SCANDINAVIAN REALISM

AS the phrase Scandinavian realism implies, the writers whose work is generally considered under this head all have in common a rejection of explanations of a legal system or of legal notions which either are not expressed in factual terms or, if so expressed, nevertheless make a concealed reference to non-factual entities. An example of the first type of explanation is Kelsen's analysis of a legal system as a hierarchy of ought (not is) statements; an example of the second is Austin's analysis of law as the content of the will of the state. This is an apparently factual definition of law. But in so far as law cannot be identified with the intentions of the individual legislators, then the will of the state which is said to constitute the law cannot be located in the world of fact.

The Scandinavian writers themselves attempt to provide an explanation of law in terms of fact which cannot be criticised on the ground that the facts which it advances turn out on investigation not to be facts at all. Their main contribution in this respect was to include under the label fact not just what can be seen or touched or heard (the phenomena of the visible or external world) but mental states and conditions experienced by people, in particular their ideas, beliefs and feelings. These mental and emotional states are given so prominent a place in the accounts of the Scandinavian writers that their approach to, and elucidation of, legal notions can aptly be described as psychological.

In the English speaking world the best known of the Scandinavian realists are Axel Hägerström, Vilhelm Lundstedt and Karl Olivecrona from Sweden and Alf Ross from Denmark. Their work shares the characteristics which have already been indicated. It is anti-metaphysical and it seeks to provide an explanation of law in terms of psychological and other facts. Therefore they can justly be described as constituting a school of thought. Within this framework there are considerable differences between the views of the four realists. In this paper I shall attempt to point out some of the differences especially as they are revealed in the treatment of rules of law and the notion of rights and to make a brief assessment of the final positions which have been reached.

Hägerström, the founder of the school, stands in quite sharp

contrast to Lundstedt, Olivecrona and Ross. He produced little in the way of a constructive analysis of a legal system, concentrating mainly on a series of investigations into Roman law and on very detailed refutations of theories which conceived law as the will or the command of the state. His Roman law studies yielded the conclusion that the Romans believed their legal system to be composed of magical powers which could be utilised and made to produce results in the world of fact if the appropriate acts were performed. Thus by the performance of a formal act known as *mancipatio* one person could transfer property to another in such a way that the latter obtained over it a magical power which constituted him owner. The primitive Roman belief in magical powers survived into the modern age, though in a disguised form. Hägerström maintained that any attempt to find facts with which the rights and duties of a modern legal system could be identified must end in failure. On the other hand people did talk about rights and duties as though they were real entities possessed of an objective existence. The only conclusion possible was that they meant by rights and duties, mysterious, supernatural powers and bonds.

In the course of his refutation of the will theories Hägerström worked out a version of rights and duties difficult to reconcile with that which he obtained from his Roman studies. He held that the pressures to which an individual was subjected through his membership of a society generated in him certain feelings of power and of restriction. The individual gave spontaneous expression to his feelings of power by saying that he had a right, and to his feelings of restriction by saying that he was under a duty. Statements in the indicative form about rights and duties induced him to conceive of being a right and being a duty as qualities or properties possessed by certain actions, even though no such properties existed in the natural world.[1]

By two different routes Hägerström arrived at the conclusion that people believed rights and duties (and other legal notions) to have an objective, real existence, even though the belief was an illusion. He indicates briefly the importance of this belief and people's feelings of power and duty as factors in securing the

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For Hägerström's views see the collection of his essays translated into English by Professor Broad under the title *Inquiries into the Nature of Law and Morals*, especially chapters I and VI. For discussions of Hägerström see Broad, 1951, 26 *Philosophy* 99; Passmore, 1961, 36 *Philosophy* 143; Olivecrona, 1959, 3 *Scandinavian Studies in Law* 125; *Essays in Jurisprudence in honor of Roscoe Pound* (ed. R. A. Newman), 160 *et seq.*; MacCormack, 1969, 4 *The Irish Jurist* 153.

maintenance of a legal system (viewed as organised processes of coercion within a society to enforce what are regarded as duties and protect what are regarded as rights).[2] But he does not work out from realist premises a comprehensive analysis of a legal system; nor does he study in detail the function which statements about rights and duties have. Both tasks have been undertaken by his followers who have made his conclusions the foundation of their own more constructive analyses.[3] The three later writers are all rigorously anti-metaphysical and adopt the criticisms which Hägerström had developed of the will theories. They all base their accounts of a legal system on the feelings experienced by members of a society and they all retain vestiges of Hägerström's treatment of a legal system as a system of magical or supernatural powers and bonds.

It is not necessary to say much concerning Lundstedt whose contribution has been the least significant of the three.[4] He criticised traditional legal ideology for confusing cause and effect. Lawyers habitually represent a sanction as attached to a breach of duty on the part of the individual, or the enjoyment of some advantage as attached to the possession of a right. In reality the position is the reverse. It is the consistent punishment of certain types of behaviour by the courts that gives rise to feelings of duty in respect of the behaviour punished. These feelings are expressed in statements about duties, statements which are meaningless except as expressions of feelings. Likewise the consistent according of protection to people who behave in certain ways gives rise to feelings of power which are expressed in meaningless statements about rights.[5]

Any legal situation can be explained in terms of how people actually behave and the beliefs which they hold. Ownership may be explained by looking at the behaviour of the owner in a particular case, the behaviour of the courts, and the beliefs which people hold in connection with the owner. First one can say that an owner is a person who has acquired the object which he owns in a particular way, by sale, gift, inheritance and so on. Then one can describe his behaviour in relation to the object, and note that whereas he

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[2] Hägerström, *Inquiries*, 348 *et seq.*

[3] Strictly only Lundstedt and Olivecrona are disciples of Hägerström; but his influence has also been very strong on the work of Ross.

[4] See Lundstedt, "Law and Justice," in *Interpretations of Modern Legal Philosophies* (ed. Sayre); *Legal Thinking Revised*, especially Part I.

