Law as Fact

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Law as Fact

Based on a non-cognitivist meta-ethical position and an anti-subjectivist concept of “reality”, Hägerström questioned the pretension of traditional legal theory, especially legal positivism, to be a science of law, because the entities to which it refers are not real. Olivecrona succeeded in pursuing such a thesis while he tempered it. Taking a socio-psychological approach, he offered a realistic theory of law which is able to emphasize psychical and linguistic phenomena lying at the root of our ideas of rights and duties, which determine what functions they serve in society and how they affect our conduct.

Keywords: independent imperatives, social behaviour, rights, duty, meta-ethics, norm, legal science, epistemology, Hägerstöm, Lundstedt, Olivecrona, Ross

The title of my paper connects up immediately with Karl Olivecrona and his work Law as Fact. The second edition of it, dating to 1971, brings Olivecrona’s reflection on law to a conclusion and, more important, constitutes the most successful attempt at working out a systematic theory of law from a realist point of view.

As Olivecrona himself points out in a recently published memoir, the starting point of his reflection on the problems of legal theory was Axel Hägerström, the “venerated and beloved master”. Olivecrona feels indebted to him because he inspired an approach to legal studies, in a way that “would not have been possible without the basis provided by his speculative thinking”. In the words of Olivecrona,

Hägerström had shattered the old conceptual framework but did little to replace it with something new; in contrast, Lundstedt thought that, with his theory of social welfare, he had grounded the scientific study of law on a new foundation. But this theory [ – Olivecrona says – ] convinced me only so much, and in addition didn’t take on the problems I was concerned with. I needed to know in the first place what in effect legal norms are: Hägerström had shown that they cannot be defined as the commands of a supreme authority or as declarations of its will; how, then, was a legal norm to be defined?

Thus, to address the question what the Scandinavian realists understand the law to be, we will follow the lead of Olivecrona and turn in the first instance to the fountainhead of Scandinavian realism, Hägerström. His research – encompassing religion, morals, psychology, political science, and legal philosophy – is
notably framed by the so-called “reality thesis” (worked out beginning with *Das Prinzip der Wissenschaft*, Uppsala, 1908). Briefly stated, this thesis, set against epistemological subjectivism, and the idealist philosophy it characterizes, consists in affirming the dualism of subject and object and in the appreciation that in the cognitive act the cognizing subjects come in contact with an object, a reality other than themselves, and not with a change occurring in their conscience.

In Hägerström’s opinion, when we follow through on the subjectivist stance we stumble into a contradiction as follows: if, as the subjectivists claim, all objects are known by representation, knowledge will consist in coming to know a state of consciousness, but then these states themselves will be known only by representation, and so on without end. We fall into a vicious circle, and the subjectivists attempt to wriggle out of it by assuming that we perceive our states of consciousness instanter, without mediation. But here, by the admission that the subjects can come in contact with something other than themselves (their states of consciousness), we have already leaped from the subject to the object, for which reason every cognitive act can be said to effect a linkup between the subject and the object, whether this object is a state of consciousness or any other thing. By the acknowledgement that the conscience necessarily enters into a relation with something other than itself (with objects), and that what is immediately known is not the conscience, but reality itself, the Copernican counterrevolution is brought to completion. Hägerström sets it opposite to Kant’s Copernican revolution and says that, following this last, several philosophers began to understand reality as a product of the very act of thinking. By gainsaying subjectivism, Hägerström lays the groundwork for a new concept of reality. We can say what reality is only by invoking the principle of non-contradiction, the foundation not only of thought, but of reality itself. On this principle, reality consists in what is determinate, or identical with itself. For it would be absurd to aver that we know an $x$ which is indeterminate and not identical with itself: determinacy and self-identity are what make something an object, distinguish it from other objects, and make it a possible object of cognitive activity. At the same time, all that is determinate must of necessity belong to a wider context, next to which there cannot be another: this wider context is the space–time dimension.

Hägerström maps out this context proceeding from some Cartesian and Kantian echoes: the conscious subject will take cognizance of his own existence and will become distinct from others only by the determinate point he occupies in space and time. Thus, if individual conscious beings belong to the world of sensory experience, and if the space–time context is the condition without which they cannot exist and think, then all other contexts will have to be understood relative to the context of space and time, and will cease to be determinate if they turn out to be inconsistent with it.
In summary, the reality thesis can be said to emerge from three defining points as follows: what is real is determinate, namely, identical with itself and not contradictory; there is a context of reality beyond which no other contexts are conceivable; this context is the space–time context.

