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Strang, Johan

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Two Generations of Scandinavian Legal Realists

JOHAN STRANG

Abstract: The discussion on the implications of Scandinavian Legal Realism would benefit considerably from more careful historical attention to the different political and philosophical ambitions of the theoreticians that followed Axel Hägerström. The scholars, who were later gathered under the label Scandinavian Legal Realism, did not represent a static theoretical position that remained unchanged from the 1910s to the 1950s; rather, their aims and ambitions varied with changing political and philosophical circumstances. The purpose of this article is to propose a distinction between two generations of Scandinavian Legal Realists. While the goal of the first generation (Vilhelm Lundstedt and Karl Olivecrona) fell little short of revolutionising the field of jurisprudence, transforming law into a vehicle for political and social reform, one of the main objectives of the second generation (Alf Ross and Ingemar Hedenius) was to take the edge off the radicalism of their predecessors.

Key Words: Scandinavian Legal Realism; politics, democracy; Uppsala philosophy; logical empiricism; Alf Ross; Ingemar Hedenius

If Scandinavian Legal Realism could be reduced to one basic tenet, the idea that the law is a social phenomenon ultimately relying only on the sanction of man himself would be one prominent candidate. This was a basic line of thought for the founder of the school, Axel Hägerström (1868-1939), as well as for his followers Vilhelm Lundstedt (1882-1955), Karl Olivecrona (1897-1980), Alf Ross (1899-1979) and Ingemar Hedenius (1908-1982). The assertion that the law is man-made and thus revisable was a useful philosophy for intellectuals with radical ambitions as it enabled them to claim that the law must not (or indeed cannot) be used as a conservative argument against political reform. But the nature of the connection between Scandinavian Legal Realism and politics has been a regular topic for discussion among legal theorists and intellectual historians in recent years. Roughly, the combatants can be divided into two opposing camps. On one hand, it is quite common to suggest that Hägerström and his disciples are to blame for state-absolutistic, paternalistic and even totalitarian tendencies in Sweden (Bjarup 1982, 195 f.; 2004; 2005, 12; Sundberg 1978, 191 f.; 1984). On the other hand, there are a number of scholars who see connections to the democratisation of the Nordic societies, and

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interpret Scandinavian Legal Realism as a legal philosophy of the liberal welfare state (Alexander 2002; Blandhol 1999; Malminen 2007; Pihlajamäki 1997).  

There is more to this debate than diverging attitudes towards the political development in the Nordic countries since the 1930s, but the discussion would benefit considerably from more careful attention to the ambitions of the individual historical actors. The scholars that were later gathered under the label Scandinavian Legal Realists did not represent a static theoretical position whose ideas remained unchanged from the 1910s to the 1950s; rather, the aims of the different legal realists varied with changing political and philosophical circumstances. The purpose of this article is to propose a distinction between two factions, or generations, of Hägerströmian scholars that were occupied with different political as well as theoretical questions and ideas. By distinguishing between Lundstedt and Olivecrona on one hand, and Hedenius and Ross on the other, we might be able to understand not only the apparently contradicting views on the relation between Scandinavian Legal Realism and politics, but also the late international acknowledgement of the movement, and in particular the rather late reception in the neighbouring countries of Finland and Norway.

By employing the concept “generation”, however, it is not suggested that the thoughts and ideas of the historical actors are determined by the year that they were born (Olivecrona and Ross were virtually the same age), but rather, in a Mannheimian sense, that the two generations shared different “formative experiences” that were of crucial importance to the way they looked upon the world. Following Aulis Aarnio, a historical examination of legal theory must pay attention to both the socio-economic and the theoretic-philosophical situation of the actors (Aarnio 1976, 31). The 1930s are often presented as a watershed in Nordic political history. It was the decade of the famous settlements between the workers and the farmers, and the beginning of the half-century long Social Democratic hegemony in Nordic politics. On these pages it will be argued that, while the first generation of Scandinavian Legal Realists used their theories in order to overcome the conservative and liberal dominance in Swedish politics, the latter generation worked in a political milieu largely dictated by the ideas of planned economy and state intervention, and in which, following the rise of totalitarianism and the Second World War, “democracy” had emerged as the central political challenge. While the first generation was more explicit in propagating certain political reforms, the second generation nursed a more instrumental view of legal science. In fact, following the political changes

1  It might be justified to add a third group of an increasing number of scholars who claim that the relation between Scandinavian Legal Realism and (welfare state) politics should not be exaggerated (cf. Björne 2007, 368; Pihlajamäki 2004).

2  According to Karl Mannheim (1927) a “generation” is essentially tied to subjective experiences and can therefore not be reduced to any objective and mechanical criteria.
during the 1930s, it became a pressing task for the second generation to take the edge off the radicalism of their predecessors.

To study “theoreticians as politicians” is in Kari Palonen’s terms to follow the Skinnerian inversion of the study of political thought, from the analysis of ideas and principles applied on a separate sphere of politics, to an analysis of thoughts and ideas as moves in the political world itself (Palonen 2003, 173-180). However, the philosophical field can be viewed as a “political” sphere in its own right, where contingency and controversy reigns, and where the borders between friends and enemies are well defined. The 1930s also marked a significant turning point in Nordic philosophy, witnessing the breakthrough of logical empiricism, and accordingly, it will be argued that the second generation of Scandinavian Legal Realists successfully adopted this novel philosophy as part of their criticism. But however critical the second generation was of Lundstedt and Olivecrona, they never denounced their intellectual debt to Hägerström, and therefore, the conflicts between the generations often took the form of a struggle for the right to represent the Hägerströmian legacy.

