

Law – Fact, Fiction or In Between? Axel Hägerström’s Quest for Legal Realism¹

Marie Sandström

What is Kiri-kin-tha’s First Law of Metaphysics?

In the 23rd century, Mr. Spock, the science officer onboard the *SS Enterprise*, is suffering from the side effects of a reversed Vulcan mind meld. The process of recovery includes a host of digital and analogue tests aimed at restoring his intellect to its former capacity. In one of these tests, Spock is required to answer a number of questions, covering a wide range of topics from science to history. One of the questions posed by the computer concerns philosophy: “What is Kiri-Kin-Tha’s first law of metaphysics”? Spock promptly replies:

-”Nothing unreal exists.”

It is difficult to fault Spock’s answer. In fact, the response seems to be more or less self-evident. Even humans in the 21st century know that nothing unreal exists. How could it? In the vocabulary of most people, “real” and “existing” are equivalents. Therefore, it seems just as implausible to suppose that unreal things exist as the opposite, that real things do not. However, once you start to mull over the specific connotations of the words “real” and “unreal”, this intellectual gut reaction can be perceived as somewhat dubious.

Consider, for instance, the Swedish lawyer. I think it is safe to assume that he or she most likely considers Swedish law to be real. If this assumption is correct, the advice offered to clients would then largely consist of simple statements of facts. For instance, Swedish contract law stipulates that a written contract offer,

¹ This contribution is a slightly modified version – the text being adapted to readers belonging to the common-law tradition – of an essay previously published by the author in Swedish and German, see Sandström, Marie, *Axel Hägerström och realismen* in *Juridisk tidskrift*, 2001-2002, p. 858 and *Axel Hägerström und der Realismus. Ein Beitrag zur Geschichte des Irrtums* in *Europäische Rechtsgeschichte und europäische Integration* (Ed. Kjell-Åke Modéer), Stockholm 2002, p. 169. The vocabulary used in this essay might be unfamiliar to a legal philosopher, as I have chosen to use an inclusive vocabulary, the concepts being adapted to jurists in general.

once it has reached the other party, is *in dubio* binding for a specific period of time. During this period, the recipient is free to deliberate as to whether to accept the offer, while the offeror is prevented from revoking the offer.

This peculiar aspect of Swedish contract law may lead a lawyer to advise his client to instead issue an invitation for the other party to submit an offer rather than to themselves make the offer, as an invitation can be revoked at any time. It is obvious that Swedish law must be taken into account whenever two parties enter into negotiations. The legal consequences of actions and omissions can manifest themselves painfully to the individual. In this sense, at least, Swedish law obviously exists. The question presented in this essay, however, is not whether law is a force to be reckoned with, but whether it is real.

It is equally obvious that law cannot be said to be real in the way a car or person might be real. In a way, law seems to resemble a pink elephant. No one in their right mind would claim to have seen one, although sightings might be linked to a very palpable and painful hangover. Hence, the law seems to defy Kiri-Kin-Tha's first law of metaphysics: Law, like pink elephants, might exist, without being real.

The particular characteristics of law make it a difficult subject for academic study. The German 19th century jurist, Julius von Kirchmann, went so far as to argue that law is incompatible with scientific studies, and jurisprudence a waste of time. In contrast to Kirchmann's rather harsh judgment, Axel Hägerström, philosopher and founder of the Uppsala school of jurisprudence, maintained that jurisprudence at least potentially is scientific in character. However, this assertion begs the question of whether academic lawyers have indeed achieved scientific distinction.

Science – as opposed to other discourses such as politics or fiction – is meant to describe reality. Accordingly, true scientific scholars are supposed to put reality into words. In this respect, however, academic jurists seem to have failed miserably. Despite numerous attempts, one of the key concepts of the Swedish contract law seems to lack scientific substance altogether; the concept of *viljeförklaring*.² According to Hägerström, this is no more than the manifestation of a chimera. Hence, legal scholars – or in the absence of a critical jurisprudence, philosophers – have to subject this and other concepts to the strictest of scrutiny in order to “attain a real world of scientific concepts”.³ Such a “real” formation of concepts is to supply jurisprudence with adequate expressions of the true object of scientific knowledge – *i. e.*, reality. No scientific discipline, “which claims to describe reality”⁴, can evade such a scrutiny. Jurisprudence is no exception to this rule. Its scientific credibility hinges on the strictest analysis of its concepts.

