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THE CONTRIBUTIONS OF AXEL HÄGERSTRÖM AND KARL OLIVECRONA TO THE DEVELOPMENT OF SCANDINAVIAN REALISM

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1. INTRODUCTION

Jurisprudence has various schools of thought. Every school of thought has its own way of analyzing nature and extent of concept of law and the practice of law. Some schools discuss law as an ideal code of conduct to run the society whereas others prefer to study actual impact of law on social behavior. This paper is about Scandinavian Realism, but to understand its origin and its comparatively different philosophical basis, brief reference to other major schools of jurisprudence is pertinent.

In ancient and medieval times word of king was law. King was supposed to rule on his subjects according to the 'divine will'. And only church had the authority to decipher the 'divine will', hence church assumed a status which was superior to the king and the state.

To counter the influence of church on the 'state power' many philosophical initiatives were made by various philosophers. But real strength to state power was given by Analytical Positivist School, which emerged in nineteenth century. Positivist detached law from divine will and started studying it as 'law as made by the legislature'. Its main concern is 'developed legal system' only. Positivist school sets logical parameters for the study of legislative, judicial and administrative aspects of law. Bentham and John Austin founded the basis of this school.

Other major school of thought in jurisprudence is Historical school, which emerged mainly as a reaction to the natural law thinkers. Von Savigny and Sir Henry Maine are flag bearers of historical and anthropological approaches. This school studies historical development of law and societies from historical behaviors, customs and beliefs. According to them law cannot be made consciously, it evolves. And people follow law due to habits and because of social pressure.

Next important school is Sociological school. Sociological jurists study law as a social institution. They consider law as means of social good. Mere theoretical precepts do not satisfy sociological school, application of law is equally important for them. This approach is concerned with social justice as part of social process.

In twentieth century natural law once again got revived. It is represented by Stammler, John Rawls, L.L. Fuller and H.L.A. Hart. It was a search for ideal justice. It acts as a higher guide to the unresolved problems of positive law. Natural law is basically a philosophical precept which tries to establish importance of idealism in the field of law.

1.1 Realist School

Contrary to all these schools Realist approach neither finds any idealism or social welfare in law nor it is satisfied with mere legislated law. It talks about law in actual action. To some extent it appears like a branch of sociological school of jurisprudence. But it is different because sociological school is worried about the use of law for welfare of society, whereas realist school is concerned with law as it is applied in judicial decisions.

Realist school is further sub divided in two parts; American Realism and Scandinavian Realism.

1.1.(i) American Realism

American realists avoid any dogmatic formulation and concentrate on the decisions given by law courts. The decisions are not based only on law. 'Human factor' in judges and lawyers also plays a considerable part in decision making. They believe that law in actual is nothing but an official action, so all those forces which influence decision of a judge in reaching a decision should be studied. Gray[1] defines law as "what the judges declare." Llewellyn[2], famous American realist, declares, "Purpose of the law as a going institution is to do 'law jobs' effectively".

[1] John Chipman Gray, *Nature and Scope of Law* 267 (The Columbia university press, New York,1909)

[2] Karl Llewellyn, "Some Reflection about Realism" 44 Har. L. Rev. 1233-1241(1931)

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1.1.(ii) Scandinavian Realism

By contrast, 'Scandinavian realism' is basically a philosophical evaluation of the metaphysical foundations of law. Due to geographical separation of Nordic region, Scandinavian countries had little interaction with common law countries or even rest of Europe. Economic self sufficiency further helped in development of its distinct concepts of economy, society and law. Hence influence of Common law system was absent in the legal system of these countries. Law in Scandinavian countries is far less codified as compared to other European countries. So, judge made law is the fundamental form of law in these countries. This school of jurisprudence is essentially filled with heavily abstract discussion of first principles. Father of 'Scandinavian realism' is Axel Hagerstrom. Other representatives of this school are Karl Olivecrona and A.V. Lundstedt, Alf Ross. All of them have, to some extent, influence of their teacher Hagerstrom on their approach. Due to this common source of influence some similarities are visible in the approaches of Olivecrona, Lundstedt and Ross, which they themselves do not acknowledge.

