrutiny a contradiction, they are notions only in appearance. In that case there is merely a string of words without meaning. And the alleged fact, which is supposed to have a nature defined by the 'notion', would be no fact at all. Ever since Socrates' time it has been held that one of the highest tasks of philosophy is to analyze notions which are in common use in order to attain a real world of coherent concepts which must be internally coherent. For the reality with which science is concerned cannot be determined by means of judgments which contradict each other. No doubt it is always possible to put such judgments into words, but these words have no meaning. Therefore no science which claims to describe reality can evade a conceptual analysis of this kind." (299)

The conceptual analysis Hägerström has in mind depends upon the contrast between "reality" and "appearance", between "a real world of coherent concepts" and "notions only in appearance", between "facts" and "no facts", or between "words with meaning" and "words without meaning". If so, then one important question is to indicate a method for teaching another person the difference between reality and appearance, to which I return below (p. 29). Another important question is whose business it is to teach the correct procedure. To the latter question Hägerström's answer is that this is the task of the philosopher, not the task of the scientist. Why is this so? Hägerström's answer is that "it has been held that one of the highest tasks of philosophy is to analyze notions".

The objection may be that it has been held to be the task of philosophy, but this assumption is false. This threatens to put an end to the whole enterprise of the philosopher's effort to attain a real world of coherent concepts, before he has begun his efforts. It is rather a task for the scientist to establish a coherent set of concepts, or at least scientists are not debarred from pursuing this task. Hägerström's reply to the scientists is that before science can begin it is necessary to provide a systematic inventory of the various kinds to be studied. In this respect science—including legal science—rests on inarticulate assump-

tions. It is the philosopher's task to bring these into the open and examine them critically.

Philosophy is the highest form of inquiry, just because it alone involves no presuppositions. This is the Platonic approach to philosophy. That it is shared by Hägerström and his pupil Olivecrona is confirmed by some extracts from their writings.

Hägerström states, "I have certainly not taken my basis in any theory concerning the nature of law ... It is very dangerous, from a methodological point of view, to allow an investigation concerning the ideas of certain people during certain epochs to be in the least degree influenced by any theory concerning that which is called law."²⁴

It may be objected that it is very dangerous, from a methodological point of view, to investigate the ideas of certain people without a theory. In philosophy, as in science, one finds only what one seeks. One cannot have the answers without knowing what the questions are. It is quite useless to investigate, e.g., the Roman ideas of rights and obligations, without some theory in mind which determines the kind of evidence which is relevant for the truth or falsity of the theory. A theory will tell a person what to look for; it will not tell him, what, within the theory, is actually the case.

I suggest that Hägerström has, after all, some theory in mind. And this theory is his theory of knowledge, i.e. that there is a necessary connection between words and things, and that there is a necessary connection between genuine judgments revealing the logical nature of reality. This connection can be discovered by logical analysis. It is to proceed from sounds to things, from the world of images to the world of facts. This, in turn, involves the fundamental distinction between reality and appearance which is left for the philosopher to explore. His method is the method of induction in the Aristotelian sense of the method by which philosophers are led to perceive the essence or true nature of a thing. This is for Hägerström "one of the highest tasks of philosophy". This suggests that there are other tasks of philosophy besides the task of conceptual analysis aiming at attaining a real world of coherent concepts which must be internally coherent. Suffice it to say that Hägerström has not attained this world. His phrase "one of the highest tasks" is incoherent, since "the highest task" implies that there is one and only one task, whereas Hägerström implies that there is more than one such task.

Another task is, presumably, to provide the proper guidance for men living in society. This guidance is based upon thinking, and the true philosopher's

²⁴ Hägerström, *Der römische Obligationsbegriff*, vol. II, p. 399. Quoted from Olivecrona's introduction to Hägerström's *Inquiries*, p. XIX. For Olivecrona's method, see *Law as Fact*, 1st ed. London 1939, p. 11.

thinking is objective in the sense that it is devoid of values and preconceived notions, so it follows that his guidance is objective. It is guidance not prediction which matters. This is the fundamental difference between the Swedish realistic approach and American legal realism, to which Alf Ross is much closer. Hägerström's guidance is based upon his fundamental aims: to achieve peace of mind and to achieve peace in society.

These tasks are intertwined for Hägerström, I suggest. The philosopher's task is conceptual analysis, Hägerström claims. This provides an answer to the question raised above, p. 27 concerning the proper method for teaching another person the difference between reality and appearance. Hägerström alludes to Socrates. And this is very revealing, since it is precisely the aim of Socrates to ask questions in order to destroy prejudices and false beliefs and help people to look for the essence or true nature of things, e.g. the true nature of virtue, or justice, or law. Socrates himself does not pretend to know the answers to these questions. He does not know what the essence of justice is. He only wishes to make men think by his teaching. He calls to the intelligence of man believing that it will reply to the call. Socrates professes that his only knowledge is knowledge of his own ignorance. His attitude is described by Aristotle in the words "Socrates raised questions but gave no answers; for he confessed that he did not know".

Thus, Socrates' teaching is aimed not at teaching any belief, but rather at purging or cleansing the human soul of its false beliefs, its seeming knowledge, its prejudices. Hägerström shares Socrates' view that the human soul must be purged from illusory notions. Knowledge must take the place of ignorance. In contrast to Socrates, however, Hägerström believes that he has the right answers, so his teaching aims at teaching genuine knowledge. And those in whose minds it is set must guide their lives in this light of genuine knowledge. True knowledge and true teaching coincide. This is exemplified in Hägerström's inquiry into legal notions. If we follow Hägerström's mind, then we follow the way of truth.

In order to establish this conclusion Hägerström adopts the Platonic approach, i.e. the method of essentialism. A subject-matter is discussed, e.g. the notions of rights and obligations inside the individual mind. One view is set up, only to be demolished by another. Hägerström's discussion, in his introduction to *Der römische Obligationsbegriff*, is an excellent example of his technique.

