OLIVECRONA ON LEGAL RIGHTS

REFLECTIONS ON THE CONCEPT OF RIGHTS

BY

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In his recently published work *Rätt och dom* [Legal Right and Judgment] (Stockholm 1960) Karl Olivecrona discusses the problem of the meaning of legal rights. The author's main concern is with the fundamental concepts of procedural law, but these topics fall outside my field of research and I shall therefore leave it to others to judge of them. I shall confine myself to commenting upon Olivecrona's treatment of the concept of rights.

To a very great extent Olivecrona bases his argument on Hägerström—to such an extent, indeed, that often he gives Hägerström the credit in cases where rightly it belongs to Olivecrona himself. This aspect of the matter, however, is scarcely one which is of interest to readers outside Scandinavia.

I. In Olivecrona's opinion, the basic defect in the traditional concept of rights is that it presupposes a *factual* condition and assumes that something material happens when a right is created, e.g. when A, by virtue of a completed sale, becomes the owner of a thing. As the notion of A's right of ownership undoubtedly has a highly motivating influence—both on A himself and on those who might come into contact with his ownership—this influence is conceived as an effect arising out of an ownership which is itself an existing fact and which is considered as created by certain facts endowed by the law with the capacity for such creation. A has become the owner by reason of the sale, and so he remains until some other circumstance recognized by law puts an end to his ownership. This is so even if no other person knows of A's right of ownership, i.e. even when it cannot have any motivating influence on the actions of any other person. In principle, according to the traditional concept, it ought to be irrelevant to the existence of the right that no one knows of it and that consequently no one can be influenced by it.

Olivecrona considers that this is to turn the whole matter upside down. It is clear enough that the contract which makes A

owner of the object of the sale has certain psychological cons quences. "But the fact that the buyer becomes owner through th sale cannot be identified with the fact that the parties and tho around them act in a certain way. Such reactions are not absolutel bound to occur; the right of ownership, however, is presumed t pass by virtue of the contract in all circumstances. Further, whe deciding whether the purchaser has become the owner of a parti ular piece of land, no investigation is ever made whether an psychological reactions have occurred or not. *All* that is taken int account is whether the requisite legal conditions have been fulfilled i.e. whether the contract of sale is in order, whether the vendo has a good title to the land, etc. Finally, the reactions of th parties and their entourage are in fact due to the impression tha the purchaser has *become* owner by virtue of the contract. It i *due to the fact that* he is now the owner that he and not the vendor is regarded as the person invested with the power of disposi tion over the land." (Olivecrona, *op. cit.*, pp. 88–89.) And the motivating effect of the idea of ownership arises "gradually as the news of the sale gets round" (p. 89). Nor can the test of A's owner- ship be that the courts will react in a certain manner if an action is brought. "The right of ownership is conceived as existing ir- respective of whether there will be a lawsuit concerning the land or not. (Most landowners will certainly escape this calamity.) If there is an action, the attitude of the court will be conditioned by the view it forms with regard to the question of ownership." (P. 89.)

The conclusion, says Olivecrona, must therefore necessarily be as follows: "The statement that a person becomes the owner by virtue of the sale evidently cannot mean that all these consequences follow. For they are not absolutely certain to follow, but only do so with a certain, if quite appreciable, regularity. But the con- sequences are, above all, products of the fact that the *idea* has arisen in the minds of some people that the purchaser is now the owner. The statement that the purchaser has become the owner cannot possibly denote the fact that the idea has arisen—of the purchaser's ownership. Nor can it signify the actual consequences with respect to the power over the land produced by the fact that this idea has become general among those concerned." (Pp. 89–90.)

This leads up to what Olivecrona regards as decisive from the point of view of principle. The statement that A is the owner is not a statement of an actual fact, but what he terms an *imperative,* i.e. an instruction that something *shall* or *shall not* happen. This

in turn means that the statement is in a certain sense removed from the world of facts into that of ideas. This admission, however, does not cause him to dismiss the concept of rights as of no value. The particular body of ideas concerned "is an inescapable reality in the practice of law as well as in the public mind" (pp. 90–91). This body of ideas must be penetrated, conquered and made use of by the lawyer. That is Olivecrona's next task.

II. Olivecrona first deals separately with the function of the concept of rights in "general intercourse", i.e. in the relations between individual persons, and begins with its "directive" function. The statement that A has a particular right, as owner, creditor, etc., implies certain *directives* for him and for others. The owner will have some notion that he can go so far but no further—and this means in the case of most owners that they will in fact keep within those limits. The person who is not the owner knows that he must keep off—and generally does. And the fact that this, by and large, becomes the normal pattern of behaviour is not primarily due to any ideas concerning the nature of the right of ownership. People have, however, certain notions concerning the consequences of being an owner, and the word "ownership" will consequently function as a *signal calling attention* (p. 104). The well-tried metaphor of the red and green lights turns up in this connection and is made use of in the following very important passage: "Be it noted that it is the very *phrase* that A is the owner of the land which functions as red or green light. It is *this phrase* that people are conscious of and that will therefore influence their actions. In order to have such a function, it is not at all necessary for the phrase to express an *opinion* as to actual facts. The changing red and green lights at the crossroads certainly do not express any opinion. They are signals which have been invested with a social function because people have generally learnt to react to them in a particular manner. Therefore, the red and green lights will normally produce a particular pattern of behaviour, e.g. in an approaching motorist. And a similar position prevails with regard to the *phrase* that A is the owner of Blackacre. The statement has a definite social function because people have learnt to react to it in a particular way. As such reactions are common in society, the consequence will normally be that A will be left undisturbed to exercise a certain control over the land." (P. 105.)