For Scandinavian realists, law can be explained only in terms of observable facts. In the word of Lundstedt, "Law is nothing but the very life of mankind in organized groups and the conditions which make possible peaceful co-existence of mass of individuals and social groups and the cooperation for other ends than mere existence and propagation."[1]

2. Contributions of Axel Hagerstrom and Karl Olivecrona

In this paper focus is contributions of Axel Hagerstrom and Karl Olivecrona to the 'Scandinavian realism. Axel Hagerstrom is the pioneer of this approach. And Karl Olivecrona is the best known Scandinavian jurist in Britain as well as in other common law countries. So these two have been most studied in other countries . Due to important nature of their work and obvious interest of common law students, study of their works is very valuable.

2.1. Axel Hagerstrom

Study of Axel Hagerstrom's views about law is very important because he is the founder of Scandinavian school of jurisprudence. Even to understand works of other representatives of this school, in right perspective, study of Hagerstrom's point of view is very important.

Hagerstrom was not a lawyer but a philosopher. His attention towards law and ethics was directed due to its being major sources of metaphysics. His mission of life was to expose all those speculative ideas and myths which were used for exploitation of man by man. He wanted to formulate a real legal science which, could be used to restructure the society in the same way as other social sciences were used to transform the society. To do this it was necessary that legal science should be made free from idealism, mythology, theology and metaphysics. According to him it was the aim of philosophy to emancipate the human mind from the imaginary phantoms of its own creation.[2]

Hägerström attacked various words and legal concepts in his writings so as to prove they could not stand up to scientific application. Hägerström, who had been influenced by the Neo-Kantianism of the Marburg school, rejected metaphysics in their entirety.[3] His opinion was that words such as 'right' and 'duty' were basically meaningless as they could not be scientifically verified or proven. They may have influence or be able to direct a person who obtains such a right or duty but ultimately, if they could not stand up to a factual test, they were mere fantasies.

But legal sphere is unthinkable without the presence of concepts such as 'rights', 'duties' and 'will of state' etc. So this fallacy has to be clearly understood so that an objective theory of knowledge could be constructed. Legal philosophy of Hagerstrom was sociology of law which was based on historical and psychological analysis, but was without empirical research.[4] Much of his writing is accordingly, a critique of the lacunae of earlier juristic thoughts.

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[1] Lundestedt, cited in W.Friedman, *Legal Theory 308* (Stevens & Sons, London, 5th edn., 1967) as referred to by Autar Krishan Koul, *A Textbook of Jurisprudence* 33(Satyam law International, Delhi, 1st edn., 2009)

[2] M.D.A. Freeman, Lloyds' *Introduction to Jurisprudence* 1036 (Thomson Reuters,Ltd, 8th edn., 2008)

[3] http://www.citizendia.org/Axel_H%C3%A4gerstr%C3%B6m (visited on 9th September 2013)

[4] *Supra Note* 4

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He also analyzed the historical bases of the idea of right. For this he made an extensive study of Greek and, especially of Roman law and history. He viewed modern law as a ritualistic exercise, which was basically a mental element than the actual reality. As one thinks of black cap, the wedding ring or coronation ceremony or the legal oath, this is basically nothing else but a legal ritual. But people take this legal ritual as a sign of change in legal status. This ritual can be performed in a drama also, but there nobody thinks of a change in legal status of actors. So to some extent Hagerstrom is right because it is not the ritual, which is regarded as law, which changes rights and duties but the mental acceptance of rights and duties. As mentioned by M.D.A. Freeman[1] :

Pollock wrote[2], ritual is to law as a bottle is to liquor: you cannot drink the bottle, but you cannot cope with liquor without the bottle. There is a danger in assimilating legal with ritual symbols, for rituals can be understood if the beliefs underlying it are investigated, but legal symbols perform a function and are not just concerned with the beliefs.[3] *…… The influence of Hagerstrom's thesis is nonetheless apparent in Olivecrona's analysis of legal language, in his discussion of what he calls "performatives," legal words which are used to produce certain desired results, usually a change in legal relationships.*[4]

Hagerstrom firmly denied the existence of objective values. According to him there are no such things as 'goodness' and 'badness' in the world. Words merely represent the emotional attitudes towards approval and disapproval for certain facts and situations. [5]