[5] Lundstedt, *Legal Thinking Revised*, 123 *et seq.*

may treat the object in any way he pleases, if another person interferes against the owner's wishes then the courts will step in and compel the third person to abstain from interference. This is one side of the account, the description of people's actual behaviour. The other side is an account of the beliefs which make the behaviour intelligible. Both the owner himself and the other members of the society believe that he is able to behave as he likes in relation to the object which he owns because he has a right and because everyone else is under a duty to abstain from interference. The belief in the owner's right and everyone else's duty brings about a psychological attitude in members of the society which induces them to let the owner behave as he wishes in connection with the object owned. Judges in consequence of their belief that the owner has a right feel bound to protect the owner in his enjoyment of the object.[6]

For Lundstedt, then, the belief in the existence of rights and duties is important because of the psychological influence which it has upon people's behaviour, but sentences about rights and duties and these words themselves are meaningless except in so far as they can be treated as expressions of feelings.[7] Olivecrona and Ross while still emphasising the importance of beliefs and feelings in the analysis of a legal system hold that statements about rights and duties are more than just expressions of feelings. Even though the words right and duty do not designate identifiable objects the sentences in which these words occur have certain functions. A description of those functions can provide an adequate account of the meaning of rights and duties.

The key to the understanding of a legal notion lies in the recognition of the fact that language may be used to achieve ends other than a mere description or report of a state of affairs. Both Olivecrona and Ross in their most recent works stress the multiple uses of language.

Olivecrona distinguishes between language which describes facts and language which performs some other function, such as to induce people to behave in particular ways or to express or arouse emotions.[8] Legal language belongs to the latter category. It is used in order to get people to behave in certain ways; it is directive as

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[6] *Ibid.*, 93 *et seq.*

[7] Lundstedt suggests that " the expressions legal rights, duties obligations, relationships, claims and demands, properly speaking, should not be used, not even as terms or labels," though he admits that it is impossible to do without them, *ibid.*, 17.

[8] Olivecrona, " Legal Language and Reality," in *Essays in Jurisprudence in honor of Roscoe Pound*, 169.

distinct from reporting language. Within the field of directive language there is a further important classification to be made. Some words can be classified as words which possess purely a technical function (hollow words in Olivecrona's terminology) and some utterances can be classified as performatives.

A word, a noun, may not stand for any object, and yet its use may be found indispensable in many contexts. Although it does not describe anything it can, and often has to, be used in order to accomplish certain transactions or to produce desired results. Olivecrona gives as an example of such a word the units of a monetary system (the pound or the dollar) and remarks:

> " The case of the monetary unit is highly illuminating. We find here a noun ostensibly used as denoting an object. But there is no object; the word has ceased to denote anything at all. It nevertheless plays an important role when employed in certain ways according to law and social custom. By means of its use the whole exchange of goods and services is mediated.[9]"

An utterance is performative when it is used not to describe a state of affairs but to bring something about and in particular to effect a change in legal relationships.[10] Olivecrona adopts J. L. Austin's analysis of performative utterances and cites from him the example " I do " taken from the marriage ceremony.[11] The words " I do " uttered in the course of the ceremony have the effect of creating the legal relationship of marriage between the parties. The effect of performatives is explained by Olivecrona as a relic of the time when words were believed to have magical properties and the utterance of certain words was believed magically to have the power to actualise what the words described. Olivecrona admits that performatives cannot nowadays be explained as pieces of magic. Even if the belief in the magical function of legal language survives it has only minor significance.[12] The function of a performative can be understood if one takes into account the psychological influence which it has. The words " I do " uttered in the course of the marriage ceremony operate by influencing people to treat the husband and wife in a way quite different from the way in which they have been treated prior to the marriage.

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[9] *Ibid.* 173.
[10] *Ibid.* 174 *et seq.*
[11] See J. L. Austin, " Performative Utterances," in *Philosophical Papers*, and *How to Do Things with Words*, Lecture 1.
[12] Olivecrona, " Legal Language and Reality," *op. cit.*, 190 *et seq.*

Whether one thinks of the social or the legal effects of marriage, the reality of the situation is constituted by the reactions called forth by the completion of the ceremony.[13]

Ross makes a distinction between indicative and directive speech. Indicative speech "expresses the idea of or describes a topic[14]"; it is that which is used to report a state of affairs and to convey information. Directive speech "expresses a directive, that is, an action-idea conceived as a pattern of behaviour[15]"; it is the form of speech used when one person wants to get another person to do something, to behave in a particular way.

Directives may be in the imperative mood; or they may make use of words which themselves have a directive force (ought, bound, right, duty and so on). In such cases they carry a visible sign of their function. But directives may be phrased in the indicative and may look as though they are merely descriptions of fact. Nevertheless their function is to get people to behave in a particular way. Legal language especially makes use of directives which look like indicatives.[16] An example which Ross gives is a statement found in the Danish criminal code: "whoever kills another man is imprisoned for five years to life."[17] Directives are normally issued in circumstances where it is probable that they will be effective and that the person to whom they are addressed will behave in the way indicated. The likelihood of compliance may depend upon some external factor, such as whether a sanction has been attached to the directive or whether the person issuing it is regarded as an authority by the person to whom it is addressed.[18]

Finally there are utterances which are neither indicative nor directive but purely emotive such as exclamations of pleasure or pain. Indicative or directive utterances, especially the latter, may have an emotive aspect. A directive which makes use of an emotionally charged word, for example right or duty, is a powerful instrument of persuasion.[19]

The multiple function of language and the psychological realities of beliefs and feelings are the main elements in the explanation offered by Olivecrona and Ross of legal rules and their validity and of legal rights. Both consider legal rules to be expressed in language which is designed to get people to behave in certain ways. In order