Proceeding upon these premises, Hägerström stages in all fields – philosophical, moral, and juridical – an attack against metaphysics, which in his opinion is chiefly founded on subjectivism and is consequent upon it. It was Hägerström’s intention to wage battle against metaphysics not only in its most explicit form, in philosophical systems of various kinds, but also in the forms it takes in non-systematic as well as scientific thought, wherein Hägerström understands metaphysics to be any combination of words whose epistemological status cannot be determined with certainty by the person who pronounces those words.

This commitment against metaphysics – which Hägerström encapsulates in the dictum praeterea censeo metaphysicam esse delendam – is meant, in the words of Hägerström, to “cut through the fog of words that are born by feelings and associations, and so proceed from sounds to things”.

Hägerström transfers the reality thesis to the study of morals and law and applies it here for an accurate restatement of the concepts occurring in these fields: these concepts are parsed and disarticulated in an effort to match them to corresponding facts.

In the scheme of Hägerström’s ontology, values, duties, and rights are unreal, on a par with contradictory concepts (e.g., the square circle) and with purely spiritual entities (e.g., God).

On Hägerström’s view, values are no more than the expression of a pleasing or displeasing feeling the subject feels in association with the idea of an object. If we as subjects were indifferent to the world around us, objects would empty of all valence, such that we could continue to consider them as objects of knowledge, but could no longer judge them to be good or bad: “good” and “bad” cannot convey meaning to us when attributed to an object if not insofar as that object elicits pleasure or displeasure in us. Value is not a quality appertaining to an object, because the notion of value proves devoid of meaning without an attendant feeling of pleasure or displeasure. Value can partake of any reality only as the content of an emotive experience, but this experience concerns only the subject from the inside and cannot be placed in the space–time context.

Otherwise stated, the words “good” and “bad”, and kindred expressions of value, do not indicate a quality of objects, but an emotive or, better yet, an emotional reaction of the subject.

It follows from this that value judgments are not judgments proper, with which we affirm or deny something about reality, but are rather pseudo-judgments, such as can be neither true nor false.
Proceeding upon the premise that only what is real, in the sense of belonging directly to the space–time context, can be an object of knowledge, and that only what can be an object of knowledge can be an object of scientific research, Hägerström denies moral philosophy the status of a science. He does so on the grounds that the sentences used in moral philosophy are noncognitive sentences, for they pertain to values and these last are not real entities. A moral science is possible not as a science of morals, but as a science about morals. If moral philosophy is to attain a scientific standing, it will have to shift its focus, and undertake to provide psychological, anthropological, and sociological descriptions and accounts of moral evaluations as they factually exist or have existed in determinate cultures, and among determinate peoples, in space and time.

It is Hägerström’s view that the line of reasoning applicable to values holds true for the ought as well. If, when faced with an ought, we take up the attitude of mere spectators before ourselves, and probe inside, we will discover only a sentiment of dutifulness arising in connection with a certain action: that is, we will observe a constructive impulse to act upon the idea of a given behavior.

We will therefore discover a string of psychological events, but not the ought itself.

To expand on this point, Hägerström compares the state of mind of the person feeling a sense of duty with the state of mind of the person receiving a command.

A fundamental difference intervenes between the two situations: when a command is issued, there is an actual relationship between the command-giver and the command-taker that does not exist in the case of duty; again, a feeling of constriction or bindingness arises in the addressee faced with duty and commands alike, but with the sense of duty this feeling assumes the guise of an objective quality inherent in the action. This different perception occurs, according to Hägerström, when the commands undergo a transformation process and become impersonal. From very early on in life, we become subject to a copious flow of commands and prohibitions issued by parents, teachers, society, religious authority, and so on. In other words, a certain degree of joint action occurs in society with different authorities prohibiting or commanding roughly the same actions. From this emerges the idea of a system of kinds of conduct, positive or negative, that must be engaged in for their own sake, in that they seem to possess a binding force of their own, a sort of objective quality – which is precisely the ought – integral to the same actions.

Like value judgments, sentences about duty appear in the form of judgments, and like all true judgments they seem to presuppose the reality of what the judgment is about, but the words duty and value say nothing when they figure as predicates of judgments. The sentence “This is my duty” is not a judgment proper: it is a pseudo-judgment, because what it rests upon is not a real
quality or entity called “duty”, but an association between a feeling of constric-
tion experienced by the subject speaking these words and the idea of a certain 
action.

This analysis of duty bears a logical connection with the analysis which 
Hägerström conducts on the idea of a right, even if the discussion here is more 
fragmentary.

