Frónesis: Vol. 13, No. 3, 2006: 32 - 55
ISSN 1315-6268

Analysis of language and legal rights within the Scandinavian debate. Human rights: a "*hidden essence*"?

Alessandro Serpe
Universidad Federico II de Nápoles
Italia
aserpe@yahoo.it

Abstract

The new approach of analytical jurisprudence was in line with the tradition of Scandinavian realism. My contribution addresses the search for differences and similarities by describing the contribution of Scandinavian authors on legal rights and more explicitly their ontological and semantic nature, the issues of a definition and its practical utility within the legal system. The debate on legal rights arose in the 40's may be considered as still actual in the sense that the semantic and pragmatic approach has nowadays involved the issues concerning the nature of human rights. It is recognizable in the debate on human rights a pragmatic approach on the subject seem to predominate. Pragmatic and realistic instances get the upper hand. The definition of a theoretical concept (as "human right" or "legal right") does not say anything concerning the content and moreover the forms of protection or the immunities which should be stated as fundamental. Scandinavians seem to avoid ontological-substantial definitions.

Key words: Human rights, legal rights, Scandinavian realism.

Recibido: 23-02-2006 • Aceptado: 02-11-2006

Análisis de lenguaje y derechos legales dentro del debate Escandinavo. Derechos humanos: ¿una "esencia oculta"?

Resumen

El nuevo enfoque hacia jurisprudencia analítica estaba conforme con las tradiciones del realismo Escandinavo. Esta contribución enfoca la búsqueda de diferencias y similitudes al describir la contribución de autores escandinavos sobre derechos legales, y más explícitamente su naturaleza ontológica y semántica, y el asunto de su definición dentro del sistema legal. El debate en torno a los derechos legales empezó en la década de 1940, y es aún vigente ya que el enfoque semántico y pragmático hoy en día incluye la naturaleza de derechos humanos. Se encuentra en el debate sobre derechos humanos un enfoque pragmático que parece dominar. Las instancias pragmáticas y realistas tienen prioridad. La definición de un concepto teórico (derechos humanos o derechos legales) no especifica en relación al contenido, e indica que las formas de protección o inmunidades deben ser declaradas como fundamentales. Los Escandinavos aparentemente evitan definiciones sustanciales-ontológicas.

Palabras clave: Derechos humanos, derechos legales, realismo Escandinavo.

1. An Introduction. The major aims

From the Second World War the relationship between legal rights (*rett*) and language has been amply debated within Nordic countries (Eckhoff, 1969: 63). The new approach of analytical jurisprudence was in line with the tradition of Scandinavian realism. My contribution addresses the search for differences and similarities by *describing* the contribution of Scandinavian authors on legal rights and more explicitly their ontological and semantic nature, the issues of a definition and its practical utility within the legal system. The debate on legal rights arose in the

40's may be considered as still actual in the sense that the semantic and pragmatic approach has nowadays involved the issues concerning the *nature* of human rights.

1.1. The major threads

In 1945, the Swedish Per Olof Ekelöf (2) published an article supporting his theories. It was the object of Ivar Strahl's (2.1) and Anders Wedberg's criticism (2.2). To some extent the Swedish Anders Wedberg anticipated Alf Ross's approach (3; 3.1) other significant contributions came from Karl Olivecrona and Vilhelm Lundstedt who followed in the footsteps of Axel Hägerström (4; 4.1); in Norway Torstein Eckhoff's and Nils Kristian Sundby's contributions, even if quite distant from Ross's, are worthy of mention (5). Last but not least, Torkel Opsahl's contribution, as to definitions and legal rights terms, seems to be quite suggestive. The Norwegian legal philosopher opened an interesting connection between the theory and the practice of human rights by investigating human rights and legal rights by semantic and linguistic analysis (6). The essay ends with a brief indication of my conclusions (7.1; 7.2).

1.2. A preliminary question: What does "*rett*" mean?

Before proceeding any further it is convenient to describe the meaning of the word "*rett*" as used within the Scandinavian countries. The word "*rett*" has at least four main meanings:

a) The word "*rett*" may mean the set of all current legal rules in society (in this sense the word "*rett*" may mean what Germans call "*das objective Recht*" and what Anglo-American call "*Law*");

b) The word "*rett*" may be considered as a synonymous of the German "*Gericht*" and the Anglo-American "*Court*";

c) The word "*rett*" may express a 'positive appraisal' namely it may mean 'worth of ethical approval' so as its application is quite neutral;

d) The word "*rett*" may mean "legal right" (in this sense the word "*rett*" may mean what Germans call "*das subjective Recht*").

As to the fourth sense of the word "*rett*", it is important to note that it is often used as synonymous of the other term "*rettighet*". More explicitly the term "*rettighet*" (or "*rett*" in a subjective sense) may not only be contained within normative statements which describe or prescribe how a certain action is to be judged according to the law, but also in a more complex way. "*Rettighet*" is also used in a sense in which a person is said to have a right *even* where this statement does not entail that there are definite actions which he has a *right* to do or not to do, or which others have a *duty* to do or not to do (Sundby, 1968: 74-76).