Hagerstrom first reviews the attempts, earlier made, to discover the empirical basis of a right, but rejected all these theories and labeled them as unsuccessful. He denied the possibility of any science of 'ought'. All questions of justice, aim, purposes of law are matters of personal evaluation and not susceptible to any scientific process of examination.[6] Similarly, Hägerström regarded all value judgments as mere emotional expressions using the form of judgments without being judgments in the proper sense of the word. This position caused Hägerström's critics to characterize his philosophy as "value nihilism" - a label that was invented by journalists and later endorsed by some of Hägerström's less orthodox followers, namely Ingemar Hedenius.[7]

Axel Hagerstrom's approach is too much 'human thinking' oriented. It strongly rejects impact of written laws on real situations. But this approach is not fully right because, if written rules are not there then it will be rather more difficult to make a decision in judicial proceeding. Even judge made laws are also followed in similar cases. Judges cannot give contrary decision every time. So, a law may be written or it may be judge made but for the sake of uniformity in decision it has to be recorded. Though in different situations different kinds of human factor apply on the minds of judges and decision may be altogether different, but even then one can find certain degree of similarity even in those decisions. Because judge can only appraise facts in a different way but ultimately he has to apply the basic principles of natural justice, equity and good conscience.

"The essence of Hagerstrom thesis", as Autar Krishen Koul[8] writes" is the extrapolation of idea of "right and duties" as they are 'ought' propositions but their content is something of supernatural power with regard to thing and persons". The second aspect of his thesis is that "rights" and "duties" have a psychological explanation

[1]M.D.A. Freeman, Lloyds' *Introduction to Jurisprudence* 1037 (Thomson Reuters,Ltd, 8th edn., 2008)

[2] Quoted in Passmore, 143, 156 in 36 Philosophy(1961) in M.D.A. Freeman, Lloyds' *Introduction to Jurisprudence* 1037 (Thomson Reuters,Ltd, 8th edn., 2008)

[3] MacCormack in 4 *Irish Jurist* 153,167 (1969) in M.D.A. Freeman, Lloyds' *Introduction to Jurisprudence* 1038 (Thomson Reuters,Ltd, 8th edn., 2008)

[4] Karl Olivecrona, *Law as a Fact,* Chaps 8 & 9 ,(Oxford University Press, London 2nd edn.)

in M.D.A. Freeman, Lloyds' *Introduction to Jurisprudence* 1038 (Thomson Reuters,Ltd, 8th edn., 2008)

[5] Avtar Singh and Harpreet Kaur, *Introduction to Jurisprudence* 57 (LexisNexis Butterworths Wadhwa, Nagpur, 3rd edn.,2010)

[6] *Ibid*

[7] *Supra Note* 5

[8] Autar Krishen Koul,*A Text Book Of Jurisprudence* 199 (Satyam Law International, Delhi,2009)

found in the feelings of strength and power associated with the conviction of possessing a right : "One fights better if one believes that one has right on one's side.[1]

2.2. Karl Olivecrona

Karl Olivecrona, is also such a jurist, without whom study of Scandinavian realism is not complete. He pulls the discussion near to its logical conclusion. He has made detailed and in depth analysis of the nature of law. Law is always concerned with actions of men, in daily course of their lives. So, the study of law should be taken as a social fact and for a right approach, to study law, sociological investigation is indispensable.[2]

Karl Olivecrona (25 October 1897 – 1980) was a Swedish lawyer and legal thinker: He studied law at Uppsala from 1915 to 1920 and was a student of Axel Hägerström, the founder of Scandinavian legal realism. One of the internationally best-known, especially in Common law countries, Swedish legal theorists, Olivecrona was a professor of procedural law and legal philosophy at Lund University. His writings lay emphasis on the psychological association of legal ideas. His outstanding work on legal theory was his book *Law as Fact*. In this work he stressed the importance of a monopoly of force as the primary basis of law. Olivecrona during World War II stressed on the need of overwhelmingly strong and coercive power to guarantee order in international relations. He became convinced that Europe required an unchallengeable controlling force to ensure its peace and unity, and that Germany alone could provide this. His pamphlet *England eller Tyskland* (England or Germany), published in the darkest days of the war, argued that England had lost its claim to wield leadership in Europe and that the future required a recognition of German domination.[3]