When we speak of the right to property, Hägerström says by way of example, 
we believe we are using an expression whose meaning is plain for all to see: even 
children at play contending for a toy seem to be perfectly aware that one thing 
belongs to one child and the other to another; but if we attempt to determine 
the facts, and so the reality answering to this right, we will run into considerable 
trouble. When someone has a right of property over something, the real datum 
answering to that right would seem to be the fact that the state uses its power to 
guarantee a certain protection. But on a closer analysis it will turn out that the 
state's protection never proves equal to the idea of the right to property, because 
what the state actually does is merely to offer a possibility for property-owners 
to claim what they have been dispossessed of, whereas property seems to us 
to be a right to the thing itself, and so a right not to have that thing abstracted 
from us by anyone, and this stronger guarantee no state can make good.

In reality Hägerström fashions the idea of a right into the idea of a duty: a 
right is our right to have others do their duty. From this it follows, in the same 
way as with duty, that we cannot pinpoint the reality answering to the idea of a 
right.

Consistently with the critical analysis just outlined, Hägerström questions 
the pretension of traditional legal theory, especially legal positivism, to be a sci-
ence of law, since the rights and duties which it refers to as objective entities 
have actually no traffic with reality.

The impact of Hägerström's criticism on the theory and science of law – 
recall that Hägerström trained and worked, not as a jurist, but as a philoso-
pher – was mainly to be had through the works of his jurist students, namely, 
Vilhelm Lundstedt, Alf Ross, and foremost Karl Olivecrona. Even so, some lines 
of research for a scientific grasp of legal concepts were pursued by Hägerström 
himself, and others still trace to his reality thesis as well as to the conclusions 
he reached on moral philosophy. As noted, on the one hand Hägerström sub-
scribes to the thesis whereby only what belongs to the space–time context can 
be an object of knowledge, and on the other hand he comes to the conclusion 
by which a moral science is possible only as a science about morals, meaning 
a science that sets out to provide psychological, sociological, and historical ac-
counts of the moral evaluations of single individuals and peoples specified in 
time and space.
Accordingly, anyone looking to inquire scientifically into the law can do so, not in the manner of traditional legal science, which conceives of rights and duties as objective entities, but taking different angles: for example, he can enter into a historical investigation, aimed at tracing the origin of different ideas of rights and duties (this is the avenue that Hägerström in particular followed: in his monumental inquiry into the concept of obligation in ancient Roman law as well as his essays on ancient Greek law and natural law); or we can take a sociopsychological approach, and hence seek out the psychical and linguistic phenomena lying at the root of our ideas of rights and duties and determine what functions they serve in society and how they affect our conduct (this avenue was followed in particular by Olivecrona, who by his own admission developed some suggestions of Hägerström’s and built on the results reached by Hägerström to work out a realist theory of law).

The critical part of Olivecrona’s theory rests on the same arguments that Hägerström lines out in his polemic against voluntarism, which Hägerström considers the foundation of legal positivism in particular. The keynote of Olivecrona’s arguments is that there can be no lawgiving authority independent of the legal system, and so anterior to law itself.

If de facto power is said to constitute the source of law (Bentham and Austin, for example, hold with this view, since they make out the law to be the expressions of will of those who wield actual power in society), Olivecrona will retort that no power can function unless it is organized, and “organization implies /…/ that there is a set of rules which the members of the organization feel bound to follow and actually follow more or less consistently”: that is, power requires “law”. Hence, Olivecrona concludes, the legal system stands as the antecedent and condition without which the lawmaker’s work would prove ineffectual.

Olivecrona comes at similar conclusions with regard to those conceptions under which the source of law lies in the state and the people. The state, like all other organizations, presupposes the law, a claim supported by the consideration that “the state makes its appearance in history much later than the law” (customary law, Olivecrona points out by way of example, took shape long before statutory law ever came into existence). Similarly, the people lay down the law through their representatives, but no such representatives can exist without an organization, that is, without rules, or law. Plainly, there does not exist a lawgiving authority independent of law and prior to it, the law cannot be considered the set of any authority’s commands or of its declarations of will. Further, the voluntaristic theory views norms by and large as commands, but – Olivecrona argues, again developing some intuitions of Hägerström’s – commands always require a face-to-face relationship between two subjects, and this relationship simply does not exist in the case of legal norms.
By no stretch of the imagination can the lawmaker be thought to fancy that all the norms in force are the issue of his commands: these norms were in force before the lawmaker took office and will continue to be in force even after he dies; nor does the lawmaker know the content of all norms in force at any one time. So who is it that actually commands? Apparently no one.

