Roman Law and Scandinavian Realism: Kunkel versus Hägerström

Direito romano e Realismo Escandinavo: Kunkel versus Hägerström

Carlos Sánchez-Moreno Ellart[*]
Universidad de Valencia, España

Abstract

This paper evaluates the then famous Kunkel's review of Hägerström's Der römische Obligationsbebriff, better expression of the Scandinavian realism and its treatment of Roman law. Both the limits of Hägerström's out-of-step anthropological approach, and of Kunkel's criticism, still under the impact of Pandect law underlie behind this discussion.

Keywords: Roman Law; Scandinavian Realism; Law of Obligations; Animism; Mana; Wolfgang Kunkel; Axel Hägerström.

Resumo

Este artigo avalia a então célebre resenha de Kunkel ao livro *Der römische Obligationsbebriff*, de Hägerström, máximo expoente do realismo escandinavo, e de seu tratamento do Direito Romano. Subjazem nesta discussão tanto as limitações do enfoque antropológico defasado de Hägerström como a crítica de Kunkel, ainda influenciada pela Pandectística e pela Escola Histórica.

Palavras-chave: Direito Romano; Realismo Escandinavo; Lei de Obrigações; Animismo; Mana; Axel Hägerström.

● **Enviado em: 30/11/2017**
● **Aprovado em: 22/12/2017**

[*] Facultad de Derecho, Universidad de Valencia, España.

Nowadays, scholarship tends to forget the close implication of the so-called Scandinavian realism and Roman law. In this paper, I shall not analyse in depth the Scandinavian realism, but only some aspects of its better expression, the Swedish philosopher of law Axel Hägerström and in particular the impact of his work on the study of Roman law. Probably some of Hägerström's pupils, such as Olivecrona, Ross or Lundstedt, jurists strictly speaking, devoted more creative works to this subject, but always under his influence. That is why I considered significant the reception of his main book on the theory of obligations by scholarship and especially by German legal scholarship.

Perhaps, Scandinavian realism -today for the majority, a matter of jurisprudential archaeology[1]- could still be challenging and able to offer a refreshing perspective on many legal problems. I must admit that I am not especially interested in this question. As stated above, my only aim is to evaluate the impact of this school on Roman law studies. This question, I believe, could be for this purpose tackled by commenting the famous -in its time- controversy between the main figure of Scandinavian realism, Axel Hägerström, and one of the most remarkable scholars of Roman law, the German professor Wolfgang Kunkel.

In my view, the discussion between these scholars makes clear both the limitations of Hägerström's approach and also of Kunkel's criticism. Hägerström's thinking entailed a positivist outlook, based on a rejection of what he used to call metaphysics and consequently, weighed down by a naive realism. Furthermore, Hägerström wrote under the influence of an anthropological approach focused on topics such as 'primitive mentality', 'animism' or 'cultural evolutionism', which made his theories biased from the outset. On the other hand, also the criticism of Kunkel, one of the most brilliant scholars of Roman law in the first half of the last century, proves to be unable to distinguish interesting suggestions on some legal institutions, mixed up with a lot of imaginative hypothesis, because he was highly indebted to the rationalistic basis of the Historical School and in some way to Pandect law.

Let us consider some of the key anthropological concepts in Hägerström's approach. 'Primitive mentality' -an influential theory on Scandinavian realism, implied some of the notions used by Hägerström, such as 'mystical', in the sense that primitive peoples do not distinguish between natural and supernatural or 'pre-logical. Later this theory was mostly ruled out by Lucien Lévy-Bruhl himself[2], who coined it. This theory entails that primitive

1 F. Shauer & V. J. Wise, "Legal Positivism as Legal Information", *Cornell Law Review* 82 (1997) 1080-1109, esp. 1081. These authors include in the "museums of jurispudential archaeology" also historicism

2 We are bound to simplify, since Lévy-Bruhl wrote six book on this topic, exactly from 1912 to 1935, vid. F. De Laguna, "Lévy Bruhl's Contributions to the Study of Primitive Mentality", *The Philosophical Review* 49 (1940) 552-566, esp. 552, n. 2.

