THE LEGAL THEORIES OF AXEL HÄGERSTRÖM AND VILHELM LUNDSTEDT

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I

In the nineteen-twenties, under the influence of the philosopher Axel Hägerström (1868–1939) and his friend and follower Vilhelm Lundstedt (1882–1955), legal theory in Sweden took a new turn. I will try briefly to sketch the general view of law propounded by these writers, with the addition of some critical remarks of my own.

Hägerström's attitude was anti-metaphysical. In his opinion, metaphysics is a mere play with words. It implies that one habitually employs certain words and expressions as if they had a real meaning, though this is not the case. All metaphysical concepts are sham concepts. Psychologically, they are to be explained by the emotional background.

In the field of law and morality, metaphysical concepts are, in Hägerström's view, especially abundant. This he maintains not only with regard to the legal and ethical concepts used in daily life, but also concerning the concepts of the sciences of law and morality.

In order to give an idea of his reasoning, I will briefly summarize his criticism of the concepts of *legal rights and duties*. These concepts have always been fundamental for legal theory and practice. The legal system of a country has always been regarded as a system of rules regulating the rights and duties of individuals in relation to one another and in relation to the state and other bodies. It therefore seems impossible to talk about law at all without talking about rights and duties. These concepts, indeed, are familiar to everybody. We use them in daily life as if it were perfectly clear what is meant by them.

But what *is* meant by them? What *is* a legal right, what *is* a legal duty? These questions have troubled jurists for centuries without any general agreement having been attained. On the contrary, dissension is stronger than ever today. The more one delves into the literature, the more one gets the impression of a prevailing confusion on the subject.

Let us first take the concept of a *right*. The trouble arises if and

when one tries to identify a right with a factual situation. Apparently the necessity for doing this did not present itself, for example, to the great teachers of natural law in the seventeenth century. For them it was self-evident that a right was not a mere fact. It was a power of a higher order.

Grotius defined a right as a spiritual power. The right of property was a spiritual power to possess an object. The owner possessed it with something more than his own physical strength. In relation to other persons, a right was a spiritual power to dominate their minds. The essence of a legal claim against another person was a power to obligate this person. A debtor was bound to the creditor in the sense that a part of his will was subject to the domination of the creditor. Pufendorff explained this further by saying that it was morally necessary for the debtor to fulfil the claim; he was unfree in his own mind in relation to the creditor.

It is quite obvious that these ideas are highly mystical. They are not expressions of actual reality. As Hägerström points out, modern science, however, seeks to use only such notions as correspond to facts. As soon as one tries to determine the facts which correspond to the idea of a right one lands in difficulties. Hägerström has set forth these difficulties in the following way.

Suppose that a person is deemed to be the owner of a certain house. It might be said that the right consists in that the state guarantees his possession of the house. But, Hägerström asks, is that really the case? The state only steps in if the right of property is violated by another person, who, for instance, dispossesses the true owner or causes damage to the house. But if the action of the state is conditioned by a violation of the right of property this right cannot consist in the protection which the state extends to the owner. His right of property is conceived as being a condition of the protection. Moreover, the protection will not be granted to the owner unless he can prove his title to the house. It may be impossible for him to do this. But no jurist makes the existence of a right dependent upon the possibility of proving the factual basis of the right. The right may come to naught, practically speaking, if the facts supporting it cannot be proved. But the right is held to *exist* regardless of the possibility of proving those facts.

Thus the right cannot consist in the fact that the owner is actually protected by the state. The right of property is conceived as a prerequisite of the protection. It cannot, therefore, be identical with the fact of protection.

One is therefore forced to try to explain the nature of a right in another way. Some jurists have said that the right of property consists in the state's having issued certain commands forbidding anybody to interfere with the possession of the owner; and further that the state threatens to take coercive measures in the event of these commands being disregarded. This implies that the rights are nothing *beside* the legal rules, or commands. It would, indeed, be pure verbiage to speak about rights. The legal rules are the sole reality.

This may be true. But the question now under discussion is what is implied in the idea of a right as this idea is actually used in jurisprudence and in daily life. Is it an adequate rendering of this idea to say that we are thinking of nothing but the rules when we talk about rights? In that case, current linguistic usage would be singularly misleading. We should say that rights are created by such and such facts; that one acquires the right of property by buying a house; that one has a right; that the right is violated by such and such acts; that the right is extinguished in this or that way; that it is transferred by a sale or gift, and so on. But all this would only be a figure of speech. We should only mean to express the contents of certain commands in this curious way.

Our language is obviously based on the assumption that a right is something that is created by certain acts or deeds, that is transferred in certain ways, and so on. This can only be a kind of *power*. One acquires the right power according to the law through certain legal acts and loses it in the way the law prescribes. The rules of private law are rules about rights. They lay down, for example, how the right of property is acquired and lost and how it is to be protected by the state. In the law of personal rights we find rules that say how a money claim is acquired, how it is to be fulfilled, and so on. The rules, as we know them, refer to the rights. The rights, therefore, cannot be identical with the rules themselves. According to legal language and legal ideas, they are something beside the rules, namely powers regulated by the rules of law.

Two attempts to give the concept of a right a factual, comprehensible content have therefore failed. The right, as it is conceived in jurisprudence and in daily life, is neither identical with the fact of protection by the state nor with the legal rules. There seems to be no other possibility left of reducing the right to a mere fact.

