

# “Scire leges non hoc est, verba earum tenere, sed vim ac potestatem” (D. 1, 3, 17)<sup>1</sup>

Max Lyles

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<sup>1</sup> In English, “to know the laws is not to be familiar with their phraseology, but with their force and effect.” *Corpus Juris Civilis*, trans. S. P. Scott, 17 vols., vol. 2 (New York: AMS, 1973).

This article explores the tentative method of teleological statute interpretation conceived by the founder of Scandinavian legal realism, Axel Hägerström (1868 – 1939). The object of the article is to describe Hägerström’s concept of methodology in contrast to the prevailing trends and schools of legal theory and methodology of the late 19<sup>th</sup> century and early 20<sup>th</sup> century.

## 1 Introduction

The issue of how the laws are to be interpreted and applied is a perennial problem to the study of law. Should the study of law be restricted to the exact wording of the statute, or should it be permitted to liberate itself from these shackles? The Roman jurist *Celsus* (2nd century A.D.) described legal knowledge in the following, “to know the laws is not to be familiar with their phraseology, but with their force and effect“ (D. 1, 3, 17)<sup>2</sup>, a quote that, in order to be properly understood, must be read together with D. 1, 3, 18, where *Celsus* writes, “laws should be interpreted liberally, in order that their intention may be preserved”. According to these maxims the study of law must be regarded as a logically open activity, and hence the jurist’s proper understanding of law requires that the jurist establish the purpose or intention of the law rather than its exact linguistic meaning. If one considers the severe strictures that Axel Hägerström and the Uppsala School place upon scientific reasoning, it is quite natural to assume that Axel Hägerström in fact would disapprove of anything but a logically closed literal and grammatical doctrine of statute interpretation. But appearances can be deceptive. According to Axel Hägerström’s legal theory, the foremost task of legal science<sup>3</sup> is to interpret, comment and supplement the law for the benefit of the judge.<sup>4</sup> This is a task that legal science should perform by, on one hand, guiding the judge’s application of positive law, and, on the other hand, by increasing the judge’s understanding of the proper meaning of positive law.<sup>5</sup> In other words, the proper task of legal science is to help the judge to determine the content of valid law<sup>6</sup> by establishing which coercive measures prescribed by positive law that are either legal in respect to a higher positive norm or legally applicable in a specific case.<sup>7</sup> The task of legal science is thus to help the judge to determine under which specific conditions that a legal fact can be said to be at hand or not, and the basis of this determination decide whether

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<sup>2</sup> Ibid.

<sup>3</sup> Swe. *rättsvetenskap*, cf. Ger. *Rechtswissenschaft*.

<sup>4</sup> Hägerström, *Till frågan om den objektiva rättens begrepp I. Viljeteorien*, *Skrifter utgivna af K. Humanistiska vetenskapssamfundet* (Uppsala; Leipzig: Almqvist & Wiksells Boktryckeri AB; Otto Harrassowitz, 1917), 23-25, and *Till frågan om begreppet gällande rätt*, review of *Theorie der Rechtsquellen* (Alf Ross), *Tidsskrift for Retsvidenskap (TfR)* 44 (1931) p. 88-89.

<sup>5</sup> Hägerström, *Till frågan om begreppet gällande rätt*, p. 87 and 89.

<sup>6</sup> Swe. *gällande rätt*, cf. Ger. *geltendes Recht*.

<sup>7</sup> Hägerström, *Das magistratische Ius in seinem Zusammenhang mit dem römischen Sakralrechte*, Uppsala universitets årsskrift, 1929: Juridik; 8 (Uppsala: Lundequistska bokh., 1929a), p. 2-3, and *Till frågan om begreppet gällande rätt*, p. 62 -63.

the corresponding legal effect shall be applied or not.<sup>8</sup> By defining the task of legal science in such a narrow, technical, and practical manner Hägerström reserves the authority to produce texts with normative effect to the dogmatic study of law, which effectively means that the sociology of law, legal philosophy, legal history, legal politics, legal psychology and legal economics are denied of a similar type of authority. In other words, of the different discourses of legal science it is only the dogmatic discourse (jurisprudence) that has the authority to formulate legal principles and the status of a *source of law*.<sup>9</sup> Hägerström explains this by pointing to the fact that the findings and results of the non-dogmatic legal discourses fail to express normative principles of positive law, thereby failing to provide the practicing jurists with knowledge of any practical importance and legal relevance, consequently the non-dogmatic discourses had to be excluded from the doctrine of legal sources.<sup>10</sup> To sum up, the failure of the descriptive legal sciences has its origin in their inherent inability to treat law as a normative phenomenon.

## 2 The Enigma

As I have indicated earlier Hägerström's strict theory of science and his removal of the non-dogmatic scientific discourses from the class of legal sources, makes any pretensions of a tenable positivistic teleology enigmatic and debatable. For instance, my characterization of Hägerström as legal positivist is not universally accepted. According to *Jes Bjarup* the Scandinavian Realists Hägerström, *Vilhelm Lundstedt*, and *Alf Ross* are scientific positivists, but their failure to satisfy *H. L. A. Hart's* five criteria of legal positivism indicate that they might not be true legal positivists.<sup>11</sup> To understand professor *Bjarup's* argument one must take a look at *Hart's* description of the Anglo-American understanding of legal-positivism. According to *Hart* the Anglo-American view makes five assertions, namely:

“(1) that laws are commands of human beings; (2) that there is no necessary connection between law and morals, or law as it is and is it ought to be; (3) that the analysis or study of meanings of legal concepts is an important study to be distinguished from (though in no way hostile to) historical inquiries, sociological inquiries, and the critical appraisal of law in terms of morals, social aims, functions, &c.; (4) that a legal system is a ‘closed logical system’ in which correct decisions can be deduced from predetermined legal rules by logical means alone; (5) that moral judgments cannot be established, as a statement of fact can, by rational argument, evidence or proof (‘non-cognitivism in ethics’).”<sup>12</sup>

<sup>8</sup> Hägerström, *Till frågan om begreppet gällande rätt*, p. 62-64 and 88.

<sup>9</sup> For a fuller account of this idea see e.g. Hägerström, *Stat och rätt: en rättsfilosofisk undersökning: 1* (Uppsala: Almqvist & Wiksell, 1904) p. 1-18.

<sup>10</sup> Hägerström, *Till frågan om begreppet gällande rätt*, p. 54-55 and 62-63.

<sup>11</sup> Bjarup, *Skandinavisk Realismus: Hägerström, Lundstedt, Olivecrona, Ross*, Kolleg Rechtstheorie, 3:1 (Freiburg: Alber, 1978) p. 179-182.

<sup>12</sup> Hart, *The concept of law*, 2. ed., Clarendon law series (Oxford: Clarendon, 1994) p. 302 (note

But as my article shows the full acceptance of *Hart's* five criteria amounts to a definition of legal positivism corresponding to the exact type of legal positivism that Hägerström through his critique of the will-theory distances him from. The foundations to Hägerström's theory are of Continental origin, rather than of Anglo-American origins. And both his anti-metaphysical philosophy and his legal theory taken together correspond better to the Continental use of "positivism" than to the Anglo-American use (as described by *H. L. A. Hart*). Incidentally, *Hart* observes that there is a fundamental difference between Anglo-American and Continental legal positivism, as the latter, historically, primarily has concerned itself with the rejection of rationalistic natural law.<sup>13</sup> My hypothesis is thus that it is primarily when perceived from this perspective that the concept of legal positivism and Hägerström's legal theory coincide. For, both Hägerström's and Continental legal positivism's critique of natural law share philosophical origins, namely the late 18<sup>th</sup> early 19<sup>th</sup> century's critique of rationalistic metaphysics (and Hägerström's crusade against natural law is in fact nothing more than the continuation of his Kantian rejection of transcendental object categories and notions thereof). It is first after the completion of its critique of Classical, rationalistic, natural law that Continental (particularly German) legal positivism develops in a direction similar to *Hart's* description of Anglo-American legal positivism (who both have voluntaristic traits absent in Hägerström's theory). And for reasons shown below the realist movement is not as much a rejection of positivism as a development of positivism, primarily by introduction of so-called realistic arguments.