Hägerström’s legacy

Scandinavian Legal Realism has been defined as a group of individual legal scholars that had little in common except for their respect and admiration for Axel Hägerström (Dalberg-Larsen 2006, 66). Undoubtedly, as the founder and leader of the so called Uppsala school in philosophy, Hägerström exerted an immense influence on his students, and some of his most devoted disciples were arguably from the field of law. Vilhelm Lundstedt, professor in Civil Law in Uppsala (1914-1952) and Karl Olivecrona, professor in Procedural Law in Lund (1933-1964) spent much of their careers deciphering, completing and implementing the programme of their master. But Hägerström’s importance did not confine itself to the universities; he represented a break with the conservative idealistic tradition of Christopher J. Boström, and especially his radical value theory, later labelled “value nihilism”, marked a significant turning point in Swedish intellectual life (Källström 1984; Nordin 1983). In his famous inaugural lecture “Om moraliska föreställningars sanning” (1911), Hägerström argued that value judgements are not real judgements as they always include an emotive element, a feeling, which does not aim at presenting its subject as existent in time and space. Therefore, a value judgement cannot be true or false, there is no way to prove that a given valuation is correct or not, that someone ought

3 For an application and discussion of the relevance of a Skinnerian approach to the history of jurisprudence, see Blandhol 1999 & 2005 respectively.

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to do something, or that something is someone's duty (Peterson 1973; Danielson 1990).

In legal theory, Hägerström aimed at uncovering metaphysical elements by means of conceptual analysis in order to establish a foundation for a truly scientific theory of law. As such, Hägerström’s programme has been seen as an attempt to improve the doctrines of legal positivism (Bjarup 1982; Helin 1988; Lyles 2006), and this was apparently also how Hägerström himself conceived his mission. He followed the legal positivists in claiming that it is only by focusing on a study of the law as a positive fact that the blatant metaphysics of natural law could be avoided. But Hägerström argued that legal positivism failed in giving a sufficient account of the validity of law. In this connection Hägerström devoted much energy to a refutation of the so called “will-theories”, according to which the law was valid by virtue of the commands or declarations of the will of a supreme authority, the state, the society or the people. According to Hägerström, the will-theories failed to present the physical person that was the subject of these wills, and thus the talk of “the law as the will of a legislator” was nothing but an anthropomorphic construction (cf. Hägerström 1916, 37-41).

A central theme for Hägerström was the analysis of basic legal concepts such as ‘rights’ and ‘duties’, which he refuted as metaphysical pseudo-concepts representing nothing existent in time and space. According to Hägerström, any attempt at determining the facts that correspond to the idea of ‘rights’ leads to “insuperable difficulties” (Hägerström 1927, 4). By the ‘right to property’ we do not mean protection by the government, because, all the government can do is to help me regain the property if it is lost or stolen. Similarly, if a person is obliged to me, the state can in no way guarantee that he will carry out the payment in time. It is the right that is the precondition for the protection, and not the protection that is a precondition for the right. What we really mean by a legal ‘right’, Hägerström argued, is a superstitious and magical power (Hägerström 1927, 1-6).

Lundstedt, philosophy and social reform

Hägerström’s value nihilism and analysis of ‘rights’ are two separate theories; Sven Danielsson (1990) has aptly pointed to the fact that it is possible to support one of the theories while disapproving of the other. However, the ways that the theories were used in political debates were rather similar. In the same way that the value nihilistic theory played an important role as an argument against conservative moral attitudes, the claims that there are no rights was used in order to legitimate changes in the legal attitudes of people, and even for modifications in the law. Hägerström himself undoubtedly nursed optimistic beliefs in the emancipatory significance of his philosophy, but some of his disciples were far more buoyant. Lundstedt, especially,
who served as a Social Democratic Member of Parliament in 1929-48, never hesitated to make political use of the Hägerströmian tenets. From Lundstedt’s point of view, it made no sense to claim that expropriation of land constituted a violation of ‘the right to property’, as this ‘right’ was created and guaranteed by the state in the first place. It would be more correct to say, Lundstedt argued, that the possibility of expropriation is part of ‘the right to property’; i.e. that the rules regarding private property are construed in such a way, that nothing prevents the government from taking control of the land if necessary (Lundstedt 1925, 89).

‘Property’ was particularly topical in the debates before the 1928 elections, when the Social Democratic proposal for a substantial reform of the law of inheritance was criticised by the conservatives as a violation of the ‘right to property’. Staffan Källström has illustrated the manner in which Lundstedt countered such allegations with Hägerströmian arguments, claiming the non-existence of the right to property in political speeches (Källström 1991, 15).Nevertheless, even if the concept of ‘rights’ was non-existent, metaphysical and based on an ancient idea of magical forces, Lundstedt still maintained, in his theoretical writings, that there are some “realities that correspond” to the concept of ‘rights’, namely a certain position of safety, which is the result of the regular enforcement of certain legal rules and the psychological effects this has on the minds of people. But this, Lundstedt argued, is clearly not what is conceived by ‘rights’ in legal theory or in public mind, and therefore it would be better to abandon the concept altogether (Lundstedt 1922, 73-74).