How, then, Hägerström asks, is the right conceived? It seems to be a power, but no actual power. The holder of a right can, it is true, apply to the courts for help if he considers his right to be infringed. But success in the courts depends on many other circumstances than the existence of the right. The claimant must be in a position to bring forward proofs, supporting his contentions; he may need an able lawyer to convince the court of the correctness of his view, and so on. The actual power that he may have through the help of the courts is therefore only a relative one. The right, on the contrary, is held to exist absolutely when the operative facts are present. If I lend a sum of money to another person, my claim against him is held to exist as soon as the transaction has been completed, regardless of my ability to prove it. If he has given me no written promise to pay and no witnesses were present, I may be totally barred from bringing a successful action against him in the courts. But this has nothing to do with the existence of my right. The owner of a thing may lose possession of it. This, of course, does not mean that he has lost his right of property. His right exists independently of his having any real power over the object.

The right is usually accompanied by a real power. In ordinary cases the creditor has the necessary proofs at his disposal and is therefore able to bring pressure on the debtor by threatening legal action, and taking legal action. Most owners of houses enjoy undisturbed possession and are able to bring successful actions against trespassers. But this actual power must not be confused with the right. The existence of the right is conditioned only by the existence of certain legal facts, the real power by the existence of many other facts besides.

Hägerström's conclusion is as follows. What we have in our minds when talking about rights is a power. But it is a power raised above the facts of social life. He therefore calls it a "supernatural" power. Since it is impossible to grasp this power with the mind, he also calls it "mystical", or "metaphysical".[1]

[1] In his inaugural lecture "Definition and Theory in Jurisprudence" (published in the *Law Quarterly Review* 1954, and also separately) Professor Hart, citing Hägerström and myself, says that we hold a right to be "nothing real at all but an ideal or fictitious or imaginary power" (p. 6). The Hägerström theory is characterized as being a counterpart to the fiction theory of corporate bodies. The author seems to have been led astray by the occasional use on my part of the expression "fictitious power". The fiction theory of corporate bodies, as represented, for instance, by Savigny, says that the "corporate personality" is a fictitious personality created by the State. This theory purports to explain *legal reality,* which is supposed to be different from the world of mere facts. When a right is said by Hägerström and myself to be a fictitious

With regard to the notion of legal duty the argument is analogous. Attempts have been made to reduce a legal duty to the fact that contrary behaviour is followed by a sanction. But this involves the difficulty that infliction of a sanction is held to be legally conditioned by infringement of a duty. First comes the duty and its infringement, then the sanction. It has also been said that a legal duty is nothing but the fact that a certain action is commanded or forbidden. In legal ideology, however, a distinction is certainly made between a duty and the fact of command. Not every command, however strongly supported by power it may be, is held to give rise to a duty. Unless the commanding authority has a right to command, its orders are not considered to create real duties. If a robber pointing a pistol at my head commands me to hand over my money, surely I am not held to be under a duty to give him the money. A duty is obviously held to be a bond of another kind than that existing in such a power-relation.

Hägerström's conclusion with regard to the notion of a duty is analogous with regard to the notion of a right. He contends that a legal duty is conceived as a mystical, or metaphysical, bond, corresponding to the mystical power constituting a right. The notions of modern jurisprudence are fundamentally the same as those of the great teachers of natural law, even if the language is different.[2]

or ideal or imaginary or mystical power, the meaning is that a "right" is actually conceived in this way, or that this is the actual content of the idea behind the word. The variety of expressions ("mystical", "ideal", "fictitious", etc.) is explained by the difficulty of finding adequate words for rendering the content of the idea of a right. Beyond the word "fictitious" there is no similarity at all between this theory and the fiction theory of corporations.

[2] In certain respects there is a striking resemblance between Hägerström's view and the theory of the great Polish-Russian scholar Petrazhitsky. But there are also very great differences between them. Cf. my essay "Is a Sociological Explanation of Law Possible?" in the philosophical journal *Theoria* (1948). As Petrazhitsky's works at that time were available in Russian only, a language I do not command, my account of his views was necessarily based on the account given in English by a number of his followers: Sorokin, Timasheff, Gurvitch, Laserson and Meyendorff. Since then, an English translation of the most relevant parts of his two chief works has been published in the *20th Century Legal Philosophy Series* under the title "Law and Morality: Leon Petrazycki" (Harvard U.P. 1955). The editor, Dr. Timasheff, whose valuable *Introduction to the Sociology of Law* (1939) first directed my attention to Petrazhitsky, points out the partial coincidence of views but continues: "The members of the Upsala school did not have direct access to Petrazhitsky's work. This did not prevent one of them, Karl Olivecrona, from writing a lengthy criticism of the Russo-Polish master." This is a strange way of hailing the efforts of one who has taken the trouble to present and discuss Petrazhitsky's theory on the basis of a careful examination of the available sources. Are the accounts of the disciples (Timasheff and others) inaccurate? Was it not intended

When Hägerström had arrived at this point, one would think that he would have turned his attention to explaining the actual use of the notions of rights and duties in modern jurisprudence and in social life in general. If his theory is, in the main, correct, a number of problems necessarily arise in this respect. But he never discussed these problems at any great length, perhaps because he thought that this should be the task of the jurist. Instead, he directed his attention to the history of legal ideas.

Hägerström was of the opinion that the notions of rights and duties must first of all be historically explained. He says that one might expect these notions to present themselves in a more naive form in early times. As modern jurisprudence starts from the foundations laid by the Roman lawyers, he thought it appropriate to investigate their ideas of rights and duties in order to get a background for understanding our own ideas. Hägerström devoted a very great part of his work to this task and produced an important work in two volumes on the Roman concept of legal duty, or obligation. I must try to give a few glimpses of this work, because it plays such a considerable rôle in Hägerström's legal philosophy. One can hardly understand his philosophy without taking his historical investigations into account.

