Chapter 13
Truth and Correctness

Abstract We have seen that Olivecrona maintains that in addition to its directive and technical functions in legal thinking, the concept of a right can also fulfill an informative function; and we shall see in this chapter that he maintains that legal statements in general can fulfill an informative as well as a directive function, and that in regard to the informative function, these statements can be correct or incorrect, but not true or false. I argue in this chapter (1) that while it is not entirely clear whether Olivecrona in his discussion of truth and correctness is concerned with internal or external legal statements, we should take him to have external legal statements in mind. I also argue (2) that his account of the concept of correctness is self-refuting, and (3) that in any case, a correct, but not true, legal statement cannot fulfill an informative function. But I also argue (4) that Olivecrona does not need the concept of correctness, because he could give a conventionalist account of the truth (or falsity) of legal statements. As I explained in Chap. 7, we may say that a rule is a legal rule if, and only if, it can be traced back to a recognized source of law, *SL*, such as legislation, precedent, or custom, and that the existence of *SL* is a matter of convention, in the sense that each member of the community treats *SL* as a source of law partly because the other members treat *SL* as a source of law. If we do, we may also say that any given legal statement will be true or false, depending on whether it correctly describes the relevant, conventional legal state of affairs, and this means, of course, that there will be no need to speak of the correctness of legal statements, as distinguished from the truth of such statements.

13.1 Introduction

We have seen in Sect. 9.2 that Olivecrona maintains that in addition to its directive and technical functions in legal thinking, the concept of a right can also fulfill an informative function; and we shall see in this chapter that he maintains that legal statements in general can fulfill an informative as well as a directive function, and that in regard to the informative function, these statements can be correct or incorrect, but not true or false. I argue, however, (1) that Olivecrona's account of the concept of correctness is self-refuting, and (2) that in any case, a correct, but not true, legal statement cannot fulfill an informative function. But I also argue (3) that

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Olivecrona does not need the concept of correctness, because he could give a conventionalist account of the truth (or falsity) of legal statements.

I begin by introducing the distinction between truth and correctness (Sect. 13.2) and proceed to discuss the relevance of the previously introduced distinction between internal and external legal statements to Olivecrona's discussion of the truth or correctness (Sect. 13.3). I then identify and discuss two difficulties in Olivecrona's analysis of the concept of correctness (Sect. 13.4). Having done that, I propose a conventionalist analysis of (external) legal statements (Sect. 13.5).

13.2 Truth and Correctness

Olivecrona maintains that the *correctness* of a legal statement intended to convey information consists in conformity of the statement to an effective system of rules, whereas the *truth* of such a statement would consist in conformity of the statement to brute, as distinguished from institutional, facts. He writes:

> The import of correctness is not that a right, duty, or legal quality really exists. Correctness according to the legal rules means that it is in conformity with these rules to ascribe a right, a duty, or a legal quality to a person. It is a question of using legal language in a certain way. The ascription of the right of property to a person is, so to speak, an echo of the rules concerning the right of property. The rules say that one acquires the right of property to an object in a certain way. When a person is believed to have 'acquired' the right of property to an object in a proper way according to the rules, we say that he possesses the right of property to it. (1971, p. 259)

Olivecrona emphasizes, in keeping with this, that the correctness of a legal statement is not an empirical matter, and that it presupposes instead the existence of an effective legal system:

> It is no empirical fact that I own a certain house, that A owns a car, that M and W are married, that C is a judge, or that D is President of a country. All such statements are based on the assumption of a system of rules regulating among other things the mode of acquiring the right of property, concluding marriage, appointing judges, and electing a president. The statement can only be judged correct or incorrect according to these rules. Without reference to the rules the question about correctness would be meaningless. (Olivecrona 1971, p. 259)

He also explains that legal statements are associated with certain consequential ideas on the part of those concerned, and that, if correct, such statements are supported by the coercive power of the state (Olivecrona 1971, pp. 259–260). As the reader will have noticed, the first part of this claim is in keeping with the claim (considered in Sect. 9.2) that people connect words like 'mine' and 'yours' with the idea of having acquired (or not having acquired) the object in question in a certain way and with the idea of being permitted (or not permitted) to use the object (Olivecrona 1971, p. 187).