Besides ‘property’, Lundstedt devoted much effort to a criticism of international law, which he thought was the result of a “double forgery”. It was based on a misleading conception of municipal law, misleadingly used on a particularly ill-suited topic. Lundstedt pointed to the fact that in contrast to municipal law, international law lacks an authoritative power that enforces the rules. Thus, while there are within a legal community, such as the state, certain facts that lie behind the chimera of ‘rights’, all that remains in international law are the rules themselves and a superstitious belief in their binding force. Lundstedt repeatedly argued that it was the superstitious beliefs in the ‘rights’ of nations and peoples that had been the ultimate reason for the outbreak of the World War, and that only a radical break with this cerebral metaphysics could pave a way for lasting peace (Lundstedt 1924; 1925; 1931).

While the Hägerströmian philosophy constituted a powerful critical weapon, it was perhaps less simple to give it a constructive positive role. Lundstedt’s attempt

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4 In the late 1930s he returned to the issue, claiming that the political development in Europe had proved him right (Lundstedt 1937). And after the war, or at the beginning of the Cold War, Lundstedt was one of the few Social Democrats who supported Swedish membership of NATO. Lundstedt preferred a strong union of western democracies to another helpless attempt at a League of Nations (Lundstedt 1948).
was based on the notion of “public welfare” (samhällsnyttan), which he launched as a realistic alternative to the different metaphysical dogmas concerning the basis of law. According to Lundstedt, the purpose of punishment is not for revenge, but to maintain a system that is to the benefit of all, i.e. a system where a thief is held liable for his damages. If the purpose of the law was ‘justice’, it could be argued that theft should be condoned if the thief is considerably worse off than the subject of the crime (Lundstedt 1925, 23-26). Lundstedt also used his principle of public welfare as an argument against a prohibition law, as he believed it would harm the public respect for law (Lundstedt 1922a). In 1933 he argued in favour of the decriminalisation of homosexuality, as he believed the reigning law had too many unwanted consequences both for the homosexuals and the general public (Lundstedt 1933).

However, the principle of ‘public welfare’ was problematic and often criticised. Lundstedt repeatedly emphasised that it was not “a moral or a philosophical principle” (Lundstedt 1925, 145). Contrary to utilitarianism, Lundstedt acknowledged the Hägerströmian thesis that there are no objectively valid moral principles. Rather, “public welfare” should be understood in a descriptive sense, representing the actual valuations of people in society. According to Lundstedt, it was simply the principle of furthering things “which indisputably man actually strives to attain” (Lundstedt 1925, 146). But Lundstedt’s arguments were not altogether convincing; he failed to prove that people in general actually supported the values he was proposing, and he did not provide a measure for those situations in which the valuations of people, in fact, diverged. Moreover, the fact that Lundstedt eagerly made normative use of his principle also seemed to violate his Hägerströmian premises (Zambroni 2006). In general, Lundstedt was somewhat hesitant on whether “public welfare” was a principle that, as a matter of fact, influenced the legislation, or whether it was a normative principle that Lundstedt thought should influence legislation. As Markku Helin has pointed out, there was a trait of historicism in Lundstedt’s theory (Helin 1988, 125). His ambition was, so to speak, to assist an inevitable development towards enlightenment and realism.

Olivecrona, law and force

Olivecrona’s *Law as fact* (1939) has been characterised as a milestone in the development of Scandinavian Legal Realism (Björne 2007, 321). The book was not only a concise and lucid exposition of the Hägerström-Lundstedtian philosophy, but it also included a more thorough and convincing attempt at a positive reconstruction of";
of legal science. Olivecrona followed Hägerström’s analysis in claiming that the binding force of law exists only as a psychological effect of the consistent implementation of legal rules, and that a legal ‘right’ is an idea of a fictitious power (Olivecrona 1939, 15-17 & 88-89). But as the result of these considerations, Olivecrona concluded that the law itself is essentially organised force. According to Olivecrona, organised force is the backbone of every conceivable modern community, without which “there could be no real security, not even with regard to life and limb”. The modern state, in turn, is an organisation that has monopolised the use of force (Olivecrona 1939, 123-136).

The idea of a relation between the state and force echoes Max Weber, but as Svante Nordin has suggested, the idolising manner in which Olivecrona portrayed the necessity of force also resembled the famous German legal theoretician Carl Schmitt (Nordin 1983, 124). There is certainly an element of Schmittean decisionism in the theories of the Scandinavian Legal Realists – the law is valid only because it is affirmed and protected by an authority. However, Nordin seems to base his claim mainly on the political role that Olivecrona took during the Second World War. There was a notable addition of four pages at the end of the Swedish and German translations of Law as fact in which Olivecrona developed Lundstedt’s arguments against ‘international law’ into a call for a monopolisation of the use of force in Europe. According to Olivecrona, the prevailing anarchism on the European continent, which manifested itself in one destructive war following upon the other, could only be overcome if the nations submitted themselves to an organisation controlled by the strongest power in Europe (Olivecrona 1940b, 226-9; 1940c, 195-8). The political implications of these paragraphs were simple enough for anyone to decipher, and soon Olivecrona announced his German sympathies by the notorious pamphlet England eller Tyskland (1940a). In his study on Lund’s University during the Second World War, Sverker Oredsson (1996, 96) claims that Olivecrona rapidly established himself as a leading proponent for Nazi Germany in Sweden, as he was one of the very few who did it with something resembling a coherent intellectual argumentation.

Even if it would be a mistake to straightforwardly label Olivecrona a National Socialist or a fascist, it is safe to say that he utilised the legal philosophy of Hägerström in a different direction than the Social Democrat Lundstedt. On the other hand, there were some striking similarities in the ways Lundstedt and Olivecrona conceived of the relation between legal science and politics. They were both on a mission to overturn the conservatism of both Boströmian philosophy and legal posi-

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6 Schmitt referred positively to Lundstedt’s criticism of international law in his Die Kernfrage des Völkerbundes (1926, 45).
7 In the terminology of Oredsson, Olivecrona was “Nazi-minded”, by which Oredsson means “a person hoping for Nazi-German victory in the war” (Oredsson 1996, 9-10, 144, 219).