All this naturally presupposes a certain consistency in the use of the word "right". "If the term 'right of ownership' were used

arbitrarily, so as to indicate indiscriminately now this, now that person as owner of a particular piece of land, then that term would not be capable of possessing the psychological effect which—as indicated above—it does in fact possess. In order to have such an effect the word must be used *according to rules;* it must be generally assumed in the community that it is possible to establish that A is the owner of a particular piece of land, B the owner of another piece, etc. Another prerequisite is that it shall be possible, if necessary, to obtain an *authoritative decision* on a question of ownership." (P. 106.) But this condition, too, is obviously fulfilled, and the very important consequence is "that the idea of ownership can function very well in human intercourse without the word 'ownership' expressing any opinion whatsoever as to actual facts. It is possible to understand and explain the function of the idea on the basis of the above assumption that people are only conscious of the word itself as it occurs in certain phrases. All that is necessary is that certain consequential ideas, and habitual reactions connected with the latter, shall be associated with those phrases and that it shall be generally believed that the title to a thing can be ascertained according to definite rules." (P. 106.)

But the idea of rights is also used to *inform* other people about legal situations. Information may be received, for instance, that A is the owner of a particular thing, and this will be understood. This does not amount to information of the facts in consequence of which A has become the owner, nor of the actual relations between A and the object of the ownership—he may, for instance, lack any practical means of defending his right, and he may even be unaware of its existence. Something nevertheless happens in the mind of the person who hears that A is the owner of a thing X—he will assume that the information has reference to particular facts of legal relevance and to certain rules of law.

"Thus the term 'ownership' does indeed possess an informative function in general intercourse, and this function is of great importance. It facilitates the giving of notice of legal situations. Instead of stating that a particular set of legally relevant facts exists—sale, inheritance, etc.—reference will be made to something which is conceived as a common consequence of every one of a whole group of different sets of circumstances—viz. that A is the owner of a particular thing. This will greatly simplify matters. And further, the significance of the legally relevant facts would not always be apparent to the person informed. He would, for instance, often be puzzled when confronted with the more unusual

ets of legally relevant facts. People will, however, normally have ome idea of the practical consequences if somebody 'is the owner' of something.

"An analogous position prevails in the sphere of obligations. It is convenient and handy to refer to obligations rather than to legally relevant facts. A debt, for instance, may arise from any of a number of different sets of circumstances. And whatever the latter may be, a great number of common rules of law will in each case apply to the resulting debt. If somebody is correctly described as a party to a debt—i.e. if this combination of words is used in accordance with the rules of law and with the true facts—then it may safely be assumed that the common rules of law are applicable. It also follows that a number of practical consequences may be expected. There will normally be an actual situation of compulsion as regards the debtor and one of power as regards the creditor, corresponding to the supposed obligation. But this is so, be it noted, only in normal cases. Whether a situation of compulsion does in fact exist depends, *inter alia,* on whether the facts out of which the debt arose can be proved or not. For any actual compulsion it is also essential that the debtor shall have sufficient assets. If he has not, the situation of compulsion is purely nominal.

"One disregards these variations when speaking of a debt instead of referring to an actual situation of compulsion." (Pp. 115–116.)

This leads on to a discussion of the use of the concept of rights in *legislation.* It may, of course, at first sight seem odd that a concept which does not belong to reality should be used in legislation. But it is not so strange after all: "In order to describe reality, real concepts must be employed. But the object of the law is not to describe reality but to direct people's actions. For this purpose there will be needed not only certain concepts but also some 'signal calling attention'." (P. 120.)

Where a statutory rule—directly or indirectly—describes A as the owner of a thing, this will give rise to a number of more or less clear ideas in the public mind that A is in a particular position, the main features of which are generally known and which, for everyday purposes, need not be known more closely. Thereby an enormous simplification is achieved, e.g. in expressing what are traditionally labelled rules concerning the acquisition of ownership.

The essence of Olivecrona's views is brought out by the following quotation: "The term 'a right' has both an emotional and an

imperative function. It may *express* a feeling of power and it ma *give* such a feeling. (Both these circumstances must be carefull distinguished from the statement that a position of power does i fact exist.) The term may also function as a sign of command o prohibition or permission: a command to the party against whon the right is directed, as is the case with a debt, a prohibition fo people other than the person entitled, as with the right of owner ship, and a sign of permission for the owner.