According to Olivecrona, although the distinction between truth and correctness is generally overlooked, we need it to give a scientific account of legal entities and

properties (Olivecrona 1971, p. 267). As far as I can see, he means by this that we can avoid postulating such troublesome, non-natural entities or properties as 'rights' and 'duties' and 'binding force' by speaking of the correctness or incorrectness of legal statements instead of speaking of their truth and falsity. For example, if one maintains that a legal statement, according to which Smith owns the mansion on the hill, is correct, though not true, one does not have to postulate the existence of property rights or the existence of legal rules with binding force.

But, one may well wonder, if there are no legal entities or properties, how can one convey *information* by maintaining that Smith owns the mansion on the hill, or that Jones is a professor of jurisprudence? If there are no property rights, how can Smith own the mansion? If there are no legal properties, how can Smith be a professor? We saw in Sect. 9.2 that Olivecrona posed this very question in the context of his analysis of the concept of a right. His proposed solution to the problem, as we also saw, was to maintain that we learn from a correct, but not true, rights statement that *A* owns a house, say, that *A* has at some point *acquired* the house, and that *A* has not sold it since; and he emphasized that although useful, this piece of information is not information about *A*'s ownership, but about *A*'s *acquisition*, of the house. By the same token, we learn from a correct, but not true, statement that *B* is a professor, say, that *B* was at some point *appointed* professor, and that *B* has not been divested of his title since. Olivecrona's view, then, is that a correct legal statement provides us with relevant information, such as information about acquisition or appointment. As Olivecrona puts it in the first quotation above, such a statement is an "echo" of the relevant rules.

But why cannot a legal statement be true or false? Olivecrona's answer is that the ascertainment of a legal statement as correct presupposes that we *evaluate* the legal system as being *valid*, that therefore we must adhere to some common scales of value, that this means that we can speak of the correctness of a legal statement only in a relative sense, that is, relative to a given evaluation, and that non-cognitivism has it that evaluations cannot be true or false (Olivecrona 1971, p. 261).

I cannot, however, see that the judgment that a legal system is valid presupposes an evaluation of that legal system, unless one means by 'valid' morally valid; and I cannot see that we need to conceive of legal validity as a species of moral validity. Indeed, I suggested in Sect. 11.7 that when Olivecrona speaks of evaluations of purported operative facts and legal texts in the context of his discussion of judicial lawmaking, he might have in mind precisely conventions. That is to say, he might mean that the existence of legal norms and legal relations is a matter of convention, not a matter of brute fact, and that therefore a judgment that a certain operative fact is at hand, or that a certain text is a legal text, is a conventional, as distinguished from an empirical, judgment. But I also said that such a conventional judgment is, or at least can be, true or false in a straightforward manner. As we have seen in Sect. 7.6, we may say that a social rule, *R*, exists if the members of the relevant group of people (1a) believe that *R* exists and (1b) believe that the others in the group believe that *R* exists, and (2) act accordingly, that is, speak of *R* as existing and, if occasion arises, treat *R* as existing, at least partly because they have the beliefs (1a) and (1b). If these factual, specifically empirical, conditions are satisfied, there is in existence a social

rule and, if we generalize the analysis, a(n) effective legal system. And the claim that this is so—that there is in existence a social rule or, on a larger scale, a legal system—will be true in a straightforward manner.

In any case, Olivecrona maintains that the evaluations in question are characteristic of the *internal* aspect, or internal point of view, that is, the point of view adopted by a committed participant in the legal system, such as a judge or a citizen, as distinguished from a detached observer (on this, see Hart 1961, pp. 55–79); and he points out that the idea of a correct legal statement would be meaningless if one did not adopt the internal point of view. He writes:

> The 'external aspect' is the view held by a person standing outside a working legal system looking at it in a detached way, not animated by its valuations. On the whole we take the internal aspect with regard to the system of our own country and particular questions arising within it. The external aspect is usually applied to other countries and the situations in them. Similar language is employed in both cases. But there is a fundamental difference regarding the modes of ascertaining the correctness of a statement. For those sharing the internal aspect, the assertion that a statement is correct contains a reference to fundamental valuations. Argumentation of this kind becomes meaningless from the point of view of a neutral observer. He only takes notice of what is said within the system and of the opinions held by those who are regarded as its authorities. (Olivecrona 1971, p. 265)