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tivism in favour of a legal science that functioned as a vehicle for social reform. Their ambition was to provide the legal foundations for a new society order. Moreover, both of them ascribed a central role to the legal scientist in the elaboration and construction of this new social order. It is perhaps no surprise that Olivecrona’s vision of a society in which the law was maintained through the monopolisation of organised force ignored a discussion on the democratic control of legislation. But neither did Lundstedt’s concept of “public welfare” emphasise such considerations (Björne 2007, 368); instead he simply seemed to presume that ‘public welfare’ was a self-evident principle, which arguably left the reader wondering if Lundstedt was not merely promoting his own political valuations. At the very least, it seems as if his theory, which was framed as a criticism of dogmatically conservative or liberal legal theories, yields a similar dogmatism in the name of ‘public welfare’.

Hedenius and the new theory of meaning

For the democratically minded followers of Hägerström, Olivecrona’s pamphlet England eller Tyskland (1940a) could hardly have come at a worse time. The discussion on the demoralising and destructive consequences of Hägerström’s value nihilism, which had already begun in the early 1930s, had recently reached its peak as a result of the outbreak of the Second World War and the posthumous publication of a collection of some moral and social philosophical essays by Hägerström, as Socialfilsosofiska uppsatser (1939). In a number of critical reviews it had been suggested that Hägerström’s theory was leading to moral nihilism and cultural decline. Some even argued that Hägerström’s philosophy was connected with the rise of totalitarianism on the European continent (Källström 1986, 110-116). This was the immediate background for the critical review of Olivecrona’s book, by the young Uppsala philosopher Ingemar Hedenius, in the Social Democratic journal Tiden in 1940. Even if Hedenius, on the face of it, hardly discussed the closing paragraphs of Olivecrona’s book, his concern to find a way of refuting Olivecrona was undoubtedly largely motivated by the political ballast that Olivecrona had imposed on Uppsala philosophy (Oredsson 1996, 98).

Hedenius’ main argument was that Olivecrona seemed to have somewhat contradictory ambitions with his book. On the same pages that he was emphatically declaring that notions such as ‘the binding force of law’, ‘rights’ and ‘duties’ were meaningless and metaphysical, he was also describing what he called “the realities that are covered” by these concepts. “There must be something erroneous at play here”, Hedenius argued, because surely, the meaning of a concept cannot be anything else than the facts that are covered by it (Hedenius 1940, 431). This might seem a trivial comment, but it was based on the fact that Hedenius was abandoning the act-psychological theory of meaning, used by Hägerström, in fa-
The turning point was more explicit in the book *Om rätt och moral* (1941), in which Hedenius stated that the problem of “theoretical meaning” was emerging as a key challenge in contemporary philosophy and that he himself subscribed to the view that “[t]he meaning of a statement is the fact which makes it true or false” (Hedenius 1941, 62). The meaning of “it is raining”, Hedenius argued, is the fact that drops of water are falling from the sky. A completely different thing is the thoughts or ideas someone has in mind while saying, “it is raining”, and yet another thing is the theories people have regarding the meaning of the statement. Echoing G. E. Moore’s “A Defence of Common Sense” (1925), Hedenius claimed that it is perfectly possible to use a sentence correctly without knowing its correct analysis. The fact that the Ancient Greeks had an erroneous theory on the correct analysis of “it is raining”, e.g. that Zeus was throwing water from the sky, did not prevent them from using the sentence correctly. Similarly, Hedenius continued, legal terms can be used correctly despite the misleading ideas there are about their meaning. The things people have in mind, or the theories they have regarding, for example, ‘rights’ have no bearing, whatsoever, on the philosophical analysis of the meaning of the word (Hedenius 1941, 62-68).

This was a direct attack on the first generation of Scandinavian Legal Realists. According to Hedenius, it was in failing to recognise this point that Hägerström, Lundstedt and Olivecrona forced their opponents into one of two wicked positions. If you identified the meaning of a juridical term, e.g. ‘right’, with some idea of validity or a binding force of law, you were (correctly, in Hedenius’ view) refuted as metaphysical. But, on the other hand, if you tried to describe the facts that are covered by a legal concept, Lundstedt and Olivecrona claimed that you failed to reach “the true meaning” of the concept. In other words, Lundstedt and Olivecrona had “construed a scissor that enabled them to cut the head of any legal philosopher” (Hedenius 1941, 74).

Lundstedt and Olivecrona were thoroughly enraged by Hedenius’ book. Olivecrona published a pamphlet including an appendix called “Settlement with docent I. Hedenius” (1942), and Lundstedt interrupted his course at the faculty of law in Uppsala in order to devote the remaining semester to confront “the ignorant attack” by Hedenius upon the achievements of the late Hägerström (Lundstedt 1942, 14). Lundstedt accused Hedenius of exploiting some terminological difficulties that were inevitable due to the revolutionary character of the theory. Lundstedt emphasised that when he used ‘rights’ it was merely as a word, label or term, that had nothing whatsoever in common with the ideas of traditional legal science (Lundstedt 1942, 29-30). Olivecrona, on the other hand, argued that that Hedenius misleadingly thought that a criticism of central legal concepts implied a denial of the realities that the concepts are supposed to stand for (Olivecrona 1942, 51). These arguments