thinking is concrete, far from abstraction and with a peculiar interpretation of cause and effect[3]. 'Animism' could be defined as the cornerstone of Sir Edward Burnett Tylor's anthropology, closely linked to cultural evolutionism in its turn and to a concept both present in Hägerström and in other scholars such as Pietro Bonfante: 'survival'[4]. For him, in a context of cultural evolutionism, animism was the first stage of religion and, to a certain degree, the profound content of every religion. Marett's anthropology, which insists on animism in inanimate things[5] and Frazer's concept of magic are important ingredients of Hägerström approach[6]. On the other hand, also the criticism of Kunkel, one of the most brilliant scholars of Roman law in the first half of the last century, proves to be unable to distinguish interesting suggestions on some legal institutions, mixed up with a lot of imaginative hypothesis because he was highly indebted to the rationalistic basis of the Historical School and in some way to Pandect law.

A critical study of Scandinavian realism cannot therefore be pursued in this paper, but it is necessary to pinpoint the essential corollaries of this system in order to understand Hägerström's historical hypothesis. As it is widely known, Hägerström's approach is a rational naturalistic standpoint that rejects both natural law and fictions such as the "will of the legislator" (against Kelsen)[7]. In his opinion, legal rules can be defined as a set of behavioural patterns[8] maintained by the use of force. His study of legal history is always involved with his purpose to discard every trace of metaphysics in law and, what is for us more significant, his aim conditioned his research by superimposing a previous scheme to the sources.

In few words, Scandinavian realism tries to identify survivors of primitive beliefs as a part of this conception of 'metaphysics'. Hägerström analyses the Romans and their primitive

---

3 L. Lévy-Bruhl, *Primitive Mentality* (English translation by L. A. Clare), London-New York (George Allen & Unwinn / MacMillan Co)) 1923 90-91.

4 E. B. Tylor, *Anthropology. An Introduction to the Study of Man and Civilization*, (George Allen & Unwin) London 1881 15-16

5 R. R. Marett, "Pre-Animistic Religion", in *The Threshold of Religion*, Oxford (Methuen & Co.) 1914 1-28; "The Conception of Mana", *ibid*. 99-111. According to G. MacCormack ("Hägerström's Magical Interpretation of Roman Law", *The Irish Jurist* 4 1969 153-167, esp. 154, n. 5) Hägerström probably became acquainted with Tylor's and Marett's works by means of W. Wundt, *Völkerpsychologie*, Leipzig (Verlag von Wilhelm Engelmann) 1904 or rather of the book published by the Lutheran archbishop and recipient of Nobel Peace Prize Nathan Söderblom *Gudstrons uppkonst* (Uppsala 1914) from which there is a German translation, *Das Werden des Gottesglaubens*., Leipzig 1916 (repr. 1979).

6 J. G. Frazer, *The Golden Bough*, London 1923 (Abridged version, reprinted London Papermac. 1983) 11-47 develops his concept of sympathetic magic, highly influential on Hägerström, but also on other scholars such as Lévy-Bruhl, belonging to a different school. An early and acute criticism towards cultural evolutionism as a paradigm and especially against Tylor can be found in H. Pinard de la Boullaye, *L'Étude comparée des religions* I, Paris (Beauchesne) 1922 362-370.

7 In general, on this point vid. J. Bjarup, "The Philosophy of Scandinavian Realism", *Ratio Iuris* 18 (2005) 1-15, esp.6-8.

8 J. Bjarup, "The Philosophy of Scandinavian Realism", cit. 9.

features: animism, mana and magic as defining features. His historical theories of the origin of the obligation as a legal concept are nothing but a consequence of these propositions. In the first volume of his controversial work *Der römische Obligationsbegriff im Lichte der allgemeinen römischen Rechtsanschauung* (Uppsala 1923) Hägerström contends that the Roman theory of obligations was actually only a collection of remnants of magic rituals that survived both in Roman law and in its tradition. This book was received in many ways[9], but Romanists -and especially the German ones- were especially critical and objected to a lack of method (a method highly dependent on concepts of the anthropology of those days such as animism) and even ignorance of the very basis of the discipline, conceived according to the German Historical School.