The enigma mentioned above manifests itself if one takes into consideration that a teleological method of statute interpretation explicitly allows standards other than the strictly legal to be introduced into the interpretative process, *as well as* be used as interpretative data when applying the law. In effect this methodological standpoint allows the incorporation of standards that, according to the exact letter of the law, cannot be directly derived from the sources of law into the interpretative scheme. A central argument of the teleological method of statute interpretation is that the content of the law and valid law only can be meaningfully and practically ascertained, if the interpretation of law is understood as a logically open operation/activity rather than perceived as a logically closed operation/activity (which the literal method presupposes that statute interpretation must be regarded as).<sup>14</sup> So one may thus, by way of introduction, argue that the teleological method and the literal or grammatical method of interpretations start from different premises, the first realistic and the second formalistic, and therefore proceed along different paths. As a point of discussion Hägerström's teleological approach can be contrasted to the systemically based and logically closed creative deductivity of the so-called *Begriffsjurisprudenz* to.

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to page 185).

<sup>13</sup> Cf. *Ibid.*

<sup>14</sup> This argument can be inferred from Hägerström's critique of various monistic and logically closed doctrines of interpretation, that is doctrines only including literal and grammatical standards of interpretation, *see* for example Hägerström's critique of Hans Kelsen. Hägerström, *Hans Kelsen: Allgemeine Staatslehre*, Litteris: an international critical review of the humanities 5 (1928).

## 2.1 Interpretation

To start out it must be stressed that Hägerström does not reject the grammatical or literal method of interpretation out of hand. To him this method is just one of several methods of interpretation; methods that taken together lead to the fixation of the formal legal system, the other commonly accepted methods were the so-called logical and historical.<sup>15</sup>

### 2.1.1 The Closed, Formalistic, Method of Interpretation

The literal method of interpretation presupposes that the linguistic meaning of a norm is more or less clear, or at least possible to determine, with regard only to the wording of the norm, and that the result of this process in turn shall be applied to the case in question in accordance with the sentence's exact phraseology and linguistic meaning. This implies that the closed method of interpretation allows theoretical familiarity with the phraseology and linguistic meaning of the norm to exert decisive influence over interpretation, while practical familiarity with the ensuing practical consequences and effects of the norm shall be denied influence over the outcome of interpretation. But in order to have an interpretative operation carried out in the strictly literal manner, it must be assumed that the jurist can act as if he was a machine; setting all human shortcomings such as emotions aside and applying the law in a disinterested, mechanical, manner. But this is an unrealistic assumption, for the jurist is more than "a mere calculating machine", and he must therefore take other aspects than the merely deductive into consideration when deciding a case.<sup>16</sup> To Hägerström the same line of argumentation must also be applicable on the legal scholar's scientific efforts (see section 5.2.2. below), an idea that entails a pronounced breach with the systemic-deductive ideal that the *Begriffsjurisprudenz* wishes to impose on all legal activities.<sup>17</sup>

### 2.1.2 The Open, Realistic, Method of Interpretation

The teleological interpretation presupposes that the norm in question has a *telos*, a *telos* that for various reasons shall be satisfied and fulfilled, a fact that forces the jurist to interpret the norm with this specific *telos* kept in mind. And provided that this is the case, then the interpretation itself cannot be conducted in a logically closed manner. Consequently the teleological method of statute interpretation demands that the anticipated consequences and effects of a norm's application must be taken into consideration from the very beginning of the interpretation. And provided that this description describes the teleological method of interpretation correctly, then one must ask: Can the teleological method of statute interpretation be combined with the Uppsala School's

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<sup>15</sup> Hägerström, *Till frågan om den objektiva rättens begrepp*, p. 19-20, footnote 6.

<sup>16</sup> See *ibid.*, p. 31.

<sup>17</sup> See Wagner, *Die politische Pandektistik* (Berlin: Berlin Verlag A. Spitz, 1985) p. 11-29.

outspoken legal positivism? (N.B. To Hägerström legal positivism constitutes a legal theory that, apart from its philosophical and political connotations, is concerned with the systemic legality and validity of decisions to apply coercive measures in specific cases.<sup>18</sup>) The reason why one must ask how teleology can be combined with the Uppsala school's legal positivism is that the open approach of the teleological method of interpretation inevitably will raise questions of how a logical open standard of interpretation can correspond to legal positivism's closed doctrine of sources. Is it thus possible to combine a teleologically based methodology with the strict scientific theory of the Uppsala School in a wholly non-contradictory manner? In order to answer these questions one must address a basic theoretical issue of law, namely that regarding the sources of law and their nature.

### 3 Positive Law and the Sources of Law

According to Hägerström, the only system of actually applicable law is non-metaphysical to its nature.<sup>19</sup> Hägerström's argument is twofold. Philosophically the argument is that human cognition and knowledge to its very nature is restricted by the bounds of physical spatio-temporal reality, and consequently human cognition and knowledge also must take the content of the same positive reality as its ultimate point of departure.<sup>20</sup> On the basis of this argument, it is safe to conclude that every valid human claim to possess knowledge of law must refer to a positive, non-transcendent, system of law; law is thus an historical category, which, from the Historical School of jurisprudence and onwards, is the ruling theoretical opinion of legal theory. From a practical point of view, the argument is that it is not enough for the jurists to restrict the concept of law to spatio-temporally given sets of positive norms; for even such sets of norms are by themselves too extensive and amorphous to be intelligibly applicable. The reason why is that such sets of norms will include norms of every type and form (legal, political, religious and moral), as well as epoch (past, present and future or historical, actual and potential). The concept of law has historically, due to practical demands as well as out of epistemological necessity, been restricted even further, to be exact, been restricted to include only specific sets of rules in specific geographical and historical settings, in other words, the concept of applicable law has been restricted to include only norms valid for a specific country, people, culture, and period of time.<sup>21</sup> And throughout history this

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<sup>18</sup> Hägerström, *Till frågan om begreppet gällande rätt*, p. 63-64.

<sup>19</sup> See Hägerström, *Begreppet viljeförklaring på privaträttens område*, in *Rätten och viljan: två uppsatser ånyo utg. av Karl Olivecrona*, ed. K. Olivecrona (Lund: Gleerup, 1961) p. 120-151, where Hägerström accounts for the applicable sources of law, and see section "3.1. The Sources of Law — a Concise List", below.

<sup>20</sup> Hägerström, *'Ein Stein, Ihr Herren, ist ein schlechtes Argument'*, Fönstret 1934, p. 3.

<sup>21</sup> See e.g. Hagerup, *Forelæsninger over retsencyclopedi* (Kristiania: Aschehoug, 1906) p. 28-34, Puchta, *Das Gewohnheitsrecht I*, 2 vols., vol. 1 (Darmstadt: Wissenschaftliche Buchgesellschaft, 1828; reprint, 1965) p. 133-148, and Ross, *Theorie der Rechtsquellen: ein Beitrag zur Theorie des positiven Rechts auf Grundlage dogmenhistorischer Untersuchungen* (Leipzig: Deuticke, 1929), passim.

definition of law, as the law of a specific country and time, is the specific definition of law that the jurists themselves have used, which *e.g.* the pragmatic positivism of Roman law and lawyers illustrate.<sup>22</sup> The fact that the different systems of positive law throughout history, for political, religious, or philosophical reasons, have been provided with metaphysical superstructures (a theoretical superstructure according to which human law has been regarded as either or both hierarchically and causally subordinate to superior legal orders of some supernatural nature) does not affect the essentially positive nature of the laws that humans actually apply.<sup>23</sup>

### 3.1 *The Sources of Law — a Concise List*

In short, Hägerström, in accordance with the prevailing jurisprudential opinion of his day, restricted the number of positive sources of law to the following: statute law/legislation, customary law, judicial practice and the doctrines of jurisprudence.<sup>24</sup>

#### 3.1.1 Motives and Preparatory Works — a Special Case

If we take a closer look at Hägerström's list of legal sources we find that it differs from the modern Swedish doctrine of the 20<sup>th</sup> century and early 21<sup>st</sup> century in an interesting way. Despite his teleological aspirations Hägerström argues that motives and preparatory works do not constitute proper sources of law. One reason explaining why preparatory works shall be excluded from the class of legal sources is Hägerström's normative classification of preparatory works and motives. According to this classification preparatory works do not constitute norms. On the contrary preparatory works and motives merely make up the means, the factual and historical material, by which the jurists (in vain) try to ascertain the historical legislator's will or intent with a specific legislative

<sup>22</sup> For the Roman pragmatism *see e.g.* Buckland, *A manual of Roman private law*, 2 ed. (Aalen: Scientia Verlag, 1939; reprint, 1981) p. 27-28.