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[13] *Ibid.* 179.
[14] Ross, *Directives and Norms*, 9.
[15] *Ibid.* 34.
[16] *Ibid.* 36 *et seq.*
[17] *Ibid.* 37.
[18] *Ibid.* 50.
[19] *Ibid.* 74 *et seq.*

to avoid any possibility of confusion with commands issued by one person to another each selects terminology which brings out the impersonal nature of a rule. Olivecrona terms rules independent imperatives,[20] and Ross quasi-commands (a species of directive).[21]

Already there is a difficulty. To describe the language of a rule as designed to get people to do things and to call rules imperatives, directives or quasi-commands seems a suitable mode of procedure for one type of legal rule but not for another type. The rules of the criminal law may be represented as phrased in language designed to get people to avoid certain forms of behaviour. But the rules which lay down the conditions under which a will may be made or a contract concluded, or which confer powers to make delegated legislation do not seem designed to influence people's behaviour. One way of overcoming the difficulty is to say that the distinction between rules which tell people how to behave and rules which confer powers on them is only apparent. The latter class of rules is, it could be urged, equally concerned with getting people to behave in certain ways but their object is expressed indirectly. Thus the rules about wills can be represented as rules which indirectly tell people what to do once a will has been made. Olivecrona and Ross do seem to regard rules which confer powers as indirectly expressed rules which prescribe conduct.[22] The reduction of rules conferring powers to rules prescribing behaviour is misleading and unnecessary.[23]

There is another and more important point. One may distinguish between the content and the force of a rule. Only rules which directly prescribe conduct can reasonably be said to have an imperative or directive content. All rules whether they prescribe conduct or confer powers have imperative force. What this means is that those who come within the scope of a rule have to observe its provisions. If a rule prohibits theft, then all members of the society are bound to refrain from behaviour which amounts to theft. If a rule provides that a will is to have two witnesses, then it does not prescribe conduct in the same way as the rule about theft. But it has imperative force in the sense that anyone who wishes to make a will has to comply with the provision about witnesses. There is

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[20] Olivecrona, *Law as Fact*, 43.
[21] Ross, *Directives and Norms*, 48.
[22] Olivecrona, *Law as Fact*, 30, 130 *et seq.*; Ross, *On Law and Justice*, 32 *et seq.*; *Directives and Norms*, 118—*cf.* p. 130 *et seq.* where certain differences between norms of conduct and norms of competence are pointed out.
[23] See Hart, *The Concept of Law*, 26 *et seq.*

some recognition of this point by Olivecrona.[24] But the danger of the directive (quasi-command) and the imperative terminology is that a necessary distinction between the content of a rule and its force is obscured.

To describe a rule of law as a quasi-command or an independent imperative is not enough to make it intelligible. Two further questions arise: how is a rule of law to be distinguished from other quasi-commands or independent imperatives, and how is the notion of the validity of a rule of law to be explained? The first question is answered by Olivecrona and Ross in the same way. Rules of law are those independent imperatives or quasi-commands within a society which are concerned with the regulation of the use of force. In particular they establish the conditions under which, and the agencies by whom, sanctions can be inflicted on those who fail to behave in the prescribed manner.[25] Undoubtedly many rules of law are concerned with the use of force and it is difficult to conceive of a viable legal system which does not function with some degree of efficacy (through the regular application of sanctions). But to imply that a rule is not a rule of law unless it provides for the application of a sanction leads to the same distorted picture of a legal system as the suggestion that all rules of law are rules which regulate behaviour.

The explanation offered by Olivecrona and Ross of the sense in which the validity of a rule is to be understood is central to their whole view of law. Both explain validity in terms of psychological facts (feelings and beliefs), but the details of their explanations differ quite substantially. For Olivecrona a rule of law essentially is an independent imperative which is generally obeyed within the community. The question, in what does the validity of a rule consist, can be answered by an account of why the imperative is obeyed, or, as he puts it, by an elucidation of the "social significance" of an independent imperative.[26] Basically there are two reasons for obedience to those independent imperatives which are rules of law. The first is the existence of coercive machinery within the state and the second is the psychological reaction of members of the society.

Society is organised in such a way that the content of certain

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[24] Olivecrona, *Law as Fact*, 42; "Legal Language and Reality," *op. cit.* 180 where the promulgation of a law is classified as a performative utterance. I have not been able to see Olivecrona's essay, "The Imperative Element in the Law," 1964, 18 *Rutgers Law Review* 794 *et seq.*

[25] Olivecrona, *Law as Fact*, 134 *et seq.*; Ross, *On Law and Justice*, 32 *et seq.*; *Directives and Norms*, 93.

[26] Olivecrona, *Law as Fact*, 50.

independent imperatives, identified in a particular way, is regularly and generally enforced in relation to the members of the society. The police and courts will impose sanctions on those who behave in a manner prohibited by independent imperatives. Likewise they will protect those who behave in a way prescribed or permitted by independent imperatives against the interference of others.[27] A consequence of this view, if strictly maintained, is that an independent imperative which is in fact not applied by the courts, because its content is obsolete or because enforcement would create too many problems, is not a rule of law even though it exhibits the outward characteristics of such a rule.

The regular enforcement of independent imperatives by the police and the courts is also relevant to the second reason for the obedience accorded to independent imperatives. What contributes to the spontaneous urge to obedience experienced by members of the community is the knowledge of the unpleasant consequences which will very likely follow if the independent imperative is ignored. There appear to be three states of mind which have to be distinguished if Olivecrona's account of the psychological reaction to independent imperatives is to be appreciated.