Concerning rights "we seem to be dealing with something whose meaning is obvious", Hägerström says. A child is quite clear that the hobby-horse belongs to him, for example. So Hägerström continues, "It should, therefore, it would seem, present no particular difficulty to explain what the rights in question *really* consist in. And yet to one's astonishment one finds a mighty juristic

literature whose object it is to determine the meaning of these notions and which contains all kinds of different views about them" (1, my italics).

Hägerström's astonishment, I suggest, is based upon the Hegelian view that "truth in philosophy means that concept and external reality correspond".²⁵ But in the case of right there is no such correspondence to be found. It may also be based upon the way he formulates his question: "What does right really consist in?" He assumes that it must be possible to discover some identity in all the applications of an ambiguous word. A word like "right" or "duty" is singled out. A survey made of the ways the word is used which is governed by Hägerström's assumption that the word "right" or "duty" must refer to something tangible, just as the word "hobby-horse" refers to a stick with a horse's head.

This assumption may be wrong and Hägerström in fact says that it is "a mistake to reduce the mystical notion of legal duty to factual relationships" (8).

He also says that "modern jurisprudence seeks to use only such notions as correspond to facts" (1). Now, if it is mistaken to reduce the notion of legal duty to factual relationships, then it is quite wrong for modern jurisprudence to "be pushed on by the demand ... to try to exhibit the facts which correspond to its characteristic notions of rights and duties" (16). This is not Hägerström's answer. He subscribes to the view that a concept is altogether impossible, and can have no meaning, if no object is given for it. So there must be an object. Thus, he makes the demand that we must state what it is that is common to all the ways of speaking of rights in virtue of which they all, and they only, are called "rights" or "duties". The answer is "mystical forces". Hägerström presents this answer as the answer to the question "what does the word 'right' refer to?" This question is then equated with the question "how did Romans look at right and obligation?" The former question is to ask for a nominal definition, i.e. correlating a word to a thing. The latter question is to ask an empirical question where the meaning of the word "right" is taken for granted. This question is concerned with the question what a Roman had in mind when he was buying or selling things. But then Hägerström says that "the relevant question is not whether the Romans entertained a true belief when they meant, e.g., that the holder of the imperium (the *vis imperii*) acquired it through the ability to make auspices that was conferred upon him" (XIX).

I should have thought that this is the relevant question, viz. was the belief which a Roman entertained concerning rights and duties true or false? For Hägerström this question cannot be relevant. The reason is that Hägerström

²⁵ Hegel, *Philosophy of Right*, p. 231 (§ 21 Add.).

commits the methodological error, which he imputes to other writers, viz. "to introduce without justification modern points-of-view" (58). In the absence of any possible means of knowing how the Roman mind actually operated Hägerström foists his magical interpretation on the Romans. The basis for this interpretation is Hägerström's inductive conclusion that the essence of right and obligation is a sort of magic. This is the only natural explanation, Hägerström says. Why? His answer is that the Romans lived under the appearance that they were able to cause things by exercising rational will and choice. In reality this is a superstition, since everything is determined by natural necessity. The implication is then that Hägerström's own effort to purge the modern mind from superstitions is also determined, and how can he possibly interfere with natural necessity? He obviously thinks he can, but only by involving himself in a self-contradiction, which is not fitting for a philosopher who claims to present a real world of coherent concepts.

To revert to Hägerström's natural explanation: this is backed up with inductions in the sense of particular evidence from "some real knowledge . . . of reading Justinian's *Institutions* and *Digesta* from beginning to end".²⁶ This is, needless to say, dubious evidence, since Hägerström has already made up his mind that individual rights and obligations are delusions.

Suppose though that Hägerström's answer is true. How is it that such magical beliefs and practices, which are anything but reasonable according to Hägerström's way of truth, could nevertheless be accepted by the Romans and help to create an empire? Hägerström holds that law is a condition of culture itself. If law, then, is equated with magical beliefs, the surprising result is that magical beliefs are a condition of culture. If we follow Hägerström we must destroy all magical beliefs. This leads to the conclusion that culture is destroyed as well. This is not Hägerström's intention. On the contrary, there is a case for upholding culture against attacks from anti-social individuals. So Hägerström has created a problem for himself.

Hägerström's detailed attack on the will-theory is also based upon the Aristotelian view: "for we say that that which everyone thinks so, really is so, and the man who attacks this belief will hardly have anything more credible to maintain instead".²⁷

Hägerström's argument against the will-theory then proceeds as follows: Everybody says that he has rights independent of the will of the state. Hence it is the case that everybody has rights independent of the will of the state. But the will-theory states that the basis for subjective rights of individuals is the

²⁶ As reported by Olivecrona, see *Inquiries*, p. XII.

²⁷ Aristotle, *The Nicomachean Ethics* (translated and introduced by D. Ross), London 1954, p. 250 (ch. X, sec. 2).

will of the state. Hence the will-theory must be wrong, since it is in conflict with ordinary consciousness (217).

Having refuted the will-theory, Hägerström then proceeds to demolish ordinary consciousness by using the same argument: Hägerström holds that sound reason reveals subjective rights to be illusory or pure magic. Hence it is the case that subjective rights are illusory or pure magic. But individuals believe that they have subjective rights. Hence the ordinary consciousness of individuals is confused, since it is in conflict with sound reason. Hägerström's argument is unsound, since he confuses the question: "What is the meaning of the word 'right'?" with the quite different question: "What actions are right or wrong?" It is one thing to ask how the words "right" and "obligation" are used, but quite another thing to ask what things individuals think are right or wrong.