<sup>23</sup> Olivecrona, *Rättsordningen*, 2. uppl. ed. (Lund: LiberLäromedel, 1976) p. 21-34. For two short descriptions of the mere rhetorical value that *ius naturale* had for Roman lawyers *see* Hattenhauer, *Europäische Rechtsgeschichte*, 3. ed. (Heidelberg: C. F. Müller Verlag, 1999) p. 90-91, and Robinson, *The sources of Roman law: problems and methods for ancient historians, Approaching the ancient world*, (London: Routledge, 1997) p. 26-27.

<sup>24</sup> Hägerström, *Till frågan om den objektiva rättens begrepp*, p. 31-36, *Hans Kelsen: Allgemeine Staatslehre*, p. 36-37 and 94, *Till frågan om begreppet gällande rätt*, p. 69, *Begeppet viljeförklaring på privaträttens område*, p. 120-128, 135, 138-141 and p. 150-151. For the late 19<sup>th</sup>, early 20<sup>th</sup>, century Scandinavian doctrine of legal sources *see e.g.* Hagerup, *Nogle ord om den nyere Retsvidenskabs Karakter*, *Tidsskrift for Rettsvitenskap* 1 (1888) p. 19-21 and 45-46, Nordling, *Anteckningar efter prof. E. V. Nordlings föreläsningar i svensk civilrätt: allmänna delen H. T. 1877-V. T. 1879* (Uppsala: Juridiska föreningen i Uppsala, 1882), p. 26, and Reuterskiöld, *Grunddragen af den allmänna rätts- och samhällsläran, särskildt med hänsyn till positiv svensk rätt, jämte grundlinier till rättsutvecklingsläran och rättsvetenskapens historia* (Uppsala: Almqvist & Wiksell distributör, 1912), §§8-16. Reuterskiöld is of the opinion that jurisprudence does not constitute a proper source of law since in reality it constitutes an expression of the common sense of justice (§8).

product.<sup>25</sup> Hägerström argues that they are texts lacking a direct normative function, and hence Hägerström reduces them to a methodological function when determining the meaning of a statute.<sup>26</sup> One reason appears to be that preparatory works and motives depend upon the existence of a corresponding statute for their applicability. Another reason is Hägerström's claim that if the real will or exact intentions of the legislator (irrespective of the fictitious nature of such categories) are to be determined, then this operation only can be successfully executed through an analysis, a grammatical interpretation, of the legislative text itself (provided that the text does not contain any editorial mistakes or misprints), rather than through an analysis of its preambles.<sup>27</sup> Hereby preparatory works and motives are reduced to serve as standards for statute interpretation, rather than serving as objects of interpretation whose proper normative meaning in turn shall be applied on a specific case. Motives and preparatory works thus serve as an auxiliary source of law rather than as a direct source of law. What is important to keep in mind in this respect is Hägerström's extensive critique of the will-theory, as it is this critique and non-voluntarism that eventually leads to the conclusion that the prescripts of law must be understood as facts rather than as declarations of will.<sup>28</sup>

Hägerström's analysis of the problems connected to the use of preparatory works and motives is primarily concerned with the voluntaristic view of their use as legal sources, namely their assumed ability to help uncover the legislator's true will, a view that Hägerström for various reasons rejects.<sup>29</sup> Hägerström considers the subjective interpretative method an insufficient guide when determining the proper meaning and application of legislation. The reason is that the results arrived at by means of this method are, taken by themselves, too narrow in scope, too particular, and too historically fixated, to be of any direct practical assistance to practicing lawyers. In fact, the actual demands of contemporary society continually forces the jurists to disregard the specific historical conditions that a statute came into being under, and adopt a wider perspective when interpreting and commenting a statute by taking the entire legal order into consideration.<sup>30</sup> Hägerström thus suggests that the subjective method of interpretation must be supplemented, or wholly replaced, with an objective method of interpretation in order that the interpretations may arrive at results in correspondence with the specific historical conditions at the moment of application, *i.e.* fulfill contemporary needs.<sup>31</sup> And finally the peculiarities of the legislative process make the formulation of a sufficiently precise as well as a legally relevant will (that is a will having the desired normative effect that the subjective method of interpretation according to the will-theory wishes to

<sup>25</sup> Cf. Hägerström Hägerström, *Till frågan om den objektiva rättens begrepp*, p. 18-19, and p. 21-22.

<sup>26</sup> *Ibid.*, p. 16-25, Hägerström, *Till frågan om begreppet gällande rätt*, p. 86-89.

<sup>27</sup> Hägerström, *Till frågan om den objektiva rättens begrepp*, p. 36-38.

<sup>28</sup> See *e.g.* Olivecrona, *Rättsordningen*, p. 109-112, where Olivecrona gives Hägerström credit as a predecessor in non-voluntaristic theory.

<sup>29</sup> Hägerström, *Till frågan om den objektiva rättens begrepp*, p. 1 and 16-19.

<sup>30</sup> *Ibid.*, p. 18-19.

<sup>31</sup> See *Ibid.*, p. 17-19.



establish) impossible, whereby it becomes scientifically untenable to the legislator's will to serve as a principle of interpretation.<sup>32</sup>

## 4 Legal Positivism, the Will-theory, Bergbohm and Kelsen

When we discuss Hägerström's critique of legal positivism there are a few facts that must be taken into consideration. To start out, Hägerström's critique of legal science is primarily directed at the so-called will-theory, or voluntarism, which exists both in natural law theory as well as in positivistic theory of law.<sup>33</sup> And since this is the case Hägerström's brand of positivism will differ from that outlined by *H. L. A. Hart*.<sup>34</sup> In this paper I will, however, only address the positivistic version of the will-theory.

### 4.1 Two Extremes of Legal Positivism

Apart from Hägerström's critique of the positivistic will-theory of law Hägerström criticized two extremes of legal positivism.<sup>35</sup> First, *Karl Bergbohm's* apotheosis of the entire system of positive law, second, *Hans Kelsen's* pure theory of law, which first reduces the entirety of positive law to encompass legislation alone, and then apotheosizes what is left. The purpose of these two varieties of legal positivism seems to have been an underlying desire to create a perfect object for legal science, which would lend the conclusions of legal science a truly scientific and objective form, whereby legal science would become a truly objectively binding source of law.<sup>36</sup>

To begin with *Bergbohm* (anno 1892), his basic assumption is the fiction that positive law exists as a perfect system, a state of perfection validating every legal conclusion. To *Bergbohm* this assumption constitutes more than a mere fiction. According to *Bergbohm* positive law must be understood as the reification of the dogmatic fiction of a self-sufficient system of law, reification of concept that *Bergbohm* in turn elevates to the status of actual reality.<sup>37</sup> This reification of a fiction furthermore leads *Bergbohm* to the conclusion that every legal conclusion, provided that the conclusion is logically sound, automatically gains validity, and does so by virtue of the fact that the system of positive law,

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<sup>32</sup> *Ibid.*, p. 163-168.

<sup>33</sup> Olivecrona, *Rättsordningen*, p. 21-86.

<sup>34</sup> See Bjarup, *Skandinavisk Realism*, p. 179-182, who refers to Hart, *The concept of law*, p. 302.