In my paper I will focus on this last fourth meaning of the term "*rett*" (and/or "*rettighet*") so ignoring the other senses of the term "*rett*".

2. Per Olof Ekelöf. On the Concept of legal right

As far as legal rights were concerned Ekelöf tried to find a comparable expression to substitute the word "*claim*" within normative statements (1945: 211-272). He used the two following examples A and B.

A)If a loan is granted it comes as a consequence that a *claim* comes into existence;

Here a loan is granted.

Here there exists a *claim*.

B)If a *claim* exists, then it stands to reason that payment is made on the day it falls due (Sundby, 1968: 79).

Here there exists a *claim*.

Here payment shall be made on the day it falls due.

In example A the word *claim* could be substituted by an expression indicating *complex legal consequences* (namely a set of

all the facts which according to the Law constitute the conditions for the existence of a claim) whereas in example B *claim* could be substituted with an expression regarding *complex legal facts* (namely the set of all legal consequences following the existence of a claim) (Sundby, 1968: 79-80). Complex legal facts can be also defined as "*creative facts*" (for example in the case of a loan, the factual causes) and partly as the "*extinguishing facts*" (the prescriptions, compensations or remissions). Complex legal consequences can be grouped into "*actual*" or "*present*" consequences (the loan might be transferred to another creditor) and "*hypothetical*" consequences (coming into existence) only if additional facts supervene. The substitution will be successful only if the new sentences combined through deductions have the same legal function as the old ones (Sundby, 1968: 82).

Ekelöf's significant contributions regarded the innovative attempt of substituting legal rights terms by fighting the belief that such terms designate something which "comes between" legal facts: legal rights have a factual nature.

2.1. The '*combined inferences*'. Ivar Strahl's contribution

Ivar Strahl arose his criticism toward Ekelöf's concept (Strahl, 1946: 204-210) by asserting that the word *claim* could not indicate two different things namely legal consequences (in example A) and legal facts (in example B). A and B only represent two legal inferences which are bound and combined to a wider chain of inferences so that the conclusions deriving from one inference will constitute the premise for the others. Strahl used the two following examples through a simple combination of A and B (C) and by combining elements from A and B (D):

C)If a loan is granted, a claim comes into being (A)

Here a loan is granted.

If a claim exists, then payment shall be made on the day it falls due.

Here payment shall be made on the day it falls due.

D)If a loan is granted, a claim comes into being;

If a claim exists, then payment shall be made on the day it falls due (B).

Hence, if a loan is granted, then payment shall be made on the day it falls due.

Consequently the legal term cannot mean two different things as this would lead to a logic fallacy (Sundby, 1968: 82). The word *claim* has to indicate either legal facts or legal consequences. Strahl chose the first alternative, legal facts, because apparently these terms had already been used in the application of Law after previous investigations of a factual nature (*Ivi*, *op.cit.*: 83).

2.2 Anders Wedberg: *A Theory of regression to legal facts*

A different contribution still aimed at getting rid of this antiquated approach came from Anders Wedberg with his "theory of regression to legal facts" (*teori på regressen på rettsfaktasiden*) (1951: 246-275). According to this theory a legal factual situation (e.g. an ownership situation) is always influenced by a previous factual situation and consequently it is possible to draw "*origin-lines*" (*avstammingslinjer*). By going against these lines of thought, the original factual situation (*førstehåndseiersituasjon*) could be found, totally independently from the others, and defined without using the legal term (right of ownership) and constituting the basis for future factual situations second, third, fourth and so on (level of right of ownership) (Eckhoff, *op. cit.*: 65). Ekelöf's, Strahl's and Wedberg's theories built up the foundations for Ross's contributions.

3.Alf Ross and the issue of a "semantic reference"

Differently from Ekelöf, Ross believed that words indicating legal rights neither designate nor mean anything and in this respect he spoke about "*hollow words, without independent seman-*

tic reference" (Ross, 1957: 818). In his theory he proposed a suggestive and fantastic story to his readers to underline his point. He assumed that the anthropologist Ydbon had landed on Noîsulli Island and had made inquires about the habits and language of the Noît Kifs tribe. This tribe believed that if somebody violated certain taboos (for instance stealing the chief's food, killing his stepmother or the killing of a totemic animal) they would become a *Tû Tû*. This expression indicates a sort of magical and dangerous force which possesses a person responsible for a crime. Once possessed by the *Tû Tû* force the victim must be purified by performing specific religious rites (Ross, 1976a: 165-181). Ross took for instance, the following sentences which are in use within the Noît Kifs tribe:

A) If a person has eaten the chief's food, then he is a *tû-tû*.

B) If a person is *tû-tû*, then he shall go through a ceremony of purification.

These two sentences may be combined into a new sentence:

C) If a person has eaten the chief's food, then e shall go through a ceremony of purification.

It is as if the tribe is surrounded by a mysterious veil and irrational superstition so that the word "*Tû Tû*" totally lacks meaning and for this reason all discourses containing this word are meaningless. Nevertheless, the inhabitants are able to speak significantly when using this word as it is also aimed at prescribing and denoting other words belonging to other languages. In B for instance: "*If a person has eaten the chief's food, then he shall go through a ceremony of purification*". Such an assertion is undoubtedly pronounced with the magic word "*Tû Tû*".