The work starts with an analysis of the ancient act of sale and purchase called *mancipatio*. This was a strictly formal act. Every word had to be said and every gesture performed in the way prescribed by ancient custom, or else the act would be without effect. The act had the character of a unilateral appropriation by the buyer of the object of the purchase, for instance, a slave. This was the example usually employed by the Roman lawyers. The seller did nothing to transfer the right of property to the buyer. He was an onlooker; but by his silence, he allowed appropriation by the buyer to gain force.

In the presence of five witnesses the buyer took a firm grip of one arm of the slave and recited a formula, in which the most important words were these: "I proclaim this man to be mine according to the law of the Roman citizens and to be bought by me through this piece of copper". He then threw a piece of copper on a scale held by a person appointed for the purpose.

The act has puzzled generations of students of Roman law. The Romans were most particular in their use of legal expressions. It is

that Petrazhitsky's theory should be made the subject of discussion? I should prefer to hear Dr. Timasheff's scientific arguments against my criticism of Petrazhitsky (and himself).

therefore a remarkable fact that the buyer said that the slave was his before the ceremony was over. Until then the slave was not considered to be his. The ceremony had to be completely performed if he was to be owner. Suppose he did not throw the piece of copper on the scale: no Roman lawyer would then have said that he had acquired the slave. It is therefore clear that the buyer said something that was not true when it was said; and this is a striking circumstance in view of the great exactitude in legal matters required by the Roman jurists.

Many explanations of the act have been offered. The obvious one seems, however, to be that proposed by Hägerström. The utterance of the buyer was not true at the moment when it was made. But it was not meant to be a statement about the actual situation. The buyer had not the intention of telling the witnesses that he was already the owner of the slave. Everybody knew that he was not yet the owner. He used the words in order to acquire the right of property, to *make* the slave his property. He actually did make him his property by using these words in the proper context and performing the proper gestures. But what does it mean to produce such an effect by means of words and gestures? This is magic, of course. The whole ceremony was a ritual act whose effect was to give rise to the right of property in the buyer.[3]

According to the Roman view, Hägerström maintains, the right of property is a mystical power over the spirit inherent in the object. This power is created, and transferred, by means of magical acts. An obligation was a mystical bond, created in the same way. The ancient Roman law, embodied in the law of the Twelve Tables of the fifth century B.C., was a system of rules for the acquisition and exercise of mystical powers. All the ancient legal acts belonging to the original Roman law were magical acts.

In Hägerström's opinion the notions of rights and duties are still fundamentally of the same nature as in ancient times. They have been watered down and the formal truly magical acts have disappeared. But still we speak of rights and duties as powers and bonds that are created and transferred by means of contracts and other so-called operative facts. These powers and bonds do not belong to the world of facts. They usually have a counterpart in actual powers, and actual situations of constraint, based on the functioning of the legal machinery. They exist, however, in a

[3] Cf. my paper "Zur Frage des magischen Charakters der älteren Rechtsvorstellungen" (*Bulletin de la société des lettres de Lund* 1956–57, I).

metaphysical sphere, floating, so to speak, above the actual, empirically given world.

The notions of rights and duties are thus historically explained by their origin in magic. Hägerström also offers a *psychological* explanation. These notions, he says, are accompanied by certain emotions, or feelings. A feeling of strength naturally comes to him who believes that he has a good right. "One fights better when one is standing up for one's rights", Hägerström says. There is a feeling of being backed by a superior power. This feeling is so to speak objectivated. One gets the impression that a real power is there, although it is impossible to seize it when one tries to do so.

In a corresponding way the idea of duty is connected with a feeling of constraint. If one holds that it is one's duty to do something, or not to do something, the duty seems really to exist. The feeling is "objectivated". The impression is that one is under a real bond, if not a palpable one.

Hägerström maintains that the word "duty" in the sense of moral duty is an expression of emotion associated with the idea of an action. The language is misleading, since we speak of duties as really existing. A legal duty is not held to be identical with a moral duty. Certain differences exist, particularly in that a legal duty corresponds to a right in another person. But into a legal duty there enters an element of moral duty. Therefore a legal duty is also basically an emotional expression. The same is the case with the expression "right".

A most important part of Hägerström's work is his criticism of legal positivism, which was unquestionably dominant in his time. The real, positive law, as opposed to mere natural law, or ideal law, was represented as being an expression of the will of the state, the general will, or something of the sort. It goes without saying that Hägerström rejected such notions as the will of the state and the general will as being devoid of scientific content. But he criticized legal positivism from another angle also.

If one unswervingly adheres to the notion that the law is nothing but the commands of the state, it becomes impossible to speak of rights and duties in the usual sense of those words. Rights and duties can never be reduced to the mere fact of certain commands being issued by an authority having actual power to enforce its will. They have a mystical quality that cannot be derived from naked power alone. The positivists, however, always assumed that the law gives rise to real rights and duties. Therefore, they necessarily assumed, expressly or tacitly, that the state has a right to

issue commands. But the state obviously cannot create its right to command by its own commands. It must have recourse to a pre-existing law. A natural law, on which the right of the state is based, must necessarily be a prerequisite of positive law. Hägerström showed, indeed, that legal positivism was thoroughly permeated with notions of natural law.

Hägerström's thesis that the ideas of rights and duties are metaphysical did not lead him to underrate their practical importance. On the contrary, he always stressed the enormous rôle played by them in the history of human society—for better and for worse.

He attributed great importance to the magic of ancient times. He went so far as to say that man has risen above the level of the animals, not as the thinking animal, *animal sapiens,* but as the mystical animal, *animal mysticum.* His meaning was that the first bonds of society were forged by fear of the hidden forces that were taken into man's service through magical acts.