<sup>35</sup> This concise characterization of what is called the roots of Nordic legal sociology (sic!) is borrowed from Verdross, *Abendländische Rechtsphilosophie; ihre Grundlagen und Hauptprobleme in geschichtlicher Schau* (Wien: Springer, 1958) p. 182-183.

<sup>36</sup> See e.g. Hägerström, *Till frågan om begreppet gällande rätt*. for an extensive critique of the idea that jurisprudence is an objectively binding source of law.

<sup>37</sup> See for example Bergbohm, *Jurisprudenz und Rechtsphilosophie: kritische Abhandlungen* (Glashütten im Taunus: Detlev Auvermann, 1892; reprint, 1973) p. 384-388. Cf. Hägerström, *Stat och rätt*, 22, where he calls Bergbohm's legal theory "mediaeval conceptual realism" (my translation).

due to its perfection, in itself materially contains as well as ordains every forthcoming legal conclusion.<sup>38</sup> For how can *Bergbohm's* assumption otherwise be upheld? Provided that Hägerström's description of *Bergbohm* is correct, then it is safe to assume that *Bergbohm's* ideas are closely related to those of the so-called *Begriffsjurisprudenz* (which is a theory of legal science according to which the system of positive law itself seems to constitute self-sufficient totality capable of solving the problems of society in a strictly juristic as well as apolitical manner).<sup>39</sup>

As the other extreme we have *Kelsen* (anno 1925 – 33), who contends that valid legal conclusions only can be arrived at through deductions from the rules of statute law (which moreover constitutes the whole of the positive law).<sup>40</sup> And if this methodological premise is combined with *Kelsen's* theory of the *Grundnorm*, then it in essence implies that only legal sources instituted by the legislator have any legal authority and legal validity at all.<sup>41</sup> Furthermore *Kelsen's* theory, on one hand, with respect to the monistic doctrine of legal sources expressed, appears to be closely related to French 19<sup>th</sup> century legal positivistic theory, while it on the other hand, with respect to the deductivity expressed by its methodology, appears to be just as closely related to the so-called *Begriffsjurisprudenz* of the late 19<sup>th</sup> century.<sup>42</sup> The exact genesis of the details of *Kelsen's* theory does however not fall within the scope of this essay.<sup>43</sup>

#### 4.2 Hägerström's Definition of Legal Positivism

To Hägerström legal positivism is a theory of law merely stating that law, legal practice and jurisprudence has a given object, *viz.* positive law, and that this object shall be applied in legal matters.<sup>44</sup> This simple statement gives rise to several questions: How does this restriction on law and legal practice affect the validity of legal argumentation? Under what circumstances do legal conclusions

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<sup>38</sup> Bergbohm, *Jurisprudenz und Rechtsphilosophie*, p. 73.

<sup>39</sup> Wagner, *Die politische Pandektistik*, p. 11-17.

<sup>40</sup> Hägerström, *Hans Kelsen: Allgemeine Staatslehre*.

<sup>41</sup> *Ibid.* p. 36-39, Kelsen, *Den rena rättsläran: dess metod och grundbegrepp*, *Statsvetenskaplig Tidskrift*, no. 3 (1933) p. 31-32.

<sup>42</sup> See *e.g.* Olivecrona, *Rättsordningen*, p. 50-61 (French positivism), and Ross, *Theorie der Rechtsquellen*, p. 169-192 (*Begriffsjurisprudenz*).

<sup>43</sup> *Kelsen's* monistic view of law, legal sources, and legal method idea represents a characteristic trait of Continental legal thought, namely the assumption that the Central European style of legal codifications have universal applicability as standards for law, legal sources, and legal method, while such ideas in fact only have restricted applicability, which becomes apparent when attempts are made to transplant the theoretical substratum of the codifications to legal orders lacking codifications, such as the *e.g.* Scandinavian countries.

<sup>44</sup> See Hägerström, *Till frågan om begreppet gällande rätt*, p. 63-64, where Hägerström classifies *Hans Kelsen* and *Alf Ross* as legal positivists insofar as they both base the validity of a legal finding on its correspondence to a given system of norms, but Hägerström also calls attention to the fact that *Kelsen's* non-positive *Grundnorm*, and *Ross's* sociological understanding of law (p. 72) makes a classification of *Kelsen* and *Ross* as legal positivists problematic.

gain validity? Is it when legal conclusions and findings copy the exact content of positive law? Or is it when the legal findings and conclusions constitute strictly logical applications of superior norms, *i.e.* when the findings and conclusions are deductively inferred? Or is it when the legal conclusions are based upon the acceptance of a certain legal theory? Or is it when the legal conclusions help maintain coherency in the legal order?

In the framework of Hägerström's theory a central principle of legal positivism is its central ontological principle; that all forms of applicable law ultimately are positive in the spatio-temporal sense of the word. According to this understanding law is an object belonging to this world, as well as a human artifact (as an expression of the efforts of the human spirit).<sup>45</sup> From this premise it does however not necessarily follow that Hägerström adheres to a primitive positivistic understanding of law, legal concepts, and legal practice.<sup>46</sup> To Hägerström positive law certainly constitutes the natural point of departure for every jurist, but he neither accepts the will-theory of law's unreflective exclusion of non-statute law from the doctrine of sources, nor the idea that positive law itself constitutes a perfect and complete system of material rules.<sup>47</sup>

## 5 Doctrines of Legal Sources, Positive Law and Valid Law

To Hägerström the reason why only dogmatic jurisprudence is able to produce legally relevant, valid, principles of law, while the other fields of legal science are unable, is closely connected to the judge's legal obligation to decide the case before him through the application of a given set of rules, namely the law of the land.<sup>48</sup> This set of rules, positive law, consists of two main elements, on one hand, legislation (statute law), which has practical predominance in modern states, and, on the other hand, customary law, which includes not only customary law proper, but also judicial practice and legal doctrine.<sup>49</sup>

<sup>45</sup> Hägerström, *Hägerström, Axel*, in *Filosofiskt lexikon*, ed. A. Ahlberg (Stockholm: Natur och kultur, 1925).

<sup>46</sup> For Hägerström's description and analysis of primitive positivism *see e.g.* Hägerström, *Hans Kelsen: Allgemeine Staatslehre*, p. 36-37.

<sup>47</sup> For a fuller account of Hägerström's ideas in this respect *see* Hägerström, *Till frågan om den objektiva rättens begrepp*, p. 1-42 (will-theory), and Hägerström, *Stat och rätt*, p. 1-32 (*Begriffsjurisprudenz*).

<sup>48</sup> Hägerström, *Till frågan om den objektiva rättens begrepp*, p. 16-43, *Hans Kelsen: Allgemeine Staatslehre*, p. 36 and 94, *Das magistratische Ius*, p. 3, *Till frågan om begreppet gällande rätt*, p. 69, and *Begeppet viljeförklaring*, p. 120-128, 135, 138-141 and p. 150-151.

<sup>49</sup> Hägerström, *Till frågan om den objektiva rättens begrepp*, p. 16-25 and p. 31-36, *Hans Kelsen: Allgemeine Staatslehre*, p. 36-37 and 94, *Das magistratische Ius*, 3, *Till frågan om begreppet gällande rätt*, p. 69, and *Begeppet viljeförklaring*, p. 120, 124-128, 135-140 and 150-151. As I have pointed out earlier (*see* section 3.1.1 above) Hägerström does not consider preparatory works and motives to constitute proper legal sources. The reason is that they lack real normative content, insofar as they lack directly applicable material rules. But since jurists nevertheless use them to ascertain the proper meaning of statute law, their proper function must be methodological, formal, rather than material. Consequently, what these texts contain are the means by which the jurist can try to determine the historical legislators

Consequently legal knowledge (scientific or other) not taking both the *content* of positive law as its primary point of departure, and the *application* of the same law as its ultimate goal will produce material that (due to the essentially non-normative nature of the investigated material) at best is of secondary importance to the legal practitioner.