This story helps Ross to explain that not only mystical language but also legal language contains words with traces of mysticism. Ross took, for instance, the *ownership* and noticed the close analogy to the *tû-tû* inference:

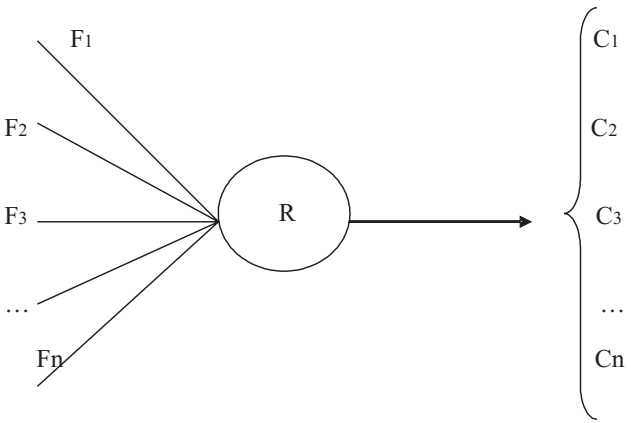
A) If A has purchased an object, then ownership for A of the object is created.

B) If A has ownership of an object, then he has the right of recovery.

C) If A purchased an object, then he has the right of recovery.

As "*Tû Tû*" is meaningless in itself, as it lacks a semantic reference, in the same way legal terms such as legal rights (ownership in the example) acquire meaning through the combination of sentences which contain this word.

What differentiates Ross's approach from Ekelöf's is that Ross does not consider the legal term as the object of substitution but the sentences in which the word occurs. What is more, the sentences which contain the word cannot be considered singularly but only in connection with other sentences (Sundby, 1968: 86). He further underlines the fact that legal right terms do not denote anything at all. Why does legal language use such "*concept words*"? Ross's answer is that these words have the function of important "*systematic tool of presentation*" (Ross, 1958), that is to say, they allow the correlation between *legal facts* and *legal consequences*, as this model below: (F=legal Facts; C=legal Consequences; R=Rights):



If it were otherwise it would be necessary to formulate a large amount of legal norms in order to directly connect individual legal consequences to individual legal facts (Ross, 1976b: 207). Though the legal right term lacks in meaning and semantic reference on its own it represents a tool for systematic connections and for the systematisation of legal rules. It is evident that Ross got in line with Swedish philosophers particularly as far as the anti-metaphysical approach was concerned.

3.1. The criticism of Ross's argument

However, one doubt emerged - what exactly did he mean by "semantic reference"? Perhaps it represented Ross's Achilles heel. Although there is no semantic reference whatsoever a word can mean something in compliance with the other "senses". The Norwegian legal philosopher Nils Kristian Sundby (1968: 85) thought that Ross's expression ran the risk of being misunderstood and that the word in question might have "*the same semantic status of sounds or accidental scribbles*".

An other Norwegian legal philosopher, Frede Castberg (1), heavily criticised Ross's unexplained thesis and asserted that even if a statement containing words such as "*duty*" or "*right*" lacked in semantic reference as they don't refer to a physical event, therefore not verifiable, it could not be asserted that the normative propositions were meaningless or irrational. According to his Idealism, Castberg maintained that such a proposition always refers to a presumed valid higher norm and moreover it acquires meaning in the light of a valid legal system (Castberg, 1967: 56). Sundby questioned if the expression "semantic reference" is meant to "designate" or to "denote" something and that the relation between the word and what the word denotes must be verified using true/false distinctions (Sundby, *op.cit:* 92-93).

4. Scandinavian Realism. Legal rights terms as *pure fancy*

Vilhelm Lundstedt's conclusions were even more extreme than Ross's because he refused to restrict himself to the assertion "the unreality of legal terms". First of all he distanced himself from Windscheid's concept where a legal right is "*eine von der Rechtsordnung verlichene Willensmacht oder Willensherrschaft*" (Windscheid, 1906:156) or rather the willpower or prevalence in producing a legal effect as acknowledged by the legal system; he maintained that a legal right is a real entity dependent on the machinery of Law. The identification of legal right with Jhering's "juridical protected interest" does not satisfy him: it seems indeed possible to separate the concept of legal right in a substantial element (interest) from a formal element (legal protection). By the elimination of the formal side, Law would be belittled to a mere advantage, practically identical to the position of a thief as long as he keeps the stolen object. Jhering expanded his concept of "*juridical protected interest*" with the indication of another element: the "juridical protection worthy": how to find - Lundstedt asked himself - an anchorage point which could be used to evaluate whether the interest at issue was or was not worthy of protection (Castignone, 1995: 117 ss). Here one plunges headlong into the metaphysical abyss.