As stated above, Hägerström's work in general (not only his *Der römische Obligationsbegriff*) is highly indebted to the anthropology of that moment, still under the influence of E. B. Tylor's cultural evolutionism, Sir James Frazer's theory of magic and Marett's theory of Mana that implies some modifications of Tylor's theory and that entails an idea very influential on Hägerström himself, that the remnants of older phases in the evolution of cultures can be detected in subsequent periods[10]. To sum up Hägerström's starting point, the Romans can be treated as a primitive people that came to believe that they were able to take control, by means of ritual and sympathetic magic, over the indwelling powers (animism, Mana) of things. On the other hand, as MacCormack rightly pointed out, Hägerström did not make any attempt to construct a coherent chronology "substantiated by evidence" on the evolution of Roman culture, despite his belief in cultural evolutionism[11].

Kunkel is from the first, quite critical of the idea that the obligation as such is a "mystische Gebundenheit einer Person durch eine andere"[12]. At the same time and from the beginnings of his review Kunkel points out the "sehr eigenartige Methode"[13]. The German scholar recognises Hägerström's wide knowledge of sources but on the other hand, criticises his biased use of them.

---

9 C. Faralli, *Diritto e magia Il realismo di Hägerström e il positivismo filosofico*, Bologna (CLUEB) 1987 57-64; 74-76-P. Mindus, *A Real Life: the Life and Works of Axel Hägerström*, London-New York (Springer) 2009 212 and n. 50; K. Tuori, *Lawyers and Savages. Ancient History and Legal Realism in the Making of Legal Anthropology*, London-New York (Routledge) 2015 133.

10 To the best of my knowledge, P. Mindus (*A Real Life*, cit. 205) is the scholar who mainly outlines the influence of Marett on Hägerström and the Scandinavian realism. Normally legal scholars (especially the Roman law scholars) use a confusing concept of animism for gods, people and also inanimate beings. On the distinction between animism and animatism, vid. the classical handbook by R. L. Beals & H. Hoijer, *An Introduction to Anthropology*, New York (Mac Millan & Co) 1968 475-476.

11 G. MacCormack, "Hägerström's Magical Interpretation " cit. 154.

12 Kunkel, Review A. Hägerström, Der römische Obligationsbegriff, SZ 62 (1929) 479-490, esp.. 479.

13 Kunkel, op. cit. 480.

Only to select some examples of Hägerström's views, let us start by the contrast between matter and form. Even in this case, the most accepted Greek influences on Roman jurisprudence, Hägerström puts forward that it can be attributed to animism[14]. In his opinion the influence of animism can be traced in the origins of this theory, to Plato himself because of the belief in the existence of an essence of things [15]. By means of a simplistic commentary on the Phaedo, Hägerström states that things have their own being in the ideas while these have their own existence regardless of things and hence it is legitimate to conclude that a link between primitive peoples and animism is available and that animism is the background even of Greek philosophy[16]. This Greek influence would operate on the Roman culture because of a common cultural background, since in the Greek popular culture animism was clearly present[17].

According to Hägerström, the Romans carried animism in the same way in their own blood, since not only people but also animals and even inanimate things can rouse the wrath of the gods and be considered as sacrilegious[18] and on the other hand this reality explains why the wrath of the gods could be transmitted and that the *impius* could contaminate worship (Ov *Fast* II 246-266, esp. 261-262: *'addis' ait 'culpae mendacia' Phoebus 'et audes / fatidicum verbis fallere velle deum?*).