First the members of the society are attuned to react in a certain way to independent imperatives which bear the marks of a particular origin. In every modern society there is a source from which those independent imperatives which are rules of law emanate. Usually the source is Parliament. Legislation which has been enacted by Parliament bears on its face some sign which indicates that the procedures necessary for the enactment of legislation have been complied with. Recognition of this sign induces a spontaneous attitude of obedience towards the content of the independent imperative. Olivecrona likens the state of mind of the members of the society upon recognition of the sign of due enactment to the state of mind of a soldier who receives on the parade ground an order which he has heard countless times before. In both cases the response is one of automatic, unreflecting compliance. The individual's state of mind is characterised by a spontaneous urge to perform what is directed by the imperative, but nothing so specific as a definite intention to act is present. The reaction of members of a society to duly promulgated legislation as described by Olivecrona resembles to some extent Austin's requirement of the habitual

[27] *Ibid.* 55 *et seq.* and Chapter IV.

obedience paid to the commands of the sovereign. The difference is that Olivecrona looks at the matter from the point of view of the psychology of the individual, not just from the point of view of his external behaviour.[28]

In addition to releasing an urge of compliance independent imperatives may arouse a more positive state of mind in the members of the society. If they require people to behave in a particular way they may arouse feelings of duty in respect of the behaviour prescribed. If they confer advantages they may arouse feelings of power. The use of the words duty and right in the formulation of the independent imperatives is particularly apt to arouse feelings of duty and feelings of power. Such feelings when aroused provide an extra stimulus to observance of the independent imperatives which arouse them.[29]

Finally there is the belief people have that independent imperatives produced in a certain way possess an objective validity. They believe that these independent imperatives possess in an absolute sense the quality or property " that they are to be obeyed." This belief is an illusion. No such property or quality exists in the real world. " The ' binding force ' of the law," Olivecrona remarks, " is a reality merely as an idea in human minds. There is nothing in the outside world which corresponds to this idea." [30] Nevertheless the belief in the validity or the binding force of rules of law is an important fact because it is one of the pressures which ensures compliance with imperatives recognised as rules of law. Olivecrona does suggest that existence of the belief is not necessary for the maintenance of a legal system and that being a belief in something that has no reality it should be discredited and expelled from people's minds.[31]

Olivecrona's position may be summed up as follows. A realist explanation of a rule of law can be given by identifying the independent imperatives which are regularly and generally enforced by the coercive processes within a society, by describing the manner in which these imperatives are created, and by describing the psychological reactions of the members of the society to them.

Ross' account of rules of law has been presented in two principal versions, one in *On Law and Justice,* the other in *Directives and*

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[28] *Ibid.* 51 *et seq.*, and especially Olivecrona's later work, *Der Imperativ des Gesetzes.*
[29] Olivecrona, *Law as Fact*, 14, 98.
[30] *Ibid.* 17.
[31] *Ibid.* 10 *et seq.*

Norms. There are important differences between these versions. In *On Law and Justice* Ross presents an analysis of a rule of law which is reminiscent of that made by H. L. A. Hart in *The Concept of Law*, though there are crucial differences.[32] A rule is a directive in the sense that it is intended to exert an influence on people's behaviour. More correctly the only people whose behaviour is of relevance when considering a rule of law are judges and other members of the law-enforcing agencies. All rules of law are to be construed as directives to the judges even though they regulate the conduct of members of the society in general. In order to understand the sense in which directives to judges are rules one has to distinguish between their external and their internal aspect.[33] The external aspect consists in the outward behaviour of the judges. A person observing the behaviour of the judges would observe that they regularly applied to cases before them directives which exhibited certain signs, that is, signs that they had been enacted in accordance with the constitutional procedures.

More important is the internal aspect since this alone can explain why the judges behave as they do. The internal aspect of the rule consists in the fact that it is experienced or felt by the judges to be binding. The nature of the feeling experienced by the judges is described as a " pure feeling of duty." [34] It is not a feeling derived from the judges' fear of sanctions or their desire to promote their own interests. The validity of a rule means first that judges base their behaviour (in their capacity as judges) upon the rule by carrying out the instructions it contains as to the apportionment of penalties and the determination of rights and duties, and second that they base their behaviour upon the rule because they feel it to be binding on them. Rules of law thus not only serve as a means by which the past and present behaviour of judges can be explained but as a means by which their future behaviour can be predicted.[35]

A consequence of Ross' view is that a directive is only a valid rule of law if it is effectively applied by the courts. He is faced with the same problem as Olivecrona. A law which is still on the statute book but is not enforced by the courts cannot on his premises be a valid rule of law.[36] The principal difference between

[32] *Cf.* Hart's review of *On Law and Justice*, 1959 C.L.J. 233.
[33] *Cf.* Ross, *Directives and Norms*, 37, n. 1.
[34] *Ibid.* 53.
[35] Ross, *On Law and Justice*, 11 *et seq.*, 29 *et seq.* *Cf.* Arnholm, 1957, 1 *Scandinavian Studies in Law*, 11.
[36] Ross, *On Law and Justice*, 35.

the analysis of Ross and the analysis of Olivecrona is that for the latter the internal aspect of a rule consists in the psychological reaction of the majority of the members of the society. No position of pre-eminence is assigned to the judges. This is certainly a point in Olivecrona's favour. It is a gross distortion of the truth to construe every rule of law as a directive to the courts.[37]

In an earlier work, *Towards a Realistic Jurisprudence,* Ross, like Olivecrona, had examined the supposed objective and absolute nature of validity and found that the belief in its objectivity arose from a rationalisation of impulses and feelings experienced by members of a community in relation to directives enforced by the courts.[38] In *On Law and Justice* he describes the objectified notion of validity which is produced from a rationalisation of feelings as a moral, higher validity related to God or reason.[39] He appears to be referring here to views which declare a law to be invalid if it conflicts with certain moral notions.

Ross' latest work, *Directives and Norms,* contains an important modification of the analysis of a legal rule made in *On Law and Justice.* It contains also a more precise interpretation of the words valid and invalid. In accordance with his earlier analysis Ross argues that a norm (a rule of law) can be "defined neither merely as a linguistic phenomenon (the meaning content which is a directive) nor merely as a social fact."[40] It is to be defined as "a directive which corresponds in a particular way to certain social facts."[41] The social facts become intelligible only in the light of the directive and the directive itself is intelligible only as applied to the facts.