To approach legal terms issue as a *real* term is "*pure fancy*" (Lundstedt, 1956: 123): a legal right is nothing but an advantageous position held by a person by virtue of the psychological pressure that the legal system exerts over others whereas a legal duty is the corresponding state of constraint (Olivecrona, 1976: 256a). Legal rights and duties are illusions, imaginary entities interposed between legal facts and legal consequences (Olivecrona, 1976: 209b): "*ghosts and superstitions*", elusive *quid* without any foundations (Lundstedt , 1932-12936: 74). Legal terms shall not be used at all as they are lacking in meaning: since it would result impossible to extrapolate them from common legal practice.

It should be the scientist's duty to put them in inverted commas and consider them as mere *labels* (Lundstedt, *op.cit.*: 17). Östen Undén, Professor at the faculty of Law in Uppsala, criticized Lundstedt by asserting that his opinions would be founded only if legal experts used the concepts of legal rights as a substantial concept denoting certain entities.

Yet, the term is only used in a "functional" sense in order to facilitate the norms or cases descriptions and to better represent them. Lundstedt's criticism concerning legal concepts remained an echo since the Scandinavian scholars interests soon turned to the realistic-functional aspects of the matter, namely how one should or might use legal right terms by avoiding a metaphysical perspective. In this respect it is worth mentioning Karl Olivercrona's concept since he tried to explain the use of legal right terms with an innovative proposal and yet not far from Ekelöf's, Ross's and Strahl's ideas. Olivecrona preferred the analysis of the functions of terms to definition issues: "*this is a causal relation*" (Olivecrona, 1960: 102) he admitted. Olivecrona drew a converging line between the matter of meaning and function: at first he upheld a theory with reference to the meaning of legal right terms taking as his departure point legal philosophical contributions aimed at denying the reality of legal rights (Bentham, Austin, Binder, Petra ycki, Cohen, Llewellyn, Jaehner) (Olivecrona, 1976b: 201-207). Afterwards he asked whether the given functions of the legal terms might correctly verify his particular theory of meaning (Sundby, *op. cit.*: 99). Bentham's theories exerted great influence on Olivecrona's ideas: the English author maintained that legal duties and rights are "fictitious entities" which Law "creates" and "provides". As allegories they do not demand any analysis aimed at understanding their content (Bentham, 1945, 57): Bentham enforced the "*method of parafrasi*" adapted to investigate the fictitious entities and to describe sensitive objects which gave life to these fictitious ideas that is to say the sovereign orders and the behaviour they refer to (*Ivi*, *op. cit.*:310). Ol-

ivecrona was of the opinion that Austin considered legal rights as "shadows bordering the non-sense" (Austin, 1929: 396). Moreover, Olivecrona recalls Julius Binder's thoughts whereby legal right were "*Gedankendinge*" representations of the mind lacking in objective reality so that discourses concerning their legal effects were meaningless (Binder, 1913: 290). Petra ycki's approach was definitely similar whereby he suggested legal rights were psychical phenomena – ghosts - though of great social and psychological importance (Petra ycki, 1955: 123 ss). The Americans, having the same empirical background as the British, maintained that individual rights were supernatural concepts, but, unlike the latter, the former defined them in terms of reality and behaviourism: legal rights seem to express the probability that Courts behave "*in a certain way in a certain situation*" (Holmes, 1920: 238). Holmes, Llewellyn and Cohen believed that it would not be possible to expel them from Law (as Ross and Lundstedt later asserted) but instead to consider them as practical symbols of the Courts behaviour (Llewellyn, 1962: 21-22).

4.1. Legal rights terms as *metaphysical fallacy*

To a great extent Olivecrona's ideas took shape from Hägerström's concepts: in his "*Law as Fact*" Olivecrona as Hägerström previously, took his distance from Natural Law and Positivism doctrines (Olivecrona, 1939). The latter believed legal rights derived from the will of the single individual consisting in transferring part of the power concerning his/her actions *pro* the others. Therefore, legal rights terms derive their origin from individual original freedom and from men's power of disposing of things and actions (Olivecrona, 1967: 288). To put it another way a sort of *facultas moralis*, a declaration of will in virtue of this an individual commands another individual to behave in such a way that the individual receiving the command feels morally obliged. Legal rights are so identified with the "*potestas in se*" (*Ivi, op. cit.*:301-302). The will theory was later upheld by positivists who, believ-

ing to have banished Natural Law, brought back the will concept of the highest social authority (*Ivi*, *op. cit*.: 265-266). Furthermore Olivecrona referred to Hägerström's criticism on metaphysical concepts by comparing the idea of legal rights with concrete facts and found this attempt vain since their foundations could neither lie in "*commands*" nor in "*guarantees of protection*". As a consequence legal rights do not exist or at least they do not have nothing to do with the factual reality (Hägerström, 1953: 4). Afterwards he tried to determine the contents of legal rights: for instance to think of the right of property as a power or a legitimate claim only recalls the idea of *forces* which pass over our minds and exist beyond the State (*Ivi*, *op. cit*.:5-6). In the last phase of his argumentation, Hägerström starts with the assumption that legal rights *exist*: what would they mean? His answer was that such powers constitute a "logical absurdity" as it is impossible to assert that they belong to the supernatural and the reality of the external world at the same time (*Ivi*, *op. cit*.: 324). He concluded that the legal rights *object* notion was possible whereas the legal rights notion *in itself* was not. The idea of having legal rights provokes a feeling of power so that legal rights originate from psychological forces and embody man's belief of having real powers (Olivecrona, 1976a: 254-255).