Hägerström's writings illustrate his method of essentialism and also illustrate that Hägerström misunderstands his own questions. Hägerström begins by asking a conceptual question, viz. what is meant by the word "right", and ends up by answering an empirical question about the origin of ideas of rights and duties. The answer provided by Hägerström is thought to be an answer which covers not only the conceptual question, "what does the word 'right' mean?", but also the normative question, "what makes an action a right action?". Hägerström's mistake is to ask the question "what is the real nature of law?". Like Plato, he uses the question form "what is x?" to ask for real definitions. And the confusedness of the concept of real definition is an effect of the vagueness of the formula "what is x?". For apart from an inarticulate grunt it is the vaguest of all forms of question.²⁸

Hägerström uses this formula to ask his questions about the real nature of law. I think that Hägerström's use of this question form has the effect that he confuses real definition and nominal definition. The question "what is x?" saves Hägerström the trouble of thinking out and saying exactly what it is that he wants to know about law. By saying "what is law?", he can leave to his answerer the task of discovering what particular information about law Hägerström wants. Hägerström is always playing safe, since he can dismiss an answer by the remark that this is not the sort of information which he wants. Hägerström wants to see clearly what the object of jurisprudence is. This leads him to present his own theories of law, to which I now turn.

2. Hägerström's Theories of Law

Hägerström's inquiry into law has been regarded as epoch-making, at least in Sweden. There Hägerström's teaching caused many people to abandon rights

²⁸ Cf. Richard Robinson, *Definition*, Oxford 1954, p. 190.

and obligations as fictitious or magical notions based upon the individual's feelings or volitions but without any basis in reality. These converts to Hägerström's gospel purport to see the law from the purely scientific point of view of thinking. What they seem to forget is that "we are very apt to overrate the importance of our own ideas", to use a phrase from Olivecrona.²⁹ This is, no doubt, true. Rather than just obey Hägerström as a cognitive sovereign, it is essential to consider his credentials. From the fact that Hägerström has offered a theory it does not follow that we have to accept it. Hägerström's cognitive sovereignty can be questioned, and this is what I wish to do.

My thesis is that Hägerström offers two theories. There is what I call the formal theory of law, according to which "positive law is only a system of rules for the so-called organs of the state—themselves defined in the rules—a system of rules which is actually carried through" (P 316). And there is the psychological theory of law, according to which "law is, at any rate to a large extent, an expression of interests; and this is true both of its foundations and of secondary rules. Therefore the question of the intention and the significance of a law is a legitimate one" (41).

According to the formal theory there is no reference whatsoever to any will. According to the psychological theory law is an expression of intention or will. To be sure, there is no unified will, as the will-theory implies, but "the real state of affairs is that, in the conflict of interests within society, certain interests come to express themselves in the form of laws" (41).

According to the formal theory, "the legislator starts with the accepted juristic technique as a factor which is independent of him and regards himself as determining the law which is put into force *in concreto* only through the words in which it is formulated" (98). We are, Hägerström says, "forced to the conclusion that the only volitional factor in the legislator which can on the whole be considered as positive law is simply the intention to use certain expressions" (98).

If the only volitional factor is the intention to use certain expressions, then there is no reference to any interests (cf. 354). On the formal theory there are "thoughts behind the words", which implies that legal rules have "real meaning" independently of the legislator's intention. "No personal power exists which gives the law its force, and therefore no personal wishes in themselves are at all relevant" (82, cf. 241, 312).

According to psychological theory a different state of affairs exists, since here "a certain mode of valuation becomes prevalent and stands out as the correct one. It is plain that the standard of values of the socially predominant class must have great importance in this" (77).

²⁹ Karl Olivecrona, *Law as Fact*, p. 11.

According to the formal theory the function of the judge is to render “the straight judgement which is at one with the truth concerning the case” (89).

Hägerström refers to Homer and Hesiod but continues to say that “the judge has the same pacificatory function nowadays by ideal methods ... he is *not merely* an organ of the law as power but also of the law as the doctrine of rights and duties” (89). It follows that the judge in legal controversies does really and truly express the objective norm for rights and duties, which is the cornerstone of social peace. The same applies to the legislator who “feels himself bound by an objective norm for rights and duties which stands above him. He feels obliged to give positive legal force to this, without regard to his social wishes as to what shall become positive law” (91).

According to the formal theory (FT), “from the normative system of conduct one can deduce with logical necessity that in such and such a case, such and such an action is a duty in respect to another’s right” (293, cf. 207, 241).

According to the psychological theory (PT), “the law’s utterance ‘it shall be so!’ is merely a phrase which does not express any kind of idea, but serves as a psychological means of compulsion in certain cases. (FT) But it is only from ideas that any logical conclusion can be drawn. On the other hand, the ideal content of the law is of course used in the case in question. And (PT) it is only for psychological associative reasons, and (FT) not for logical ones, that the result he reaches by his application presents itself to him (FT+PT) as an ought” (319).

I have inserted (PT) and (FT) in order to show that in one passage Hägerström moves from the psychological theory (PT) to the formal theory (FT) which “of course” is used by the judges to present the parties in the dispute with a decision, where the use of “ought” is conflated. The conflation in question is between “ought” in the sense of motivation or “exciting reasons”, and “ought” in the sense of justification or “justifying reasons”.³⁰ One final passage needs to be quoted in order to substantiate my thesis. The passage runs: “Laws are thus not imperatives in the usual sense, i.e. commands issuing from a certain authority. Their force therefore does by no means rest only on their imperative form. This is indeed important from the *psychological point of view* and it is in fact a distinguishing mark of actual laws. *But a law as such is characterized only by the fact* that it occurs as an item in a whole system of pronouncements of universal scope, produced in a certain way and issued in a certain form, which do in fact get their ideal content actualized in society” (311, my italics).

There is here clearly a distinction made between the psychological point of

³⁰ For this distinction, see Francis Hutcheson, “Illustrations on the Moral Sense” (1728), in *British Moralists 1650-1800* (ed. D.D. Raphael), Oxford 1969, vol. 1, p. 308.

view, i.e. what I have called the psychological theory of law, and the non-psychological point of view which is concerned with a law as such, i.e. the formal theory of law. Thus, I think I have established that Hägerström has two theories of law.