Further, in the case of norms, not only the issuers, but also the addressees of commands cannot clearly be determined, because it is in the very nature of norms to be general, meaning that norms turn to a generality of persons. The imperative form of norms is what misleads the voluntaristic theory into believing that all law is command, but the imperative form does not attach to commands only. According to Olivecrona, several statements (or signs, taking the broader view) that are meant to influence behavior occur in the imperative form and yet do not carry with them the direct relationship distinctive to commands. Olivecrona uses the expression independent imperatives to indicate the medley of signs that serve a directive function (of prohibition or permission) without entailing a person-to-person relationship.

The power of suggestion that independent imperatives share in stems from a preexisting attitude of respect for certain conventions: the independent imperative is a sort of abstract command that, given certain circumstances, takes effect automatically in the individual’s conscience as forged in certain ways by education and social conditioning.

One chief element accounting for the power of independent imperatives to influence behavior is the sense of objective duty that comes to form gradually within us. True enough, the word duty does not correspond to any concrete thing (Olivecrona follows Hägerström on this point too), but our belief in the existence of duty as an objective entity – as a real quality of certain behaviors – has become a key psychological mechanism enabling norms to function and society to endure.

To conclude, for the critical part of his theory, Olivecrona takes his cue from Hägerström and proceeds upon two main assumptions: first, there exists no lawgiving authority independent of a legal structure and organization; second, legal norms are not commands.

The constructive part of Olivecrona’s theory is, by his very account, “not intended to be anything more than a description and an analysis of facts”.

But Law as Fact is actually most innovative in just this part, for it is here that Olivecrona attempts a solution to the question which Hägerström leaves unanswered; namely, as Olivecrona says in his memoir, “if norms cannot be defined as the commands of a supreme authority, what then are they?”.

Olivecrona understands norms to be imaginary representations of actions and situations; specifically, norms are representations of actions the lawmaker
wants to see people (citizens or judges) perform whenever certain conditions occur: they are patterns of behavior.

Laws owe their efficacy to the “people’s general sense of reverence for the constitution and their settled habit of obedience to it”. Among all peoples there exists a complex of ideas about the procedures by which certain persons take the highest offices (as heads of state, ministers, members of parliament, etc.) and about the ways the persons holding these offices are to perform certain activities.

This attitude is such that when the officials use certain formalities, the citizenry will behave in certain ways in consequence. The addressees of these norms are already primed to act in certain ways: it suffices to tell them which way and they will do so, provided this request takes the appropriate forms, meaning the forms set forth in the constitution.

Using the formalities set forth in the constitution produces the effects described, this because the judges and the citizens have a predisposition to revere and hold by the constitution. To explain the origin of our deference to the constitution we can trace one constitution to the one that came before it historically, but in order not to lapse into an endless process, we will have to take up the problem how the very first constitution arose, which is none other than the problem, framed from a historical perspective, of accounting for the way the law comes to have a binding force.

To this end, Olivecrona draws on the Romanist studies done by Hägerström, and by Italian historians of Roman law like De Francisci and Orestano, to trace the origin of this reverence back to the magical–religious experiences that developed in archaic Rome, when no distinction marked off fas from jus, religious law from juridical law. The people lived in a religious setting: each act and each behavior was imbued with sacredness and was experienced as having a supernatural meaning which would advance well beyond the compass of the practical end the act or behavior in question was intended to achieve. This way, the meaning of certain acts and behaviors came to take on a cachet of objective dutifulness, a sense of bindingness that coincides with the notion of “normativeness”.

The mystique has waned and vanished, but the binding force has remained in place through the conditioning process set in motion by the heavy psychological pressure the legal machine exerts.

Olivecrona compares the lawmaking mechanism to a power plant exploiting the flow of a watercourse. The plant transforms into electric current the power of running water and distributes to the environing territory the energy so generated. The single power lines stand for the single laws enacted under the constitution: each lawmaking act corresponds to the derivation of a new power line from the hydroelectric plant.
The various laws enacted are the means wherewith people are brought to rein in dangerous elements, maintain a certain division of property, look after the elderly and the sick, educate the youth, and suchlike.

Thus the ability to make laws with practical effect results from the general attitude among the population with regard to the constitution, this attitude being the immediate source of the law-making ‘power’ of the legislators. They are in a position to invest a text with the quality of law, in the eye of the public; when it has become a law, it belongs to a great body of rules commanding universal respect.

Having defined the notion of a norm and accounted for its binding force, Olivecrona turns to the function that norms serve in society. As noted, Olivecrona understands norms to be imperative representations of actions and situations, where the imperative form is such that the norms can exert influence on behaviors. Thus, on this view, legal language is directive language. In this language words are used, such as duty or right, that have no semantic referent, in that there exists no phenomenon in space and time answering to such words.