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hardly hit the mark; Hedenius’ main point had not been to claim that Lundstedt and Olivecrona unwarrantedly used the concept ‘rights’ or that they denied the existence of some realities, but that they wrongly associated the meaning of ‘rights’ with a metaphysical theory of their nature and not with the realities that they, with great success, were describing.8

The explicit references to logical empiricism and the Cambridge School were rather scarce in Hedenius’ book, and both Lundstedt and Olivecrona continued to confront Hedenius with traditional Uppsala philosophic arguments, thus failing to grasp the novel philosophical basis of Hedenius (Nordin 1983, 153). The thing that arguably disturbed Lundstedt and Olivecrona the most was the fact that Hedenius, by defending the value nihilistic theory in this very popular and successful book, seemed to be on the verge of colonising the Hägerströminian legacy. Hedenius was rapidly emerging as the main proponent of value nihilism in Sweden, i.e. as the new and improved Hägerström. Few noticed that Hedenius had transformed value nihilism from a theory on the ontological and epistemological status of moral ideas, into a semantic theory on the correct analysis of certain linguistic expressions (Nordin 1983, 149-152). In fact, Hedenius’ value nihilism was far more similar to the theories presented by leading logical empiricists such as Ayer (1936) or Carnap (1937) than it was to Hägerström. One could argue that Hedenius introduced logical empiricism to Sweden, and to Nordic legal theory, by anchoring it to the Hägerströminian tradition (Strang 2006, 262).

Hedenius and the defence of jurisprudence

Hedenius also proposed “an important modification” of value nihilism, the distinction between ‘genuine’ and ‘non-genuine’ legal statements (äkta och oäkta rättssatser). While Lundstedt and Olivecrona were correct in claiming that some moral or legal statements, the so called ‘genuine legal statements’, are theoretically meaningless, i.e. clearly only used in order to persuade or to announce a personal emotive point of view, Hedenius believed that they had failed to notice that a moral or legal statement also can be used in such a way, as a ‘non-genuine legal statement’, that it is

8 However, Lundstedt and Olivecrona did have a point in claiming that Hedenius misleadingly presented their theories as a reaction against some dated natural law philosophy or against the conceptions of common people, and not as a reaction upon ideas in contemporary legal positivistic theories (Lundstedt 1942, 134-5). On the other hand, they often seemed to slide over from a discussion of the latter to a discussion of the former, presuming that the conceptions of the legal scientists determined the way common people thought about things. At least, this must have been a tacit premise in Lundstedt’s argument on the dangers of international law.
clearly true or false. For example, “It is not right to listen to English radio in Nazi-Germany” is a true or false statement, corresponding to the fact, whether or not listening to English radio actually is prohibited in Germany (Hedenius 1941, 56-59). The origin of Hedenius’ distinction has been subject to some discussion. Some regard it as a stroke of genius (von Wright 1999, 32); others claim, as a result of historical exegesis, that Hägerström himself was familiar with the idea of non-genuine legal statements (Peterson 1973, 74f.). There are, however, good reasons to suspect that the source of the distinction is to be found in the article “Imperativer og Logik” by the Danish logical empiricist Jørgen Jørgensen. In this article, that started a comprehensive debate on the possibility of “practical inferences”, Jørgensen remarked that an imperative such as “You ought to close the door!” can be used as “a description of the fact that a demand or command exists” in case of which it is clearly capable of being true or false (Jørgensen 1938, 185). This certainly mirrors the idea behind ‘non-genuine’ legal statements, and Hedenius was undoubtedly familiar with the article as he discussed the problem of “practical inferences” rather extensively in Om rätt och moral (Hedenius 1941, 106-115).10

Lundstedt found the distinction between ‘genuine’ and ‘non-genuine’ legal statements trivial (Lundstedt 1942, 43), and of course, in some sense it was. But it had significant implications; the example of the prohibition of English radio in Germany alluded to the political sympathies of Olivecrona, but was also purposely chosen in order to refute arguments, raised by many critics, that the Uppsala philosophers were forced to hold that the Nazi-German laws were ‘right’ (rätt). By emphasising the demarcation between law and morals, Hedenius tried to make the point that even if one used ‘law’ and ‘right’ descriptively about the Nazi-German system, one could still be convinced that it was repulsive in a moral or political sense. By stating that “it is not right to listen to English radio in Germany”, one does not necessarily indicate, in a moral sense, that Germans ought to refrain from listening to foreign radio stations (Hedenius 1941, 57). Moreover, Hedenius also used the distinction between genuine and non-genuine legal statements as a criticism of the radicalism of the Hägerströmian theory. There was no doubt that Hedenius believed that the theories of Hägerström and Lundstedt had been useful as weapons against conservatism, but the repeated claims that “there are no rights” and of the “unscientific nature of legal science” had prompted negative reactions, not only from the legal community, who sensed that their discipline was under attack, but also from the general public. At a point in time when the political and legal sovereignty of the

9 The problem, later called “Jørgensen’s dilemma”, was to account for the apparent logical nature of an inference such as “keep your promises, this is a promise, therefore keep this promise” despite the “well-established facts” that imperatives cannot be true or false, while only sentences that are capable of being true or false can function in logical inferences.

