Chapter 9
The Concept of a Right

Abstract Olivecrona follows Hägerström in maintaining (i) that the noun 'right' does not refer to anything real, but to some sort of imaginary power, and that there are no rights in the natural world. He maintains, however, (ii) that the concept of a right nevertheless fulfills important functions in legal thinking, namely a directive, an informative, and a technical function, respectively, as well as the function of exciting or dampening our feelings. He also maintains (iii) that the non-existence of rights means that the so-called declaration theory of court judgments is mistaken, and (iv) that there is a close connection between a belief in rights (and other non-natural entities) and a belief in magic.

I argue, however, that the claim that there are no rights, although true in a certain sense, is misleading. For it concerns rights in a special, metaphysical sense, and we may think of the concept of a right along the lines of the choice theory of rights, which does not posit the existence of non-natural entities or properties. I also argue that while the functions of the right-concept identified by Olivecrona are prima facie plausible, Olivecrona's thoughts about the technical function do not add much to Alf Ross's better-known analysis, and that in any case, this function is really just a special case of the informative function. Furthermore, I argue that Olivecrona's claim that the declaration theory is mistaken because there are no rights, is itself mistaken because we can account for the existence of rights using the above-mentioned choice theory of rights. Finally, I argue that Olivecrona's claim about the connection between a belief in rights and a belief in magic, although plausible, is too weak to be really interesting.

9.1 Introduction

Olivecrona follows Hägerström in maintaining (i) that the noun 'right' does not refer to anything real, but to some sort of imaginary power, and that there are no rights in the natural world. He maintains, however, (ii) that the concept of a right nevertheless fulfills important functions in legal thinking, namely a directive, an informative, and a technical function, respectively, as well as the function of exciting or dampening our feelings. He also maintains (iii) that the non-existence of rights means that the so-called

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I argue, however, that the claim that there are no rights, although true in a certain sense, is misleading. For it concerns rights in a special, metaphysical sense, and we may think of the concept of a right along the lines of the choice theory of rights, which does not posit the existence of non-natural entities or properties. I also argue that while the functions of the right concept identified by Olivecrona are prima facie plausible, Olivecrona's thoughts about the technical function do not add much to Alf Ross's better-known analysis, and that in any case, this function is really just a special case of the informative function. Furthermore, I argue that Olivecrona's claim that the declaration theory is mistaken because there are no rights, is itself mistaken because we can account for the existence of rights using the above-mentioned choice theory of rights. Finally, I argue that Olivecrona's claim about the connection between a belief in rights and a belief in magic, although plausible, is too weak to be interesting.

I begin with a consideration of Olivecrona's analysis of the concept of a right as it was put forward by Olivecrona in the First Edition of *Law as Fact* (1939), in the book on the monetary unit (1957), in the essay on legal language and reality (1962a), and in the Second Edition of *Law as Fact* (1971) (Sect. 9.2). I then discuss the distinction between internal and external rights statements (Sect. 9.3), the choice theory of rights (Sect. 9.4) and the relation between rights and magic (Sect. 9.5).

9.2 The Concept of a Right

Olivecrona begins his analysis of the concept of a right in the First Edition of *Law as Fact* by pointing out that since we have seen that the idea of the binding force of law is an illusion, we must conclude that the idea of duties is subjective. Duty, he explains (1939, 75), "has no place in the actual world, but only in the imagination of men." He then maintains that the situation is essentially the same with regard to the concept of a right, namely that rights exist only as *conceptions in human minds*:

> It is generally supposed that the so-called rights are objective entities. We talk about them almost as if they were objects in the outer world. On reflection we do not, of course, maintain that this is the case. But we firmly believe that the rights exist outside our imagination as objective realities, though they are necessarily something intangible. We certainly do not confine their existence to the world of imagination. Suggestions to that effect are commonly rejected with scorn and indignation. Yet on close examination it is revealed that the rights just as well as their counterparts the duties exist only as conceptions in human minds. (1939, 76–7)

While Olivecrona intends his remarks about rights to be applicable to rights in general, his focus is clearly on *legal* rights (1939, 77). Accordingly, he considers various ways in which a legal property right might correspond to facts, giving special consideration to (i) the view that the right is identical with the favorable position typically enjoyed by the right-holder in regard to the legal machinery, and (ii) the view that the right is identical with the right-holder's security in enjoying actual control over the thing to which he has the right. These two alternatives, he

explains (1939, 83), "are the only facts which could, with any semblance of truth, be said to correspond to the notion of the right to property as we conceive it."