A similar approach is taken on *mancipatio*, but with the difference that in this case, ritual could be easily compared to performative acts, as subsequent scholarship proposed[19]. Where *mancipatio* is concerned, Hägerström defended its magical background by stating that this ritual generated a link of a magical nature between both parties[20]. Another interesting point in the context of *mancipatio* is how Kunkel criticises the interpretation that Hägerström

14 A. Hägerström, *Der römische Obligationsbegriff* I, Uppsala /Leipzig (Almqvist & Wiksell / Harrasowitz) 1927 277 quotes the in that moment, the classical treatise by Paul von Sokolowski, *Die Philosophie im Privatrecht* II, Halle (Max Niemeyer) 1907 (rpr. Aalen - Scientia Verlag -1959) 151

15 A. Hägerström, *Der römische Obligationsbegriff* I, cit.278: "Hierbei muss zuerts beachtet werden, dass die platonisch-aristotelische und stoische Lehre von einem inneren Wesen der Dinge, wie sehr sie auch bei ihrem philosophischen Begründer Plato von erkenntnistheoretischen und ontologischen Motiven bestimmt gewesen sein mag, sich doch nicht ohne den allgemeinen animistischen Glauben an selbständige, nach Zwecken wirkende physische Kräfte in den Dingen begreifen lässt".

16 A better explanation of Anaxagoras's interpretation by Plato in his *Phaedo* in W. D. Ross *Plato's Theory of Ideas,* Cambridge (Cambridge University Press) 1951 22-32.

17 A. Hägerström, *Der römische Obligationsbegriff* I, cit. 279: "Was besonders den griechischen Volksglauben betrifft, tritt der Animismus handgreiflich hervor". As usual Hägerström provides a lot of literary sources concerning popular beliefs (e.g. Plato *Leges* IX 873 E; Aeschylus *Choefor*. 277ff.) but of course his analysis is not necessarily accurate.

18 A. Hägerström, *Der römische Obligationsbegriff* I, cit. 281.

19 G. MacCormack, "Hägerström's Magical Interpretation", cit. 160-161; E. Pattaro & C. Roversi, *A Treatise of Legal Philosophy and General Jurisprudence* XII, Berlin, Heidelberg, New York (Springer) 2005 344

20 A. Hägerström, *Der römische Obligationsbegriff* I,cit. 35-41.

supports of imperative. In his view, it was nothing but a part of magic formula[21] and on the same grounds he excludes that this formula could be identified as a declaration of will (Willenserklärung). Significantly, Kunkel's criticism is aimed to demonstrate that this use of imperative not only had nothing to do with magic but that it was a clear declaration of will and he takes resort to the wide use of imperative in the Greek documentation, especially in contracts[22]. This argument could be misleading, since we know today that consensual contracts have probably little to do with the Greek concept of contract and that imperative in this context could demonstrate exactly the contrary of Kunkel's idea.

The point is remarkable because Hägerström took the trouble to write an answer to Kunkek's criticism in the second part[23] of *Der römische Obligationsbegriff*. As a matter of fact, nothing new is added, or at least Hägerström is not especially clear in his response. He objects that Kunkel has misunderstood his assertion on declaration of will[24]. According to him, a declaration of will in modern law is relevant whenever those declarations of will are considered above all personal rights. In fact, this is the criticism by Hägerström to the Pandect law idea of declaration of will as basis of a legal transaction ('Rechtsgeschäft'). According to him, a legal transaction is made not merely to declare that some rights and duties exist but to modify them or to bring them into being. The right statement should be not "the promisor aims to say", but "the promisor aims to do". This explanation brings the *mancipatio* closer to the performative acts theory and this is the most valuable part of Hägerström's theory, albeit based occasionally on wrong foundations.

The same goes for *bonorum possessio*, in which he saw[25], more than the removal by the Praetor of the formal requirements conceived by the old *ius civile*, the creation of a new magic link. Kunkel objects Hägerström reading of the sources.