Hägerström demanded that the formation of legal concepts must conform to certain standards in order to be scientifically acceptable. Definitions of legal

² This Swedish concept is the exact equivalent to the German *Willenserklärung*. In the following, the concept of *viljeförklaring* will be translated as *declaration of intent*.

³ Hägerström, Axel, *The Concept Declaration of Intent in the Sphere of Private Law* (Om begreppet viljeförklaring i privaträtten) in *Inquiries into the Nature of Law and Morals* (Ed. Karl Olivecrona), Stockholm 1953, p. 299.

⁴ *Ibidem* p. 300.

concepts must be given a "factual" basis, be "realistic" and correspond with "reality". It seems, however, as if Hägerström used these expressions alternately and almost synonymously. A realistic jurisprudence consists of legal arguments based on facts reproducing substantial law.⁵ At this stage, after weeks of arduous study of Hägerström's writings, it was extremely tempting to make a comparison between his attempt to promote a more realistic formation of legal concepts in jurisprudence through philosophical critique, and the demand from American legal realists for a realistic description of law. The emphasis that American legal realists give to an empirical – above all sociological – method of jurisprudence fits well with Hägerström's description of a realistic jurisprudence as "knowledge of factual social norms of behavior".⁶ Realism, after all, must be realistic, regardless of nationality, must it not?

In retrospect, it is obvious that it was unwise to link the realism proposed by Hägerström with, for instance, the realism advocated by Karl Llewellyn. A closer study of the sources gives rise to the suspicion that the notion of realism in the writings of Hägerström, and the way in which the concept is used in the tradition of the American Legal Realism, are a kind of *faux amis* in the history of philosophy. One might reasonably argue that precipitated assumptions are the scourge of academic studies. In *A Study of Scarlet*, Sir Arthur Conan Doyle has his hero, Sherlock Holmes, warn his trusty companion, Dr. Watson, against insufficiently founded conclusions:

"No data yet", he answered. "It's a capital mistake to theorize before you have all the evidence. It biases the judgment".⁷

The words of this legendary detective still hold true. However, epistemological objectivism has been subjected to heavy philosophical criticism during the last two hundred years, and the critique, of course, has left its traces. Not even scientists or sociologists have been able to cling to the fiction of the passive observer gaining knowledge of the world without affecting the object of observation; the habit of 20th century anthropologists of wearing a neutral white seems to have been a last-ditch effort at maintaining the fiction of absolute objectivity. As early as 1803, the German philosopher Friedrich Wilhelm Joseph von Schelling dismissed the notion of the unbiased study. He noted that knowledge – without exception – is characterized by the observer as well as by the object of the observation. The expectations, needs and personality of the scholar will, in combination with the object of the knowledge, be reflected in the outcome of our research. Academic truth, according to German idealistic philosophy, is the product of a dialectical process in which the scholar, as well as the object of study, is subjected to change.

⁵ See *ibidem* p. 299 f.

⁶ Hägerström, Axel, *Om moraliska förställningars sanning. Installationsföreläsning*, in *Tidskrift för rättsvetenskap*, 1931, p. 84: "And so it is thought that jurisprudence is a discipline that teaches us about our legal obligations as objectively existing, as if pure expressions of emotions of the same fundamental character as a 'alas!' or 'oh!' could be a characteristic of an act. The only cognitive element in jurisprudence, from this point of view, is and remains *the knowledge of factual social norms of behavior*" [*italics added*].

⁷ See *A Study in Scarlet*, in *The Penguin Complete Sherlock Holmes*, p. 27.