Hägerström points out two currents of feeling connected with the ideas of rights and duties. On the one hand, there are feelings of constraint in relation to other people's rights. When one has the idea of another person having a right in a certain respect, there follows a tendency to refrain from interfering with his interests in that respect. On the other hand, there are feelings of power in connection with the idea of one's own rights. When one has the idea of possessing a certain right, one feels fortified in defending one's interests in that respect. Feelings of the former kind act inhibitively, feelings of the latter kind set free a special energy in striving for certain advantages. Both currents of feeling contribute to the maintenance of the social order.

But Hägerström also drew attention to another aspect of the matter. If the ideas of rights and duties with their attendant feelings act as a cohesive element in the social fabric, they can also, he pointed out, have the opposite effect. When people fight for what they believe to be their rights, they become blinded. The fight is embittered when both, as often happens, are equally convinced of their good right. People believe themselves to be gods when they fight for their rights, Hägerström said. This he held to be particularly disastrous for international relations.

Hägerström regarded the general outlook on legal and social questions as being relatively primitive so long as the ideas of rights and duties in the traditional sense hold their sway over the minds of men. He looked forward to a time when such ideas would lose

their grip. Conflicts between individuals, classes, and peoples could then be solved without the interference caused by the sublimation of interests into rights. Unlike godlike creatures fighting fanatically for their divine rights, men of flesh and blood, he said, can sooner or later always come to an understanding. I hope he was right in this.

It is evident that Hägerström's criticism of the fundamental legal concepts was destructive. If his contentions are mainly correct, a radical change of outlook and methods will be necessary. But how is this change to be effected, and what should it imply?

With regard to moral science, Hägerström gave a clue to his opinion on this point. He said that it cannot be scientifically determined what is right or wrong. Scientific methods can only be applied to the actual ideas of right and wrong which can be philosophically analysed and explained in a historical and psychological way. That is what science can do. The choice of values does not belong to science.

If the corresponding contentions are applied to legal science, the consequences would be as follows. There can be no science of legal rights and duties; it cannot be scientifically determined what rights and duties exist under such and such circumstances. Only actual ideas of rights and duties, as appearing in legal practice, in legislation, and so on, can be scientifically investigated. No more can any binding, or obligatory, norms be ascertained; only ideas about such norms can be subjected to scientific discussion.

Hägerström never expressly stated these conclusions, though I think they are implied in his view on law. He never did much to make clear what was to be put in place of the old concepts and methods so devastatingly criticized by him. He left, indeed, a vacuum behind him.[4] It is therefore not surprising that his criticism of jurisprudence has given rise to much discussion, to many differences of opinion, and even to some confusion.

II

Vilhelm Lundstedt was a colleague and close friend of Hägerström's. His first publications were wholly in line with traditional thought. But when he met Hägerström, shortly after having been promoted to the chair of private law in the University of Uppsala,

[4] Cf., however, some indications in the *Inquiries*, pp. 315 ff.

his outlook underwent a profound change. After a period of uncertainty and groping he enthusiastically embraced Hägerström's ideas and it was upon them he based his future work.

Lundstedt used to say that he was not a philosopher but a jurist. He envisaged a complete reorientation of legal science as a consequence of Hägerström's criticism. One of his books (written in German) bore the title "The Non-Scientific Character of Legal Science". He regarded it as his own special task to lay the foundations of a truly scientific science of law. *Legal Thinking Revised* was the title of his last book.[5]

Lundstedt's writings are characterized as much by vigorous language as by penetrating criticism and vivid imagination. They covered vast fields: the fundamental legal concepts, the methods to be used in legislation and judicial practice as well as in jurisprudence, the principles of the law of torts and of criminal law, and, last but not least, the principles of international law. He was a man of strong temperament who did not mince his words.

It is difficult to describe Lundstedt's work. He vehemently attacked the ideas of rights and duties as being superstitious. In the case of a right, he says, the existing reality is only a favourable position actually enjoyed by a person as a consequence of the functioning of the legal machinery. The owner of a house, for instance, actually enjoys undisturbed possession *because* legal sanctions in the shape of punishment and damages are regularly inflicted on trespassers. It is turning things upside down to say that the right of property is "protected" by the state. The actual position enjoyed by the so-called owner results from the regular use of sanctions. Therefore, the judge cannot ascertain the existence of a right as a prerequisite of the infliction of a sanction. In a corresponding manner, Lundstedt says, the existing reality in the case of a so-called legal duty is an actual situation of constraint resulting from the regular imposition of executive measures if a certain line of conduct is not followed, for instance, if compensation is not paid for an injury to another person or his property.

From this criticism, Lundstedt proceeded to a discussion of the

[5] This book (in English) was published in 1956 (after his death). It contains a summary of his thought.—In his article "The present position of jurisprudence in the United States" (44 *Virginia Law Review* p. 322) Jerome Hall says that Lundstedt "transmitted" Hägerström's "keen Viking realism" to Alf Ross and myself. I do not think that Alf Ross would regard this statement as correct in so far as it concerns himself. For my own part, I followed Hägerström's seminars for many years. I have drawn much inspiration from Lundstedt s writings; but he never acted as a teacher for advanced studies.

method to be used by the judge in finding solutions and by jurisprudence in recommending solutions. He rejects, of course, the method of the so-called conceptual jurisprudence based on the assumption that a complete system of legal rules exists which makes it possible to find a solution to every conceivable case by drawing logical inferences from the concepts used in the law.

The assumption of the existence of a complete system of legal rules has been criticized from many quarters for at least fifty years. It has been shown to be illusory. No human lawgiver could cover all possible cases by his provisions. The law is necessarily defective in many respects. Consequently, there is always more or less scope for the judge's own evaluation and decision. The problem is what principles should guide him in this activity.