He rejects both alternatives, however (1939, 83–8). The problem with the first alternative, he explains, is that whereas we think of the right as being *independent* of circumstances in the real world, the favorable position in regard to the legal machinery depends precisely on such circumstances. Hence the right and the favorable position cannot be identical. The problem with the second alternative is that the right-holder's security is thought to *presuppose* the right and can therefore not be identical with it.

Having thus argued that the term 'right' does not refer to anything real, he maintains that the essence of the concept of a right is an *imaginary power*:

> The owner "can" do what he likes with the object; the creditor "can" claim a sum from the debtor – that is the way we paraphrase the notion of a right when we are trying to explain what we are thinking of./…/ This power, however, does not exist in the real world. We have seen that it is not identical with the actual control over the object generally exercised by the owner, nor with his actual ability to set the legal machinery in motion. It is a *fictitious* power, an ideal, or imaginary power. (1939, 89–90)

We see that on this analysis, 'right' refers to a non-natural entity, namely the imaginary power just mentioned. As we have seen (in Chap. 6), this suggests that Olivecrona espouses an *error theory* of rights in the First Edition of *Law as Fact*, according to which rights statements are always false, since they assert that there are rights (outside our imagination) when in fact there are no rights (outside our imagination). If instead Olivecrona had espoused a *non-cognitivist* analysis of rights statements, he could not without contradiction have said that 'right' refers to an imaginary power, since on the non-cognitivist analysis 'right' has no cognitive meaning and does not refer at all.

The analysis also makes it clear (what we have already seen in Chap. 5) that Olivecrona does *not* accept the broad conception of semantic naturalism, according to which an analysis of a concept is philosophically acceptable only if it implies that the concept thus analyzed does not refer to non-natural entities or properties. For, as we have also seen, his idea must reasonably be that his *analysis* of the concept of a right is philosophically acceptable, even though the *concept* of a right *itself* is not. The reason why he believes that the concept is unacceptable is precisely that it refers to non-natural entities.

Olivecrona notes that on the whole legal scholars have been unwilling to admit that there are no rights. He points out that those who strive to be scientific are inclined to say that the term 'right' is a "metaphorical expression for a legal situation" or something along those lines, the idea being that it is *useful* to speak of rights even though, strictly speaking, there are no rights (1939, 91). Having complained that these scholars never explain the precise sense in which their analyses are supposed to be metaphors, he proceeds to discuss rather briefly a type of analysis that would later be put forward by Anders Wedberg (1951, 261–74) and by Alf Ross (1957, 1959, Chap. 6).[1] On this type of analysis, the concept of a legal right is best

[1] Wedberg's and Ross's analyses are results of the so-called Scandinavian rights debate, which was initiated by Per Olof Ekelöf (1945).

understood as a *technical tool of presentation*, which ties together a disjunction of operative facts and a conjunction of legal consequences; and rights statements are used to render the content of a number of legal norms in a convenient manner.

But Olivecrona rejects this type of analysis. The problem, he explains, is that it cannot account for the fact that the legal rules *themselves* sometimes speak of rights, say, when they determine the circumstances in which a person acquires or loses ownership – for this analysis to work, 'right' must have a meaning that is independent of the relevant legal rules (1939, 93). He does not elaborate on this idea, however.[2] But I suppose the idea is that a legal rule providing that a person acquires a right if certain conditions are satisfied would be more or less vacuous and therefore unable to guide behavior, if the meaning of 'right' depended on the relevant legal rules – if this were so, the clarification of the content of the right would be viciously circular, since the rule in which 'right' occurs would then partly be referring to itself. I am not sure that this would have to be the case, however.