At this stage, my work seemed to be all but complete. The only remaining task was to finalize the analysis of the written sources in order to substantiate the thesis. I was convinced that I would find proof for the assumption that both Scandinavian and American legal realism resulted in jurisprudential empiricism in Hägerström's critique of the legal concept of declaration of intent. At first, Hägerström's reasoning seemed to substantiate my assumptions. In the field of private law, the concept of declaration of intent is a portmanteau term denoting an entire scale of legal acts⁸, ranging from invitations to submit an offer, offers, acceptances and contracts. When using the concept of declaration of intent, the lawyer, according to Hägerström, refers to "a statement concerning [the party's] volition in reference to certain legal relationships".⁹ Despite the fact that lawyers seem to find the concept practical, it is obvious that this concept does not qualify as a part of the academic vocabulary. A declaration of intent is widely thought to have a legally constitutive function – the purpose being that the declaration should give rise to a legal relationship – *i. e.*, an allocation of rights and obligations - between the parties. The legal relationship between the parties is presumed to change because of the declaration; in a legal sense the *before* and *after* of the declaration are two different things. Assuming that the declaration of intent consists of a message to the other party concerning the volition of the sender, it cannot reasonably then have any palpable effect on the legal relationship between the parties, since the declaration is the act that allocates rights and duties between the parties. It is equally impossible to interpret the declaration as a description of already existing rights and duties of the parties; the declaration is supposed to give rise to a specific allocation of rights and obligations. According to Hägerström, it is self-evident that the declaration of intent is neither a proposition concerning the actual direction of the volition of the party, nor a description of existing rights and duties. Instead, the declaration would seem to be a manifestation of the notion of specific rights and duties. Such a notion, according to Hägerström, lacks any real content. In this sense, the concept of declaration of intent is a pseudo-concept that cannot be part of an academic vocabulary as it is not based on facts but on pure fantasy.

Hägerström's critique of the jurisprudential formation of legal concepts would seem to be a strong argument for the assumption that Swedish and American legal realism share philosophical roots. The philosophical critique of the traditional – idealistic – vocabulary is doubtless a key ingredient in every type of legal realism. The correspondences between the two schools would seem to include the demand for a scientific vocabulary; every legal concept must have a firm foundation in facts and express law from an empirical point of view. Now, every jurist – scholar or not – knows that jurisprudence in general, and legal practices specifically, normally spurn the notion of law as fact. If a jurist speaks, for instance, about the law of infanticide, his statement would rarely be interpreted as a statement of empirical facts. Similarly, the findings of academic jurists – with the exception of legal historians, legal sociologists and other

⁸ In this essay, the term *legal act* is used as the closest equivalent to the Swedish *rättshandling* and the German *Rechtshandlung*.

⁹ Hägerström, *ibidem*, p. 300. The Swedish *rättsförhållande* and the German equivalent *Rechtsverhältnis* have been translated as *legal relationships*.

pseudo-jurists – concern fiction rather than fact. Does this mean that Hägerström’s critique of the jurisprudential vocabulary should be interpreted as a frontal attack on the traditional legal method? Is the basic issue of legal dogmatics – what is valid law?¹⁰ – inherently unscientific?

It would be possible, according to Hägerström, to give the concept of declaration of intent a purely empirical definition. However, this would not solve the underlying problem. Such a declaration only describes the wish of one of the parties that certain legal consequences arise. Such an ardent wish is just as ineffective as a prayer – “May the weather be fine!”¹¹ – when it comes to the relation between legal prerequisites and legal consequences. Neither empirical facts, nor wishes, according to Hägerström, have the argumentative strength to give rise to the desired consequence. Hägerström instead turned to an often-overlooked category of words, *i. e.*, imperatives.¹²

A particular property of imperatives – in this respect, Hägerström and Immanuel Kant appear to be in agreement – is that they do not entail a description of or an opinion on the direction of a party’s will. The recipient of the imperative could draw certain conclusions, of course, concerning the volition of the other party from the imperative. However, this function of the imperative is secondary and subordinate to its true purpose, *i. e.*, to “*evoke* a certain practical or emotional attitude”¹³ within the addressee – in this case, within the other party. Hence, imperatives do not describe the intentions of the parties; their function is to mechanically influence action in a certain direction. Consider the relationship between two parties from the point of view of contractual freedom: It is obvious that the parties, by exchanging explicit or in certain cases implicit declarations of intent that bring about a contract, make use of their right to *legislate* the conditions of their legal relationship. Default or *in dubio* rules apply only if the parties – intentionally or not – abstain from making full use of their contractual freedom.¹⁴ In order for the parties to make full use of their contractual freedom, they have to use the same *prescribing* technique as does a true legislator.

In actual fact, according to Hägerström, all promises have an imperative character. The only differentiating feature of a legal promise is that it declares that “certain rights and duties of a legal nature shall come into being”.¹⁵ Irrespective of the potential legal consequences of a promise, imperatives would seem to have a strong impact upon the direction of the addressee’s actions. A

¹⁰ *Valid law* and *law in force* are poor equivalents to the German *geltendes Recht* and the Swedish *gällande rätt*.