Indirectly, Scandinavian legal realism, with its emphasis on "law as fact", helped to create a climate encouraging to the sociological study of law. One of Olivecrona's doctoral students, Per Stjernquist, who as a left-leaning liberal entirely rejected his supervisor's Thoughts about the need of change in European centre of power, became a pioneer of sociology of law and was mainly responsible for establishing it as a university subject of study in Sweden in the early 1960s.[4]

Professor Olivecrona expressly refrains from defining law. He says, 'I do not regard it as necessary to formulate a definition of law. A description and analysis of the facts is all that will be attempted'.[5]

Karl Olivecrona has given his view in detail on different aspects of law. It is better to discuss his views in different sub-headings.

i. The binding force of law

If we reject the superstitious idea that the law emanates from a god, it is apparent that every rule of law is designed by men. The rules have always been made through legislation or in some other way, by ordinary people of flesh and blood. In other words they are produced by natural causes.[6]

On the other hand, they have natural effects in that they exert a pressure on the members of the community. The rules of law are a natural cause –among others-of actions of the judges in cases of court proceedings as well as of the conduct in general of people in relation to each other. The law-makers and other people who are in position to formulate rules of law may actually influence the behavior of the members of the society.[7]

Olivecrona recognizes law as a binding force. Though he regards the words of law as hollow piece of writing on the paper, even then he accepts that these words have psychological binding effect on the thinking of people and on their behaviors. It means we will have to accept that there is a link between law and the chain of causes and effects. This is a contradiction in the views of Olivecrona, because if words have an effect on the mind of people

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[1] C.D.Board, *Hagerstrom, Inquiry into the Nature of Law and Moral*

[2] B.N.Mani Tripathi, *An Introduction to Jurisprudence (Legal Theory)* 59 (Allahabad Law Agency, Faridabad, 8th edn.,)

[3] http://en.wikipedia.org/wiki/Karl_Olivecrona (visited on 9th September,2013)

[4] *Ibid*

[5] Karl Olivecrona, *Law as Fact* 26 (Oxford University Press,London, 1st edn.,1939) in Avtar Singh and Harpreet Kaur, *Introduction to Jurisprudence* 58 (LexisNexis Butterworths Wadhwa, Nagpur, 3rd edn.,2010)

[6] M.D.A. Freeman, Lloyds' *Introduction to Jurisprudence* 1057 (Thomson Reuters,Ltd, 8th edn., 2008)

[7] *Supra Note* 20

then these can be hollow, then how it can be related to superstitious thinking. If law has an effect in real world then it cannot at the same time belong to other world.

"Every attempt to maintain scientifically that law is binding in another sense than that of actually exerting a pressure on the population, necessarily leads to absurdity and contradictions. Here, therefore is the dividing line between realism and metaphysics, between scientific method and mysticism in the explanation of law."[1]

ii. The Concept of Rule of Law

He believes that concept of rule of law is an idea of imaginary action of a judge in an imaginary situation. For example, if somebody has murdered a person he should be given sentence of death or life imprisonment, as the case may be according to the law of the concerned land, but this rule of law cannot be applied in isolation. Before that many other rules of law will have to be applied, to check whether the case comes under any kind of exception or not. Judge will have to consider the age of the accused, his state of mind, and circumstances etc. It means the imaginary picture of rule of law is a very rich picture which is full with the optional contents according to the facts and circumstances of the case.

"With this qualification the content of the rules of law may be defined *as ideas of imaginary actions by people* (e.g. judges) *in imaginary situations.* The application of the law consists in taking these imaginary actions as model of actual conduct when the corresponding situation arises in real life."[2]

iii. A Rule of Law is not a Command in the Proper Sense

The rule of law is not a command in the proper sense; its innermost meaning is to range law among the facts of actual world. The commands if there are any, are natural facts. Because the concept of command presupposes the presence of an individual who is sovereign . Rule of law, according to Olivecrona, is an imaginary concept which is implemented by the courts of law and by the officers of the state. Here ,sometimes, it appears as if he is very near to the concept of "grundnorm" theory of Kelson , though Olivecrona himself does not accept this resemblance of ideas, because "grundnorm" is also an imaginary concept which has a psychological impact on the minds of the people. Moreover, "grundnorm" has also, allegedly, that element of mental compulsion, because of which people think that "grundnorm" is basic rule which has to be followed.