Olivecrona accepted Hägerström's criticism and used it constructively to further develop his theories. Expressions such as "property, "claim" are empty words denoting nothing. From a content point of view there exists a "*representation of the legal right object*" (physical object or individual behaviour): these representations although denoting nothing reach the minds of men through the senses of sight and hearing and create the idea of a legal right. Olivecrona's psychological realism appears clear and suggestive. The illusion - he wrote- of having legal right sprouts from an *emotional dimension* in the sense that psychological forces produce a feeling of power and this sensation objectifies giving the impression that this power is placed at the highest and elusive

level instead of depending on a factual situation (Olivecrona, 1976b: 215). Legal rights terms do not express "*any genuine concept*" as they lack a semantic reference (Olivecrona, 1960: 91). Olivecrona's theory is definitely comparable with Ross's but the Swedish took one step forward. Whilst Ross asserted that only the propositions containing a legal right term lacked a semantic reference, Olivecrona held the opinion that also legal right terms lacked a semantic reference. Sentences like "*A is the owner of x*" though informative do not provide any direct information concerning the real existence of a legal right or on the relation between *A* and *x*. This affirmation is only a supposition that *A* has a valid legal title consequently it is neither true nor false (Sundby, 1968: 100-101). In this respect, Sundby strongly criticised Olivecrona as he had considered this approach superficial as it was obvious that a normative proposition is either true or false (Sundby, 1968: 101). Olivecrona indicated two more legal right functions as part of the *informative* one: the function *of signs* where legal terms can be either permissive or prohibitive (as the changing colours of traffic-lights) and evoke a psychological connection between the normative propositions and the ideas of "duties" and "rights" in our minds (Olivecrona, 1976a: 273-276). Moreover, as far as the *technical* function of legal right terms are concerned, they are nothing but technical conjunction-rings among various groups of norms (*Ivi, op. cit.*: 281-282).

Olivecrona's criticism on Ross regard the incoherent approach of the Danish on legal rights as a "*tool of presentation*" as this assertion did not justify his conclusion whereby legal rights terms were a means of presenting norms in a simplified form (Olivecrona, 1976b: 211-212). And as far as Ross's concept of "semantic reference" Olivecrona, thought that he introduced instead of eliminating the legal rights terms. In his famous example R introduced the legal right concept when describing the legal consequences implied from the right of ownership (*A* has the right of recovery) instead of focusing on what in fact it is possible to ob-

tain. In this way he had forgotten his departure point of demonstrating that legal rights do not originate in relation to legal consequences (*Ivi, op. cit.*: 213).

5. The Norwegian debate. Nils Kristian Sundby and Torstein Eckhoff

Nils Kristian Sundby's argument was positioned between Ross and Olivecrona. In fact he thought was illusory to try and find objects in the physical world objects corresponding to legal rights terms. Yet, he finds two ways of explaining that the sentence "*x is a legal right*" is never true. The first explanation is based on the Scandinavian conclusion whereby these terms do not denote anything; the second is founded on the argument that these terms are to be conceived as *relative terms*, namely as terms which do not denote ("*are true or not*") single objects but several objects. A relative term can be said either true or false with reference to several objects (for example: pairwise, triplewise) The same happens for other kinds of terms expressing relations like "*is bigger than*" which refers to an object pairwise. For this reason every attempt aimed at identifying a single object by the legal term (e.g. property) will fail (Sundby, 1968: 102-103). The remedy for fighting such words is not to declare them "hollow words" as the Danish and the Swedish asserted but to look upon them as "*relative terms*" (*Ivi, op. cit.*: 103).

Torstein Eckhoff took part in the Scandinavian debate by proposing an attractive and original solution. Conversely to Ross he did not ask *what* legal rights were but more pragmatically *how* the propositions of legal rights might be understood (Eckhoff, 1969: 63) (2). Words present different meanings according to the sentences they belong to. He indicated two types of propositions: the former *containing a condition* (*betingelsessetninger*, for instance: the conditions for acquiring or losing a right); the latter *containing a consequence* (*følgesetninger*) from the very circumstance of having a right (*Ivi, op. cit.*: 64). How could the meaning

be understood considering that the meaning of the single term does not show its function in a determined sentence? (*Ivi, op. cit.*: 64). So far his approach did not differentiate from Ross's.