To sum up: There is the formal theory of law. This theory holds that law is a normative system of objective rules of rights and duties. This system has binding force or "categorical validity", i.e. it stands above the governing authorities and the people. The legislator's will is determined by his knowledge of right and wrong actions. The foundation of law is "its own spirit, i.e. on principles of equity and public utility" (71, cf. 87, 204). This is capable of being objectively ascertained by persons adhering to Hägerström's philosophy and formulated in statutes. These statutes constitute the framework for activities, and there is an obligation to obey the law. What is right and wrong is expressed in rules which are made known to people through formal promulgation. As a means to secure obedience there are sanctions, in the sense of penalties, attached to the rules. And the authorities are obliged to enforce the rules against offenders of the legal system.

This theory, it may be added, is a natural view to adopt for an atheist like Hägerström, who wants to hold both that there is no God, but there is nevertheless right and wrong conduct. It fits with Hägerström's thought that nature is an ordered system and so is society. Thus is upheld thinking as against willing and feeling. Hägerström's formal theory is close to Hegel's view: "For it is not what makes us irascible and resentful, but the fact that it is not as it ought to be. But if we recognize that it is as it must be, i.e. that it is not arbitrariness and chance that make it what it is, then we also recognize that it is as it ought to be. Yet it is hard for the ordinary run of men to rise to the habit of trying to recognize necessity and think it."³¹

Hägerström has the capacity to recognize necessity, think it, and implant his knowledge in the mind of his pupils.

Then there is the psychological theory. This theory holds that law is an expression of conflicting interests. Law is a coercive system of emotional and attitudinal responses to independent imperatives. These imperatives have binding force, i.e. they are upheld as links in a causal psychological chain between predominant ideas of values of the socially predominant class and the behaviour of people. The feelings are maintained by the authorities using words to cause the right behaviour. Promulgation is a piece of magic which works. The important thing is that there are unpleasant consequences, e.g.

³¹ G.W.F. Hegel, "The German Constitution", in Hegel's *Political Writings* (translated by T.M. Knox, edited by Z.A. Pelczynski), Oxford 1969, p. 145.—Hägerström's formal theory is also akin to Kelsen's theory of law. See my paper "Legal Realism or Kelsen *versus* Hägerström" (forthcoming).

penalties, applied in case the use of words alone fails to achieve the purpose of securing a comprehensive and harmonious system of feelings to keep people in awe of the state and its officials. The foundation of law is interests upheld by force. What is right and wrong conduct is simply what the authorities use words to command. To know what is right and wrong is a question of paying attention to the commands. This theory, it may be added, achieves the same purpose as the formal theory, viz. to establish law and order—but by using persuasion rather than by appealing to reason or thinking. The important difference between the formal theory and the psychological theory is this. If you hold the formal theory there are actions which are right or wrong independently of any legislation. If you hold the psychological theory then there are no right and wrong actions independent of the words of the authorities. In other words, if there is no civil authority then Hägerström is logically committed to say that there are not right and wrong actions. For, on this theory it is only the words expressed in commands which make actions right and wrong. As far as legal science is concerned, the important thing is to offer guidance to the authorities. The formal theory does this by supplying information as to right and wrong conduct. The psychological theory does this by supplying motivation in terms of words to make the authorities apply the formal theory in its unadulterated form.

To be sure, Hägerström does not clearly present the two theories as distinct theories. In this respect the question is whether Hägerström has adhered to his own claim “to attain a real world of scientific concepts which must be internally coherent. For the reality, with which science is concerned, cannot be described by means of judgements which contradict each other”. The formal theory and the psychological theory need not, it must be noticed, be in conflict. The formal theory is a non-empirical theory concerned with the conditions which must be fulfilled in order that a rule is a legal rule. It is a jurisprudential theory concerned with the question how to bring rules about as legal rules. The test for the identification of a rule as a legal rule is according to Hägerström that the rule is formally promulgated, and it ceases to be a legal rule through formal abrogation (38, 355, cf. 103).

The psychological theory is an empirical theory. This is concerned with the influence of legal rules upon people's behaviour. It is a causal theory which claims that one set of events, viz. the promulgation of legal rules, and another set of events, viz. that persons act in certain ways, are links in a causal chain. The psychological theory presupposes that there are legal rules and is concerned with whether these rules are in force in the sense that legal rules are followed and enforced by the authorities. The test for the psychological theory is experience, i.e. whether the behaviour occurs as a “factor in the system of nature” (116).

Hägerström sometimes keeps these two theories apart, and indeed they must be kept apart since they deal with different questions. I suggest, however, that Hägerström in the end reduces his formal theory to the psychological theory. If this is so, then Hägerström has not achieved his aim to see what the object of jurisprudence is. Then Hägerström does not present “a true picture of the law itself”.³² The phrase is Olivecrona’s and is meant to refer to Hägerström’s theory. I turn the phrase, with respect, against his master. A major weakness in Hägerström’s picture of the law itself is precisely that it does not present the law itself. Hägerström’s picture diverts the attention from the law itself towards a system of emotional responses, caused by using words. It is, in short, to confuse legal science as an exposition and criticism of the law with psychology based upon a dubious theory of meaning which Hägerström never tried to present in a fully elaborated theory using coherent scientific concepts.