Lundstedt went farther than most writers on jurisprudence in his criticism of the idea of a complete law. He even maintained, with great emphasis, that there *are* no rules of law. The pretended legal rules exist no more than do the rights and duties, he said. What exactly he meant by this is not quite clear to me. He himself constantly spoke of legal rules. This point might, however, be passed over in this connection. His expressions were sometimes strange. What he above all wanted to say was that the judge should not think in terms of rights and duties but in terms of social aims.

It is not enough, he contends, to abandon the illusory logic of conceptual jurisprudence if, as is usually done, one puts in its place the sense of justice. In that case the habit of thinking in terms of rights and duties is retained. Lundstedt maintains that all such thinking is illusory. In fact, he criticized most energetically the idea that the sense of justice could be a guide for the judge. His reasoning was briefly as follows.

If the sense of justice were really to be decisive, for instance, in the law of torts, the judge would have to take all sorts of circumstances into consideration. He could not disregard the financial position of the parties. A person with normal feelings, Lundstedt says, could not regard it as just that a poor breadwinner with a sick wife and many children should pay damages to a wealthy bachelor for a broken vase. The case might also be the opposite: that the plaintiff is destitute and the defendant wealthy. Between these two extremes there are many intermediate cases. A sensitive conscience could not fail to take the financial circumstances into account in determining whether justice required that the defendant should pay damages to the claimant. Furthermore, one would have to take notice of many other circumstances that

influence the sense of justice. The defendant is supposed to be to blame for his negligence if he is to be liable to pay damages. But how can one blame, for instance, a person who suffers from hereditary clumsiness or is of a highly strung, nervous disposition? If these and all similar circumstances really were relevant for the judge in deciding claims for damages, there would, however, be no *law* of torts; it would be dissolved. No hard and fast rules would be enforced. The courts would waver, since the sense of justice would be influenced by all sorts of considerations.

The courts do not proceed in this way. They actually apply rules that are based on considerations of social utility. Lundstedt wants to make these quite conscious. The law of torts, he says, is not really based on the sense of justice; it is only apparently so based. The real basis of the law of torts is the necessity of making people careful with respect to the property and the personal integrity of others. People's habits and ideas about what is right or wrong are influenced by the regular imposition of damages for certain kinds of acts. The judgment for damages in the individual case cannot really be justified by what has taken place in this case alone. It is justified as a link in the series of judgments necessary to maintain the general rule that acts of this kind entail a sanction in the shape of a judgment for damages.

The judge should consciously take the social aim of the law of torts as his guide in deciding cases of claims for damages. The question should not be whether the defendant is to blame or not. It should be framed in another way. The judge should ask: What standard of conduct is to be maintained in this respect? If the conduct of the defendant falls short of this standard, damages should be allowed to the claimant. The individual case should always be seen against the background of the social aims behind the law.

Lundstedt's arguments concerning criminal law are similar. The punishment inflicted in an individual case cannot be justified by the guilt of the accused. Lundstedt rejects the concept of guilt on the ground that human actions are causally determined. Punishment cannot, therefore, be justified as retribution for the wrong done by the criminal.

Many people who hold a similar opinion on this point have drawn the conclusion that the infliction of punishment cannot really be justified. They therefore lean to the opinion that punishment should ultimately be abolished in favour of measures aimed at educating and reforming the criminal, and in a few cases by

preventing him through permanent seclusion from committing further crimes.

Lundstedt does not adhere to this opinion. He strongly insists on the necessity of punishment. Without the regular infliction of punishment for such acts as murder and manslaughter, assault, burglary, rape, embezzlement, and so on, social life, he says, would be impossible.

Like the imposition of damages, the infliction of punishment cannot be justified by what has happened in the individual case alone. Viewed in isolation, the single punishment would be meaningless from the point of view of society, he says. It has a social effect only as a link in the long chain of punishments necessary in order to maintain respect for the fundamental rules of conduct.

In this connection attention should be drawn to Lundstedt's view on the preventive effect of punishment. The single punishment, he says, would have no preventive effect if one had no reason to suppose that it would be repeated in a similar case. But repetition is assured by the criminal law and the forces assuring its maintenance. The effect of preventing crime therefore stems from the law. In this respect Lundstedt takes the same position as Feuerbach. But he differs sharply from Feuerbach in describing the psychological effect of criminal law. Feuerbach only saw its power of inspiring fear. Lundstedt, on the contrary, does not regard fear as a major motive for lawful conduct. He maintains that the existence of criminal law through hundreds of years has had a profound influence on the deeper strata of human personality. It moulds the moral consciousness of people. Only in so far it is successful in doing this is criminal law really effective.

The necessity of maintaining criminal law, Lundstedt says, follows from the necessity of shaping and channelling moral ideas in accordance with the need of the community. He was all in favour of reducing the employment of punishment as far as would be compatible with the interests of the community; but he warned against the dangers of going too far in this direction.

What Lundstedt has to say with regard to criminal law is perhaps the best part of his work. It deserves close attention on the part of all those who take an interest in these difficult questions. I think that Lundstedt has made a very valuable contribution towards a more profound understanding of the functions of the law of crime. The practical problems seem to be acute almost everywhere. A sharp rise in the crime rate is noticeable in many

countries. Industrial society, with its rising standard of living, has not made it easier for society to cope with crime. On the contrary, appetites have grown and the means of committing crimes have multiplied.

Lundstedt's views on criminal law are often quoted with respect in his own country. But one could wish that they had had more influence on legislation and judicial practice. There are strong indications that we in Sweden have gone too far in remitting punishment in favour of educational and other reformative measures. It would seem that the preventive effect of criminal law, so strongly emphasized by Lundstedt, has been neglected.