### 5.1 *Normative Understanding of Valid Law*

It is on account of his understanding of the concept valid law that Hägerström exclusively bestows the dogmatic science of law with the authority to create law, in the form of the doctrines of jurisprudence. The reason is Hägerström's normative interpretation of valid law, rather than interpreting it as a question of fact, *i.e.* interpreting it sociologically. According to Hägerström the concept of valid law refers to the legal validity, the legality, of certain acts and to the prescriptive application of a norm (Swe. *normenlig*), but not to the actual use of force or to how the addressees of a norm actually act, *i.e.* the actual execution of the law.<sup>50</sup> Because when it comes to determining the content of valid law, factual reality is of secondary importance to the jurist, because to the jurist valid law primarily constitutes a determination of how a person should or may act in order to comply with the rules of law, and only secondarily a prediction of how a person actually will act.<sup>51</sup>

There are three reasons to why Hägerström's understanding of law excludes legal sociology and all other non-dogmatic legal sciences from the doctrine of sources: 1:o, descriptive sciences such as sociology, and the sociological analysis of law, describe what people actually do and think about law, rather than what they are legally bound to do (and in some instances think) according to law, which is the practical reason why the jurists (whose profession it is to occupy themselves with what people ought to do) must exclude sociological findings from the legally relevant category of normative prescripts.<sup>52</sup> 2:o, sociology's descriptive understanding of law as that which people actually do, implies that it is logically impossible to break the law, since sociology's descriptive view of law necessitates the conclusion that that which people actually do is the whole of the law, and accordingly every act eventually must be regarded as legal. But this understanding of law is in stark contradiction to the normative, dogmatic, understanding of valid law, which on the contrary presupposes that violations of the law constitute a logical possibility, as well as a factual reality of law.<sup>53</sup> 3:o, in the continuation of Hägerström's arguments, the exclusion of legal sociology from the doctrine of sources can be justified by the

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intents with a specific legislative product, a determination that ultimately has practical end, namely the facilitation of statute interpretation, and the facilitation of the application of a material rule of statute law.

<sup>50</sup> Hägerström, *Das magistratische Ius*, p. 2-3, and *Till frågan om begreppet gällande rätt*, p. 52-54, 62-63, 84-85 and 88-91.

<sup>51</sup> Hägerström, *Till frågan om begreppet gällande rätt*, p. 88-91.

<sup>52</sup> Hägerström, *Das magistratische Ius*, p. 2.

<sup>53</sup> *Ibid.*

fact that the doctrine of legal sources itself is normative as well as descriptive, in the same way as customary law, as the doctrine of sources, on one hand, prescribes from whence the jurists shall collect their arguments (a certain body of authoritative texts), on the other hand, describes what major characteristic these arguments must have in order to be of practical use to the jurists (*i.e.* that of normativity), describe what jurists in general do — that is follow the principles to the doctrine of legal sources, and, finally imbue the doctrine (the lawyer's custom) with a sense of necessity (so-called *opinio necessitatis*).

The same line of argument, as that excluding sociology from the doctrine of sources, can be applied *ex analogia* to similarly descriptive sciences such as *e.g.* legal history, legal psychology and legal economics. And if this argument is applied to legal philosophy and legal politics (provided that the latter is considered to be a science at all), then the conclusion must be that these two discourses lack normative meaning to the jurists. For Hägerström's standpoint seems to be that, as surprising as it may seem, legal philosophy and politics are not concerned with positive law as a binding set of norms, but concerned with positive law, on one hand, as an object whose meta-positive validity is subject to analysis, investigation, and determination, and, on the other hand, as an object whose future and ideal, rather than present and real, form and content is subject to discussion.<sup>54</sup> In conclusion, one can discuss whether Hägerström was of the opinion that legal philosophy and legal politics constituted proper sciences of law.

## 5.2 *The Positive Task of Jurisprudence – in Contrast to the Negative Task of Philosophy*

As we have seen above, the fact that jurisprudence (dogmatics) formulates rules of law for the benefit of the judges' determination and application of law gives jurisprudence a positive task in Hägerström's system.<sup>55</sup> In contrast to the practical applications of jurisprudence we have philosophy, which in a Kantian manner has its task defined negatively, whereby by it is reduced to policing and controlling the scientific conduct of the object related sciences (such as law).<sup>56</sup> Legal philosophy is affected accordingly. And since the proper administration of justice itself depends upon the proper application of the rules of positive law, the judge's application of law constitutes an activity that is of central importance not only to the judiciary, but also to the legal order in general.<sup>57</sup> The issue at hand is thus one regarding the methods of how law can, and should, be applied in the most legally satisfactory manner. This is an issue centered on the problems that may arise when the body of jurists tries to interpret, understand, determine, and apply positive law in a uniform and consistent manner.<sup>58</sup> Related issues are for instance those of how these problems best are solved. Are they to be solved

<sup>54</sup> Hägerström, *Stat och rätt*, p. 1-33.

<sup>55</sup> Cf. *e.g.* Hägerström, *Till frågan om begreppet gällande rätt*, p. 65, 84 and 88.

<sup>56</sup> Hägerström, *Begeppet viljeförklaring*, p. 99-100.

<sup>57</sup> Hägerström, *Till frågan om den objektiva rättens begrepp*, p. 16-25.

<sup>58</sup> *Ibid.*, p. 31.

through the creation of complete set of positive rules (e.g. the codifications of the 18<sup>th</sup> and 19<sup>th</sup> century), or solved by means of the *fiction* that positive law *per se* is a complete system of norms covering all possible cases (e.g. Bergbohm's "*umschliessende Hülle*" and Kelsen's version of "*Gesetzpositivismus*"), or solved by means of the methodical application of existing positive law on a given case?

### 5.2.1 The Practical Function of Legal Doctrine

To Hägerström the doctrines of jurisprudence play a crucial role in the interpretation and clarification of (statute) law.<sup>59</sup> The reason is that the doctrines and principles of jurisprudence (in the narrow, dogmatic, sense of the word), if scientifically inferred and deduced, supply the judge with knowledge of not only the linguistic meaning of the law, but also with knowledge of the force, effect, and spirit of the law<sup>60</sup> (the latter in a very narrow context as we shall see later). And it is this combined knowledge that guides the judge in his work, telling the judge how to act (*i.e.* how to apply force and sanctions) in order to comply with the public demands placed upon the judge in his role of a civil servant.<sup>61</sup> Seen from this point of view, legal knowledge constitutes a purely theoretical form of knowledge, and does so on the basis that it supplies the judge with knowledge how he *can* act in order to realize and implement the aims and objectives of the law.<sup>62</sup>

### 5.2.2 Congruence Between Theory and Practice; Scientific Law and Judge Made Law

The theoretical knowledge thus provided (see above) to the judiciary by jurisprudence is analogous to the knowledge of society that the legislator himself must have in order to be able to fulfill his own political aims.<sup>63</sup> The difference between the judge and the legislator is, that while the judge is legally obligated to arrive at a decision, and thereby legally obligated to carry out what the law ordains, the legislator is not.<sup>64</sup> It is thus implied that the judge's and the academic lawyer's knowledge of society cannot be of different nature, neither with respect to type nor quality, than that discussed above. On the contrary, Hägerström argues, from teleological premises, that the judge's and the academic lawyer's knowledge of society is of identical nature and origin, as the two classes of jurists both must comply with the specific social aims and purposes expressed by the legislator through legislation, when ascertaining valid

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<sup>59</sup> *Ibid.*, p. 23-25.

<sup>60</sup> Hägerström, *Till frågan om begreppet gällande rätt*, p. 86-88.

<sup>61</sup> *Ibid.* p. 84-88.

<sup>62</sup> *Ibid.* p. 84-91.

<sup>63</sup> *Ibid.* p. 88. Swe. *syften*.