3. *The Maintenance of Law*

According to Hägerström’s formal theory there are independently existing objective moral properties revealed by reason which determine the regulation of the use of legal terms. This formal theory is clearly in conflict with Hägerström’s theory of moral nihilism which states that there are no such objective properties. So it is the legislator who must be the master of using words to mean what he chooses them to mean. Hägerström’s conception of the legislator is then equivalent to Hobbes’ Sovereign. Sovereigns “make the things they command just, by commanding them, and those which they forbid unjust, by forbidding them”.³³

This is, in the end, also Hägerström’s view. Thus, he ends up with a will-theory of law. This has been overlooked. The question is the authority behind the words. One of Hägerström’s objections to the will-theory is that the authority behind the words is personal power. By contrast for Hägerström the authority rests upon the fact that “the power is of an impersonal kind, at any rate in constitutional regimes” (311). But then Hägerström lapses into the will-theory by saying that “in interpreting the letter of the law it is *necessary* in doubtful cases to pay regard to what is called the *intention* of the legislator” (312). This is by no means necessary. It is only necessary if you hold a will-theory of law.

Thus, Hägerström ends up propounding a will-theory claiming obedience to a genuine legal order of independent commands, where “the community is organized on the basis of rules of law into superiors and inferiors” (15). This is

³² Olivecrona, *Law as Fact*, p. 11.—Olivecrona fails to see that Hägerström presents two theories of law and endorses the psychological theory, see *op.cit.*, p. 60.

³³ T. Hobbes, *Man and Citizen* (ed. B. Gert), London 1972, pp. 244 f.

Hägerström's design of the legal order as a machine, where the inferiors are cogs, and the superiors the philosophers who provide the "intelligent guidance as to whither we are travelling", to use Lundstedt's apt expression.³⁴ This "intelligent guidance" is Hägerström's philosophy which stands out as "one source of information" (313).

Thus, Hägerström's epistemology is crucially important. It is presented as a case of thinking devoid of valuation. On this basis Hägerström denies that individuals have any personal rights independent of the legal order. He denies that individuals have any right to govern themselves. He denies that there can be criticism of the existing legal order. He affirms that there is a duty to obey the law. He affirms that a person who disobeys legal rules is irrational. The person is not a human agent but rather an object posing the problem of intellectual management, treatment and control. This is expressed in Hägerström's theory of law in its psychological version. This is, then, a version of a will-theory. This has been overlooked, since Hägerström claims that the legal order is prior to the sovereign. There are, Hägerström says, "three *conditions* which are always *necessary* for the maintenance of a legal order, viz. social instinct, a positive moral disposition, and fear of external coercion. But of these three the social instinct is presupposed by the other two. Without it morality would not lead to such actions which are free from legal coercive reaction" (352, my italics).³⁵

Thus, Hägerström's thesis is that if there is no social instinct then there is no legal order, which is equivalent to making the social instinct a necessary cause of any legal order, since the thesis is equivalent to: if there is a legal order then there is a social instinct. This is Hägerström's formal theory which leads him into a theory of natural law. This theory of natural law is not a theory concerning the rights of individuals. It is a theory which elevates the rights of society. Society depends upon the proper social instinct towards sociableness and away from selfishness. The end is that the genuine legal order functions as a machine. As a machine it must have technical perfection. Every person must fulfil his proper function. It must also have human perfection. Every person must seek technical perfection as an outward expression of his moral perfection, his willingness to submit his passions to rational control. "No one", Luther writes, 'is without some commission and calling'—a set of tasks it is his responsibility to perform".³⁶

³⁴ Lundstedt, *Legal Thinking Revised*, p. 9.

³⁵ It may also be that the instinct is rather a product of education, the effect rather than the cause of legal order. This dispute may be called Hägerström *versus* Marx. Hägerström presents no empirical evidence for his thesis of man's social instinct which he perhaps borrowed from Aristotle. See for a discussion, Popper, *The Open Society and its Enemies*, vol. 2, pp. 89 ff.

³⁶ Quoted from John Passmore, *The Perfection of Man*, London 1970, p. 13.

Hägerström has a mission in life: his vocation is to establish a genuine legal order, and a society which values, above all else, unity, harmony, stability. This is presented as a necessity of thought which cannot be otherwise. This is where we are travelling to, if we follow Hägerström's theory. It may preserve an outward appearance of order only at the cost of suppressing human freedom and creative experiment.

IV. HÄGERSTRÖM AND HIS PUPILS

Hägerström invites us to think of him as one who has come to destroy man's metaphysics and to fulfil man's hope for a complete understanding of life in nature and society. Thus, Hägerström thinks of himself as initiating a Copernican Revolution, that is, a new age founded on a solid foundation of knowledge, in which it is for the first time understood that there is but one world, a single harmonious whole, and that this world can be known only by the use of science, expressed in a system of self-consistent judgments.

The traditional religion of Christianity has to be replaced by the new religion of science. Thus, Secular, not Christian, perfection by knowledge is the hopeful note which Hägerström sounds as his counterblast to Christian dramas of salvation by means of faith, feelings or volitions.

There is a dilemma for Hägerström, which I believe is important for understanding his writings. On the one hand, Hägerström proclaims his awareness of his own importance as having a mission, which is actualized in and through his philosophical writings. On the other hand, Hägerström needs to be recognized by others in order to maintain his sense of importance and uniqueness. Basically, Hägerström's longing was always to be important and significant to someone else. He found this importance and significance by being recognized by his students as an object in the real world. An application of the Berkeleyian principle: to be is to be perceived; in the case of Hägerström: to be is to be recognized by someone else.³⁷

Thus, there is a mutual dependence between Hägerström and his devoted pupils. Hägerström is the light, and they reflect it. He who is not with Hägerström is *eo ipso* against him. This explains, I think, Hägerström's wrath against dissenters, his "polemical acerbity" in his writings, which, however, "are strictly scientific" (XVI, XXI). Hägerström is only what other people regard him as being. And his acolytes regard him as a God.³⁸ For these acolytes Hägerström is the torch of knowledge, and it is their mission to hand it over, that is, to preserve Hägerström's existence as well as his fundamental

³⁷ Cf. Hägerström, "in the abstract one needs an object in order to be conscious ... which exists independently of me or outside me", *Philosophy and Religion*, p. 187.