¹¹ *Ibidem* p. 303.

¹² In this sense at least, Hägerström’s reasoning closely resembles that of his predecessor in the tradition of critical philosophy, Immanuel Kant. Kant also paid close attention to the function of imperatives in ethics and law.

¹³ *Ibidem* p. 303.

¹⁴ Even if the parties waive or do not make full use of their right to “legislate” their legal relationship, it is still not absolutely certain that the political legislator would assume the right to regularize the relationship, as custom and well-established practices between the parties may take precedence to any subsidiary legislation.

¹⁵ *Ibidem* p. 304-305 [*italics added*].

declaration of intent in private law is thus a “declaration” made by a legal subject “that in the form of an imperative expresses a fantasy concerning arising rights and duties”.¹⁶

At this point, the philosopher – the critic – has done his job. He has removed another concept that at a superficial level, and to the unaware jurist, seemed to be meaningful, but after a deeper analysis, revealed itself to be a pseudo-concept:

“If they disclose to analytic scrutiny a contradiction, they are notions only in appearance. In that case there is merely a concatenation of words without meaning. And the alleged fact, which is supposed to have a nature defined by the ‘notion’, would be no fact at all”.¹⁷

The use that jurists make of the concept *declaration of intent*, according to Hägerström, is inconsequential and is, therefore, however practical it might seem, scientifically unacceptable. To this critique Hägerström also added the philosopher’s definition of the concept: A declaration of intent is neither purely a wish that certain legal consequences may ensue, nor a description of the direction of the party’s volition. As every jurist knows, deep down, the nature of the declaration of intent is normative rather than empirical; its task is to prescribe rather than to describe. It follows that declarations of intent – offers, acceptances and other legal acts – are norms in more or less the same way as decrees of legislative powers. The epistemological difference, for instance, between a contract and a statute is quantitative rather than qualitative; the difference mainly concerns the scope of the norm and the hierarchical relation between the different forms of “legislation”. However, Hägerström had no intention of answering the legal question involved: What are the legal consequences of a declaration of intent? The legal consequences of a declaration of intent, as with a binding contract or the duty to compensate or inform the other party, is regulated by such norms in statutes and customary law as to place the issue firmly outside the realm of the philosopher. The definition proposed by Hägerström explicitly leaves the question open, whether a declaration of intent presupposes that the sender intended to make a declaration (the doctrine of real intent or the will-theory¹⁸) or if it is sufficient that his actions, seen objectively, typically give the impression of a real intent (the doctrine of reliance¹⁹ or the reliance-theory²⁰). This issue, according to Hägerström, must be resolved by academic jurists.

Hägerström’s critique of the legal vocabulary, however, was not consistent with my image of the relationship between Scandinavian and American legal

¹⁶ *Ibidem* p. 105f.

¹⁷ *Ibidem* p. 299.

¹⁸ A poor substitute for the German concept *Willenstheorie* and the Swedish *viljeteorin*, according to which legal emphasis is given to the actual will of the sender.

¹⁹ An equally poor substitute for the German concept of *Vertrauensstheorie* and the Swedish *tillitsteorin*, in which the determining factor is a well-founded reliance of the other party.

²⁰ A very poor substitute for the Swedish concept of *förklaringssteorin*. According to this doctrine, the wording of the declaration is crucial to the legal assessment, since volition without an expression cannot give rise to legal consequences.

realism. The critique resulted in an all too familiar conclusion: Jurists deal in norms – *sollen* – not facts, *sein*. It seems difficult, if not impossible, to reconcile this point of view with the demand of legal realism that jurisprudence be made an empirical discipline.

After all, Hägerström's critique effectively refutes the claim that the declaration of intent constitutes a proposition concerning the actual volition of the party. At the same time, I found it difficult to pinpoint the exact point at which the two schools of legal realism parted company. Indubitably, Axel Hägerström's definition of the concept meant that a notion that constitutes a pivot of Swedish contract law no longer could be understood as a statement of facts. Normative statements – in the linguistic form of imperatives – as opposed to propositions, can neither be verified nor refuted. The norm, “thou shall not kill”, from a scientific point of view is neither true nor false. In this sense, not even Hägerström's formation of legal concepts can be said to be founded on irrefutable facts. It suddenly hit me at this stage that Hägerström's persistent references to facts may not indicate an intention to create an empirical jurisprudence. What did he actually mean when he demanded that legal scholars be realistic?