<sup>64</sup> *Ibid.* p. 85-86.

law.<sup>65</sup> This, the jurist's, compliance to law must be observed in all legal matters. In other words, the actual application as well as the preceding interpretation of law must be performed in compliance with the social aims and purposes expressed by the legislator. The judge is bound to compliance on account of a legal duty.<sup>66</sup> The academic jurist is bound to compliance on account of practical considerations, such as the wish to be of any material value to the judge – practitioner.<sup>67</sup> So, if the academic's texts are to have *any legal relevance* at all to the judge, *i.e.* constitute a source of law (albeit with the *caveat* that academic law does not constitute an objectively binding legal order), then the academic lawyer must apply a teleological method of interpretation when interpreting *positive law*.<sup>68</sup> And if the academic analysis and exposition of law is to be of any practical relevance to the judge at all, then it must be performed with a specific practical aim in mind, namely the aim to determine what valid law ordains; which in turn amounts to the simple determination of the extent to which the application of a specific coercive measure, as prescribed by positive law, can be regarded as legally conclusive or not.<sup>69</sup> Consequently the positive task of the jurists', judges', and legal scholars' legal activities is to determine whether a decision to apply force is legally conclusive or not, and base their actions upon this conclusion.

## 6 Interpretation of Statutes

Statute interpretation is a process through which the jurist ascertains the meaning of positive law, thereby determining the content of valid law.<sup>70</sup> There are, however, a few problems associated with this simple statement of fact. First, one must determine the relationship between positive law and valid law. Is positive law identical to valid law or not? Hägerström's answer is that idea that valid law and positive law are identical with each other is a scientific fiction created by the will-theory of law.<sup>71</sup> According to this fiction, the law is a system of norms constituting a complete, predetermined, and all-embracing positive expression of the legislator's will<sup>72</sup>, accordingly it becomes logical to assume that the legislator's will constitutes the binding principle for statute interpretation. But Hägerström rejects the use of the legislator's will as an authoritative principle of interpretation.<sup>73</sup> The reason appears to be that the formal rules of scientific

<sup>65</sup> Ibid. p. 85-89.

<sup>66</sup> Hägerström, *Das magistratische Ius*, p. 3.

<sup>67</sup> Cf. Hägerström, *Till frågan om begreppet gällande rätt*, p. 86-88.

<sup>68</sup> Ibid. p. 88-91.

<sup>69</sup> Ibid. p. 62-63. *Swe. normenlighet*

<sup>70</sup> Hägerström, *Hans Kelsen: Allgemeine Staatslehre*, p. 36-37.

<sup>71</sup> Hägerström, *Stat och rätt*, p. 20-24, *Till frågan om den objektiva rättens begrepp*, p. 40-41, and 163-168, and *Hans Kelsen: Allgemeine Staatslehre*, p. 20-22 and p. 36-37.

<sup>72</sup> Hägerström, *Stat och rätt*, p. 19-24, *Till frågan om den objektiva rättens begrepp*, p. 16 and 155-157.

<sup>73</sup> Hägerström, *Till frågan om den objektiva rättens begrepp, passim*, and *Är gällande rätt uttryck av vilja?*, in *Rätten och viljan: två uppsatser ånyo utg. av Karl Olivecrona*, ed. K.

reasoning forbid the use of scientific fictions as causal explanations to the existence of various legal facts, such as *e.g.* the validity of law and doctrines of interpretation, accordingly the will-theory's identification of positive law with valid law must be incorrect.

### **6.1 Eliminating Metaphysics from the Doctrine of Statute Interpretation**

In order to be of any help when determining the applicability of positive law, *i.e.* when determining valid law, the interpretation of statutes must take a number of things into consideration. To begin, it is imperative to decide what valid law is. According to Hägerström, as well as the prominent Scandinavian Realist *Alf Ross*, the determination of valid law almost necessarily entails a modification of the positive rules of law (the fixed sources of law), a modification brought about by the actual or hypothetical application of these rules.<sup>74</sup> However, this definition of valid law does not imply that the concept valid law includes the principles of *the common sense of justice, natural law, rational law or objective law* (in a metaphysical sense of the word).<sup>75</sup> Neither does it imply that these principles belong to the material rules of positive law, nor belong to the established principles of interpretation and application. To Hägerström the reason why these principles must be excluded from the class of relevant principles determining valid law is connected their inability to satisfy society's interest and demand of a uniform, predictable, consistent, and objective application of positive law. This inability to fulfill society's needs illuminates two aspects of the study of law, the first methodological (formal), the second material. From the methodological aspect, the mentioned "sources" or "principles" are standards of law that, in relation to the fixed prescripts of positive law, as well as the judge's need to arrive at a decision, are too arbitrary, subjective, and abstract to serve as a helpful standards of interpretation.<sup>76</sup> From the material aspect, these "sources" or "principles" are of rather restricted utility to the jurists. The reason is that according to legal theory they do not constitute fixed sources of (positive) law; according to legal theory they lack a determinable content; have a parallel validity with respect to the sources of positive law; and, finally, pretend to supplement the material rules of law with principles that occasionally contradict the rules of valid law.<sup>77</sup>

An additional argument against the aforementioned "unwritten" sources of law presented by Hägerström is the fact that the positive *telos* of legislation is that legislation shall govern the citizens' line of conduct, and imbue the same citizens with a sense of security, and do so by preventing anarchy and disorder (an end far easier to fulfill with the help of written rules than unwritten).<sup>78</sup> And consequently it is by tacit reference to the meta-juridical nature of the

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Olivecrona (Lund: Gleerup, 1961), *passim*.

<sup>74</sup> Hägerström, *Till frågan om begreppet gällande rätt*, p. 61-64, and 86-90.

<sup>75</sup> *Ibid.* p. 86-87.

<sup>76</sup> Hägerström, *Stat och rätt*, p. 144-147, and *Till frågan om begreppet gällande rätt*, p. 86-87.

<sup>77</sup> Hägerström, *Till frågan om begreppet gällande rätt*, p. 86-87.

<sup>78</sup> *Ibid.* p. 86-89.



aforementioned quasi-legal sources and principles that Hägerström excludes them from not only the class of valid legal sources, but also from the class of valid methodological principles.<sup>79</sup>

## 6.2 *The Positive Purpose of Law and the Interpretation of Statutes*

As pointed out earlier, at an abstract level the purpose of the law is to direct the behavior of the citizens via the courts' application and implementation of the law, which is a purpose requiring that the application of law itself must be predictable and consistent.<sup>80</sup> And it these purposes and requirements that in turn have a direct determining influence upon the final formulation of Hägerström's doctrine of interpretation. (For the case of simplicity I now restrict my investigation to the issue of statute interpretation.) The reason is: if these *purposes* are to be upheld, then it becomes necessary to model the doctrine of interpretation in a teleological fashion. For only an interpretation adapted to the purposes of the statute can fulfill the aforementioned requirements, and accordingly the scope of statute interpretation must be broadened beyond the merely grammatical and literal.<sup>81</sup>

If the scope of statute interpretation is broadened in the teleological, or purpose-driven, manner suggested above, then a few problems must be dealt with. First, in order to maintain its objectivity, *i.e.* literalism, the interpretative process must avoid straying to far from the objective meaning of the word itself. Second, the purpose of *telos* of the norm must be determined in a fairly unambiguous manner.

### 6.2.1 Subjective or Objective Teleology?

To start out, it can be asserted that the process of broadening the scope of interpretation to embrace teleological considerations can be conducted in two principal manners. The first is retrospective, historical in the true meaning of the word, and aimed at uncovering the concrete intentions of the historical legislator (so-called subjective interpretation).<sup>82</sup> The second is prospective, non-historical, aimed at discovering the truly abstract objective *telos* of the norm (so-called objective interpretation).<sup>83</sup> Regardless of which method of interpretation the interpreter chooses the interpreter must avoid committing either of two errors: a) the error of assuming that the interpreter's and the legislator's evaluations of the interests of society are identical and correspond to each other<sup>84</sup>; b) the error of

<sup>79</sup> See Hägerström, *Stat och rätt*, p. 144-147, and *Till frågan om begreppet gällande rätt*, 86-89.

<sup>80</sup> Hägerström, *Till frågan om begreppet gällande rätt*, p. 86-88, *Om svikligt förtigande såsom straffbart efter 22:1 SL.*, Svensk juristtidning (SvJt) 24 (1939) p. 325-326.

<sup>81</sup> Hägerström, *Till frågan om begreppet gällande rätt*, p. 86-88.