III

In his insistence on social aims as the proper guide for the judge, Lundstedt is in harmony with the spirit of the time. The method of conceptual jurisprudence has been discredited. It is no longer assumed that there exists a complete law from which the solution of every possible case could be logically deduced. The judge evidently has to fill many gaps in the law. He shapes the law as he goes on. He is not a mere mouthpiece for a law in the clouds but a living personality on whose insight, impartiality, and sense of responsibility the functioning of the law depends. In fact, there is no real law, but only a law on paper, without judges who are imbued with the spirit of the law and loyally carry out its aims.

Our writers on law do not excel in making logical deductions from abstract principles but discuss the function and aim of legal rules with the purpose of providing a basis for their recommendations to the judges as to how the rules are to be applied and filled out. Perhaps some writers have, indeed, gone a little too far in laying stress on social aims. It may happen that the analysis of given rules is neglected. The first thing to do should be to ascertain, as far as possible, the actual contents of legal rules as they appear in statutes and judicial precedents. If this is not done carefully enough, an element of uncertainty is introduced and the writer will tend to put forward his private views in place of the law.

Much discussion has taken place concerning the methods to be used in jurisprudence. It would be impossible to do justice to the various shades of opinion without a lengthy exposition. The chief difference lies between, on the one hand, those who emphasize the

desirability of strict adherence to the legal rules as far as they can be ascertained, and, on the other hand, those who are inclined to let supposed social aims be the dominant factor.

Hägerström's influence is apparent in everything that has been written in legal philosophy in my country during the last few decades. In Finland and Norway, Hägerström has been little studied; but in Denmark, Alf Ross has drawn his inspiration from him as regards the criticism of the traditional concepts.

A considerable part of Hägerström's criticism has been silently accepted; in some respects it is in accord with criticism proffered from other quarters. I think, for instance, that nobody in my country would speak nowadays of the law being the will of the state, although one can hardly say that any other theory on the nature of the law has won general acceptance. But there is one point where Hägerström's criticism has not been understood and where, therefore, much confusion has ensued. This is, indeed, the most important point of all: the analysis of the concepts of rights and duties.

These concepts, or ideas, may be called the chief fountain of legal metaphysics. To them Hägerström quite naturally devoted a very large part of his philosophical work. But to most jurists and philosophers his conclusions have appeared bewildering. One seems to be unable to take a single step forward either in jurisprudence or in legal practice without using these concepts. Now Hägerström says that there are no rights and no duties. Lundstedt vehemently attacks the use of these concepts; nevertheless, in reading his works one finds that he constantly speaks of rights and duties. How is this to be explained? Lundstedt says that he employs the words "right" and "duty" as mere labels, uncontaminated by the traditional metaphysical sense; but this is not easy to understand. One is inclined to ask whether the continued use of these words in the usual way is not a practical necessity. But does this imply that Hägerström's criticism is misdirected? I do not think so, and I will try to give a brief account of how the matter, in my view, is to be explained.

Hägerström's contention that a right is conceived as a supernatural, or mystical, power has greatly contributed to the confusion. For what is a supernatural power? No jurist has acknowledged that he means a mystical power when speaking of a right. On the contrary, everybody energetically denies such a use, and many, I think, have felt offended by Hägerström's thesis.

The answer to the question should, I believe, be as follows.

A mystical power is really nothing. We have no idea at all of such a thing. The word "right" is a mere word that does not connote anything, although it is believed that it does connote something. In certain circumstances, especially in situations of conflict, the use of the word is accompanied by a feeling of strength, or power. Therefore, when one tries to get hold of the something that is supposed to be connoted by the word, it is defined as a power. Hägerström's meaning would be accurately expressed, I think, in saying that the word "right" is used as if it signified a certain power but that this power is illusory, the illusion stemming from the attendant feeling of power.

Let me illustrate this by an example. We will take the right of property as an instance. Suppose I own a small house in which I live. I have a clear idea, of course, of the house and the adjacent garden. But I have no clear-cut idea of what it means that I have a *right* to it. I may have a strong conviction that the house is really mine, and this may seem to me to be as evidently true as the contention that the earth is round. Yet, I am unable to express what it signifies that the house is mine. As we have seen already, this cannot be reduced to the fact that the state will protect my possession of the house against any disturbances; for I think that I am entitled to protection by the state *because* I am the owner of the house. I feel that I have a certain power over the house. But this power, which is supposed to be a prerequisite for the actual power derived from the protection offered by the state, can never be grasped by the mind. There is only a feeling of power, which is being objectivated.

Let us now assume, for the sake of argument, that this analysis is correct. The question will then be whether the conclusion is compatible with the ways in which the word "right" is used for practical purposes. As was pointed out, we seem to be unable to get on without using the word. But how can this be explained if it does not connote anything at all?

An answer to this question cannot be reached through abstract speculation. The only possible course is to proceed empirically by observing how the word "right" is actually employed.

Broadly speaking, the word "right" is extensively used in three different spheres: in daily life, in legislation, and in legal practice. We might begin by examining its use in daily life.

When I have the idea of possessing the right of ownership of my house, and of other people being owners of the neighbouring houses, this influences my behaviour in a distinct way. I feel free

to do what I like with the house and the garden, provided that I keep within the bounds prescribed by the law: I must not cause a nuisance to my neighbours, and so on. At the same time, the idea of others being owners of the surrounding houses causes me to refrain from interfering in any way with their use of them. Other people's conduct with regard to my house is influenced in a corresponding way: they habitually refrain from interfering with my own use of it.