But it seems to me that Olivecrona overlooks the possibility that one might adopt the internal point of view in a *detached* way, and that a person might thus speak meaningfully of the correctness or incorrectness of legal statements in such a case, too (on this, see Raz 1990, pp. 170–177; MacCormick 1986, pp. 134–135). We might refer to this as the *hermeneutical* point of view, and it seems to me that this is precisely the point of view that legal scholars adopt when they study the law, be it their own legal system or that of another country. Thus what is necessary is that the speaker (or writer) adopt the internal point of view either in a committed *or* in a detached way. And if this is so, the need for committed evaluations disappears.

13.3 Internal or External Legal Statements?

We have seen in Sect. 6.5 that we need to distinguish in legal thinking between internal and external legal statements, and that meta-ethical theories—such as the error theory and the non-cognitivist theory—apply to internal, but not to external, legal statements. Moreover, we have seen in Sect. 9.3 that even though Olivecrona seems to be rather unclear about the distinction, he appears to have in most cases external, not internal, *rights* statements in mind.

The question, then, is how we are to understand his discussion of legal statements: Does he have internal or external legal statements, or both, in mind when he speaks about the correctness of legal statements? I believe that in most cases he has *external* legal statements in mind, though the matter is not entirely clear. Let me explain why.

First, he explains that he is concerned with legal statements "made with the purpose to convey information" (Olivecrona 1971, p. 259), or made to assert "the 'ex-

istence' of rights, duties, and legal qualities" (Olivecrona 1971, p. 261); and given that the function of an external legal statement is precisely to state a fact about the law, such as reporting the content of a certain legal rule, it is natural to assume that these are external, not internal, legal statements. Consider also Olivecrona's admission that the claim that legal statements cannot be true, but only correct, will be offensive to the "common, unreflective view":

> It [the distinction between truth and correctness] is alien to the common, unreflected view. As was pointed out in the introduction, our language is full of legal expressions. We speak of states, monarchs, presidents, governments, officials, courts, rights, duties, corporations, elections, appointments, crimes, etc., etc. as we talk of natural phenomena. Cannot statements *about* such things be true? Why say that they can only be assessed as correct with a reference to the system of rules and certain common valuations? To deny the possibility that such statements can be true seems, indeed, to be eccentric. (Olivecrona 1971, p. 265. Emphasis added.)

Olivecrona would hardly maintain that it seems eccentric to deny that legal statements can be true (or false) if he were concerned with internal legal statements, especially in light of the fact that he himself is a confirmed non-cognitivist. Moreover, he speaks (in the quotation) of "statements *about* such things," that is, appointments, crimes, etc., and this, too, suggests that he has external legal statements in mind.

Secondly, comparing legal statements and empirical statements, he argues that it is characteristic of the former type of statement that it includes legal terms, such as 'the president', which do not correspond to anything in the world of time and space. He writes:

> In assessing the truth of a statement we always presuppose that the statement refers to something which is what it is, regardless of the language used about it by human beings. Ascertaining the truth of the statement does not imply ascertaining that some special terminology is being used about the object. But how is it with the statement that Mr. X is president of country A? If we try to ascertain the 'truth' of this statement, we find only that in country A there is a written text called the constitution according to which a 'President' is to be elected in a certain way, that Mr. X is supposed to have been elected in that way, that he is universally called President, that officials and other people regulate their behaviour towards him and his actions according to a vast number of legal and social rules referring to somebody being President, and so on. Let us suppose that this language with its consequences for behavior did not exist: the talk about Mr. X being President would then be as empty and meaningless as the claim of a man in a lunatic asylum that he is the emperor of China. Still, the statement that Mr. X is President of country A does not refer to the said use of language as a fact. It is a repetition of that language. Ostensibly, a supersensible quality, *viz*. that of being 'President', is ascribed to Mr. X. But this quality is nothing. There is only the regularized use of language saying that Mr. X is President and social consequences thereof. (Olivecrona 1971, p. 265–266)

This suggests that he is concerned with a comparison between *external* legal statements, such as "Mr. X is the president of country X," and empirical statements, such as "Country A has only 50,000 inhabitants." For it would be odd to assume that Olivecrona considers it meaningful to compare first-order, internal value judgments with empirical statements—neither Olivecrona nor the man in the street accepts ethical naturalism. Moreover, he considers (in the quotation) as an example of a

legal statement the statement "Mr. X is president of country A," and this strongly suggests that he is concerned with external legal statements—who would take a statement of this type to be an internal legal statement?