10 Elsewhere, Hedenius (1939, 326) explicitly refers to Jørgensen’s article.

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Nordic countries was in increasing danger, any suggestion of the relativity of law was bound to be criticised. With Hedenius, the most radical and aggravating parts of the theory could be discarded without abandoning the basic line of thought: that law is essentially man-made and thus revisable in any way we like. When Hedenius in 1979 was awarded an honorary doctorate in law in Uppsala, he was celebrated as the man who had saved Swedish jurisprudence (Nordin 2004, 115). It was undoubtedly an overstatement, but Hedenius certainly provided jurisprudence and Nordic law a more stable ground at a point in time when it was challenged, not only by the radicalism of his predecessors, but also by anti-democratic political movements and foreign armed forces.

Ross and the instrumental legal science

Besides Hedenius, the Dane Alf Ross must be considered as the main agent in the transformation of Scandinavian Legal Realism, but Ross had arguably been more involved with the first generation than Hedenius. When he failed to get his Kelsenian *Theorie der Rechtsquellen* (1929) accepted as a doctoral thesis at the University of Copenhagen, Ross contacted Hägerström, who accepted it as a dissertation in philosophy in Uppsala. Ross studied for Hägerström in 1929-30, which resulted in two large monographs on the basic problems in moral philosophy and law (Ross 1933a & 1934). The latter treatise eventually granted him his longed for doctorate in jurisprudence at his home university in Copenhagen.

For Ross, Hägerström represented a more scientific way of looking upon law, enabling him to overcome and criticise both Kelsen and the professors that had turned him down at the University of Copenhagen, i.e. Vinding Kruse (1880-1963) and Viggo Bentzon (1861-1937). But Ross was not an uncritical disciple of Uppsala philosophy. Already in 1932, he launched a frontal attack on his Hägerströmian brother-in-arms Lundstedt, particularly criticising the notion of ‘public welfare’ which he deemed no less dogmatic than any other normative moral principle (Ross 1932, 342). According to Ross, Lundstedt’s attempts at presenting ‘public welfare’ as a purely descriptive principle failed, revealing only the absurdities of the notion. Did Lundstedt actually believe that the communists or the Nazis would make laws in support of ‘public welfare’ if they were to gain power in Germany, Ross asked rhetorically (Ross 1932, 339). Lundstedt replied by claiming that even they would have to present their politics in the veil of ‘public welfare’ in order to maintain power (Lundstedt 1932, 544). But as Källström notes, Lundstedt arguably failed to respond to the most important point in Ross’ criticism; that it is impossible to sum up the conflicting valuations and interests in a society in a single and definite notion of ‘public welfare’ without relying on metaphysical assumptions of society as an organic whole, or on an illusionary idea of harmony (Källström 1991, 51-58). Even if
the idea of ‘public welfare’ was not explicitly normative, it was a form of ethics that concealed the norm as an objective and rational principle (Ross 1933b, 118).

Blandhol has convincingly argued that the debate between Lundstedt and Ross was ultimately based on different conceptions of the relation between legal science and politics (Blandhol 1999, 91 & 105). While Lundstedt presented his notion of ‘public welfare’ as a rational argument in favour of a particular political decision or programme, Ross emphasised that political action necessarily involves a choice that has to be taken on the basis of subjective interests and valuations. Instead of presenting a new scientific principle, Ross stressed the rift between science and politics, is and ought, which resulted in an instrumental account of legal science. This was most explicitly developed in the final chapters of *Om ret og retfærdighed* where Ross claimed that the task of a legal scientist is to function as a “rational technician”, assisting the political decision makers by elaborating on the most appropriate means by which a given end can be realised (Ross 1953, 472). But the ideas also marked the strictly formal or procedural account of democracy that Ross defended in his *Hvorfor Demokrati?* For Ross, democracy indicated “a how, not a what” (Ross 1946, 91). It was a form of governance, a political method, and not a particular political norm that could be established as a scientific principle. Gregory Alexander has remarked that the Scandinavian Legal Realists “sought to create more room for politics by making jurisprudence more scientific” (Alexander 2002, 132). This is undoubtedly true, but while Lundstedt was making room for a particular political content, Ross was more concerned with political form and procedure. Ross was, precisely as Lundstedt was, arguing that jurisprudence should be a form of social engineering, i.e. function as a working vehicle for social reform. But while Lundstedt was promoting particular political reforms on the basis of his principle of public welfare, Ross’ conception of social engineering was instrumental and served the aims of the (democratically elected) political authorities.

**Ross and logical empiricism**

Ross’ acquaintance with logical empiricism can be dated back to at least the spring of 1934, when Otto Neurath, the locomotive of the Unity of Science movement, gave a guest lecture in Copenhagen. Ross contacted Neurath and a concrete result of their correspondence was a rather positive review by Neurath of *Kritik der sogenannten praktischen Erkenntnis* in the logical empiricist journal *Erkenntnis* (1935).12

11 According to Alexander, this distinguished them from the American Legal Realists, who more explicitly emphasised the political character of legal science itself.

12 This is evident from the correspondence between Ross and Neurath in 1934, available at the Royal Library of Copenhagen.
Later, Ross attended the Second (Copenhagen 1936) and Fourth (Cambridge 1938) International Congresses for Unity of Science, and during the Second World War he participated in the discussions in the Swedish philosophical journal *Theoria* as well as in the leading forum for the logical empiricists in the United States, *Philosophy of Science*.