> D. 37.1.3.1 (Ulp. 39 *ad ed.*)
>
> *Hereditatis autem bonorumve possessio, ut Labeo scribit, non uti rerum possessio accipienda est: est enim iuris magis quam corporis possessio. Denique etsi nihil corporale est in hereditate, attamen recte eius bonorum possessionem adgnitam Labeo ait.*

21 A. Hägerström, *Der römische Obligationsbegriff* I,cit. 38-39.
22 W. Kunkel, 485-486.
23 A. Hägerström, *Der römische Obligationsbegriff* II, Uppsala-Leipzig 1941 340-351.
24 A. Hägerström, *Der römische Obligationsbegriff* II 343-344: "Wenn einer Willenserklärung im modernen juristischen Sinne rechtliche Relevanz zugeschrieben wird, beruht dies darauf, dass der Wille als über die Rechte der Person verfügend betrachtet wird. Da nun aber das moderne Recht 'Willenserklärungen', bei denen nachweislich ein entsprechender Wille fehlt und die blosse Worte sind, dennoch Rechtswirksamkeit beilegt, so ist ja klar, dass für die Relevanz Entscheidende in Wirklichkeit nicht die Erklärung eines gewissen Willens sein kann, sondern etwas anderes sein muss". ".
25 A. Hägerström, *Der römische Obligationsbegriff* I,cit. 297.

This is a known text excerpted from the commentary to the edict by Ulpian in which Labeo is quoted to support the idea that possession in the *bonorum posessio* could be implied in a case in which no corporal thing was involved, *est enim iuris magis quam corporis possessio*. Hägerström interprets this text by resorting to the idea of 'Kraft', this being understood as an energy or power. Of course, Kunkel is absolutely right in his criticism[26], since Labeo's opinion has nothing to do with the notion of energy or animism. In fact, Hägerström trivialises the work of the Roman jurisprudence in order to superimpose his previous thesis on animism.

The last example we shall examine is the *cautio damni infecti*. A *cautio* in general is a security provided against apprehended damage, granted by the praetor by taking advantage of the effects of a *stipulatio*. In the case of a *cautio damni infecti*, the owner of the adjacent land is entitled -on the basis of anticipated damage- to apply for a formal promise for loss. In this case Hägerström's interpretation is even more slanted.

> D. 39.2.24.3-5 (Ulp. 81 *ad ed*.)
>
> 3. *Haec stipulatio utrum id solum damnum contineat, quod iniuria fit, an vero omne damnum, quod extrinsecus contingat? Et Labeo quidem scribit de damno dato non posse agi, si quid forte terrae motu aut vi fluminis aliove quo casu fortuito acciderit.*
>
> 4. *Servius quoque putat, si ex aedibus promissoris vento tegulae deiectae damnum vicino dederint, ita eum teneri, si aedificii vitio id acciderit, non si violentia ventorum vel qua alia ratione, quae vim habet divinam. Labeo et rationem adicit, quo, si hoc non admittatur, iniquum erit: quo enim tam firmum aedificium est, ut fluminis aut maris aut tempestatis aut ruinae incendii aut terrae motus vim sustinere possit?*
>
> 5. *Idem Servius putat, si controversia aquae insulam subverterit, deinde stipulatoris aedificia ceciderint, nihil eum ex stipulatu consecuturum, quia id nec operis nec loci vitio factum est. Si autem aqua vitiet fundamenta et sic aedificium ruisset, committi stipulationem ait: multum enim interesse, quod erat alioquin firmum, vi fluminis lapsum sit protinus, an vero ante sit vitiatum, deinde sic deciderit. Et ita Labeo probat: etenim multum interesse, quod ad Aquiliam pertinet, sanum quis hominem occidat an vero factum inbecilliorem*.

Again, Hägerström trivialises what Labeo and Servius thought on this point. Labeo in fact establishes a limit to liability in the case of a damage due to force majeure or chance. Servius and again Labeo nuance these questions with reference to points such as the *vitium operis*. In Hägerström's opinion, however the very terminology implies that things are actually responsible, as a further manifestation, of animism[27]. It is clear that liability is not placed on

[26] W. Kunkel, 487: "Eine derartige Auslegung entspricht gewiss nicht die Meinung Labeos. das ergibt sich schon aus dem Schlusssatz des Paragraphen: *Denique etsi nihil corporale est in hereditate, attamen recte eius bonorum possessionem adgnitam Labeo ait*".