Eckhoff retained that those propositions needed a *translation* in order to reproduce their content without using the terms contained therein. Subsequently there is an urgency to question the numerous problems arising from translations. In the first place an *interpretation problem* (t*olkningsproblem*) due to the wide choice among the different interpretations; in the second place *significance correspondence problems* (*meningslikhet*) between what has to be translated and the translation in itself: the translation from one language to another does not involve the same store of words and the delicate and diverse shades of meanings render it imperfect (*Ivi, op. cit.*: 64). The same difficulties would arise if legal language is translated into a language without legal terms (*rettighetsfri*) (*Ivi, op. cit.*: 65). Ross maintained that the condition and consequent legal sentences were fragmentary (*Ivi, op. cit.*: 65) and thus needed to be combined within the norm and could not be translated separately from each other. Ross's conclusion was - as Eckhoff recalled - to have formulated new propositions without using the term "legal right". In this respect Eckhoff wondered if Ross's translation aimed at eliminating legal terms, had satisfied "*significance correspondence*". One should not forget that legal norms have to keep the same content both in the translation and in the translated sentence (*Ivi, op. cit.*: 66).

Ross kept many questions in the dark. Eckhoff wondered if a connection between a legal term at issue and other legal terms were open it would imply a *regressus ad infinitum* so to hinder the legal terms "released from prison procedure" (*Ivi, op. cit.*: 66-67). Conditional and consequential propositions, unlike Ross, lack in a direct connection as each single condition should be related to each single consequence; at the same time Wedberg's "pure fact" thesis (*Ivi, op. cit.*: 71) is unsatisfactory as it is impossible to describe legal acts as pure facts through the use of language.

Even if we tried to keep legal facts "on earth" they would inevitably fly back to the "sky of concepts". The translation from legal language to everyday language implies severe difficulties as it could lead to the illusion of establishing a corresponding meaning. In effect it would give birth to a much more contorted language. One of the main peculiarities of legal language is that several words, not only legal rights terms, should be considered as *link*s (*koblingsord*) (*Ivi, op. cit.*: 76) which indicate norm-fragments. Link-words also exist in natural and social science languages as "*hypothetical constructs*" and "*disposition statement*". They only differ because they are aimed at connecting experience fragments instead of legal norms. "Magnetism" for instance connects all conditional propositions with consequential propositions (*Ivi, op. cit.*: 76). Link words exert a main role when issuing new norms as they provide a connection between the new norms with the legal system. An analysis of legal language is undoubtedly significant as it contributes to the fight against the widespread attitude of the Courts and lawyers of finding a pretext to use legal terms unaware of the in-depth meaning implied. If these terms are needed to connect norm fragments one should take into account their content more seriously instead of focusing on their combination within the legal norm. Eckhoff wrote an acute analysis at the situation in his final conclusion: "*It would sound absurd, whether one demanded that all lines running from a power station should be checked in detail before new electrical connections came to existence*" (*Ivi, op. cit.*: 78) (3).

6. Torkel Opsahl: real definitions and human rights

Torkel Opsahl's analyses (4) provided a very suggestive focus on the definition issues. The Norwegian legal philosopher asserted that definitions are "*have been a perennial pastime both with lawyers and logicians*" (Opsahl, 1996a: 658). Opsahl adverted his criticism towards inflexible legal definitions. The definition in his opinion was nothing but "a statement of linguistic

usage" which presents two forms: the normative and the descriptive. The former, by prescribing, expresses the usage of a word (as the author intends to use the word) whereas the latter, by describing, is a proposition asserting that a word is or should be used in conformity with the customs of a certain individual or a group of individuals. The idea of the existence of "real definitions" able to penetrate the essence of things leads to metaphysical concepts and is not at all useful. It is instead accepted that the content of the words as "duty", "individual right", "sovereignty" only reflect the linguistic usages of the people (*Ivi, op. cit.*: 659). The assertion that "*to call the tail of a cow a leg, does not necessarily mean the tail is a leg!*" hit the mark. The Norwegian fable tells the story of a farmer's wife who persistently uses words out of context and different to the conventional meaning. One day the husband loses his patience and drowns her in the river. This story is a warning and clearly proves the point whereby it is necessary to believe in "*true definitions*" instead of "*real definitions*" (*Ivi, op. cit.*: 660). Semantic analysis offer a remarkable contribution in clarifying the language and the legal reasoning: by asserting that only descriptive and normative definitions exist one avoids tedious misunderstandings so that the interplay between practice and theory is optimised. To examine the functions of legal propositions and their logical relationship is useful and helpful in understanding concepts (Opsahl, 1996b: 653-656).

In this respect, Opsahl seemed to be inspired by Bentham and Hart who supported the thesis whereby words are never to be considered separately in their own right but as an integral parts of a sentence. Opsahl also mentioned Ross who asserted that to talk about the existence of legal words such as "legal right", "ownership" independently from the propositions where they belonged was transcendental nonsense (*Ivi, op. cit.*: 670-671).

7. Conclusions

7.1. Legal rights terms as mere *"tool of presentation"*

It is not absurd to assert that the traditional dislike for definitions and for the reduction of Law and legal issues to conceptual systematisations, seem to arise. It is clearly perceivable, that all these different contributions share more than one profile. I would dare to say: these approaches, though the product of different cultural backgrounds, shine in one colour which has absorbed all the various shades and gradations. I am referring to the pragmatic and linguistic side of the debate. The linguistic analysis of legal rights terms (and human rights issues) might be considered as the lowest common denominator of their contributions.