So I resumed my quest for the peculiar nature of Hägerström's philosophy. While re-reading the essay, *The Concept Declaration of Intent in the Sphere of Private Law*, I noticed that Hägerström had, in fact, made a valiant attempt to clarify his philosophical position. Hägerström asked how it could be that even philosophically talented and well-educated jurists time after time make the same mistake. He found no other way to explain this curious phenomenon, the particular affinity between legal scholars and virtual concepts, than by turning to history for guidance. Hägerström truly took this task seriously; going all the way back to Roman law. He noticed that there was no more than a weak tendency among the Roman jurists to accentuate the importance of the actual volition of the legal subject when assessing the legal consequences of testamentary provisions. The Romans certainly construed the declaration of the intent (*contestatio*) of the testator (*mentis nostrae*²¹ or *voluntatis nostrae*²²) as a provision rather than an expression of the volition of the testator. Even though it might be possible to infer the wish of the testator from the wording of the provision, it is still obvious that to the Roman jurist, provisions are imperatives. It is not until the era of natural law, and the natural lawyers' references to *signum* or *declaratio voluntatis*, that the notion of the declaration of intent as an expression of a real volition became widely accepted among jurists. Natural law theory is the cause, and virtual legal concepts are the lingering effect.

The clue that led Hägerström to search for the answer in the history of law is the contradictions and lacunae that characterize a virtual legal concept. The task of the philosopher, to scrutinize scientific vocabulary, is motivated by the fact that:

”[N]otions which are used for describing what is actual may very well be delusive. If they disclose to analytic scrutiny a contradiction, they are notions

²¹ In this respect Hägerström referred to *Ulpianus*, Reg. XX, 1.

²² *Modestinus*, D. 28, 1, 1.

only in appearance. In that case there is merely a concatenation of words without meaning. And the alleged fact, which is supposed to have a nature defined by the 'notion', would be no fact at all."²³

The existence of contradictions and analytical gaps unveils the fact that the concepts lack an actual foundation to the watchful observer. Reality – that which is real – constitutes a consistent and complete whole. Every concept that is claimed to describe reality thus must be absolutely consistent. The historical analysis, however, seems to indicate that the legal concept of declaration of intent and contradictions seem to be inseparable companions. In fact, Hägerström, however diligently he researched the historical sources of law, did not manage to find one definition that did not bear the mark of a virtual rather than a real notion. According to Hägerström, there is only one plausible explanation for this historical phenomenon; most legal concepts do not describe reality in time and space – *existentia*; instead, they aim at expressing a metaphysical dimension of law – *essentia* – which, in turn, accounts for the fact that most of the unscientific concepts have their roots in natural law theory. Natural lawyers have no interest in time and space, since variations are deemed incompatible with scientific reasoning.²⁴ Consequently, natural lawyers shun the positive or actual law – valid law – in order to capture notions of rightful law in their concepts.²⁵ All self-contradictory concepts are caused by the choice of legal order by natural lawyers. The lawyer who actively chooses to ignore the historical dimension of law in order to capture the enigmatic and elusive law of nature, according to Hägerström, is doomed to form or at least validate concepts without actual foundations.

In contrast to Hägerström's fierce censure of epistemological metaphysics – *præterea censeo metaphysicam esse delendam*²⁶ – his analysis of legal concepts appears almost considerate. He calmly points out that concepts with roots in the natural law tradition, such as rights, obligations, declarations of intent *et cetera*, do not seem to have any sensible relation to the real world, but rather to another – supernatural – complex. Unlike the physical reality, in which every body is given a set of unique time and space coordinates, the metaphysical dimension can be perceived as both inconsistent and incomplete. As a consequence, the scientific demand for consistency must be considered irrelevant to the concepts of natural law. Only concepts related to reality in time and space, namely positive law, can therefore be scientific in nature. The imperative expressed by the concept of a declaration of intent must therefore, in order to be scientifically

²³ Hägerström, *ibidem* p. 299.

²⁴ See the definition of science advocated by the German philosopher Christian Wolff in the 18th century: Science is the "faculty of human reason to deduce the steadfast validity of each and every statement from an irrefutable basis" in Wolff, Christian, *Deutsche Logik. Vorbericht*, § 2, chap. 7, § 1.