"The system of rights that is conceived as existing at any partic ular point of time is not a system of actual positions of power. The system of rights gives expression to that distribution of powe which *shall* or *ought to* exist. Thanks to the combined effect of a number of factors this system has a rather close equivalent in the actual distribution of power. Assertions of the existence of rights are made in the community in accordance with a system of rules concerning rights and duties—a system which is regarded as authoritative. By reason of the fact that it is always necessary to fall back on this system of rules in order to assert "actual" legal rights, the very important result is a *uniformity* in the formulation of claims as to rights and duties. The authoritative character of the system receives firm support from the courts, which possess irresistible real power and which function as the supreme interpreters and guardians of the system of rules. The suggestive effect of the statements on rights becomes immense thanks to their uniformity and to the power behind them—the effect is indeed so great that it easily fixes our picture of social conditions without our giving the matter a thought.

"The phrases concerning rights, made to a uniform pattern, are continually repeated between man and man. There are associated with these statements firm ideas as to what acts must, or may, or may not be done when somebody has a certain right. Thanks to the uniformity, the phrases concerning rights also fulfil, indirectly, an informative function. If the proposition that A is the owner of X is used correctly in accordance with the rules of property law, some such set of facts as constitutes a 'mode of acquisition' of X in favour of A must necessarily exist. What the particular facts are in the actual case will not be evident from the proposition; but it will give a hint as to how they may be discovered. But this investigation will not normally be undertaken—unless some rather important transaction is contemplated—if one has reason to rely on the informant's honesty and his knowledge of the facts. If the phrases concerning rights are used in a haphazard way, then the

indirect informative function will be absent if the listener understands that the words are used arbitrarily; if he does not realize this, he runs the risk of being misled.

"In statute law—which is of an imperative nature—statements are employed which provide that rights and duties shall arise under such and such circumstances and have this or that significance. The purpose of this is to impress certain patterns of behaviour on people's minds, and this is achieved through the medium of assertions concerning rights—assertions that are made and repeated in society in accordance with the legislation. The private citizens also legislate for themselves by means of imperative statements concerning rights and duties in contracts and other legal transactions.

"The rules concerning rights and duties are applied by private citizens as well as by courts of law and public authorities. The application is made by formulating an assertion on some particular right in accordance with the rules, and then by acting in accordance with the notions as to the behaviour which is expected as a result of the idea of the existence of that particular type of right. The effect as far as a private person is concerned it that he acts in a particular way in relation to the other party to a transaction; as to the court, the result will be the giving of a particular judgment." (Pp. 131–133.)

Olivecrona then runs through a number of earlier attempts to master the concept of rights (pp. 133–143). He discovers the same basic mistake with all of them, viz. that they all start with the idea "that the word 'right' must *denote* something in order to have any intelligible and justifiable use" (p. 143). True, the necessary method in presenting the given material in legislation, case law and legal literature, is to describe the ideas which are expressed therein. But this is in reality only an intermediate stage: "In the later stages of the investigation the need to speak of rights—even in this form—will simply fall away. The writer will instead make and justify recommendations as to how the courts ought to act in imaginary situations." (P. 144.)

And the final conclusion is as follows:—

"The problem of the use of the 'concept of rights' in legal literature thus receives quite an easy and natural solution. It is not necessary to use the ordinary legal terms in a new sense, which may be more or less easy to comprehend. All that is necessary is to realize quite clearly *what one is speaking of*: either ideas actually harboured by people about rights and duties, or the writer's own recommendations as to how the courts should act. If this is ob-

served, the consequence will be the opposite of artificiality and obscurity, namely simplicity and clarity." (P. 145.)

III. The positive outcome of Olivecrona's criticism of the traditional conception of rights, and of his analysis of the idea of rights that gives the conception a comprehensible content, is his exposition of what he calls "the three aspects of private law" (pp. 146–166).

First there is the *metaphysical* conception of rights, i.e. the one that has been developed above. In this connection the right is regarded as something *absolute,* which "is conceived as coming into existence when the requisite facts have occurred, quite regardless of whether these facts can ever be proved in court or not, and independently of the personal qualifications of the persons who at some uncertain future date may be concerned with a lawsuit in the matter. If you have obtained something by a mode of acquisition recognized by law, then you *are* the owner of the thing. If you have concluded a valid contract, by virtue of which somebody is indebted to you, then you have a claim even if it will never be possible to prove the necessary conditions." (Pp. 146–147.) Shortcomings in such respects may prevent the *enforcement* of the right, but not its existence (pp. 146–147).

If this were all, we should be moving exclusively on a metaphysical level, and the rules employed by us would lack any real meaning. But this is not so, and that brings us to private law in its second "aspect". In point of fact "these rules have a further import. The evident aim of the legislator is to achieve certain practical results; it is sought to establish a particular order of things in the community. The apparent intention is that an actual state of things should correspond to the system of rights: a person should in fact enjoy whatever the law gives him the right to enjoy. The law, accordingly, does not merely state what the metaphysical system of rights should be like. It also indicates the actual state of things that the legislator wishes to realize.