The Norwegian authors I have mentioned, only some committed in the human rights field and analytical philosophy, as well as the Swedish philosophers, seem to avoid ontological-substantial definitions The authors would agree in maintaining that restlessness characterizes philosophers who run after definitions and to legal theorists who are victims of their own emotional reactions. As Ross asserted, to define a concept means to specify the context in which the particular word is to be used. *"A word* - Ross wrote - *does not in itself possess from the Creator's hand a certain quite definite significance but has no other meaning than what which men attach to it*". Ross referred to the *present linguistic usage* namely to the significance which a linguistic community attach to the words on the basis of the assumption that a concept is nothing more than "*an instrument of the human thought*". The definition of the phenomena so wide in content and structure, like human rights, would lead to the risk of ontological definitions which would, in the opinion of Scandinavian authors, darken their reality.

Legal rights terms are nothing but "*tools of presentation*" or "*technical instruments*" and they have undoubtedly a factual nature. Uppsala Realism, Ross's innovative approach and the Nor-

wegian legal philosophy seem to have fought (and still to fight) deeper the influence of Metaphysics on philosophical reasoning and speculative epistemology based on aprioristic knowledge. Legal rights terms as well as human rights terms neither designate nor mean anything since the *words* can never be considered independently from the sentences and the contexts where they belong.

7.2. Human rights terms as mere "*indicators of values*"

These contributions serve to understand the pragmatic and semantic approach as far as human rights are concerned. To assert that legal rights terms are only "*tool of presentations*" may easily explain the typical Scandinavian attitude, whereby the implementation of international obligations is an exception and not a general rule. In this respect, Opsahl asserted that the fact that the term "human right" does not exist within a Constitution should not be a reason for anxiety (Opsahl, 1996c: 28). The Norwegian Government declared: "*it will often be possible to demonstrate as a matter of "visual" fact that these obligations are fulfilled*" (*Ivi, op. cit.*: 29). The implementation of international obligations would not increase the real protection of human rights: what is important is "*to respect them in fact*" (*Ivi, op. cit.*: 29). Since legal rights terms and all the legal terms are nothing but "*tools*", "*Constitution* – as Opsahl wrote – *is a poor indicator of any social values system*" (*Ivi, op. cit.*: 44). To what extent values are effectively respected by individuals and by the institutions in power is not necessarily a consequence of a written Constitution.

It is recognizable in the debate on human rights a pragmatic approach on the subject seem to predominate. Pragmatic and realistic instances get the upper hand. The definition of a theoretical concept (as "human right" or "legal right") does not say anything concerning the content and moreover the forms of protection or the immunities which should be stated as fundamental. Scandinavians seem to avoid ontological-substantial definitions. Instead of answering the question: "What is the nature of human rights from a philo-

sophical point of view?" they would debate another question: "What exactly is intended and included in the term human rights?". However, a plausible answer to the second question would not help in the understanding of the very nature of "human rights". Even if it was possible to define human rights, by respecting linguistic usage and community *backgrounds* values, in the opinion of Scandinavian authors (Norwegians above all), a list of fundamental items, to incorporate within a Constitution (i.e. the Norwegian Constitution which is deprived of), would not help at all. Every detailed list would imply a rights-hierarchy and every hierarchy would be based on the idea of the existence of differentiations between "*strong and weak rights*". Who would decide on their being more or less strong or weak? Linguistic conventions? The circumstances? The Political community? Hence the dangers which the philosophers I mentioned above, tried to elude from.

Helle Kanger, a Swedish philosopher, by arising harsh criticism towards the possibility of a foundation of a "Theory of Human Rights" has talked about " *systematisation as triviality*": "*to indicate* – she wrote – "*types" of human rights means to draw up a tedious list of trivial propositions*" (Kanger, 1984: 64). Her words, straight and to the point, hit the mark.

Notes

1. Although Castberg's position was doomed to be isolated in Scandinavia from the very start it nevertheless contributed to animate the debate centred on Nordic and Scandinavian realism. It represented a sort of voice of disagreement within the Nordic legal-philosophical scenario. Castberg was defined "a lonely swallow" (*en enslig svale*) flying against the wind and meeting on his journey realists and non-empiricists who disagreed to his programme of "modern" Natural Law. Castberg's figure had been dominating Constitutional Law, International Law and human rights fields for years whereas his contributions regarding legal-philosophy were considered unprofessio-

nal. He was a politician and professor in Law at the University of Oslo for about thirty-five years: his works exerted a remarkable influence over the local and international environment: in Paris, Uppsala, Hensingfors and Minnesota with special concern to the Public Law. It is important to remember his *Norges Statsforfatning* was for decades adopted as the handbook for Norwegian students and source of information for lawyers and constitutionalists. Legal advisor at The Ministry of Foreign Affairs and later secretary (1921) in the same year he became assistant-professor; from 1952 to 1957 he was Rector of the University of Oslo. Amongst his works: *Den Kostruktive metode,*in 'Tidsskrift for Rettsvitenskap', 1922; *Problems of Legal Philosophy*, London, 1947; *Norges Statsforfatning* II ed, Oslo, 1947; *Realisme og Idealisme*, in 'Jussens Venner', 1953; *Philosophy of Law in the Scandinavian countries*, in 'American Journal of Comparative Law', 1955; *Freedom of Speech in the West. A comparative study of public Law in France, the United States and Germany*, Oslo, 1960; *Forelesninger over Retsfilosofi*, Oslo, 1965; *Svar til Alf Ross*, in 'Tidsskrift for Rettsvitenskap', 1966.