Thirdly, legal scholars are mainly concerned to make external, not internal, legal statements. While they study internal legal statements, typically in the shape of legal norms, they themselves make external legal statements, *inter alia*, when they write articles and monographs on legal matters.[1] Against this background, a claim that external legal statements can be correct (or incorrect), but not true (or false), is much more interesting than a claim that internal legal statements can be correct (or incorrect), but not true (or false).

Taken together, these three considerations suggest that Olivecrona is indeed concerned with *external* legal statements, when he maintains that legal statements can be correct, but not true.

But, as we have just seen, Olivecrona also maintains that the very idea of a legal statement being correct (or incorrect) presupposes an *evaluation* of the legal system as valid, and that this means that a legal statement cannot be true or false. This may be taken to suggest that he conceives of legal statements as a species of value judgment, that is, as *internal* legal statements.[2] For a statement that presupposes an evaluation in order to be meaningful appears to *be* a value judgment. Moreover, since Olivecrona, being a non-cognitivist, takes internal legal statements to be neither true nor false, he has reason to explain how they can nevertheless convey information.

While these two arguments are worthy of serious consideration, I do not believe that they show that Olivecrona is concerned with internal legal statements when he speaks about truth and correctness of legal statements.

First, I have already argued that Olivecrona overlooks the existence of detached legal statements, that is, internal legal statements made from a point of view that the speaker need not accept, and that the possibility of understanding internal legal statements as detached internal statements means that there is no need for committed evaluations. Since this is so, Olivecrona is wrong to maintain that the very idea of a legal statement being correct (or incorrect) presupposes an evaluation of the legal system as valid.

Secondly, in light of the above-mentioned focus on external legal statements among judges as well as legal scholars, one must ask *why* Olivecrona would want to maintain that internal, as distinguished from external, legal statements can be correct (or incorrect), but not true (or false). Why, exactly, would it matter that an internal legal statement—which, on Olivecrona's analysis, can be neither true nor false—is correct over and above being based on a true description of the content of the law? From the standpoint of adjudication as well as legal science [*Rechtswissenschaft*], as we have seen, what is important is that external legal statements are true.

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[1] I am not, of course, saying that they *never* make internal legal statements. A recommendation to courts and others that they choose one interpretation of a statute over another is clearly an internal legal statement.

[2] I would like to thank Jan Österberg for drawing my attention to this argument on Olivecrona's part.

Thirdly, Olivecrona does not discuss the conditions that must be satisfied if a legal statement is to be correct. If he had wanted to say that internal legal statements can be correct, but not true, he ought to have discussed not only the sense in which they could be correct, but also the conditions that must be satisfied for them to be correct. But he does neither.

One might be tempted to add to these considerations a fourth claim, namely that internal legal statements do not need to be able to convey information, since there will always be a corresponding external legal statement available that can convey the relevant information. But this claim turns out to be false. For we have seen that on the non-cognitivist analysis, normative or evaluative terms have no cognitive meaning and do not refer when they occur in an *internal* legal statement. And we have seen in Sect. 6.7, that if the same holds when they occur in an *external* legal statement, the external legal statement cannot assert anything about the internal legal statement and can therefore be neither true nor false; and we have seen that if instead these terms do *not* have the same meaning in internal and external legal statements, an external legal statement cannot render the content of an internal legal statement correctly.

I conclude that the three arguments adduced in support of the claim that Olivecrona is concerned with external legal statements in his discussion of correct, but not true, legal statements outweigh the two arguments in support of the view that he is instead concerned with internal legal statements.