²⁵ See Hägerström, *ibidem*, *loc. cit.* This is an explicit reference to Stammler's distinction between *actual* and *rightful* law in *Theorie der Rechtswissenschaft*, Halle 1911.

²⁶ See Hägerström, Axel, *Die Philosophie der Gegenwart i Selbstdarstellungen*, p. 158, bd.VII, Leipzig 1929 ("As to the rest, metaphysics should be disposed of").

acceptable, correspond to the legal causality between the prerequisites and the legal consequences in a norm of law, fixed in time and space by a legal source.²⁷

Hägerström's unique definitions of philosophical keywords such as *facts*, *factual*, *reality* and *real* throw a new and explanatory light upon the legal realism advocated by the Uppsala School. Not only was my initial hypothesis – Hägerström as an advocate for empirical jurisprudence – proven incorrect, the critique of the concept of declaration of intent results in a rather familiar legal positivism. Offers or acceptances are “facts ...which are connected in law and custom with the occurrence of a ‘right’ or a ‘duty’ within the sphere of private law”.²⁸ Hence the legal consequences cannot be derived from the party's volition. Nothing less than a supernatural will is capable of realizing the wish inherent in a declaration of intent. Instead, certain declarations are integral parts of the legal prerequisites laid down in the norms of the positive private law for specific legal consequences. The relation between legal prerequisites and their consequences, that natural lawyers sought to find in the power of a supernatural – unreal – volition to express itself in time and space, can easily be found in the norms the jurist discovers in the legal sources. According to Section 6, paragraph 1 in the Swedish Statute of Contracts, an *impure acceptance*, *i. e.*, an acceptance that, due to additions, restrictions or reservations, does not correspond to the offer, is to be considered both a rejection of the offer and a new offer in itself. This general rule is modified in the second paragraph: The first paragraph is not applicable, if the acceptor assumed that the acceptance corresponded to the offer and the person receiving the acceptance must have realized the other party's mistake. In such a case, the original offeror must inform the acceptor of his or her mistake in order to not be deemed in bad faith and consequently bound to a contract. Each declaration of intent that fulfils the prerequisites of an acceptance is given a multitude of legal consequences by the legislator, ranging from the duty of informing the other party to contractual obligations. Ultimately, the legal consequences of a declaration of intent are enforced by the power of the State.

It is a foregone conclusion: The jurist in general, and the legal scholar in particular, are ordered back to the legal sources by the strict philosopher. Positive and valid law is declared to be the alpha and omega of jurisprudence.

²⁷ Hägerström primarily named two sources of law, customary law and statutes, see for instance p. 127 in *The Concept of Declaration of Intent in the Sphere of Private Law*. This understanding of the doctrine of sources of law is consistent with the contemporary German doctrine. According to the founder of the Historical School of Jurisprudence, Friedrich Carl von Savigny, both precedents and legal doctrine must be considered legally authoritative, but they were not labeled legal sources, unlike customary law and statutes, see Savigny, Friedrich Carl von, *System des heutigen römischen Recht*, Vol. 1, Berlin 1840, p. 35f. and p. 88f. In the essay, *Quellen, Rechtsquellen und Rechtsquellensystem. Auffassungen zu den Produktivkräften des Rechts im 19. Jahrhundert*, the author, Heinz Mohnhaupt, characterizes Savigny's distinction between the concepts of legal sources and other sources of authority thus: “Der Begriff der ‘Autorität’ wird zur Hilfskonstruktion, um innerhalb dieses Rechtsquellensystems zwischen originärer Rechtsquelle und einer den Rechtsquellen ähnlichen Normativitätsqualität Raum für vermittelnde Zwischenformen zu schaffen”, p. 804 in *Grundlagen des Rechts. Festschrift für Peter Landau zum 65. Geburtstag*, Paderborn-München-Wien-Zürich 2000.

²⁸ Hägerström, *ibidem* p. 322.

The impression of the revolutionary and spoilsport Hägerström fades away and is replaced by a deeply sympathetic, albeit unglamorous description of a man possessed by a desire to protect the good name of jurisprudence from epistemological skepticism. The paradox, however, is that Hägerström's weapons are pointed inwardly; the main enemy of science seems to be the scholars.