The change which Ross introduces concerns the range of application of legal directives. He no longer defines them in terms of the behaviour and the feelings of judges and other officials but in terms of the behaviour and the feelings of all the members of the society, or at least such classes of it as are within the scope of the directive. The following argument is presented: (1) the fundamental condition for the existence of a norm must be that in the

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[37] Ross criticises Olivecrona's view, which he labels psychological realism, on the ground that it makes the legal consciousness relevant to the internal aspect of a rule depend upon the psychology of the individual, *ibid.* 72. Olivecrona's description of the automatic response generated in members of the society to obey what are presented to them as rules of law is treated as relevant to the question: Why is law obeyed? not to the question, In what does the validity of the law consist? *Ibid.* 54.

[38] Ross, *Towards a Realistic Jurisprudence,* 12.

[39] Ross, *On Law and Justice,* 53, 364 *et seq.*

[40] Ross, *Directives and Norms,* 78.

[41] *Ibid.* 82.

majority of cases the pattern of behaviour presented in the directive is followed by the members of the society, (2) if a rule is not effective in this sense it would be misleading to say that it exists, (3) the requirement that the pattern of behaviour prescribed by the norm is followed means that those to whom the norm applies in fact observe its provisions, thus if a norm establishes closing hours for shops it is only shopkeepers who will behave in the way prescribed, (4) external observation of the behaviour prescribed by the norm is not enough to warrant the conclusion that a norm exists.

> "For it is necessary for the establishment of a norm that it be followed not only with external regularity, that is with observable conformity to the rule, but also with the consciousness of following a rule and being bound to do so." [42]

The question of the internal aspect of a rule is elaborated further. Ross rightly rejects the view that it consists in the fact that failure to observe the prescribed behaviour is regularly punished by the infliction of a sanction and that the expectation of such punishment arouses in the individual concerned a feeling of coercion (a feeling that he must behave as prescribed if he is to avoid punishment). The correct view locates the internal aspect in the feeling of obligation aroused by the rule in respect of the behaviour it prescribes. This feeling is not a feeling of fear of consequences; nor is it a feeling that one's own interests are being protected. It is simply a feeling of compulsion to observe the behaviour prescribed. Ross describes this feeling of compulsion as "the experience of validity." [43]

The conclusion which Ross finally advances is that while all rules of law can logically be reduced to directives to the courts, psychologically there is a distinction between primary norms addressed to citizens and secondary norms addressed to courts.[44] This is undoubtedly an improvement upon the view that all rules of law are directives to the courts, but there remains a difficulty. It seems that in order to decide whether a rule exists one examines regularities of behaviour and determines whether they are brought

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[42] *Ibid.* 83.
[43] *Ibid.* 84 *et seq.*
[44] *Ibid.* 90. Ross writes: "Rules addressed to citizens are felt psychologically to be independent entities which are grounds for the reactions of the authorities. If we apply our definition of the existence of a norm, primary rules must be recognised as actually existing norms, in so far as they are followed with regularity and experienced as being binding (92)."

about by certain feelings of compulsion. One may observe that all shopkeepers regularly close their shops at a certain time in the evening and upon inquiry one may discover that they all experience a feeling of compulsion to close their shops at this time. One may then deduce that there is a legal rule requiring shops to be closed at this time. But the rest of the community does not behave in this way and certainly does not experience feelings of compulsion in respect of the closing of shops at a certain time. Can it therefore be said that from their point of view there is a rule? The problem is: how is a rule which obtains purely within a limited class of persons to be distinguished from a rule which is valid for the whole community even though it regulates the behaviour of a limited class? A possible solution open to Ross is that a rule which is valid for the whole community is one that is enforced by the courts. However this forces him back to his original, indefensible position in which a rule of law is defined as a directive regularly acted upon by judges and felt by them to be binding.

Ross clarifies his understanding of the notion of validity by distinguishing its meaning in moral philosophy from its meaning in legal language. In moral philosophy validity denotes " a supposed non-empirical quality which belongs to certain norms." [45] No such quality in fact exists; it is a rationalisation of " experiences of validity." From this it can be inferred that on Ross' view the members of the society who experience a directive as binding rationalise their feelings of compulsion and attribute to the directive an objectively conceived quality of validity. The description of validity as a moral notion suggests that it functions as a moral ground or justification for obedience to the law. In speech which expresses legal rules the words valid and invalid are used as a means of stating whether a legal act (*acte juridique*) has its appropriate legal effects or not. To say that a will is valid is to say that it brings about the legal effects determined by the rules which govern the making of wills. To say that a contract is invalid is to say that it does not bring about the legal effects which the rules relating to contracts provide.[46]

Some incidental difficulties which arise from the analysis of legal rules and validity offered by Olivecrona and Ross have already been pointed out. The fundamental question is, can the notion of validity be adequately explained in terms of feelings or psychological

[45] *Ibid.* 104. [46] *Ibid.* 104 *et seq.*

reactions. Does a valid rule of law mean a directive which is felt to be binding by members of the society or which arouses an impulse of obedience.[47] The answer to both questions must be negative. In the first place there is an obvious distinction between a feeling that one is bound by a rule and the statement that a rule is binding. If one says that a rule is binding one does not mean that one feels bound by it even if in fact a feeling of being bound is experienced.[48] The reply made by Olivecrona to this point is that the statement that a rule is binding is a reference to the belief that the behaviour prescribed by the rule possesses a non-existent quality, that of being binding. Ross' reply is that the statement may assert [49] that the rule possesses a moral quality; it conforms with what is required by God or reason. Both might add that the statement also has certain functions. It allows inferences to be made as to the origin of the directive and the consequences which will follow if the prescribed behaviour is not observed. It might also have an effect on people's behaviour.[50]

It might be the case that the statement that a rule is binding does have certain functions. But an enumeration of the functions does not exhaust the meaning of the statement; nor does it catch its essence. A statement that a rule is binding implies that the rule belongs to a system of rules and that there exist certain criteria by which the rules belonging to the system can be identified. It states that the rule in question is a rule of the system because it complies with the criteria by which such rules are identified. A statement that a rule is valid is not a statement about a belief in the existence of non-factual properties of actions; nor is it an assertion that the rule possesses a moral (non-factual) quality.