"We are here confronted with a conception whose content is quite easy to comprehend: the image of a state of things which ought to be realized, a pattern after which social life is to be moulded in certain respects. This imaginary pattern is essentially comparable to an architect's plans for a building. In the same way as the completed building corresponds to the plans, so does the actual state of things in society correspond to the scheme laid down by the law. If the construction is executed with great care,

then the completed building will be a rather close counterpart to the plans. But the counterpart will never be quite exact; there will always be some differences. The discrepancy between the scheme of the law and the actual state of things in society will, however, be much greater. For the equivalent in reality to the scheme is brought about by directing the daily actions of millions of people along certain uniform paths. That this gives rise to considerable shortcomings is self-evident. It is in fact remarkable that the correspondence between scheme and reality should be as close as it is.

"In so far as the rules of private law are taken as laying down a scheme for the actual order of things in society, there is nothing metaphysical about that. But what is the significance of words like 'right', 'duty', etc. in this connection? If, for instance, the law gives a person a right to compensation on certain conditions, this gives expression to the idea that a sum of money, determined in accordance with certain principles, *shall* be paid to him; if the law declares that the title to a piece of land is acquired in this way or that, then this implies that the person who has thus acquired title *ought to* be allowed to have the use of the land. And so on. The aim is achieved because other people act in a certain manner. A notion of such a necessity to act in a particular way has, of course, a meaning which is quite capable of comprehension. In so far as the discussion is confined to such manners of acting, then it will keep within the limits of reality. The expression 'a right' will not then reflect a given state of facts, but has an *imperative* function: it gives expression to a 'shall'. The law does not say that the desirable order of things does actually exist, but that it *ought to be realized.* Because of the associations connected with it, the term 'right' is an excellent tool for this purpose." (Pp. 147–148.)

But the plan will not be realized of itself, and this brings us to the private law in its *third* "aspect":—

"Apart from the rules that treat rights and duties as existing and those which constitute patterns of behaviour for the citizens, there is a third stratum of rules, viz. *rules concerning sanctions.* The latter are, first, rules which lay down the actual ('material') conditions for a sanction and which describe the sanctions and, secondly, rules concerning enforcement. The main body of the former belong to what I have here called *adjudication rules.* It is essentially the task of the courts to fix the sanctions in an actual case, although sanctions may also, to some extent, be imposed

directly by the authorities charged with the execution of judgments.

"As pointed out above, the adjudication rules must be carefully distinguished both from the rules concerning the existence of rights and duties, and from the rules as to how the private citizen should act. They are rules of action for the judge. A rule which, according to its content, is conceived of as laying down the conditions for the creation of a particular right, e.g. a rule that the title to a piece of land is acquired in a certain manner, says nothing in itself of how a judge should act. Nor does a rule of action for the private citizen, e.g. a rule that a seller in such and such circumstances should compensate the buyer, in itself say anything about any particular action that the judge should take. A rule for the adjudication of disputes must imply a *pattern of action for the judge,* e.g. that he should order a defendant to pay damages in such and such circumstances." (P. 149.) Briefly stated, the situation is as follows:—

"The rules concerning rights and duties may be described as metaphysical or idealistic private law in contrast to the adjudication rules or judicial private law. But as private law also supplies patterns of action for the use of the citizens in their doings and dealings, it might be said that private law appears in *three aspects*: *metaphysical* or idealistic, *judicial,* and *civic.* This means that in the great body of rules which is called private law, there may be distinguished three categories of rules: rules concerning rights and duties, rules as to how the courts should determine particular points in dispute, and rules of action for the private citizen." (P. 150.)

In the view of many, the word "metaphysical" has an unpleasant ring about it—nowadays to have anything to do with metaphysics is neither necessary nor advisable if one wishes to be regarded as a person of modern and enlightened views. Olivecrona makes it clear that he has no such derogatory sense in mind:

"It is true that it is not metaphysical private law itself, but only the ideas concerning rights and duties, which can be subjected to scientific research. But this fact should not, of course, lead anyone to underestimate the significance of these notions in social life. On the contrary, it is exactly from the point of view which has been put forward above that there is every reason for directing one's attention to the very significance of these ideas, and this is certainly a promising field for research. In this connection I confine myself to stressing one aspect of the matter, viz. the important

fact that rights and duties are conceived as existing quite independently of all difficulties of proof etc., which are met with in an action. Matters would be in a bad way if people were guided exclusively by the expected result of a possible lawsuit. The very fact that a person, both privately and in relation to others, does as a matter of course consider his own rights and duties, as well as those of other people, to be determined by facts that have actually occurred—whether they can be proved or not—is evidently of the greatest importance in social life. People will assert their rights against others, and often with good results, without taking into account whether there is evidence or not; an honest person will consider himself bound by obligations which he has assumed or which the law otherwise imposes on him, and he will not normally give a thought to the chances of escaping liability in a possible action. Metaphysical private law, entirely determined, as it is, by what has actually occurred, will thus be of the greatest psychological importance. But the judge is prevented from basing his decision directly on the facts as they actually occurred. He will get to the actual course of events only by way of evidence, which may be more or less accurate, and perhaps distorted on several points. But it is on this basis that he has to come to a decision, and the adjudication rules must be framed with this in mind." (Pp. 157–158.)