Hägerström explains the origin of such notions by relating them to magical and psychological phenomena, and Lundstedt, the most radical of the Scandinavian realists, suggests that we rid ourselves of them altogether, or else enclose them in quotation marks to underscore their instrumental use. More to the point – in Legal Thinking Revised, one Lundstedt’s best-known works – we find it stated that we should be enjoined from using such words as right, duty, and obligation even as expressive means or labels, if we are aiming for a scientifically sound terminology, but because it will prove impossible to uproot these words from current terminology, the jurists, to prevent misunderstandings, should enclose them within quotation marks. In contrast, Olivecrona makes it clear that whatever origin these notions have, they have become so well entrenched in the popular mind and in the legal machinery that we cannot do without them. Thus Olivecrona endeavors to reuse and justify them within a realist framework and to show that they serve an indispensable function.

For example, the concept of a right – devoid, as noted, of semantic referents – serves one such function, an informative function very much like that served by a traffic light at an intersection: the function in question, to signal an allowance for the right-holder (green light) and a disallowance for all other subjects (red light). That is, relative to a given good, the right-holder can hold a certain behaviour which all other subjects are instead prohibited from holding.

After all, similar cases, occur in ordinary language, too, in which words that have no semantic referent are used daily with practical effects of great moment. A case in point is monetary units (as the pound sterling, the dollar, and the euro): surely, these do not correspond to the piece of paper or the coin which bears the words sterling, dollar, or euro. In the past, under the gold standard, it
may have been justified to think that the word for a monetary unit took as its semantic referent a certain amount of gold, but today the words *pound sterling*, *dollar*, and *euro* are used in accordance with strictly defined conventional rules, and on this basis they serve an important function in economic and social life.

To make possible an informative function of this kind, the vocabulary or phrasings used needn’t have a specific semantic referent: what matters, rather, is that people be in the habit of receiving the signs in question in a consistently uniform manner and that the same signs be employed in accordance with widely recognized rules of usage. Legal language, Olivecrona concludes, is a language that has the capacity to influence behaviour and serves as an instrument of social control. Its “‘hollow’ words are like signposts with which people have been taught to associate ideas concerning their own behaviour and that of others”.

Thus Olivecrona blocks out a theory that can be described as realist and normativistic at the same time. The realism of it lies in the view that the notions of a norm, duty, right, and the like do not designate anything outside the bounds of empirical reality: they do not designate a world of ought (as Hägerström says, to assume otherwise, that there exists a world of ought, is every bit as silly as to hold that the world itself rests on an elephant’s back); they rather mark out psychological and social phenomena that belong to the world of is. On the other hand, the theory is normativistic because, unlike the more radical version of realism (notably, American realism), it takes into account the fundamental role played by the idea of norm. If, as has been pointed out, legal norms issue from a widespread psychological and socially relevant phenomenon, they do not equate with the behaviours by which they are brought into operation: valid legal norms are the cause, their addressees’ behaviors the effect. Hence, it must be stressed here, Olivecrona does not collapse validity into efficacy: validity is the condition enabling norms to become effective and so influence behavior. By taking this twofold approach, Olivecrona retains the normative specificity of law within a wider empirical and monistic conception of reality.

Olivecrona considers this realist theory alternative to natural-law theory and to legal positivism. Indeed legal positivism, born by the negation of natural-law theory, is considered by him to be an offshoot of natural law itself. The notion of law as will is seen as traceable to the natural-law tradition: in other words, natural-law theory and legal positivism are brought together under one label which is voluntarism.

Olivecrona argues that the fathers of legal positivism may have jettisoned natural law, but they welcomed in full the concept of law as will and developed its conceptual apparatus. Olivecrona observes as well that the definition of legal positivism overlaps two meanings: on the one hand is the traditional understanding in which *positivism* derives from *jus positum*, and this is the notion
of law as will; on the other hand there is the general philosophical meaning of positivism as an empirical orientation contrary to metaphysical speculation and founded on the observation of the phenomena that experience reveals.

But if this second meaning has any weight, legal positivism cannot properly be called positivism: a misnomer for a theory whose only concern is the form of laws, not their empirical reality. Alf Ross calls it quasi-positivism and credits it with a positivistic character, in the second meaning of positivism, whereas realism is full scientific knowledge of law.

This terminological quarreling notwithstanding, it bears pointing out here what the realists intend to underline: when legal positivism purposes to be a scientific theory of law, it proceeds on the assumption that norms are entities quite unlike social phenomena (the two are heterogeneous) and by this assumption duplicates reality, introducing next to the empirical world a supposed world of ought. In contrast, legal realism understands norms as sociopsychological phenomena and so as a reality ontologically lined up with the reality of empirical facts: in this sense they call realism true positivism.

References