To hold that validity cannot be explained by a reference to feelings is not to deny the importance of feelings or other psychological reactions for the maintenance of a legal system. It may even be the case that a certain psychological attitude towards rules of law on the part of the members of the society and especially on the part of those concerned with the enforcement of the law

[47] There is a certain difference in the treatment of Olivecrona and Ross. The latter speaks of a feeling that the directive is binding; the former speaks of the impulse to obey and here a feeling of being bound is only one of the states of mind which may be relevant.

[48] *Cf.* Hart, *The Concept of Law*, 56.

[49] Ross also holds that a statute like other *actes juridiques* is invalid if it has not been enacted in accordance with the procedures established by a " norm of competence," *Directives and Norms*, 96, 131.

[50] *Cf., infra*, the analysis of statements about rights in terms of their functions.

is a necessary condition for the existence of a legal system. To make the validity of an individual rule of the system depend upon feelings aroused in the minds of members of the society not only involves the obvious difficulty, how is the presence of the feelings to be determined, but leads to consequences unacceptable from the realist point of view. In order to avoid the objection that members of the society, even judges, so far from experiencing actual feelings of being bound in respect of a particular rule may experience positive feelings of revulsion or no feelings at all, Olivecrona and Ross have to assume that the production of a feeling of being bound (or other psychological urge to obey) is a necessary accompaniment of a directive which is a rule of law. On this assumption feelings are attributed to persons who may not in fact experience them and the same criticism can be made as Olivecrona and Ross make of Austin's conception of the will of the state, namely, that the alleged feelings have no place in the world of fact.

Ross' discussion of the internal aspect of a rule may be compared with that made by H. L. A. Hart in *The Concept of Law*.[51] Ross defines the internal aspect of a rule as the consciousness of being bound and by this he means a feeling that the rule is binding. Hart distinguishes between the external and the internal aspects of a rule but he does not identify the internal aspect with a state of consciousness that could be described as a feeling of being bound. It consists rather in an acceptance that the behaviour prescribed by the rule constitutes a standard to be followed and that deviation from the behaviour is a good ground for criticism. Hart writes:

> " What is necessary is that there should be a critical reflective attitude to certain patterns of behaviour as a common standard, and that this should display itself in criticism (including self-criticism), demands for conformity, and in acknowledgments that such criticism and demands are justified, all of which find their characteristic expression in the normative terminology of ' ought,' ' must,' and ' should,' ' right ' and ' wrong.' " [52]

There is a second point of difference between Ross' and Hart's treatment of the internal aspect of rules. For Hart the internal

[51] Hart, *The Concept of Law*, 54 *et seq.*

[52] *Ibid.* 56. Ross, *Directives and Norms*, 63, n. 3 notes that Hart's requirement of acceptance differs from his own requirement of a feeling of being bound.

aspect of acceptance has to be distinguished from the validity of a rule. Where a rule does not belong to a system of rules, then it is appropriate to speak of its acceptance by members of the society. Where the rule belongs to a system, what is relevant is not whether it is accepted but whether it complies with the criteria by which rules of the system are identified. If it complies with the criteria (the rule of recognition), then it is a rule whether or not it is accepted. The words "valid" and "invalid" can properly be used only of rules which belong to a system. They designate the compliance or non-compliance of the rule with the criteria specified in the rule of recognition.[53] Ross' position is ambivalent. On the one hand he classifies the act of legislation as an *acte juridique* and hence holds that a statute is invalid if it has no effect because it does not comply with the conditions established for the creation of new rules of law.[54] On the other hand he discusses rules of law which belong to a system in terms of the "experiences of validity" which they arouse. In this context he states that "'validity' is nothing but the peculiar characteristic of these experiences."[55] It is the second interpretation of validity which seems incorrect. An "experience of validity" may be relevant if one has to decide whether an alleged rule, not belonging to a system, is a rule. If a rule is alleged to belong to a system, then what is relevant in determining its status is not the experiences of members of the society but its compliance with the criteria by which rules of the system are identified.[56]

The same mixture of linguistic function and psychology used to explain a rule of law is used by Olivecrona and Ross to explain the notion of a legal right. In *Law as Fact* Olivecrona shows at some length that there is no factual situation which of itself can explain the notion of right. In particular a right cannot be identified with the possession of factual advantages or with the ability to bring a successful legal action.[57] What is expressed by the word "right" can only be described as a power. Since this power does not belong to the real world it has to be considered as "a fictitious

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[53] Hart, *The Concept of Law*, 105. *Cf.* Dworkin, "Is Law a System of Rules?" in *Essays in Legal Philosophy* (ed. R. S. Summers), 32.

[54] Ross, *Directives and Norms*, 96, 131.

[55] *Ibid.* 86.

[56] When defining quasi-commands (rules of law) as a class, Ross says: (they are) directives which are experienced as heteronomous, that is, directives which appear to an individual as a given, existing order imposing itself upon him independently of any acceptance or recognition on his part, 49 *et seq.* Yet each rule is held to give rise to a feeling that it is binding.