³⁸ Cf. Folke Schmidt, "The Uppsala School of Legal Thinking", p. 160, concerning the relationship between Hägerström and Lundstedt.

propositions. For Hägerström's acolytes Hägerström's philosophy must be deeply examined, judged, and accepted (XVI, XXIII). The obscurity of its presentation is a mark of the profundity and intellectual depth of Hägerström's way of thinking, which they claim they understand and others misunderstand.

Critics of Hägerström's philosophy are regarded, not as friends, but as enemies to be eradicated. To put it generally, Hägerström's true followers turn out to be henchmen who are prepared to make obeisance to Hägerström and his writings, although they also generally concede that his "extraordinary method of composition" and his "complicated exposition and language" make it difficult, if not impossible to understand (XV, XIV). This says something about the state of mind of his admirers, e.g. Folke Schmidt, who confesses that he does not comprehend what Hägerström says, nevertheless Hägerström is a genius who has "in fact something important to say". This is to confuse what is unintelligible with what is profound.

Hägerström knows, of course, that there is an immense body of philosophical doctrines. He rejects all doctrines put forward by his contemporaries, because they are uncritical, that is to say, they differ from Hägerström's doctrine. He also claims that his doctrine is far superior in wisdom to any of the doctrines put forward by his predecessors. However, even Hägerström's own thoughts are, largely, the product of his intellectual inheritance, and it seems to me to be the height of folly for Hägerström to ignore this fact and believe that he can overthrow other doctrines without being fully acquainted with their conceptual foundation. Hägerström forgets his own view of man as a link in a chain of causes and effects, and this applies equally to Hägerström as a philosopher. As I have tried to make clear his own doctrine does not provide a new foundation for knowledge. Hägerström thinks that he is an exception, a genius or great man outside the chain of events. He is a great man not only in the sense of being the man of greatest understanding and wisdom, but also the man of greatest passion with a mission in life, that is, directing the course of the chain of events. He then ends up as a philosophical imperialist in analytical disguise, with philosophical and historical success as the sole judge in matters relating to inquiries into the nature of law. If this is the standard to be adopted for the evaluation of Hägerström's revolution, then it has failed. This can easily be shown, and the evidence is, ironically, supplied by his closest followers, Lundstedt and Olivecrona.

Lundstedt, reviewing Hägerström's *Das römische Obligationsbegriff*, in 1929 predicted that this book would be a turning point concerning inquiries into Roman law and bound to influence any subsequent research, since it is the only solid basis for knowledge of Roman law.³⁹ Indeed, anybody doing

³⁹ Vilhelm Lundstedt, *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft*, vol. 23, 1929, pp. 75-116. The quotation in the text is at p. 86 (my italics).

research in Roman law is forced to adopt Hägerström's approach, "*die gesamte römisch-rechtliche Forschung durch seine Methoden in neue Bahnen gezwungen wird*", as Lundstedt writes.

Olivecrona supplies tersely the evidence for the failure of Hägerström's revolutionary approach by writing "it sank like a big stone silently dropped into the sea" (XV).

For his henchmen, however, this does not affect the status of Hägerström's philosophy. Hägerström's philosophy has acquired an almost unchallengeable status by his true followers, who teach it with relish. These henchmen and Hägerström himself regard his philosophy as a revolt against established views and impose it on others, thereby trying to make it true, since history still is the sole judge of the truth or falsity of a theory. If Hägerström's system "contains an essential element of truth" then "the consequences are very far-reaching", Olivecrona writes (XXIII). Obviously, as Olivecrona notices, this presupposes that the validity and truth of Hägerström's system have been thoroughly tested. It is remarkable that neither Lundstedt nor Olivecrona did put Hägerström's views to any serious test. They simply accepted and trusted Hägerström's insight by paying attention to his work, dedicating "months or years to the study of his work as is necessary if it is to be really penetrated and digested", Olivecrona writes (XVI). I think the reason why they do not raise any objections to Hägerström is that they have absorbed his teaching, evading "the dangerous question whether the conviction is true or not" to use an expression from Hägerström (167). Why is this so dangerous? Because it is only possible to preserve true autonomy by unquestioning obedience. I shall return to this aspect of Hägerström's way of thinking.

Obviously a firm conviction is dangerous to truth, especially if one proceeds like Hägerström, who believes that his approach is not based upon any convictions. Then the consequence may be that one is led astray and the rejoinder to Hägerström's line of reasoning is that merely thinking or merely believing in a coherent system does not alone establish that this system is the only true system in the world. It is pointless to examine the predictive and explanatory force of Hägerström's system until it has been established whether it is, in fact, a coherent and consistent system. If Hägerström's system is logically inconsistent, then it is compatible with any and all events, and then quite uninformative.

Olivecrona writes that "criticism concerns, however, the ultimate assumptions of legal science. If it is fundamentally correct, it is bound profoundly to affect our view on law and society. It should therefore be most carefully discussed without any preconceptions" (XXIII).

I believe that Olivecrona's claim can be generalized to cover Hägerström's philosophy as a whole. I agree with Olivecrona that Hägerström's philosophy

“should be most carefully discussed”. But I do disagree that this can be done “without any preconceptions”. The implication of Olivecrona’s view is that only in philosophy there are no preconceived ideas or unjustified assumptions. How could any intellectual activity be free of assumptions? Even Olivecrona proceeds on the assumption that you must have no assumptions. This is clearly incoherent, as is his other assumption that it is possible to start without any assumption and then still hope to obtain knowledge concerning, in Olivecrona’s words, “the substance of Hägerström’s contentions” (XXIII).