2. "[…] Det spørres ikke om hva rettigheter *er*, men hvordan setninger som inneholder rettighetstermer, skal eller kan *forståes* […]".

3. "[…] Det har nok forekommet at lovgivere og domstoler for raskt har søkt forankring i et eller annet koblingsord, og at nye regler derved har fått en mindre heldig utforming. Analysen av rettighetsspråket kan kanskje bidra til å motvirke slike tendenser. […]".

4. Torkel Opsahl was undoubtedly a Norwegian pioneer in consolidating human rights internationally. As a lawyer and legal scholar he fought for the solid and sound enforcement of International Law with respect to human rights. In a certain way he substituted Frede Castberg. Opsahl's contribution seems to open an

interesting connection between the theory and the practice of human rights, an attempt to investigate human rights by semantic and linguistic analysis. Amongst his works: *Bør vi modernisere individets grunnlovsvern?* in 'Lov og Rett', 1968; *Idée om menneskerettighetene* in 'Jussens Venner', 1981; *An inquiry into meaning and function of legal definitions* in *Law and Equality: selected articles on human rights*, Oslo 1996.

List of References

AUSTIN, J. **Lectures on jurisprudence**, a cura di R. Campbell, V ed. London. 1929.

BENTHAM, J. **The limits of jurisprudence defined**, New York. 1945.

BINDER, J. *Wille und Willenserklärung*, **in Arkiv für Rechts-und Wirtschaftsphilosophie**. 1913.

CASTBERG, F. **Logic and Law**, Athens. 1967.

CASTIGNONE, S. *Il Diritto e l'utilità sociale. Vilhelm Lundstedt*, in **Diritto Linguaggio Realtà. Saggi sul Realismo Giuridico**, Torino. 1995.

ECKHOFF, T. *Litt om det juridiske rettighetsspråk*, in **Festskrift til Alf Ross**, København. 1969.

EKELÖF, P.O. *Juridisk slutledning och terminologi* (Legal interference and Terminology), in **Tidsskrift for Rettsvitenskap.** 1945.

HÄGERSTRÖM, A. **Inquires into the nature of law and morals**, Uppsala 1953.

HOLMES, O.W. **Collected Legal Papers**, London. 1920.

KANGER, H. **Human Rights in the U.N. Declaration**, Uppsala University. 1984.

LLEWELLYN, K.L. **Jurisprudence,** Chicago. 1962.

LUNDSTEDT, V. ***Die Unwissenschaftlickeit der Rechtswissenschaft***, I, Berlin. 1932-1936.

LUNDSTEDT, V. **Legal Thinking Revised**, Stockholm. 1956.

OLIVECRONA, K. **Law as Fact**, London. 1939

OLIVECRONA, K. **Rätt och Dom** (Legal right and judgment), Stockholm. 1960.

OLIVECRONA, K. **Il Diritto come fatto.** 1967.

OLIVECRONA, K. *Linguaggio giuridico e realtà*, in **Diritto e Analisi del Linguaggio** (a cura di Uberto Scarpelli) 1976a.

OLIVECRONA, K. *La struttura dell'ordinamento giuridico*, in **Diritto e Analisi del Linguaggio** (a cura di Uberto Scarpelli) 1976b.

OPSAHL, T. *An inquiry into the Meaning and Function of legal Definitions*, in **Law and Equality: selected articles on human rights**, Oslo. 1996a.

OPSAHL, T. *An International Constitutional Law?*, in **Law and Equality: selected articles on human rights**, Oslo. 1996b.

OPSAHL, T. *Human Rights today: International Obligations and National Implementation*, in **Law and Equality: selected articles on human rights**, Oslo. 1996c.

PETRA Y CKI, L. **Law and Morality: Leon Petra ycki,** Cambridge. 1955.

ROSS, A. *Tû Tû*, in **Harvard Law Review,** 1957.

ROSS, A. **On Law and Justice**, London 1958.

ROSS, A. *Tû Tû*, in **Diritto e Analisi del Linguaggio** (a cura di Uberto Scarpelli) 1976a.

ROSS, A. *La definizione nel linguaggio giuridico*, in **Diritto e Analisi del Linguaggio** (a cura di U. Scarpelli) 1976b.

STRAHL, I. *Till frågan om rättighetsbegreppet* (On the concept of legal right), in **Tidsskrift for Rettsvitenskap**. 1946.

SUNDBY, N.K. *Legal right in Scandinavian analyses*, in **Natural Law Forum**, Notre Dame Law School. 1968.

WEDBERG, A. *Some problems in the logical Analysis of Legal Science*, in **Theoria**. 1951.

WINDSCHEID, B. **Lehrbuch des Pandektenrechts**, I, Frankfurt. 1906.