[27] A. Hägerström, *Der römische Obligationsbegriff* I,cit. 282-284.

the thing and that terminology has its own background free from Hägerström's anthropological prejudices and Kunkel rightly points out the actual exegesis of the term *inuria* and *vitium* in the sources, starting from the XII Tables[28].

I think we have already had the opportunity to comment on some examples of Hägerström's method and some of Kunkel's answers and criticism as well. In some way and taking into account the consideration of the Scandinavian realism today we have been beating a dead horse, so to speak, but in my opinion some features of Kunkel's criticism (normally well-aimed and accurate) have been practically overlooked and deserve a closer approach. Kunkel's criticism is essentially based on two pillars: the actual knowledge of Roman law (Hägerström unlike his pupils Ross, Olivercrona and Lundstedt was not properly a jurist, but a philosopher of law) and the contempt -very respectful in form- of anthropology in favour of a highly dogmatic view.

As many scholars have already pointed out, the review of Kunkel makes clear the flaws and limitations spotted in Hägerström[29], but normally the limitations of the review are forgotten or justified. In my opinion, these come from both sources: one, paradoxically common with Hägerström (some anthropological prejudices) and one specific of Kunkel, the German historical school.

Regarding the former, we have to bear in mind that Kunkel's approach is still highly indebted to many nineteenth century prejudices. Not by chance Kunkel implicitly accepts cultural evolutionism, especially where religion is concerned and he takes advantage of this idea to set aside every irrational element to the archaic period. By doing that, Kunkel rules out the possibility of coming across irrational elements dated from subsequent periods.

This way of proceeding demonstrates something that even Max Kaser, a scholar not very critical with Kunkel, was bound to admit[30]. According to Kaser, Kunkel's criticism of Hägerström's theories is deeply rooted in Mitteis interpretation of Roman religion[31] and its relationship to law. Mitteis meant a change of the treatment of the relationship between religion and law displayed around the mid 19th century by scholars such as Jhering or Pernice in favour of a more radical rationalistic view. That is why despite his criticism Kunkel appears to be moving within similar parameters as Hägerström did.

---

28 W. Kunkel 486: "Die Behauptung, dass 'Vitiosität in der Rechtssprache regelmässig Vorhandensein eines *iniustum* im Sinne eines Zustandes oder einer Handlung ohne Stütze des Rechts bedeutet' ist eine unzulässige Verallgemeinerung".

29 C. Faralli, *Diritto e magia*, cit. 60-63.

30 M. Kaser *Das altrömische Ius*, Berlin (Vandenhoeck & Ruprecht) 1949 301.

31 L. Mitteis, *Römisches Privatrecht bis auf die Zeit Diokletians* I, Berlin (Duncker & Humboldt) 1908, 22-25.

With regard to the latter, i.e., Kunkel's criticism, we share Faralli's criticism but in a deeper way. Carla Faralli confers to the German tradition of the legal studies a high influence of Pandect law, but -she argues- despite the tradition of the Historical School[32]. In fact, the extrapolation of modern legal concepts to Roman law has a deep origin in the Pandektenrecht method, but even the Historical School, being rooted in the rationalist iusnaturalism from its outset has in itself the seed of formalism. as Andres B Schwarz demonstrated back in 1921[33]. Exactly in the same way in which a common anthropological background sets limits to criticism, the method of the Historical School, under the influence of a systematic and formalist focus makes it difficult to discover new suggestions or new approaches.

Kunkel's review displays the best of a rigorous and demanding method that has shaped our discipline for the better, that at its worst has ruled out interesting explanations. It is obvious (as it was in the thirties) that Hägerström's theory lacked actual foundations but some of his hypothesis have inspired scholars not so involved in the method of Roman law studies. Of course, Roman law studies fortunately got rid of the problems that implied the enactment of the BGB, since the same effort to find a new approach entailed the progressive vanishing of the principles of Pandect law. Kunkel worked within a paradigm of which he was probably not fully aware in a period between the extinction of the old Pandect law and a new historical approach, but not yet free from the remains of formalism.