Olivecrona follows Hägerström. Hägerström, in turn, is, perhaps, influenced by E. Husserl, who advanced the similar claim that any philosophical investigation must be free from all presuppositions, and investigate what actually confronts us.⁴⁰ The philosopher, for Hägerström, has direct access to what is real, as distinct from the ordinary man and his confused ideas of what is real. Since the philosopher has direct access to what is real, he can proceed “without any preconceptions”. Thus, the philosopher stands in contrast to other writers who proceed on inarticulate assumptions. And the philosopher’s task is precisely to bring inarticulate assumptions of other writers in the open and put them to a critical examination. The philosopher is particularly fitted for this task, since he after all can offer his criticism in the light of his knowledge which is based, not upon any preconceptions, but only upon what there is. But this claim made by Hägerström and Olivecrona fails in the end. It is a mistaken conception to think that it is possible to proceed without any assumptions, and that philosophy is, in this respect, an exception. The claim that we must proceed “without any preconceptions” is in itself a preconception, so the claim is self-refuting. So the position of Olivecrona and Hägerström is an incoherent position.

Thus, my approach to Hägerström depends upon the assumption that contradictions need to be avoided, and Hägerström’s arguments must be taken seriously. This involves respect for the principle of rationality that it is right to believe or disbelieve, or doubt in accordance with the balance of reasons available, and wrong to doubt or disbelieve or believe in disregard of the reasons available.

It is my contention that Hägerström does not respect this principle. His attitude towards any judgment is not that you can believe it, disbelieve it, or remain in doubt whether to believe or disbelieve it. On the contrary, Hägerström’s attitude is a secular version of the New Testament’s attitude towards any judgment, that is, you can believe a judgment or you can disbelieve a judgment. Hägerström’s principle is that it is right to believe and wrong not to believe a judgment. The latter conceals the difference between disbelief and

⁴⁰ See John Passmore, *A Hundred Years of Philosophy*, p. 189.

suspension of judgment. Hägerström's principle implies that it is wicked not to believe, and more specifically, that it is wicked not to believe in Hägerström's theory. Thus, we have Hägerström's concern as a teacher, which is to draw his pupils into direct awareness of his theory as being the only true one, to the exclusion of all other theories, rather than to make his students aware of the vital question of making a reasoned choice on the basis of the principle of rationality. The effect of the principle of rationality is that he who learns the truth from argument may lose it again from argument. This should be Hägerström's position, since he appeals to argument in support of his position.

What I suggest is that this is not Hägerström's position. He is afraid of losing an argument. Therefore he makes his theory safe from failure. The devices employed to secure this are threefold. One device is to make the theory immune from being falsified, that is, Hägerström does not allow any conceivable evidence to count against his theory. The second device is to insist that only Hägerström's philosophy counts and that Hägerström's outlook is the scientific outlook. Thus, it follows that it is out of the question to acknowledge any debt to other philosophers and scientists, since this involves the danger that these views may be linked with other views, which reflect another picture of the world, and this in turn may weaken the devotion of the disciples to Hägerström's outlook. Closely related to this device is the third device of attacking a critic's motives, when he dares to question the reliability of Hägerström's philosophy.

The effect of Hägerström's principle is the position that he who learns the truth by obedience can only lose it by disobedience. Hence, we have Hägerström's lectures and writings as an injunction or imperative: *crede ut intelligas!* Legal rules, we learn from Hägerström and Olivecrona, are independent imperatives, that is, imperatives without any commanding persons. Thus, we have imperatives without a commanding authority, but with obedient subjects. The consequence of this theory is to hold that the objectivity of legal knowledge resides in the fact that it is concerned with legal rules as social rules. Is there a similar case to be made for claims to know, that is, is there knowledge without a knower? If so, we have knowledge-claims without a commanding person but with knowing subjects.⁴¹ The consequence of this view is to hold that the objectivity of knowledge in general resides in its being a social construction, not owing its origin to any particular individual but created co-operatively and communally.

This view is rejected by Hägerström. It is the origin of knowledge which is the important thing; there can be no knowledge without a knower, and the knower is, not surprisingly, Hägerström. The crucial point for Hägerström is

⁴¹ Cf. Karl Popper, *Objective Knowledge*, Oxford 1975, especially ch. 3.

that man frees himself from epistemological realism and epistemological idealism, "the two fundamental forms of metaphysics", by acquiring knowledge (P 67). And knowledge, for Hägerström, consists in the apprehension of "laws of what occurs or sequences of concepts which determine what occurs" (P 57). This apprehension "itself loses all significance if one does not actually have ideas associated with the feeling of certainty or the feeling of evidence" (P 60). What Hägerström says obviously rests upon the assumption that the human being becomes like what he knows, and what he knows depends ultimately on feelings. These feelings in turn must become constant and changeless, since reality is by nature something constant.

Hägerström's way of thinking is similar to Plato's way of thinking.⁴² For Plato the human soul frees itself from disorder by recognizing the orderly relationship between ideal forms in a world which is independent of the sensible world. For Plato the human being becomes like what he contemplates, and becomes orderly if he relies on and remains in contact with objects (i.e. ideas) which are constant and changeless. Hägerström accepts that with the important proviso that Plato's world of ideas for Hägerström is the present, sensible world of facts. But one might object that there is no reason why "the human soul-life" should become disorderly merely as a result of contemplating the disorderly, or "the human soul-life" become orderly merely as a result of contemplating the orderly.⁴³ Plato thought otherwise, and his modern follower Hägerström follows suit.

As noticed before, the foundation of Hägerström's scientific world-picture is a complex of feelings and ideas. Hence, if we follow Hägerström it "must be determined as void for one constructs meaningless combinations of words and yet believes that the words have a meaning". No particular form of metaphysics, says Hägerström, can ever become anything other than a more or less ingenious play with words (P 67).