<sup>82</sup> See *e.g.* Hägerström, *Till frågan om den objektiva rättens begrepp*, p. 17.

<sup>83</sup> *Ibid.*, p. 18.

<sup>84</sup> *Ibid.* p. 16-25, Hägerström, *Om svikligt förtigande såsom straffbart efter 22:1 SL.*, p. 326, and *Är gällande rätt uttryck av vilja?*, p. 82-83.

taking the interpretative enterprise to either of two extremes, first that of attempting to uncover the exact intentions of the historical legislator, second that of attempting to discover the truly abstract *telos* of the law in the form of objective justice.<sup>85</sup> If one continues Hägerström's line of argument the problem with the second type of error is that such interpretations, due to historicism, or abstract universality, fail to identify contemporary problems as well as fail to provide these problems with practical solutions. It is thus safe to argue that the interpreter's task is complicated by methodological perils. What appears to be a fairly straightforward process turns out to be strewn with every kind of alluring short cut, detour and pitfall. And the interpreter must, just as Ulysses, negotiate a clear passage between *Scylla* and *Charybdis*, survive the arbitrary whims of the *deus ex machina*, and turn a deaf ear to the alluring notes of the sirens' songs. In other words, the interpreter must avoid rigid literal and grammatical interpretation with out steering into historical subjective teleology, and, finally, avoid subjectivism, in the guise of natural law and so-called objective justice.

### 6.3 *Interpretation According to the Spirit of the Law*

#### 6.3.1 Social Legitimacy and Formal Authority

As I have indicated earlier, Hägerström is of the not too unorthodox opinion that strict a literal interpretation of a statute only leads to partial success.<sup>86</sup> Trade and social production do in fact require that the aims, effects, and purposes of the law in question, as well as the interests that the law is intended to safeguard must be allowed to exert a decisive influence on the activities of the courts. Hägerström argues that the opposite attitude, namely the attitude that the activities of the courts shall be performed in a social vacuum guided only by the court's strict adherence to the exact letter of the law, eventually will result in an application of the law that, when compared to the demands that society places upon the judiciary's application of the law, in many cases appears to be unbalanced, and thus erratic and idiosyncratic.<sup>87</sup> On the basis of this observation one can infer that there exists a social and public demand that the spirit of the laws shall guide the authorities' application of the law.<sup>88</sup> And provided that this is the case, then we have a methodological alternative (objective teleology) deriving its external authority and legitimacy from a social and public demand that the application of law itself shall be consistent and predictable, which traditionally, on account of its internal authority, is forwarded as a dogmatic (systematic and formal) demand — the anti-thesis of a social and public demand.

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<sup>85</sup> See e.g. Hägerström, *Är gällande rätt uttryck av vilja?*, p. 82-86. Here Hägerström sharply criticizes the Danish legal scholar *Carl Goos* for his overly objectivistic theory of interpretation.

<sup>86</sup> Hägerström, *Till frågan om begreppet gällande rätt*, p. 86, and *Om svikligt förtigande såsom straffbart efter 22:1 SL.*, p. 325-326.

<sup>87</sup> Hägerström, *Till frågan om begreppet gällande rätt*, p. 86.

<sup>88</sup> *Ibid.* p. 86-88, Hägerström, *Om svikligt förtigande såsom straffbart efter 22:1 SL.*, p. 325-326 and p. 331-334.

In other words, in the teleological method the public and the dogmatic demands on the application of law coincide.

### 6.3.2 Congruency Between Law and Society

So by sake of argument, if one assumes that the law is intended to be applied as generally, predictable and practically as possible, it becomes self-evident why the results of logically closed methods of interpretation will tend to be regarded as one-sided, unbalanced, and unsatisfactory<sup>89</sup>, or what according to the teleological method must be characterized as counter-teleological, counter-productive, and unpredictable results. And it is in order to avoid such results and to arrive at socially as well as systematically acceptable results that the jurist is authorized to, if not under obligation to, stray from the exact phraseology of the statute. The jurists have two principal ways for the jurist to perform this operation; the first is extensive (*i.e.* through an extensive interpretation of the statute or through an analogous application of the statute), the second extensive (*i.e.* either through a restrictive interpretation of the statute or through an *e contrario* interpretation and application of the statute).<sup>90</sup> But in either case the interpretation of law must, in order to avoid a counter-teleological application of the statute, be performed with the indented as well as anticipated effects of the law kept in mind.<sup>91</sup>

### 6.3.3 Methodological Conditions and Restrictions

It must be added that the teleological method's breach of the literal method of interpretation's logical isolation in way implies that the interpretative process is open to pure methodological subjectivity/arbitrariness. On the contrary the teleological method neither absolves the jurists from their fealty to the legislator, nor from their deference to the positively expressed intentions of the historical legislator (this is especially the case when the literal and grammatical interpretation leads to ambiguous and vague results, whereby the jurists are forced to find an alternative mean to eliminate such factors from their findings).<sup>92</sup> Accordingly the judge is authorized to transgress the strictly linguistic boundaries of the statute when need arises. But such need only arises on the condition that the literal interpretation of the statute leaves the scope of the statute too narrow to be satisfyingly applied (a so-called legal loophole), or

<sup>89</sup> Hägerström, *Till frågan om den objektiva rättens begrepp*, p. 16-25, *Till frågan om begreppet gällande rätt*, p. 86-89, and *Om svikligt förtigande såsom straffbart efter 22:1 SL.*, p. 325-326.

<sup>90</sup> Hägerström, *Till frågan om den objektiva rättens begrepp*, p. 16-25, *Till frågan om begreppet gällande rätt*, p. 86-87, and *Om svikligt förtigande såsom straffbart efter 22:1 SL.*, p. 325-326 and p. 331-334.

<sup>91</sup> Hägerström, *Om svikligt förtigande såsom straffbart efter 22:1 SL.*, p. 325-326 and p. 331-335.

<sup>92</sup> Hägerström, *Till frågan om den objektiva rättens begrepp*, p. 16-25, and *Till frågan om begreppet gällande rätt*, p. 86-89.

when the literal application of the statute leads to unjust results, or that the statute itself is deemed to be obsolete in one way or another (either formally, systematically or materially), or when that the statutes themselves contain loopholes caused by oversight or other editorial errors.<sup>93</sup> Once again we find that social and public, pragmatic, demands coincide with the dogmatic ideal of systemic completeness.<sup>94</sup>

However, it is important to keep in mind that the factor ultimately deciding whether a legal loophole, risk of an unjust application, obsolescence or a legislative error is at hand or not, always is, and always must be, external with respect to the actual prescripts of positive law (which is due to the fact that the rules of law themselves state exactly what they state and nothing more). Positive law *per se* cannot be flawed in any of the aforementioned ways — barring the exception that the material rules patently contradict each other. So it is only if a teleological perspective is introduced into the processes of interpretation and application of positive law that those issues regarding the (in)justice of the literal method of interpretation and application, as well as those issues concerning the flaws of positive law itself can be addressed, illuminated, and elucidated in a systemic way. The reason is that the introduction of teleological considerations provides the analysis of law with a positive standard of comparison (a standard derived from real facts, such as existing social and public demands made on the legal order). The difference between the non-teleological approach (that of the will-theory) and the teleological approach is that while the former believes that the standard that the law, its interpretation, and application shall measure up to is intrinsic to law *per se* and, in theory, can be decided *a priori* (in a social vacuum by reference to the fictional will of the legislator, state or legal order), the latter sets a standard that law etc can be compared to *a posteriori* (namely the *telos* of the law, as decided through an analysis of the law itself and society).

In any case it is only possible to uphold the objective aims and purposes of the laws in question, if the judge respects the letter of the law or statute (provided that the meaning of the statute is unambiguous) and only departs from the letter of the law when and if he is sure that the legislator would have passed another statute, *if* the legislator had known what the judge knows.<sup>95</sup> This means that the proper determination of the law's *telos* is restricted to the specific *telos* that is ascertained through an interpretation and analysis of the norm or statute itself.<sup>96</sup> But Hägerström is not explicit on the exact method how this *telos* is to be ascertained, which, on the other hand, his pupil the professor of procedural law *Per-Olof Ekelöf* is, and Hägerström's theory thus leaves us without any definite answer to how this goal can be determined.<sup>97</sup> All that Hägerström writes

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<sup>93</sup> Hägerström, *Till frågan om den objektiva rättens begrepp*, p. 155, *Till frågan om begreppet gällande rätt*, p. 87-88, and *Om svikligt förtigande såsom straffbart efter 22:1 SL.*, p. 325-326.