[57] Olivecrona, *Law as Fact*, 75 *et seq.*

power, an ideal or imaginary power." [58] The belief in the existence of such fictitious and imaginary powers is ultimately derived from a belief in magic.[59] Although it is not possible to say anything about the nature of the fictitious power which people believe is denoted by the word "right" it is possible to describe in terms of fact the uses to which the word can be put. There is first of all the use of the word "right" in legislation or judgments. Here it functions as an imperative expression. If a law or a judgment declares that a person has a right, both that person and others are influenced to behave in a particular way.[60] Second, the word "right" may be used to arouse feelings of conviction or strength in connection with certain courses of action.[61] Third, the word is a useful shorthand. The judge, instead of reciting all the facts and the rules which in his opinion allow the plaintiff to succeed in an action, may simply say that the plaintiff has a right. There are numerous occasions in which it is convenient to talk of a right of ownership rather than to set out all the relevant facts and rules.[62]

In his later writings Olivecrona places greater emphasis on the functions of the word "right." Although the belief that right denotes a fictitious or imaginary power retreats to the background of his analysis it does not disappear altogether.[63] It is not clear whether the notion of a right as an imaginary power is to be attributed to an objectification of feelings [64] or to primitive magical beliefs.[65] In a sense the linguistic standpoint which Olivecrona adopts especially in his essay "Legal Language and Reality" is incompatible with his earlier treatment of right as an imaginary power. If, as he remarks, there is no need for a noun to denote an object, and if its function is to express or arouse emotions or to influence

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[58] *Ibid.* 90.
[59] *Ibid.* 112 *et seq.*, where Hägerström's researches into Roman law are cited in support.
[60] *Ibid.* 94 *et seq.*, 103 *et seq.*
[61] *Ibid.* 98 *et seq.*
[62] *Ibid.* 110 *et seq.* This aspect is best considered in connection with Ross' analysis.
[63] Olivecrona, "The Legal Theories of Axel Hägerström and Vilhelm Lundstedt," in 1959, 3 *Scandinavian Studies in Law* 130, n. 1, 143; "Legal Language and Reality," *op. cit.*, 154. How minimal a role Olivecrona is now prepared to accord the notion of a right as a belief in an imaginary power can be seen from the following remarks in the latter essay, 168 *et seq.*: It is evident that we do not go about thinking of mysterious powers and bonds. Moreover, a mysterious power is nothing. As we just stated the word 'right' is a hollow word in the sense that it is not the expression of any notion at all. The illusion of a power of a non factual kind stems from a feeling of power. This feeling crops up only on special occasions. . . . We use the words 'right' and 'duty' as if they signified some non factual powers and bonds, but we do it without really thinking about such things.
[64] Olivecrona, "The Legal Theories of Axel Hägerström and Vilhelm Lundstedt," *op. cit.*, 143; "Legal Language and Reality," *op. cit.*, 168 *et seq.*
[65] Olivecrona, "Legal Language and Reality," *op. cit.*, 175 *et seq.*

behaviour, the case for saying that it is believed to stand for a non-existent entity becomes very weak.

Most emphasis is laid upon the effects which the use of the word " right " has on people's behaviour and its use as a means by which certain information may be communicated.[66] Olivecrona classifies " right " as a " hollow " word, that is, as a word which does not stand for a real object but has certain specific functions. Its most important function is to act on people's emotions and feelings in such a way as to influence their behaviour.[67] If a person states that he has the right of ownership or simply that he is owner the use of the word right (or owner) acts as a sign which releases a psychological reaction on the part of other people. They will feel bound not to interfere with the owner's enjoyment of his property. Likewise if someone is told that he is owner or that he has the right of ownership he feels that he may deal as he pleases with the object which he owns. The intensity of the feelings aroused will vary from individual to individual. Very often the reaction to the word " right " will merely be a spontaneous urge to behave in a certain way. Statements about rights only have this psychological effect when they are used in appropriate circumstances. If a person says that he has the right of ownership his statement will only achieve the psychological effect of influencing others to abstain from interference if it is supposed that he has some ground for the statement, that is, has acquired the property in one of a limited number of ways. The sign function of statements about rights is thus linked to another function which they have, namely to impart information.

Statements about rights have an informative function because they permit inferences to be made as to the existence of certain facts. A statement that a person has a right to be paid a sum of money enables the listener to infer that some previous transaction has taken place (a loan, sale, etc.) or that some other circumstance has occurred (a bequest in a will) of the sort to justify a statement that the speaker has a right. He cannot infer what precise transaction has taken place but, unless he has some reason to be suspicious, he can infer that some fact has occurred which justifies an assertion about a right. Statements may have an informative

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[66] The word " right " is also said to have a technical function as a shorthand by which the relation between facts and legal consequences may be expressed. There is no change from the view stated in *Law as Fact*.

[67] Olivecrona sometimes calls this the behaviouristic function of right, " The Legal Theories of Axel Hägerström and Vilhelm Lundstedt," *op. cit.*, 144.

function of this sort even if in the circumstances in which they are uttered they do not have a sign function.[68]

Ross' treatment of rights has undergone a number of phases. The analysis presented in *Towards a Realistic Jurisprudence* relies heavily on the premises worked out by Hägerström; that presented in *On Law and Justice* and in his article "Tu-Tu"[69] is based upon the multiple functions of language. In *Towards a Realistic Jurisprudence* Ross treats the word "right" as an expression for an invisible and mystical power. Such a power is the product of the rationalisation of the feeling of power.[70] He attempts to link this explanation with the explanation which attributes the belief in invisible and mystical powers to primitive magical thought by constructing the following hypothesis. He accepts that modern man does not believe in the existence of invisible powers which animate the phenomena around him and which can be controlled by the performance of certain acts (magical powers). But he does think that there is a link between the psychological process which accounts for the notion of right in the modern age and primitive man's conception of a right as a magical power. The link is the fact that primitive man rationalised certain feelings aroused by the contemplation of the world around him into rights conceived as magical powers and gave them a form which lasted into the modern age. Modern man who rationalises from a different point of view does not regard rights in the same way as primitive man but nevertheless retains the form or structure which primitive man had given them. Thus even today a right is imagined to be an invisible or mystical power which looks like the magical power of primitive man although in fact it is different.[71]

Something of this approach remains in Ross' later writings but there is a very interesting difference. Ross admits that there is a powerful tendency to think that the word "right" stands for an invisible power. He attributes this not to the rationalisation of feelings of power but to a natural mistake brought about by the structure of the sentences in which the word "right" is used. Although the function of these sentences is to facilitate the presenta-

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[68] See in general Olivecrona, "The Legal Theories of Axel Hägerström and Vilhelm Lundstedt," *op. cit.*, 143 *et seq.*; "Legal Language and Reality," *op. cit.*, 182 *et seq.* *Cf.* Arnholm, 1962, 6 *Scandinavian Studies in Law*, 9; Sundby, 1968, 13 *Natural Law Forum*, 98 *et seq.*

[69] Published in 1957, 1 *Scandinavian Studies in Law*, 137.