IV. There are many who, in recent years, have analysed and criticized the traditional concept of rights in an attempt to improve on the results. When I speak of a "traditional" concept of rights, what I have in mind is broadly what lawyers mean by that term when they use it in their everyday speech without too much reflection. Attempts to fix the meaning of the term have anyway yielded such divergent results that it is hard to speak of any settled tradition in this respect.

Some have paid particular attention to the fact that the traditional concept of rights covered quite dissimilar situations, and they have considered it as their main task to split the concept up in order to achieve a better understanding of its component concept. Here it is Hohfeld who leads the way—in the book which owing to his untimely death was unfortunately never completed: *Fundamental Legal Conceptions* (New Haven 1923).

Others went further: when a concept of rights was built up along traditional lines, one was brought beyond the limits of reality. If this meant that one was brought beyond what could be seen with

the eyes or touched with the hands, then the observation was doubt correct, though perhaps a fraction trite. It showed that c had entered the field of the abstract—but, that had already be suspected previously. The intention must have been to assert th the situation to which the conception of rights referred was lackir

This gave rise to different reactions. Some writers entire rejected the notion of individual rights—sometimes with a gre flourish: a right was a "mere phantom" which could only decei the most credulous. And when some of the adherents of this vie could not help realizing that the word was a practical and usef one, then they put it in inverted commas and solemnly averre that they took back nothing of what they had said.

The reaction of others was more positive: the statement that had a right to have a thing delivered to him by B did not i itself connote any social reality. It might refer to some particula words or documents which must have been exchanged betwee A and B, but this did not mean that A would in fact have th thing—and this and nothing else was what really mattered. It ma be that A often got what he was "entitled" to; but in the ruthles world of realities it was not unusual for A to be left with empt hands. This made it necessary to analyse the matters which inter vened between A's aspirations and their realization, and to mak these matters part of the explanation of what is meant by th statement that A has a right. And then procedural rules had to b taken into account—and not only rules for that matter: every circumstance had to be investigated which in fact contributed to the result that A was given his "due". It had to be considered whether A had the necessary means, whether he was independent and enterprising enough to bring an action, whether he had sufficient evidence and an advocate capable of making full use of it, whether the judge—and no less the jury—were equal to their tasks, etc., etc. And if a favourable judgment was eventually procured, a further investigation had to be made as to the chances of having it enforced. The result was a concept similar to Llewellyn's facetious outline: What is called A's right "could rather more accurately be phrased somewhat as follows: if the other party does not perform as agreed, you can sue, and if you have a fair lawyer, and nothing goes wrong with your witnesses or the jury, *and* you give up four or five days of time and some ten to thirty per cent of the proceeds, and wait two to twenty months, you will *probably* get a judgment for a sum considerably less than what the performance would have been worth which, if the other party is

solvent and has not secreted his assets, you can in further due course collect with six per cent interest for delay", (1930) 30 Columbia Law Review 437–438.

The quotations above will have shown that Olivecrona's views are as far removed as they could be from the concept of rights which has just been outlined: it is "a separate question", says Olivecrona, whether "the legal situation" carries with it any "practical advantages" for the person entitled; in this connection "different things must be kept apart", and "a distinction must be made between the question which facts are legally relevant, and the question which practical advantages a person derives because any particular facts are relevant" (pp. 78–79); and it is important to note "that rights and duties are conceived of as existing quite independently of all difficulties of proof etc. which are met with in an action" (p. 157).

V. Apparently we are here confronted with contrasts whose sole advantage lies in the fact that they are obvious to everybody. What are we to conclude? Is it Olivecrona who has left this vale of tears and ascended into the heaven of legal concepts? He was surely the last person one would expect to find there. Or is it American realism and its offshoots all over the world that have gone completely astray? This assumption does not seem any more likely.

Is not the explanation simply that the two sides are speaking of quite different things—as is so often the case when wise people reach different results? And I think that we are here faced with the *distinction between the juristic and the sociological concept of rights*. Several authors, among them Wedberg and Ross,[1] have stressed this point, and in my opinion one can hardly exaggerate its importance. We need both these concepts. But the first and foremost need is to keep them distinct. When that has been achieved, I think it will be discovered to what a large extent they are complementary to each other, and how the one throws light on the other.