One crucial objection still remains. Hägerström discovered virtual concepts also in the writings of the jurists who had explicitly renounced legal metaphysics. Friedrich Carl von Savigny, Rudolph von Jhering, Julius Lassen and Ernst Viktor Nordling, each and every one of them, made use of notions in their works that lacked reality.

In his analysis of the doctrine of real intent in the law of contracts, Hägerström noticed that the “jural basis for the power of creating ‘rights’ and ‘duties’ which belongs to a declaration of intent within the sphere of private law” basically is the result of mysticism.²⁹ He rhetorically poses the question, “[i]s not the basis for this, law and custom, regarded as decisions of the state authority?”³⁰ However, as he had already noticed, it was obvious that legal scholars had not settled for a simple reference to the doctrine of legal sources. Instead, the volition of the party, expressed by the declaration of intent, is imagined to be a constitutive force. The volition of the party, as for instance the intent at the bottom of an acceptance, is supposed to have the power to give rise to new legal relationships or transform relationships already existing between the parties. However, no actual human being could bring about such consequences:

”But, now, the volition to bring about certain legal consequences by means of a declaration cannot itself be a jural fact presupposed in law and custom. For, in order to be an effective volition, it presupposes law or custom itself. The jural fact can be nothing but the declaration itself, and this cannot be a declaration of the same volition. But *neither* can the supernatural volition, which is supposed to be declared in the ‘declaration of intent’ itself, be a jural fact which becomes effective through law or custom. For it is supposed to be effective without any external means.”³¹

The doctrine of real intent in private law, according to Hägerström, is founded on the supposition of the existence of ”a pure inner volition, effective without outward action, as determinative of the legal effect of a declaration of intent”.³² As a consequence, the doctrine of real intent cannot be considered “a theory concerning that which is the relevant jural fact according to law and custom”³³; it is:

²⁹ *Ibidem* p. 330.

³⁰ *Ibidem loc. cit.*

³¹ *Ibidem* p. 332.

³² *Ibidem loc. cit.*

³³ *Ibidem loc. cit.*

”[I]nstead, a theory concerning a jural basis, provided by ideal law, for the legal effect of the so-called declaration of intent. And the following point should be noted. This theory is closely connected with a certain view of the ideas, which we find expressed in imperative form in daily life, concerning the occurrence of ‘rights’ and ‘duties’. The view is that those imperatively expressed ideas are declarations *concerning* a volition which is effective independently of the declaration.”³⁴

Hägerström’s verdict as to the doctrine of real intent is harsh: ”The will-theory itself is essentially bound up with the perverse view, which originates in the doctrine of natural law, that a promise is a statement *about* a certain intent; and this view in turn is bound up with the modern account of the notion of rights, which is itself inherited from the doctrine of natural law”.³⁵ Remnants of natural law have given rise to a host of fatal contradictions and gaps in the train of thought of legal scholar in the legal positivist tradition, albeit that such an *opinio juris* cannot be of any importance to the real, *i. e.*, valid law. In practice:

”[T]he declaration ... is effective only if it expresses the *ideas* about rights and duties which were present in the mind of the declarer when he made his declaration.”³⁶

In the natural or real sphere, supernatural notions are useless; ”the jural fact is always the declaration, not the volition”.³⁷ Supernatural or metaphysical concepts have instead found refuge in jurisprudence.

In all likelihood, Hägerström’s censure of the jurisprudential vocabulary, at least from a historical point of view, was aimed primarily at the conceptual jurisprudence of the late 19th century. The annoying habit of conceptual jurists of drawing far-reaching normative conclusions from legal concepts went far beyond the boundaries of legal science. The historical link to conceptual jurisprudence does not, however, diminish the contemporary character of Hägerström’s analysis. We will do well to follow his example and remain critical – perhaps even suspicious – of jurisprudential concepts. Even if conceptual jurisprudence appears to have lost its scientific allure, dogmatic and nonsensical notions have not. Seemingly harmless contradictions in legal doctrine – such as the declaration of intent – might conceal an abyss of unscientific notions, ultimately threatening the very existence of jurisprudence. After all, if legal scholars lack scientific credibility, what use are they to anyone?

³⁴ *Ibidem* p. 333.

³⁵ *Ibidem* p. 347.

³⁶ *Ibidem* p. 333.

³⁷ *Ibidem loc. cit.*: ”[I]n the natural sphere the declaration *is* by no means a declaration of a volition”.