<sup>94</sup> Hägerström, *Till frågan om den objektiva rättens begrepp*, p. 20-25.

<sup>95</sup> Hägerström, *Till frågan om begreppet gällande rätt*, p. 86-88.

<sup>96</sup> Hägerström, *Till frågan om den objektiva rättens begrepp*, p. 18-19, and *Till frågan om begreppet gällande rätt*, p. 86-88.

<sup>97</sup> See Ekelöf, *Ett stycke vetenskapshistoria*, in *Valda skrifter 1942-1990*, ed. P. H. Lindblom, *De lege*, 1(1991) (Uppsala: Iustus, 1991), p. 79. Here Ekelöf describes how he was

on this subject can be summed up as follows: The methodological principle of teleology implies that the jurist's freedom of interpretation, even if freed from the fetters of logico-grammatical interpretation, is restricted. The jurist must adhere to the formal rules of legal argumentation and method and apply the law in a manner that is in correspondence with the material content of positive law.<sup>98</sup> But when interpreting the law the judge must use those specific social ends that the statutes themselves actually express and are aimed at resolving as his first teleological premises and principles of argumentation, and do so without erring into so-called objective justice (which neither has objective reality nor objective existence and thus is nothing more than arbitrariness hidden behind scholastic arguments).<sup>99</sup> So in order to reduce the subjective element detectable in all interpretative activities the jurist must restrict his range of arguments to only include arguments that are formally as well as materially objective/conclusive.<sup>100</sup> That is to say, the assumed *telos* (purpose or value) of the investigated norm must be possible to infer from the norm itself, rather than from some other source. It is therefore imperative that the jurist objectively tries to determine what the spirit of the law in the specific case is (in other words what good the law in question is supposed to uphold and protect) before he proceeds with the application of the norm.

## 7 Summary and Conclusions

To Hägerström legal positivism does not restrict law as a system to any greater extent than to a certain group of rules given in a non-metaphysical spatio-temporal context. Hägerström's understanding of legal positivism thus allows a pluralistic doctrine of legal sources (provided that the sources in question satisfy his ontological requirements) as well as a pluralistic doctrine of methodology (provided that the included methods satisfy his epistemological requirements). Accordingly Hägerström's outline of a teleological method of statute

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introduced to teleological and realistic reasoning by Hägerström's emphasis that the study of law was far more serious than an abstract game — a so-called *Glasperlenspiel* —, an intellectual play with legal terminology and abstract principles. But it was *Ekelöf* who developed the teleological method further. And his attempt to solution, is based upon the argument that the method for determining the *telos* of a statute must be based on the formulation of a case that clearly falls within the meaning of the statute, the so-called easy case. A case whose meaning *Ekelöf* assumes is in correspondence to the proper purpose of the statute in question, and on the basis of this assumption *Ekelöf* concludes that this specific purpose in turn shall constitute a principle of interpretation when deciding the hard cases. *Ekelöf*, *Den teleologiska metoden* (from *Rättegång I*, 1990), in *Valda skrifter 1942-1990*, ed. P. H. Lindblom, *De lege*, 1(1991) (Uppsala: Iustus, 1991), p. 170-184.

<sup>98</sup> See e.g. Hägerström, *Om svikligt förtigande såsom straffbart efter 22:1 SL.*, Here Hägerström sharply criticizes those forms of legal theory and jurisprudence allowing the interpretation and exegesis of positive penal law to deviate from its most basic prescript, the principle of *nulla poena sine lege*, in order to *ex analogia* criminalize an act of omission as if it were a crime requiring some degree of activity from the supposed delinquent's side.

<sup>99</sup> Hägerström, *Till frågan om begreppet gällande rätt*, p. 87.

<sup>100</sup> Hägerström, *Till frågan om den objektiva rättens begrepp*, p. 25-36.

interpretation, despite its logical openness, neither contradicts the principles of legal positivism, nor Hägerström's general scientific theory, or legal theory.

My initial suggestion, that Hägerström's outline of a teleological method of statute interpretation might contradict his general principles of legal science and be enigmatic and incongruent, is only possible to substantiate if the will-theory of law itself is valid; which in turn requires that positive law and valid law are identical with each other; that positive law in itself constitutes a perfect system of law (filled with gaps); that interpretation and application are logically closed activities, rather than logically open activities; that legal positivism is interpreted in a strict and closed grammatical-logical manner (akin to *Hans Kelsen's* ideas of law, its interpretation, and application); and finally, that the systematically closed deductive method of the so-called *Begriffsjurisprudenz* constitutes the prevailing standard of legal methodology. *Cf.* Hart's description of legal positivism in section 2 *supra*. But Hägerström refutes the validity of the aforementioned legal theories, and gives legal positivism a slightly different meaning. Hägerström argues that legal positivism is a legal theory concerning itself with the determination of the legally correct use of force, to be more precise, the determination of whether the authorities use of force corresponds to the rules positive law or not, but not a theory concerning itself with the intrinsic congruency and perfection of the system of positive law *per se*. Moreover Hägerström argues that social and public demands must be allowed to have an effect on the definition, determination, and application of law. And on the basis of these observations Hägerström infers that the correct interpretation and application of law must be perceived as a logically open process rather than a logically closed process.

So rather than experimenting with circumstantial constructions attempting to base the entirety of the law on one sole principle (be it the legislator's will, or the identity between positive law and valid law, or the idea of a perfect and logically closed system of positive law lacking gaps) Hägerström contends that interpretation and application are logically open activities; that the concept of valid law and the of concept positive law are different concepts; and, that positive law itself is a system full of gaps, loopholes and imperfections. However, these weaknesses can be rectified by an application of the legal method itself, rather than by reference to a set of pre-existent but not yet manifest objective standards of positive law. Once these facts are emphasized, Hägerström's teleological method ceases to be inconsistent with the principles of legal positivism. On the contrary, it is possible to argue that the teleological method simplifies, rather than complicates, legal argumentation, as well as emphasizes what society expects the jurists and the legal order to do, namely to give objective accounts of valid law and to apply the law in an objective, consistent, predictable and socially acceptable manner.

This is a description of what the teleological method should achieve that reflects the perennial issue of jurisprudence, that of justice. Is justice formal or material? Can society's expectations on the jurist and the legal order ever become fully satisfied? The problem is that society's expectations and demands of the jurists and legal order are not fully consistent. For objectivity, consistency, and predictability are categories that the jurists and the legal order perceive as purely formal, legal, categories, while social acceptance is perceived as extra-

legal category. To the scientific study of law the problem is that these categories express themselves as demands made on the legal order to act in one direction or another, directions that may coincide on an abstract level, but on a concrete level they tend to diverge from each other. And on account of this intrinsic conflict between legal and extra-legal categories the system of law becomes full of tensions, tensions that carry over to the legal method; for while the formally objective, consistent, and predictable legal finding or conclusion, will appeal to the juristic sense of justice, it quite will often offend the public sense of justice and vice versa. And it is this conflict that the legal order must resolve, and do so with Solomonic discretion.

Hägerström's teleological method constitutes a method allowing realism and realistic arguments, in the form of social and public demands as well as arguments answering to these demands, to openly influence statute interpretation. The method does so by dispelling the fiction that legal interpretation, application and jurisprudence constitute logically closed legal activities. And the method does so by opening interpretation and application to the inclusion of those specific realistic (i.e. public and social) arguments that can be found in the rules of law themselves, such as e.g. the demands of trade, social production, and general welfare and safety, in short the good of society, rather than letting the interpretation and application of law be governed by unrealistic fictitious jurisprudential constructions.

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