The sociologist must focus his main attention on the actual events in society and the forces behind them. He will then take an interest in individual rights if and so far as they actually give something to the person entitled, and he will take note of rules of law when they actually influence the course of events in society. This does not mean that the rules have significance to him only

[1] Wedberg, *Theoria* 1951, p. 262 f., and Ross, *Sv. J. T.* 1953, p. 502.

when they are backed up by force—if he is not totally blind h will discover that a rule which has the authority of society behin it is a social reality by virtue of its social recognition. How fa this is the case probably varies greatly from community to com munity; and a study of these variations and their causes must b an attractive—if exacting—task for a legal sociologist. It is hardl a coincidence that O. W. Holmes's doctrine of legal rules as "pro phecies of what the courts will do in fact", and the reference t "the bad man" and his reactions on which the doctrine is based, was developed with a comparatively young community in view.[2]

It is quite clear that the sociologist's conception of rights is very different from that of *the legislator*. The latter does not attempt to *describe* reality, but to *form* it. As Ross has put it: "Parliament is not an intelligence bureau, but a centre for social direction" (*Om Ret og Retfærdighed,* 1957, p. 19). Incidentally, Parliament is *also* something of an intelligence bureau, for it has to give information about its own directives, but this is a consequence of the main function: to direct. And there is no difference when the law, as is often the case, employs a descriptive form. A legal rule which states, for instance, that A is the heir or stands the risk is also a direction that something *shall* happen—A shall have what an heir in the particular circumstances is entitled to, or he shall lose his claim for the price if the goods should perish.

This has long been well known, although there have always been stalwarts who have denied it. The interesting thing about Olivecrona's exposition is that he shows up the imperative element in the *concept of rights,*[3] and that he demonstrates, in a way which seems convincing to me, that it is such a concept we need. And—unlike so many others—he was not dazzled because he saw a great light. His exposition is simple, objective, sober. An attempt has been made above to let him state his case in his own words. I shall now make certain comments on his text. This is not, however, in

[2] Holmes wrote in 1897. And as most people form their fundamental conceptions on the basis of the situation as it has been and not as it is at the present moment, it might perhaps be said that Holmes conceived his theories on the basis of the North American community as it was in the middle of last century. And the "bad man" who pays no attention to the letter of the law and only considers how far he can go without being stopped was then presumably more in evidence than now.

[3] I keep to the traditional terminology, and stress that I do not wish to force on Olivecrona a terminology that he does not like. I am also fully aware of Olivecrona's view that there is much more than a terminological difference in this connection—but this is one of the points where I have not been convinced that he is right.

order to pass any detailed criticism, but to take up for discussion certain questions in the hope that particular points may become clearer and that together we may make some small progress here and there.

VI. It is an essential point in Olivecrona's argumentation that an individual right indicates something which *shall* or *ought to* be. But a right *also,* in normal cases, implies a reference to something existing, and this implies that our judicial system, on the whole, is efficient. A particular right does not, however, stand or fall by this. We speak of the existence of a right even if we do not think that it can be enforced in the actual case. This way of looking at things is a social fact, and a desirable one. It is the very concept that a lawyer needs, a concept on the *imperative* level. Such a concept is necessary in legal language, e.g. when lawyers state the rules as to how rights arise and disappear and also for the ordinary man when he tries to visualize his own rights.

Though I entirely agree that there is no question of describing the actual situation, or its probable outcome, I nevertheless feel inclined to express my doubts as to the word *imperative.* For one thing I think that it is somewhat lacking in differentiation; it has struck me that Olivecrona speaks of what *shall* happen, but also of what *ought to* happen, and these do not after all, mean quite the same thing. Secondly, to me the word "imperative" sometimes seems a trifle too solid—might it not be more accurate in certain positions to speak of the *optative subjunctive?* It is not a question of "that's how it shall be", but rather "may it be so".

As grammar has been used by way of illustration, it might perhaps be profitable to look a little more closely at the structure of language itself—although this brings me to a field where I am very far from being a specialist.

One thing is that sometimes the indicative form may cover an imperative sense—the words "You will now close the door" may, depending on the situation and the intonation, amount to an emphatic reiteration of the pure imperative "Close the door!" (cf. Ross, *op. cit.,* p. 18). But the interesting thing in this connection is that there may be so many shades of meaning among phrases which, from the purely grammatical point of view, are all expressed in the imperative. Sometimes a stern command is implied; the very opposite is expressed by the imperative phrase "Do as you please!". The import may be a friendly invitation ("Help your-

self!") or even a humble prayer ("Spare my life!", "God be mercifu to me, a sinner!"—one does not issue commands to God).

But does not the legal imperative offer quite a wide spectrum too? The legislator issues commands—or directions, if that expression be preferred. This is on the level of "You shall". But when we say that A is a legatee if there is a valid will which appoints him as such, and add that he is a legatee even if he cannot prove his right, do we not then refer to a series of legal consequences—e.g. the transfer of certain property to him—which *ought to* ensue, if the matter is seen from the point of view of one who is omniscient—in other words, something which ought to happen, but which, as we well know, does not always happen in our imperfect world. And the particular legatee who knows that he is entitled, but also is aware that his right will be disputed and that he cannot prove it, is a long way from being in a position where orders are issued to those around him. He may heave a sigh for the things that ought to have happened, but will not do so. Imperative? No, he has certainly nothing much to be imperatorial about.