Now we might ask: Is it a condition for this function of the idea of a right that the right is represented as *being* something? It does not seem so to me. I need only have these words ringing in my ears: This is my property, that is not my property, you must not infringe other people's rights, and so on. These statements as such influence my mind and behaviour. What is needed for this effect is a *psychological connection* between the statement "this is the property of another" and the idea that certain consequences regarding right behaviour follow from the thing's being the property of somebody else.

In this context, therefore, the word "right" need not express any fact. Its function is to influence the feelings and activities of people. It serves as a signal that elicits a relatively uniform response within the community, because people have been conditioned to respond in a certain way. The words "this is my property" act like the green light on my activities with regard to the object; the words "this is the property of A", or simply "this is not my property" act like the red light. This we might call the *behaviouristic* function of the word "right".

The perplexing thing is that the word "right" is a noun. We are therefore inclined to think that it serves to connote an entity, and we use it as if this were the case. But there is, in fact, no reason why a noun should not have a purely behaviouristic function.

If the explanation is correct, the use of the word in legislation is easy to understand. The legislator needs words with a behaviouristic function. His object is not to describe the facts of social life but to influence the conduct of the members of the community.

As regards the courts it must be borne in mind that their task is not to distribute information but to render decisions. They do not give information concerning existing rights. They settle disputes of ownership by adjudicating the object to the claimant or dismissing his plea; they settle disputes about contracts by award-

ng damages or rejecting pleas for damages, etc. The court asserts he facts, as they appear from the evidence, and the content of the aw. Its decision does not tell what *is*; it imposes a rule.

The behaviouristic function of the word "right" is, of course, onditioned by many circumstances. Prominent among these are he two which follow.

(1) The statement "This is the property of A" can have its sychological effect only if it is supposed to be true. The statement xpresses an ostensible proposition; and if the person to whom it s addressed does not hold this proposition to be true, it cannot ave an appreciable effect on him of the kind just indicated. Assertions of rights which appear wanton are generally disregarded. (If they are accompanied by intimidation, as may be the case, and this causes the person addressed to refrain from an action, the effect stems from the threats used, not from the statement as such.) Now the proposition "This is the property of A" is held to be capable of verification. The existence of a right cannot be ascertained by direct investigation; for a right cannot be detected by observation of facts. But there is supposed to be a method of verification consisting in drawing inferences, according to the law, from certain facts. In the legal view, one acquires the right of property to an object through certain "titles", such as a purchase or a gift. If A has bought the object from B, who in his turn had a legal title to it, it is supposed to be a correct inference that A has become the owner of the object; and he is supposed to continue to be the owner until facts occur which include his losing the right of property.

For the psychological effect of the statement it is not required that the inference is really true; it suffices that it is supposed to be true. Since disagreement may arise both with regard to the facts and with regard to the purport of the law, it is further necessary that there should be an opportunity of getting an authoritative decision on the question of the right of ownership.

(2) The idea of rights needs a background of irresistible power. Sanctions in the shape of punishment and damages are needed in cases of "violations" of rights, property must be restored, and so on. This is not to say that the fear of sanctions would be the sole motivating factor. Statements like "This is the property of A" undoubtedly have an immediate effect regardless of any element of fear. In all probability, however, this effect would vanish if nothing happened in case of infringements of the spheres covered by other people's rights.

The conditions stated in (1) and (2) are obviously fulfilled in our society. They do not presuppose that a right is represented as being something. It therefore seems quite possible to explain the use of the word on the basis of the assumption that it lacks a connotation.

An objection might, however, be made to this conclusion. Even if it is true that the word "right" has a most important behaviouristic function, it seems, however, also to have an *informative* function. People tell each other that they own things, that they have certain claims, and so on. If someone tells me that A has the right of ownership to a house before which we are both standing, this seems to convey a certain piece of information to me. But how could any information be given by means of such a statement unless the words "right of ownership" have a connotation?

The objection seems to be important. But before asserting its relevancy, we must be careful to make clear what information is imparted to me by saying that A is the owner of this house. Am I informed of any factual relationship between A and the house? Certainly not. The factual relationship between A and the house may be of any conceivable kind, not differing from that of B, C, or D. He may be living in the house; but he may also be unaware of its existence. He may manage the house; but he may also, because of personal disabilities or legal obstacles, be barred from it. The only direct information I get by being told that A is the owner of the house is—that A is the owner of the house. This implies no factual relationship between A and the house.

The information that A is the owner of the house may nevertheless be of importance to me. Suppose I want to buy that house; I then make inquiries about the owner in order to know with whom I am to deal. But if we come to an understanding, I do not make any payment to A simply because I have been told that he is the owner of the house. I want to see his title deeds. This is the important thing. The information that A is the owner of the house has the function of indicating the last holder of a title to the house. The meaning of the statement is only that A has the right of property in the house. But it is *inferred* that he holds a title to it, and is the last holder of a title. If the information is correct—so the reasoning runs—A must have a title to the house and nobody will hold a title of more recent date.

It is in this way that the ostensibly informative function of sentences like "A is the owner of X" is to be explained. Such a

sentence does not, as such, tell us anything about any factual situation. Depending on the circumstances, however, we make all sorts of assumptions on the basis of it, provided that we believe it to be correct. If the assumptions are made with reasonable circumspection, they prove true regularly enough to be quite useful. The informative function of the sentences is, indeed, highly important.

Nevertheless, one question remains. How can any inferences be drawn from the statement that A has the right of ownership of the house, if his right of ownership does not imply any actual relationship to the house? The whole reasoning seems to presuppose that A's right of ownership is a certain relation between himself and the house, which cannot exist unless he has a title to the house.