Having established that the essence of the concept of a right is an imaginary power, Olivecrona proceeds to point out that we should now focus instead on placing the concept of a right among other social facts and identifying its function(s) in legal thinking (1939, 94).[3] He maintains, in keeping with this, that the concept of a right is used to *guide people's behavior*:

> In the law the notion of a right is used as a means of directing people's actions and behaviour in general. I have stressed before the simple fact that the law is not intended to describe the world as it is but to determine the course of events. To this end it is not necessary that the notions used should always correspond to objective realities. *But it is essential that the idea of a pattern of conduct should be awakened in the minds of those concerned and that they should be incited to follow it.* This may easily be done by means of such notions as that of a right. Patterns of conduct can actually be set up through statements that a person has a certain right under such and such conditions. (1939, 95. Emphasis added)

The term 'right,' he continues, can fulfill this function by expressing an *imperative*, according to which the right-holder is permitted to act in such and such a manner and to maintain control over that to which he has a right, whereas others are prohibited from acting in the same manner or from interfering with the object of the right. That is to say, on this analysis 'right' functions as a permissive sign for the right-holder and as a prohibitive sign for others:

> The power which is labeled a right is really non-existent. It is an empty word. But the power is thought to be a power to *do* something. It refers to an imagined action. If this action is clearly conceived a rule is laid down through the proclamation of the right. The *pattern of conduct* is contained in the idea of the action, or actions, which the possessor of the right is said to be entitled to perform. The expression "right", on the other hand, has here the function of an *imperative* expression. Its meaning is: the person in question shall be able to do this, his action must not be interfered with, other people may not perform the same actions with regard to the same object except by his permission, his demand in this or that respect shall be complied with etc. (1939, 96)

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[2] Thanks to Åke Frändberg for drawing my attention to the lack of clarity in Olivecrona's analysis.

[3] I cannot quite follow Olivecrona's train of thought here. On Olivecrona's analysis, whereas rights are social facts, the *concept* of a right is *not* a social fact.

One may, however, wonder whether Olivecrona's claim in the quotation above – that 'right' is an *empty* word that in certain situations functions as an imperative – is compatible with his claim in one of the previous quotations that 'right' refers to an imaginary power. I do not think so. As I said in Chap. 6, it seems that Olivecrona is vacillating between an error-theoretical and a non-cognitivist analysis of rights statements (and judgments about duty).

In any case, Olivecrona also identifies another function of the concept of a right, namely to *excite or dampen our feelings*. He puts it as follows:

> Above all, in conflicts of every kind the idea of having a right to the object in dispute serves to fortify the courage on one's own side and to beat down the will-power on the other side. This is the case in every war. The same is true of the class-struggle. An oppressed class puts on its banners that there is a *right* to freedom, to a full compensation to everyone for his labour, or something like that. A privileged class asserts with equal vehemence the inviolable right of property, perhaps the sacred rights of the monarchy with which it is connected etc. Assertions of this kind have a considerable effect on the population. They help to close the ranks of each party and to stimulate confidence. On the other hand these assertions reach the ranks on the opposite side and often serve to undermine their belief in their cause, e.g. when members of the propertied classes in their innermost soul come to acknowledge the rights of the proletarians to equality. (1939, 98)

He does not make much of this function later in the book or in his later writings, though as we shall see (in Sect. 10.9), he does argue that the idea of rights in international law can incite to violence, because right-holders will have feelings and ideas of strength and confidence that incline them to resort to violence in order to protect that to which they (believe they) have the right.