I think a closer analysis would be desirable on this point. I am not myself competent to undertake it; I must confine myself to putting the question. But I do suspect—as I have indicated above—that rather dissimilar things may have been brought together under the common label of the "imperative".

VII. To sum up, the lawyer who says that a man becomes owner when such and such legally relevant facts exist, is merely referring to certain practical rules of action which *ought to come* into play. He does it in a rather succinct form. And he makes no claim that his description will necessarily come true; but he will expect reality *on the whole* to conform to the rules of the law.

It is easy to understand that many either have failed to see this, or else have been stricken with great terror when they realized the true position. Is the lawyer to describe an illusion, while the reality is left to the sociologist?

In common with Olivecrona I do, however, think that we are on the right road, and there are several reasons for this belief. First of all, the traditional division of the subject offers advantages from the point of view of presentation which can hardly be overestimated. If all those facts which are decisive for the actual enjoyment of a right were drawn into the body of rules concerning the creation and termination of rights, then an exposition of these rules would be rather chaotic. If it were a question of repayment

of money lent by A to B, it would not suffice to say that the duty to repay arises when the loan has been made and the time for repayment has arrived. It would, for instance, be necessary to take the availability of evidence into account. And the most peculiar situations would be brought into the picture: if B has issued a promissory note and A is able to produce it in an action, if there is one, then it is highly probable that B will be ordered to pay (I disregard the possibility that B may plead that the debt was not validly incurred). The probability is in fact so great that one would venture the proposition that A is entitled. But if the note has been destroyed and A has no other evidence, and B is not a man who pays unless he is forced to do so, then A would have no right. (And what if A, to B's knowledge, has forgotten where he put the document?) But what is the position if a witness C appears who can confirm A's right? Well, if the action comes up before Judge X, and he believes in C's evidence, then A's right would have come to life again. But if Judge Y, who requires more cogent evidence, takes over from Judge X, then A may again lose his right. If he succeeds in bribing Judge Y, this will become one of the conditioning facts for the existence of the right. And if the judge is one of those persons whose temper is highly dependent on what he has had for breakfast, then an efficient toaster on his breakfast table may have the same effect. Finally, if B happens to be an honest man who is willing to pay although he knows that A has no evidence, then A's right will again be in excellent order —provided the possibility of B's insolvency can be disregarded. And so on indefinitely.

It seems tolerably clear to me that such a "factual realism" will not give us the tool we need. And, as Olivecrona explains to us, we thus add an intermediate link. In reality this is probably not very different from the technique so often employed in the purely legal sphere: if the property of a certain trust A is sold to a corporation B, this is in the last resort an occurrence which—to a greater or smaller extent—affects the actual positions of a number of persons. On the one side there are those individuals who now and in future would have benefited from the property in the hands of the trustees, and on the other side there are the shareholders of the purchasing corporation. But if the investigation were to go to the very bottom and describe the changes which occur in the relations between the separate beneficiaries of A and each shareholder of B, then the result would be so diversified that it would be difficult to draw any conclusions at all. And so the intermediate

link is inserted—the sale by the trustees of A to B is assigned to a well-known legal institution, and in addition there may be treated in separate expositions the relations between the trustees and the beneficiaries of the trust A on the one hand, and those between the company B and its member on the other. *Divide et impera!*

That legal writers proceed in the manner indicated above is well known—and Olivecrona makes no new discovery in calling attention to this. In my opinion his great achievement is to have made it abundantly clear that it is as a link in our mode of exposition that we lawyers need the concept of rights (or call it what you will), and further that we need it, not as giving information of what will really happen, but as an indication of what ought to happen.

And when I now come to a point where I do not wholly agree with Olivecrona, the reason is, in a way, that I am *plus royaliste que le roi*. I think of Olivecrona's statement quoted above that "in the later stages of the investigation" one will overcome "the need to speak of rights—even in this form" (p. 144). I do not see the present technique as some emergency solution that one should be a little reluctant to employ, some intermediary stage one ought to get past. I admit that I definitely regard the technique as a good one. If something better can be discovered, I shall naturally welcome it. But so far I have not come across anything better.

If it is thought that some conception of rights on the lines indicated by Olivecrona is necessary for purposes of legal exposition, does this mean that we can dismiss the sociological conception as something we lawyers have no need for? Should we be nostalgic for what Cardozo jestingly called "the good old days when lives were simple and sociologists unknown" (*Selected Writings,* 1947, p. 45)? By no means. True, two different concepts should be kept distinct. But on the other hand—as I have already indicated—the interplay between them is of the greatest importance. The lawyer, who is concerned with what shall or ought to happen in the legal relations in society, should find it exceedingly useful to have a view in the sociologist's looking glass of what does in fact take place. The lawyer's method is justifiable only so long as deviations from the rules are rare—otherwise he is in danger of getting lost in reveries, or worse. Let me illustrate by an example, and at the same time widen the scope by selecting an instance when the conception of rights is used outside the province of private law. We do not hesitate to say that in Norway the right to vote in parliamentary and municipal elections is universal for