However, it was arguably the article “On the Logical Nature of Propositions of Value” (1945) that marked the turning point in Ross’ philosophical view. Where he had previously followed Hägerström in arguing that a value judgement includes a feeling that does not aim at presenting its object in time and space, he now based his arguments on principle of verification as a criterion of logical meaning in a way that was more akin to Hedenius’ *Om rätt och moral* and other logical empiricist formulations. Ross was not unaware of the difference. He explicitly stated that he had “previously in the main accepted” the Hägerströmian theory, but that he now found it psychologistic (Ross 1945, 187-9). Later, in 1950, Ross stated that while Hägerström believed that metaphysical statements are meaningless as they fail to denote anything in time and space, logical empiricism (i.e. the Finnish philosopher Eino Kaila) argues that metaphysical statements are meaningless as they cannot be tested (Ross 1950, 217). However, Ross did not denounce his affiliation to Hägerström. On the contrary, he was eager to present Uppsala philosophy as a parallel movement to logical empiricism, and he even claimed that the logical empiricists (and Wittgenstein) could not compete with Hägerström “in profundity or formulation” (Ross 1945, 174).

It has often been suggested than one should distinguish between the young Ross, influenced by the ideas of first Kelsen and then Hägerström, and the mature Ross that adopted the philosophy of logical empiricism (Blandhol 1999). But as Helin emphasises, the move from Uppsala philosophy to logical empiricism hardly meant a revolution for Ross (Helin 1988, 140). In many respects it was little more than a shift in perspective and way of argumentation, and often it seemed as if logical empiricism merely provided him with a new way of making many of the same critical points that he had been making since the early 1930s. For example, Ross certainly nursed a different view on the relation between philosophy and the special sciences than the Hägerströmians, even before encountering logical empiricism. Already in 1932 he complained that Lundstedt’s war on legal science had resulted in an unfortunate scepticism among legal scientists towards the new philosophical ideas. Similarly in *Virkelighed og Gyldighed* Ross complained that Lundstedt’s persistent claims that “there are no rights” were excessive, serving only the rather unfortunate purpo-

\[13\] In “On the Illusion of Consciousness” (1941b) Ross tried to show that the problem of the relation between the psychical and physical world was a “metaphysical pseudo-problem”, and in “Imperatives and Logic” (1941a; 1944), Ross denied the possibility of practical inferences.
se of widening the gap between philosophy and the special sciences (Ross 1934, 19). While one of the main aims of Hägerström and Lundstedt had been to use philosophical analysis in order to correct the special sciences, Ross shared the logical empiricist ambition of putting philosophy on a par with the special sciences, as part of the Unity of Science programme.¹⁴ Ross was also early in refuting the conceptual realism that marked the ideas of the first generation, and in this sense his argumentation anticipated elements in Hedenius’ attack from 1941. In 1934 Ross argued that Lundstedt based his claims on a naïve distinction between the word and the concept of “rights”. Only thus, Ross claimed, was Lundstedt able to claim that the concept of “rights” was metaphysical, referring to some magical forces in the Hägerströmian sense, while the word “rights” could still be used as “a mere designation for the realities that correspond to the concept”. Ross, on the other hand, did not believe that “a name was part of the essence or inner being of a thing” (Ross 1934, 227-229).

Even if Ross’ acquaintance with logical empiricism can be traced back to the mid-1930s it would take a while until Ross made explicit use of the new ideas in his legal theory. But when Ross, in his famous article “Tû-tû” (1951), returned to the controversy with Lundstedt, he did it from within a discussion that was performed wholly on “logical empiricist” or “analytical” premises. In 1945, the Swedish legal theoretician Per-Olof Ekelöf noticed that the method of substituting an imperative with a corresponding indicative sentence, proposed by Jørgensen (1938) in the discussion on the possibility of practical inferences, might work in accounting for the meaning of ‘rights’ in juridical inferences. This resulted in a debate on whether ‘rights’ was replaceable with certain legal facts, or certain legal consequences. Ross’ contribution was to claim that ‘rights’ served merely as a “tool for the technique of presentation”, used in order to express the relation between a complex set of legal facts and a complex set of legal consequences, but without a “semantic reference” of its own. That is, though formulating it otherwise, Ross essentially followed Lundstedt in claiming that ‘rights’ was a meaningless notion that did not denote anything in time and space; he even accepted that it was “superstitious to maintain that something mystical and indeterminable comes into being” between a legal fact and a legal consequence. But when Lundstedt charged anyone who continued to use the word ‘rights’ as “a sinful heathen” Ross denounced him as a “Swedish missiona-

¹⁴ It is possible that the correspondence with Neurath in the spring of 1934 inspired Ross to talk about “Forskningens Enhedsbygning” [“the unification of research”] in the preface of Virkelighed og Gyldighed, which was dated 1934.

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Two generations; so what?

There are good reasons to distinguish between the two factions, or generations, of Scandinavian Legal Realists. While the first generation was rebelling against the conservatism of Boströmian idealism and aiming at little less than a social upheaval on the basis of their legal theory, one of the main ambitions of the second generation was to take the edge off the radicalism of their predecessors. Hedenius and Ross, were working in a context in which economic planning and social reform were parts of the mainstream political agenda, but in which democracy had emerged as a main topic of the political discourse. Accordingly, they thought that legal science had to be merely instrumental, serving the aims of the (democratically elected) political authorities. In their criticism of the first generation, they were able to make use of new philosophical trends, imported from abroad. It is difficult to say to what extent the philosophy of logical empiricism influenced their political agenda, but their politically motivated urge to overcome the radicalism of the first generation certainly facilitated the introduction of the new philosophy, as it provided them with a powerful theoretical weapon.

15 It has been suggested that Ross’ idea of ‘rights’ as a “tool for the technique of presentation” mirrors Carnap’s thoughts on “theoretical concepts” (Sartor 2007), but there is no evidence of influence on this point.