[70] Ross, *Towards a Realistic Jurisprudence*, 189 *et seq.*, 200 *et seq.*

[71] *Ibid.* 13 *et seq.*, 224 *et seq.*, 256. *Cf.* also Olivecrona, *Law as Fact*, 115.

tion of legal rules and of decisions drawn from these rules the word " right " looks as though it stands for a substance or real object. The use of the word naturally leads people to think of a power since this is the only substance that could appropriately be denoted by the word. Such a control of language over thought is related to the primitive belief that supernatural powers can be influenced through the utterance of the correct words.[72]

Ross holds that many lawyers and laymen still make the mistake of regarding " right " as a word which stands for some object.[73] In reality it is a word which itself has no " semantic reference." It is used in sentences which look as though they are descriptions of fact and yet have a totally different function. Sentences using the word " right " can only be understood if they are set against a background of legal rules. Their import is to relate certain of the rules of the legal system to some particular state of affairs and in this way they constitute a technique by which the law can conveniently be presented.

To illustrate this point Ross takes the right of ownership. A large number of different occurrences give rise to the same range of legal consequences. If a person buys a house certain consequences follow; if he inherits a house the same consequences follow and likewise if he is given one. Very often the person who acquires the house or others concerned in some way with it are interested only in the legal consequences of the acquisition. Instead of having to say that the rules provide that if a person buys a house then he may take steps to secure undisturbed possession, or that a person who has inherited a house may take similar steps, they find it convenient to have a single word or phrase which allows them to dispense with a recital of the rule and the facts which entail a particular legal consequence. So they may simply say that a person who has the right of ownership or who is the owner may take steps to eject intruders from his property.

Sentences which contain the word " right " and so act as a shorthand by which the relation between rules of law and facts may be expressed have a descriptive and a prescriptive aspect. They can be said to describe in the sense that they refer to, or imply the

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[72] Ross, " Tu-Tu," *op. cit.*, 145 *et seq.*; *On Law and Justice*, 178 *et seq.* *Cf.* also Olivecrona's view outlined above.

[73] *Cf.* Ross, *Directives and Norms*, 134: This metaphysical way of considering duties and rights to be substantial entities largely prevails in Continental and Anglo-American legal thinking, and has had unfortunate results for the treatment of practical legal problems.

existence of, one of the states of affairs to which the law attaches a particular set of consequences. They can be said to prescribe in the sense that they imply that the person to whom the right is attributed can effectively make use of a range of legal consequences.[74] The statement that a person has the right of ownership or is owner on the one hand implies the existence of a state of affairs such as a purchase or a gift or a legacy (descriptive function) and on the other implies that rules of law permit him to take various courses of action, such as to deal with the property as he thinks fit or to prosecute trespassers.[75]

The essence of Ross' explanation of sentences containing the word " right " is that (1) they have to be understood in the light of a legal system, and (2) they permit the implication both of the existence of a certain state of affairs and of the attachment of certain legal consequences to that state of affairs.

For both Olivecrona and Ross the elucidation of statements about rights depends upon an appreciation of the uses of language. For Olivecrona the main significance of statements about rights lies in the influence which they have on people's behaviour. Here the psychological effect of language preponderates. On the other hand for Ross such statements function primarily as a means by which complicated situations involving a relationship between facts and rules of law can be expressed. Olivecrona's account is open to the same objection as that which can be brought against explanations of validity in terms of the psychological reaction aroused by directives. Statements about rights may have certain psychological effects on the persons to whom they are addressed. But their meaning cannot be elucidated through a description of such effects. More relevant are the informative and the technical functions which Olivecrona treats as subsidiary to the sign function.

There is little to which one may object in Ross' account in so far as it holds that statements about rights can be elucidated by setting out the rules and the facts to which an implicit reference

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[74] Ross' prescriptive function is to be distinguished from Olivecrona's sign function. Ross does not hold that the primary function of statements about rights is to get someone to behave in a particular way. His language is not always without ambiguity. Thus he says that the statement " shut the door " is an expression of a prescription if it is presented as a guide for behaviour, " Tu-Tu," *op. cit.*, 140. He certainly accepts that statements about rights may influence behaviour. *Cf.* above on Ross' analysis of descriptive language.

[75] Ross, *On Law and Justice*, Chapter 6, esp. 172 *et seq.*; " Tu-Tu," *op. cit.*, 139. *Cf.* Sundby, 1968, 13 *Natural Law Forum*, 84 *et seq.*

is made. Statements about legal rights presuppose the existence of a legal system and refer to certain rules of that system.[76]

What does perhaps astonish is that Ross, and also Olivecrona, still revert in their explanations to the belief that right stands for a non-existent power which is conceived as a real entity. There does not appear to be any evidence for such a belief. People may assert that they have a right and therefore that they have certain powers. If asked to explain what they meant they would reply that the law permits them to do certain things. They might not understand which precise rules were involved but the essence of their explanation would be that the rules of law permitted them to behave in a certain way, and that they expressed this by saying that they had a right or a power.

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[76] See on this Hart, "Definition and Theory in Jurisprudence," 1954, 70 L.Q.R. 37. For a criticism of the approach taken by Ross and Hart, see Simpson, 1964, 80 L.Q.R. 535.