The explanation offered above does not, however, require that A's right of ownership to the house really *is* a relationship between him and the house presupposing a title on his part; it is only requisite that the right of ownership is *supposed to be* such a relationship. This condition is undoubtedly fulfilled. We take it for granted that one really acquires the right of ownership to a house by purchasing it from someone else who is the legal owner. The inferences are made on the basis of this assumption. We reason as if the law had the power of connecting so-called legal effects, for instance the right of ownership, with the occurrence of certain facts. Therefore, we seem to be able to infer that some such facts must exist, if the statement "A is the owner of this house" is true. When this mode of thinking is universal, the ostensible inferences become relatively uniform and are accepted as true under certain conditions.

These inferences are, however, not logical inferences at all. There is only a *psychological* connection between certain general ideas about rights and duties, on the one hand, and the idea that A has a certain right, on the other. The uniformity of such connection within a given community gives rise to the illusion that logical inferences are made from rules and facts to the existence of rights and duties in individual cases. It is, indeed, only a question of regularly using a certain language, the function of which is to impress certain kinds of behaviour on people. As far as I can see, there is no need to dispense with this language. On the contrary, such language seems to be a necessary ingredient in the organization of any society.

The explanation refers to the present situation. If the analysis of legal language is correct, another question will naturally be

raised. It will be asked whether the illusion that rights and duties really exist, that they are created in such and such ways, etc., is necessary for the functioning of the legal system, or at least, that its function would be gravely impaired if those ideas were dissolved. Personally, I do not think so. I am inclined to believe that an understanding of the true nature of the ideas of rights and duties would have, on the whole, a beneficial effect. The question is, however, extremely delicate. It would carry us too far to start a discussion of it in this connection.

The views of Professor Hart, as set forth in his inaugural lecture (*supra,* p. 130 footnote 1) are similar in certain respects to those proffered here. The differences are, however, important. Some remarks may be added in order to make this clear.

The great anomaly of legal language, Professor Hart says, is "our inability to define its crucial words in terms of ordinary factual counterparts" (pp. 7 f.). Thus the word "right" does not "describe or stand for any expectation, or power, or indeed anything else" (p. 10). It is a fundamental point that "the primary function of words like 'right' is not to stand for or describe anything" (pp. 12 ff.). So far, the views coincide.

The author further says that the specific function of the crucial legal words is to express *conclusions of law.* An example is the statement "X has a right to be paid £19 by Y"; it is comparable to the statement "He is out" pronounced by the umpire in a cricket match. The words have meaning only as part of sentences that have the function of drawing conclusions of law (p. 10). They cannot be defined; but one can specify the conditions under which the sentences are *true* (p. 14).

With regard to this theory it should first be pointed out that the word "right" is used not only drawing "conclusions of law". It is also used in *expressing the rules* from which the conclusions are drawn. Secondly, the conclusion that a right exists in a certain situation seems to be drawn from a rule conferring a right upon a person in situations of this kind.

The author actually makes a distinction between rules that *confer rights* and those which only *impose obligations.* It is said to be characteristic of the former rules that the obligation to perform the duty *corresponding to the right* is made by law to depend on the choice of the individual who is said to have the right (p. 16). From this it follows that a conclusion as to the existence of a right cannot be drawn from a rule imposing a duty only; it can only be drawn from a rule conferring a right. When the author defines the conditions under which the statement "X has a right" is true, this should therefore be done in terms of rules conferring rights. But the author does the op-

posite: he endeavours to define those conditions in terms of rules imposing duties. The statement "X has a right" is said to be true under the condition that Y, according to the rules of an existing legal system, is obliged to do, or to abstain from, some action and this obligation is made by law dependent on the choice of X or some person authorized to act on his behalf (p. 16). Apparently, the author tries to avoid circularity. But the duty is a duty *corresponding to a right*. It must be tacitly presupposed that the rule from which the conclusion is drawn is a rule conferring a right upon X. The circularity is obviously present. The argument only says that the sentence "X has a right against Y" is true, if the existing legal system has conferred this right upon him. In that case, it might be added, Y has a corresponding duty.

The word "duty", according to the author, belongs to the same group of words as "right"; it does not stand for or describe anything (p. 5). It is therefore impossible to describe the conditions under which sentences about rights are true by means of sentences about duties, or *vice versa*. The whole question of truth is, indeed, inapplicable to sentences about rights and duties. One can only ask whether the pronouncement of such a sentence, for instance, by a judge is in harmony with a rule saying that such a pronouncement shall be made under such and such circumstances.

If the umpire in a cricket match says about a player: "He is out", it is meaningless to ask whether this statement is true or false. The player was not "out" before the pronouncement of the umpire. Therefore, it is senseless to say that the umpire told the truth. It can only be said that a situation existed in which the umpire, according to the rules of the game, ought to say: "He is out". When the pronouncement has been made, its importance lies in its being relevant under the rules: it means that a certain behaviour on the part of the players and the umpire is the correct one according to these rules. If the player ignores the pronouncement and somebody else tells him that he is "out", this is not an assertion of a fact, although it seems to be so. It is not equivalent to saying: "The umpire has said that you are out". It is an echo of what the umpire says. The aim of the speaker is to remind the player of the rules and impress upon him that he has to act in a certain way.

The views of Alf Ross are similar to those of Hart. (See *Scandinavian Studies in Law* 1957, pp. 139 ff., especially p. 150 footnote 7.) Ross maintains that words like "right", "ownership", "claim", and others, when used in legal language, are words without meaning, i.e., without any semantic reference, and serve a purpose only as a technique of presentation. Like Hart he labours with the preconceived idea that the *truth* of statements about rights and duties has to be vindicated. This is the great mistake.

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