16 “[Filosofien] er overhovedet ingen teori, men en metode. Denne metode er den logiske analyse. Filosofi er videnskabslogik, dess genstand er det videnskabelige sprog” (Ross 1953, 34).

17 However, this very idea was also criticised for being toothless in the face of undemocratic regimes. Cf. Strang 2009.
The distinction between the two generations serves as a useful specification in the recurring debate on the political implications of the school. When Bjarup and Sundberg criticise the absolutistic elements of Scandinavian Legal Realism, they are primarily referring to Hägerström, Lundstedt and Olivecrona. And when Alexander, Blandhol and others speak about democratisation, social engineering, and the welfare state, they refer to Ross and Hedenius.

But the distinction also helps us understand the rather late international reception of Scandinavian Legal Realism. The scepticism, if not hostility, of Finnish legal theorists towards Scandinavian Legal Realism in the 1930s has often been explained with reference to the legalistic heritage from the 19th century, when Finland was an autonomous Grand Duchy of the Russian empire; the German orientation of the Finnish academic elite; the agitated language question that made everything Swedish unpopular; and with the leftish aura of Hägerström and Lundstedt, thoroughly suspicious in a white Finland recovering from a bloody civil war (Helin 1988; Malminen 2007; Pihlajamäki 1997). After the Second World War much of this changed: the German influence on the Finnish academy was declining; the Nordic countries were emerging as a lifeline to the Western hemisphere; and the ideas of planned economy and social engineering were gaining influence in Finnish politics. On the basis of this article, however, it must be emphasised that also Scandinavian Legal Realism itself had undergone a significant transformation during the same period, both politically and philosophically. The alleged “socialism” of Hägerström and Lundstedt had been replaced by a form of Scandinavian Legal Realism that was explicitly critical of communism and endorsed an instrumental understanding of the relation between science and politics. Moreover, the Uppsala philosophy of Hägerström, which remained virtually unknown outside of Sweden, had been replaced with logical empiricism, a philosophy that was represented in Finland since the early 1930s by Eino Kaila, and later also by Georg Henrik von Wright. The so called “analytical jurisprudence” that reigned in Finland during the post-war era was largely built, by e.g. Simo Zitting and Osvi Lahtinen, on the basis of Alf Ross on the one hand, and on the domestic philosophical tradition that followed in the wake of logical empiricism on the other (Aarnio 1976, 48-53). Logical empiricism was one of the main international philosophical trends of the 20th century, and therefore it is hardly very surprising that it was the second generation (mainly Alf Ross) that forged an international name for the movement.18 The radicalism of Hägerström, Lundstedt and Olivecrona had been a recipe for isolation, and when Scandinavian Legal Realism in the 1940s was confronted and, to a certain

18 The term “Scandinavian Legal Realism” itself does not seem to have been launched until the 1950s. At least, this is indicated by a search on the terms “Scandinavian Realism” or “Scandinavian Legal Realism” in the digital archives of Jstor. (www.jstor.org, accessed on February 13, 2009).
extent, merged with other theoretical points of view, it lost not only some of its radicalism, but also some of its uniqueness. From this perspective, Rune Slagstad is undoubtedly correct in describing the Norwegian Legal Realism of the post-war era (Thorstein Eckhoff and Vilhelm Aubert) as a “less militant” version of Scandinavian Legal Realism, gathering themes from the Uppsala School, logical empiricism, American Legal Realism and the Norwegian realistic tradition since Anton Martin Schweigaard (1808-1870) (Slagstad 1991, 217-219). However, as the same could be said of the whole of the second generation of Scandinavian Legal Realists, his characterisation hardly captures anything uniquely Norwegian.19

The difference between the two generations of Scandinavian Legal Realists is substantial and it is certainly debatable whether the second generation belonged to, or rather marked the death of Scandinavian Legal Realism. According to Stig Jørgensen it is “for several reasons inaccurate to include Ross among the representatives of Scandinavian Realism”, while Dalberg-Larsen goes as far as to claim that the association with Scandinavian Legal Realism hampered the reception of Ross’ ideas from the 1940s onwards (Jørgensen 1986, 289; Dalberg-Larsen 2006, 66). Lars Björne argues that the 1940s were characterised by a “syncretism of methods”, characterised above all by the consolidation of Scandinavian Legal Realism with the old Nordic realistic tradition of Schweigaard and Anders Sandøe Ørsted (1778-1860) (Björne 2007, 370-71). Of course, to a certain extent it is a matter of convention (or taste) to pick a label for the positions of Hedenius and Ross; and arguably, the point about the different political and philosophical conditions and agendas of the two generations is valuable however one opts to label them. From an historical point of view, however it is rather plain that both Hedenius and Ross were greatly concerned to present themselves as representatives of the movement originating in the philosophy of Hägerström. They did not present the transformation from Uppsala philosophy to logical empiricism as a revolutionary break, but as a development within the movement. The debate between Hedenius-Ross and Lundstedt-Olivecrona can be seen as an example of “the politics of philosophy”, i.e. as a struggle for the right to represent the Hägerströmian tradition.20

19 And Slagstad is definitely on the wrong track when describing the Norwegians as less seduced by logical empiricism than the Uppsala School; it was actually the pupils of the Norwegian logical empiricist Arne Næss, who made the most programmatic attempts to introduce logical empiricism (and particularly the ideas of Rudolf Carnap) to the field of legal science (cf. Aubert 1943).

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Author correspondence: Johan Strang (Centre for Nordic Studies, University of Helsinki, currently at) Stein Rokkan Centre for Social Studies, johan.strang@helsinki.fi

Johan Strang