Hägerström as a metaphysical philosopher uses his play with words in an ingenious way. People's volitions and feelings are unruly and this creates an unstable world. They must therefore be controlled in order to create a stable world. The only way to do this is to use the imperative form of injunctions or imperatives in order to "break down the opposition of the will", thus "paralyzing all genuine willing" (122). Hence, likewise the pupils learn the truth by making obeisance to the master. If one is obedient to laws, the world becomes safe and stable, if one is obedient to the master, his authority and infallibility are unchallenged. If one is disobedient, the consequence is that the world

⁴² I am indebted to John Passmore, *The Perfectibility of Man* and his exposition of Plato, see especially p. 41 with references.

⁴³ The phrase quoted is from Hägerström, *Philosophy and Religion*, p. 210, cf. above pp. 10 f.

becomes unsafe and unstable. What happens if one is disobedient is, if we follow Hägerström, that one is deemed to be irrational. As Hägerström writes, "considering our common social goals, a person who is not subject to the compulsive ideas fostered by the social life is a mentally disorderly person. He is abnormal in so far as he is lacking the capacity to be susceptible to social suggestion, which is the characteristic of the human being as a social animal."⁴⁴ Thus in philosophy one is considered to be abnormal if one lacks the capacity to be susceptible to Hägerström's suggestions of ideas. This is perhaps harmless, but if this is to be considered a revolution I suggest it is a step backward rather than a step forward.

It is a more serious matter when Hägerström's view is applied in social and political life. Here it presupposes that "our common social goals" are fixed and determined. They are for Hägerström, since he hates social uproar. To be sure, there can be no doubt of Hägerström's humanitarian impulse, he had, like Marx, a desire to help the oppressed. But his help consisted in freeing their minds from sentimental and visionary ideas, and turning them to accepting Hägerström's philosophy using the scientific method of analysing the cause and effect of processes in nature and society. Public opinion is confused and must be despised. It is not people but rather the Hägerströmian scientists who are faced with "the responsibility of legal science for the fate of man and nations", to use Lundstedt's phrase.⁴⁵

For Hägerström and his pupils, legal science has supreme importance for life in society, because legal science is social inculcation of the right conduct. The function of legal science cannot be to predict behaviour but rather to enthruse citizens to act according to law. The aim of legal science is that they may receive the content of law into their consciousness and thereby make society coherent. Since for Hägerström and his pupils legal science is based upon reason it is neutral in the sense that it involves no value-judgments as expressions of feelings. The legal scientist functions rather like a doctor, where the patients are the citizens. Hägerström's formal theory of law enables the legal scientist to know and demonstrate the sovereignty of law over men's passions. Hägerström's psychological theory is used to take care that the sovereignty of the law is maintained in order to secure the overriding aim of social harmony and stability between people living together in society. If the

⁴⁴ Axel Hägerström, *Socialfilosofiska uppsatser* (ed. Martin Fries), Stockholm 1966, p. 63 (my translation).—Folke Schmidt claims that "Hägerström must also be given credit for sociological theories. ... Of special importance is his insistence that human beings are social animals", in "The Uppsala School of Legal Thinking", p. 159. I wonder whether this can be Hägerström's discovery, bearing Aristotle's definition of man in mind.

⁴⁵ See Lundstedt's article bearing this title in the *New York University Law Review*, vol. X, 1932-33, pp. 326 ff.

formal theory of law and the psychological theory are combined, or even reduced to one theory of law which Hägerström's theory of knowledge and reality implies, then reason governs the passions. The legal order will function as a machine, where men, like cogs, mechanically and automatically act according to laws.

On the basis of Hägerström's cognitive sovereignty, his thesis is the sovereignty of law. The thesis is stated as a demand of reason which must be obeyed as a precondition of genuine knowledge and as a precondition of genuine order within society. Hägerström's conception of reason can only command and dominate man's passions and his life in society. His sovereign reason turns out to be a coercive sovereign, whose authority cannot be questioned.

I have, nevertheless, challenged Hägerström's authority. My objection is that Hägerström's conception of reason overlooks that reason may also function to inform and guide man's passions rather than to destroy them as Hägerström implies.

If Hägerström's philosophy works, then this leads in the end to moral as well as intellectual apathy. To be sure, Hägerström has then achieved his aim. His basic value, "we wish first and foremost to live an unobstructed life", has been implemented (P 213). Peace has been brought about by reason, but at a very high price, viz. the destruction of man's freedom and creativity. I do not know whether Hägerström has designed his theories of law to achieve this effect. If I am right that the destruction of man's freedom is the effect, then can Hägerström's philosophy be dismissed on that account alone?

I am not quite sure whether this is a proper basis for dismissal of Hägerström's theory, bearing in mind Hume's remark that "when any opinion leads us into absurdities, 'tis certainly false; but 'tis not certain an opinion is false, because 'tis of dangerous consequence".⁴⁶

Then, perhaps, there is more force in the objection to Hägerström's theory that it leads us into absurdities. The absurdity is Hägerström's theory of knowledge, which is the foundation for his legal inquiries. Hägerström's theory of knowledge leads him to reject as a piece of nonsense whatever does not fit into his system.

Hägerström is surely right to insist that legal science without epistemology is muddled. But Hägerström is wrong to insist that his epistemology is the only proper foundation for legal science.

Hägerström completely overlooks the essentially constructive nature of thought which leads to the introduction of new concepts to make reality, including law, more intelligible.

⁴⁶ David Hume, *A Treatise of Human Nature*, 2nd ed. (ed. P.H. Nidditch), Oxford 1978, Book II, Part III, Sec. II, p. 409.

Hägerström's epistemological mistake is to lay down once and for all the limits of intelligible discourse, in such a way as to exclude the asking of questions which have proposed themselves to reflective people as genuine perplexities, such as whether, and to what extent, individuals have rights, and whether the existing legal system is just or unjust.

Hägerström's epistemology was not questioned by his pupils. I have tried to do so in this paper, taking Hägerström seriously. This does not mean that one should accept Hägerström's epistemology. It should, rather, be discarded, I suggest. Then there is room for another discussion of the relationship between epistemology and legal science, which is so important for our view of law and society.