iv. Rule Of Law as Independent Imperatives

According to Olivecrona rules of law are basically "independent imperatives" as they are propositions which functions independently of any person who commands. State as an organization cannot issue commands as it is the individuals who may issue commands.[3] In modern state systems bulk of command are issued by various departments, so it cannot be said that these commands have been issued by the same person. If it is so then he has to be a super human being, so we have to ascribe the commands to the state only. But state as an organization cannot issue commands. At the best we can say that commands are given by the individuals, on behalf of the organization, who are working in the organization. But even then these commands cannot be ascribed to those individuals who actually issue those commands on behalf of state. So, for this reason, Olivecrona calls these commands as "independent imperatives", which are basically 'rule of law'. To have a better understanding of this point of view we can study it with regard to the 'juristic personality'. For example an officer of the state who was posted at a certain point of time as head of a department has made some rules for the better conduct of office. After the transfer of that officer to any other department, a new officer comes at that post but he also continued those rules. Now we cannot say that these rules belong to this officer 'in person' or to earlier officer 'in person'. So we have to ascribe the rules to the state. But state in itself is merely an organization which cannot make rule *per se*. Hence it is has be concluded, in accordance with the Olivecrona's understanding, that rule are "independent imperatives" which are attached to the state. Here he is basically condemning the positive law theory given by Austin that laws are the commands of sovereign. Because sovereignty, in modern state system, cannot be attached to any person, so the commands have to be regarded as "independent imperatives" of the state.

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[1] Karl Olivecrona, *Law as Fact* 17 (Oxford University Press,London, 1st edn.,1939) in M.D.A. Freeman, Lloyds' *Introduction to Jurisprudence* 1058 (Thomson Reuters,Ltd, 8th edn., 2008)

[2] Karl Olivecrona, *Law as Fact* 29 (Oxford University Press,London, 1st edn.,1939) in M.D.A. Freeman, Lloyds' *Introduction to Jurisprudence* 1058 (Thomson Reuters,Ltd, 8th edn., 2008)

[3] Karl Olivecrona, *Law as Fact* (Oxford University Press,London, 2nd edn.,1971) in Autar Krishen Koul,*A Text Book Of Jurisprudence* 199 (Satyam Law International, Delhi,2009)

v. Legal language and its Impact

Olivecrona on Legal Language and Reality[1], held that purpose of all legal enactments, judicial pronouncements, contracts, and other legal acts is to influence men's behavior and directs them in a certain way. Legal language is an instrument of social control and social intercourse. He gave an example of a marriage ceremony, where when man is asked by the priest, "whether you take this woman as your wife?" And when man replies, "I do" and the priest further declares, " From now you two are Man and Wife", after this, legal status of those two persons changes in the minds of other people. Olivecrona calls it 'the magical words'.

vi. Reference to "Public Welfare"

Olivecrona has given importance to the sociological approach of studying laws. Though he steps in the shoes of his master Hagerstrom, by accepting that laws are hollow words, the real issues is what people think about legal concepts and how they use them in reality, but even then he recognizes that final aim of law is the "public welfare". The reference to "Public Welfare" as the end of the law is either a revival of 'Benthamite principle of utilitarianism' or a disguised hint that the moral values which Hagerstrom attempts to discard are coming in again from back door to claim their rightful place.[2]

He, being a realist, had a natural inclination for the social welfare. In fact, this acknowledgement of 'public welfare' as a main aim of law, he has tried to pull the Scandinavian realism out of the mere discussion of metaphysical aspect of law, and has tried to give it more sense with regard to the use of this theory in practical life.

Olivecrona attracted the attention of almost all contemporary common lawyers. Reviews of his book '*Law as a Fact'* were written in many contemporary journals. At times, particularly after, his advocacy of German power, his book, got lot of criticism by common lawyers. An example of such sharp criticism by E.J.Cohen[3], which was published during 'high days' of World War II, is quoted here:

"….the Nordic doctrine shows the effects of the law in a world in which spiritual reality is non-existent. It gives a view of the law as seen from the outside, and that by a man who is color blind-blind just for those colors with which legal practice has to paint. This explains why it has not produced and cannot produce any results which are of any but very slight concern to the lawyer as such. But I venture to doubt whether its value to the moralist or politician can be any greater. The most important task of legal philosophy is the search for the ideal law. The Nordic school, like the American Realist school, constitutes another escapist attempt to avoid approximation towards this final goal of legal thought. Professor Olivecrona has the merit to have stated the strange doctrine of his masters with great clarity and admirable sincerity. It is perhaps not easy to imagine how this doctrine could be more attractively, more concisely and more intelligently presented. But there is little prospect of his hope being realized that it will be more widely appreciated in the future ."