13.4 Two Difficulties

If we assume that Olivecrona is concerned with external legal statements, we can see that his analysis is problematic in two respects. To begin with, the analysis of a legal statement such as S_1—that *A* owns *X*, say—will not be able to get off the ground, unless one makes assumptions that contradict the analysis. For on this analysis, S_1 is *correct*, but not true, if, and only if, *A* has acquired *X* and not disposed of *X* since. But this presupposes that the legal statement S_2—that *A* has acquired *X* and not disposed of *X* since—is *true*, not only correct. For if it were not true that *A* has acquired *X* and not disposed of *X* since, S_1 could not be correct. But, on Olivecrona's analysis, a legal statement such as S_2 *cannot* be true, but only correct. For *A*'s acquisition and disposal of *X* depend on the existence of one or more legal rules as much as *A*'s ownership of *X* does, and Olivecrona's position is that *only* statements about brute facts—and thus not legal statements—can be true.[3] Hence, contrary to what the analysis assumes, S_2 cannot be true, and this means that S_1 cannot be correct.

[3] As Brian Bix has pointed out in email correspondence, one might try to save Olivecrona by speaking of 'physical control' and 'abandonment' instead of 'acquisition' and 'disposal.' But it seems to me that if one did, one would also have to explain how to analyze the concept of ownership in such non-legal, empirical terms; and given his claim (in the second quotation in Sect. 13.2) that it is "no empirical fact that I own a certain house" and his objections to the attempts by Justice Holmes and

Moreover, even if this problem could somehow be solved, Olivecrona's claim that we can account for the informative function of legal statements by saying that such a statement may be *correct*, though not true, is simply false. For, as I suggested above, if the statement that a person has a right or a duty cannot be true, then there can be no rights or duties. And if there can be no rights or duties, how can a claim that a person has a right or a duty provide us with any relevant information? As we have just seen, Olivecrona's idea that the information concerns the title, not the right itself, does not work.

To be sure, we saw that Olivecrona believes that even though a person, *C*, who promises to pay somebody, *D*, a sum of money, will never be able to fulfill the promise "in a literal sense," *C*'s act of promising may nevertheless be meaningful, because by performing it *C* puts himself in a "situation of constraint." But, as I have said, while the "situation of constraint" is real enough, it is not clear why one would want to put C in a "situation of constraint," if one also believes that the promise "can never be fulfilled in a literal sense." If there are no dollars, no pounds, etc., why should *D* want to be paid in dollars or pounds in the first place? Similarly, if there are no rights, how could one, and why would one want to, inform a person about the existence of a right?

13.5 Conventions

I have argued that Olivecrona's distinction between the truth and the correctness of legal statements cannot be upheld. I shall now argue, very briefly, that Olivecrona does not need it, because he can account for the existence of legal entities and properties, and for the truth or falsity of legal statements, using a conventionalist account of the existence of social rules.

As I have argued in Sect. 7.6, the existence of legal entities and properties, presupposes nothing more than the existence of an effective legal system, and the foundation of such a system can be found in a *convention* that constitutes and identifies the sources of law. More specifically, I have argued that a rule is a legal rule if, and only if, it can be traced back to a recognized source of law, *SL*, such as legislation, precedent, or custom, and that the existence of *SL* is a matter of convention, in the sense that each member of the community treats *SL* as a source of law partly because the other members treat *SL* as a source of law (see also Sect. 13.2). It follows that any given legal statement will be true or false, depending on whether it describes the relevant legal state of affairs as it is. Hence Olivecrona's claim that legal statements can be correct or incorrect, but not true or false, is misleading, not to say false.

Olivecrona argues, as we have seen, that it is necessary to evaluate the (purported) legal system as being valid, in order to be able to say with good sense

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others to analyze legal concepts in empirical terms (see Sect. 5.3), Olivecrona would hardly want to make such an attempt himself.

that a given legal statement is adequate,[4] and that this means that legal statements cannot be true or false, but only correct or incorrect. But, on the conventionalist analysis, the existence of legal entities or properties simply is not dependent on such an evaluation, and this means that there is no such problem.[5] Hence there is no problem about describing the existence of legal entities and properties. Hence legal statements can be true or false in a straightforward manner. And this, as I see it, is precisely what common sense takes for granted.

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[4] Olivecrona does not say 'adequate,' but 'correct.' But speaking of 'correctness' here will not do, since it leads to a vicious circle. What he needs is a more general term, such as 'adequacy,' which can cover both truth and correctness in Olivecrona's sense.

[5] I argued in Sect. 13.2 that the need for committed evaluations also disappears if one adopts the internal point of view in a detached way.