Only to conclude with an example of how the apparently ludicrous theories of Hägerström could offer a new perspective and that even with the most accurate exegesis under the influence of the historical school this suggestion could remain unnoticed, I shall briefly comment again the performative acts I have tackled above. Actually, Hägerström's interpretation of *mancipatio* offers an intelligent and rich perspective that is missing in Kunkel's criticism. Kunkel rightly criticizes Hägerström's excess, but inadvertently he projects notions belonging to Pandect law (Pandektenrecht), which makes him unable to distinguish a creative explanation. As is widely known, we can define John Searle's performative acts as 'speech acts,', assurances and promises which seem not only to refer to a speaking relationship, but to constitute a moral bond between speakers[34]. Searle reformulated Austin's theory of speech acts by insisting on the ethical aspect of them. In my opinion, by driving out

32 C. Faralli, *Diritto e magia*, cit. 63, n. 15: "La sordità e l'opposizione dei romanisti tedeschi alle tesi di Hägerström si può spiegare, in parte, rilevando che in Germania (...) è durato molto a lungo l'influsso della Pandettistica ottocentesca, la quale, nonostante le sue radici nella scuola storica, scivolò progressivamente verso il formalismo".

33 A. B. Schwarz, "Zur Entstehung des modernen Pandektensystems" SZ 42 (1921) 578-610.

34 J. L. Austin, *How to do Things with Words,* Cambridge (Mass.)[2] (Harvard University Press) 1975 esp. 1-11; 53-66; J. Searle, *Expression and Meaning: Studies in the Theory of Speech Acts*. Cambridge (Cambridge University Press) 1979 12.

the magical aspect of Hägerström's theory there is a possibility of accepting part of his explanation to point out this problem, even when we consider that in Hägerström theory there is no place for performative acts, insofar as his philosophy denies -strictly speaking- the possibility of "doing things with words"[35]. Hägerström detects at least this will of modifying things before the ritual and the use of imperative. Kunkel, in the case of the use of imperative in the *mancipatio*, was more concerned with identifying a declaration of will than in observing the performative aspect of this ritual. Some scholars, by making some use of Hägerström's suggestions and Searle's theory of performative acts have been recently able to reach a more explanatory approach of this subject, even taking into account some magical elements, but regardless of an evolutionist outline.

Some years ago, on reviewing the book, *Legitimacy and Law in the Roman World,* by Elizabeth Anne Meyer (Cambridge 2004) I stated[36] that Kunkel's criticism of Hägerström was correct and accurate but in some way unfortunate. In *Legitimacy and Law* some elements of ritual and also of magic[37] are pointed out and rightly evaluated, by following a general outline based on the performative acts theory. Somehow Meyer took advantage of some intuitions by Hägerström, whom she quotes but by making use of some other works such as *Das magistratische Ius* (Uppsala, 1929). Of course, Kunkel, one of the main scholars in Roman law in the last century, corrected himself and became more open to new suggestions, but the impact of the Historical School was in some manner highly influential over him, and some preconceptions of scholarship still guided his research, which in some ways is unavoidable but we must be conscious of these narrow limits in order to trascend them. Some preconceptions, derived from a particular anthropological view are common to both scholars but their results eventually became very different, perhaps because Kunkel's background are modern legal ideals, received by means of Pandect law. On the other hand, Hägerström's aim was to discuss this background, reasonably, but in our opinion not with the best set of instruments. Our work is to evaluate both attempts by retaining the best part of each of them, both the rigour and accuracy of Kunkel's criticism with the open creativity of Hägerström's suggestions.

35 E. Pattaro & C. Roversi, *A Treatise of Legal Philosophy and General Jurisprudence* XII, cit. 345.
36 http://www.sehepunkte.de/2004/09/6167.html
37 Some of them, as the author explicitly admits, already pointed out by M. Huvelin, "Les tablettes magiques et le droit romain", *Annales internationales d' histoire. Congrè de Paris 1900*, Paris 1904 15-81.