Though, he is strongly criticizing Realism in general and Karl Olivecrona in particular, with regards to his views given in his book, but impact of World War II and Cohen's prejudiced views against supporters of Germany is also visible.

3. CONCLUSION

In earlier phase the main stream Europe was not aware of the legal system and legal thoughts of Scandinavian countries. But slowly common law countries became aware of the legal traditions of these countries. This in attention by outside world resulted in more meaningful legal writings of Scandinavian jurists. Since mid of 19th century study of Scandinavian Realism has become regular part of studies in most of the common law countries.

Scandinavian realists have developed a characteristic approach to law which is unique. Essentially it is philosophical critique of the metaphysical foundations of law. They disregarded the legislated enactments, but paid a great attention to the concept of law in the minds of people. To them real subject matter was that mental element people feel about the law in their psychological consciousness.[4]

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[1] K.Olivecrona, "Legal Language and Reality" from *Essays in Honour of Pound* 151(Newman,1962)

[2] E. J. COHN, "Review of Law as a Fact" 6 MLR 176(April, 19430)

[3] E. J. COHN, "Review of Law as a Fact" 6 MLR 175-176(April, 19430

[4] Edgar Bodenheimer, *"Jurisprudence; the Philosophy and Methods of the Law"* (Universal Law Publishing Co., Revised edn.,2004)

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Hagerstrom gets the credit of initiating this new debate in the arena of realist school of jurisprudence. He contributed in deciding the direction of this distinct school of thought. His influence on later Scandinavian jurists was of such a great level that one can easily detect impact of Hagerstrom in the writings of Karl Olivecrona, Lundstedt and A.Ross. None of these later jurist neglected Axel Hagerstrom's views, rather they contributed to it by adding new dimensions in it.

The crux of Hagerstrom's thesis is that concepts of 'rights' and 'duties' are basically psychological immpessions of the minds of society. Written statute may provide rights to anybody but if it cannot in reality enforce that right then it is futile. He gives illustration and explains that if a person believes that he has a valid claim of right on his side, then he can fight better. Though in reality that person may not have that right, but if he is believing that he has a right, may it be a mistaken belief, he will feel more power in himself in claiming and struggling for that right. In this way Hagerstrom showed that the concept of rights is a 'relative reality, in the minds of the people. It is 'relative' because that feeling of real right and power associated with it may change suddenly by getting the knowledge that it was a wrongly believed right. After being aware about the invalid right, the person will not feel that much power in his claim, which he was feeling earlier. In the same way he has very efficiently analyzed the concept of 'duties'. A realization of duties makes a person feel element of compulsion. But if he gets aware that he is under no obligation or he has no such duty, then he will stop feeling compulsion.

Olivecrona on the other hand extended this school of thought towards more logical conclusions. His contribution is of manifolds. He analyzed nature and extent of 'Rule of law' and detached it from the concept of 'command'.

His theory of 'independent imperatives' very finely explains the institutional nature of law, which is not attached to any particular individual. He rejected the ideas of positive lawyer as far as 'commands of sovereign' thought was concerned. But one can find some similarities in Olivecron's theory of 'independent imparatives' and Kelson's theory of grundnorm. Here he comes near to the positive law school.

Moreover, he declared that ultimate aim of law is the social welfare. This gets him close to 'utilitarian' concept of 'maximum good for maximum people'. But, even in this approach his main concern was from the point of view of a sociological lawyer only.

Olivecrona discussed in detail 'magical effect' of legal language. Here he again analyzed impact of legal language on the social psychology.

Contribution of both Axel Hagerstrom and Karl Olivecrona to the Scandinavian realism is very important. One is founding father of this school, other is one of the strong pillars of this approach. Ultimately it can be concluded that Axel Hagerstrom, being pioneer of this school, was very vast in his approach, but Karl Olivecrona gave it a more logical and comprehensive outlook.