those who have attained 21 years of age, although we know that a person who has not been put on the electoral roll is prevented from voting—and a right to vote without access to the polling booth is meaningless. Such a mode of exposition is practical and honest, for the number of errors in the electoral roll is insignificant. But imagine a country where the rules for the registration of the population, and thereby the recording of names on the electoral roll, have been made so complicated by the legislation that a substantial proportion of the electorate is excluded from voting, and that this is done with the very purpose of excluding some of those who are given a nominal right to vote—the example is not entirely unrealistic. In such a case an honest legal writer could not confine himself to an exposition of the rules concerning the right to vote without bringing the rules for the registration of citizens into the picture.

And this brings us close to an aspect—an important one, I think —of the interplay between substantive law and procedure. If the latter is not organized in such a manner as to give effect, by and large, to the rules which are classified as substantive law, there will be a feeling that something is wrong. There may be good reasons, in a particular situation, for refusing A damages in respect of an injury B has caused him—but it should not be done by first declaring A entitled to compensation and then seeing to it, by some procedural arrangement, that he does not get any. In this connection I believe the traditional division to have a mission far beyond the technique of exposition. If, in a particular field, there is a marked disproportion between, on the one hand, the substantive rights that the legislator has been willing to grant A and, on the other A's actual chances of enforcing these rights, then there will be an urgent demand for an investigation whether something is not at fault in procedural law. It may be a question of the form of action, or it may be, for instance, that the expense of a lawsuit constitutes an obstacle. As a matter of fact, it has probably been of great importance for the introduction of legal aid that most people feel uncomfortable about throwing somebody a right which he will not be able to enforce.

VIII. If we turn to the conception of rights held by the average man, the picture will probably be more diversified. It is primarily the lawyer's concept of rights that he will find useful—not as a mental tool, but as a guide for his actions. In some situations, however, I think it is rather the sociologist's concept that he needs.

I should first like to declare my complete agreement with Olivecrona when he says that most people are interested in what they are "entitled to", not in the prospects of subjecting others to legal sanctions or of suffering sanctions themselves. I also unreservedly agree that the community would be in a bad way if such were not the position; in this connection we Norwegians can base our opinion on experience of the time when a hated rule of occupation, and its even more detested collaborators, attempted to establish a system of coercion in our country. That system was in general obeyed only in so far as there was a fear of sanctions.

It is probably the same conception—or something closely akin to it—that the average man has need of in so far as he allows some conception of rights to enter into his legal transactions. When he is thinking of the right of ownership that he is acquiring, it is probably the control that the law allows him which he has in mind. But another factor must be noted in this connection, viz. that the ideas of the average man on such matters are often vague. Paradoxically, it is this very lack of precision which makes, for instance, the notion of a right of ownership such an excellent tool in everyday legal transactions. The prospective buyer does not normally need to worry about the legally relevant facts which have made the seller the owner of the object of the sale. It is sufficient for him to know that the seller is the owner, a fact which will often be quite obvious to him if he gives the matter any consideration at all; the average shop customer will waste no mental energy on this. And even more important: neither the buyer nor the seller need have any exact notion of the right that the buyer will acquire in his capacity of owner. A man who purchases forest land in order to run it as a business will consider questions of management and marketing, which will concern him as owner, but not normally how far up in the air and how deep down into the earth his right of ownership extends, nor what will happen if diamonds are discovered underneath the blueberry bushes. He will take the right of ownership as it is. And this is quite important for a tolerably smooth turnover of property in society.

What has been said above incidentally throws some light on the problem whether a person is the owner because he has certain powers, or whether he has the powers because he is the owner. A person who wishes to classify the legal situation will, of course, have followed the correct procedure if he establishes ownership by ascertaining the aggregate of powers which exist in the actual

case. If the aim is to demonstrate how A acquired his powers, however, the reverse procedure will apply: it is established that he has become the owner—by purchase or inheritance or otherwise —and that is why he enjoys the powers. It would indeed be difficult to enumerate the latter in a hurry, even those most learned in the law may even hesitate as to some of them—how far, for instance, can A prevent other people from excavating under his land or from flying over his treetops?

In other situations, however, the average man has to fall back on the sociological conception of rights. If he wants to survey his financial situation, he must put down the debts owed to him at their actual value, not at the sum they would yield if all went according to rule. And in one form or other (there is no need to go into details here) this principle has to be introduced into his bookkeeping as well (cf. Olivecrona, *op. cit.*, p. 116). This aspect of the matter might perhaps with advantage have received a little more emphasis than Olivecrona gives it. But there is room for different estimations.

I should like, finally, to express the wish that Olivecrona's book —or at any rate selected parts of it—should as soon as possible be translated into one of the world's leading languages. I think that on some points he will be contradicted, and that the book will have to be revised in certain particulars. But I have no doubt whatever that it constitutes a great and permanent achievement.