Having come thus far, Olivecrona pauses to point out that it is the imaginary or fictitious nature of rights that makes it possible for us to imagine that a legal title, such as a purchase, infallibly gives rise to a legal right. He states the following:

> Were the right to be identified with actual power it could not be said infallibly to be established or arise whenever a certain event defined in the law takes place. It could only be said that if the law were conscientiously applied by the judges etc. certain consequences would follow. The if's would be many, including the economic position of the holder of the title, the ability of his advocate etc. The situation is totally different when the right is conceived as a fictitious power. Then nothing prevents people from imagining that the law is able to determine with absolute infallibility its coming into being – since it exists only in imagination. The same is true, of course, of the transference, the modifications and the extinctions of the rights. (1939, 99–100)

I believe that this seemingly banal point is worth making. The tacit assumption on the part of lawyers, judges, legal scholars, and others that concern themselves with the law, is clearly that a person has the legal rights and duties that follow from a correct, or at least a defensible, interpretation of the legal materials. On this analysis, it does not matter that the right-holder may lack the economic means to take legal action, or that the judge may be prejudiced against people like him or her. What matters is what the law, properly understood, has to say about a given (hypothetical or real) scenario. Now, what Olivecrona does is to challenge this whole way of understanding the law by insisting that fundamental legal concepts must refer to social facts in order to be philosophically acceptable. And if they are thus analyzed, we

cannot maintain, as we might wish to do, that a person has, say, a right of ownership just because he has acquired an object, since he might actually lack the economic means to take legal action, etc. In other words, Olivecrona is again objecting to the tacit assumption on the part of lawyers, judges, and others (discussed above in Chap.7) that legal rules have binding force and give rise to legal relations that exist in a supernatural world.

Olivecrona also maintains that his analysis of the concept of a right makes it clear that the received view among lawyers and legal scholars about the *nature of court judgments* is mistaken (1939, 103–12). For, he explains, most of them accept the declaration theory of court judgments, according to which a court judgment is a *report* about the existence of rights (or duties). On this analysis, deciding a case involves describing the law in the sense of reporting about the rights (or duties) of the parties. But, says Olivecrona, if there are no rights (or duties), a court judgment cannot be a report about such entities (ibid., 106). As I shall explain in Sect. 9.4, I do not accept the claim that the declaration theory is mistaken because there are no rights (or duties). For I believe that there are indeed rights (and duties).

At the end of his analysis of the nature of court judgments, Olivecrona returns to consider the connective analysis of the concept of a right briefly mentioned earlier in the same chapter (and in this chapter). Observing that lawyers and judges interpolate the concept of a right or the concept of a duty between certain facts and court judgments, Olivecrona uses the example of the concept of property to illustrate the practical advantages of this type of analysis (1939, 111–2). His approving comments on the connective analysis are difficult to understand, however, because he rejected this type of analysis earlier in the very same chapter, on the grounds that it could not account for the right concept as it occurs in the legal rules themselves (1939, 92–3). And it is clear that he is here concerned with the concept of property precisely as it occurs in legal rules, not in statements about legal rules.

Olivecrona concludes his consideration of the concept of a right in the First Edition of *Law as Fact* by pointing to the close connection between the *concept* ("the idea") of a right and the *term* (the word) 'right.' He explains that whereas we can describe a triangle, say, without using the word 'triangle,' we cannot describe a right without using the word 'right' (1939, 121): "Here the usual word for expressing the conception is essential. We believe that this word signifies an objective reality, a belief which is an illusion, as we have seen. What we have in mind is primarily the word only. The imagined reality is not even clearly conceived. Therefore the picture is altered when the word is taken away and replaced by other words." Note that Olivecrona's thoughts on this topic indicate not only that he accepts an error theory of rights statements, but also that he conceives of the meaning of a word in *psychological* terms, that is, as a matter of what goes on in the mind of the language user.

In the late 1950's, Olivecrona published a book entitled *The Problem of the Monetary Unit* (1957), in which he argued that even though the word for the monetary unit – 'dollar,' 'pound,' '*Mark*,' '*krona*,' etc. – does not refer to anything real, it can fulfill an important function in our thinking, provided that we use it in accordance with an effective system of rules. For, he explains, an effective system of rules puts the duty-holder in "a situation of constraint." The following quotation, which concerns the significance of a promise to pay somebody a sum of money, illustrates this idea:

> Such promises serve to put the promisor in a situation of constraint because the legal machinery acts with a high degree of precision against the promisor if the other party applies for a sanction and is able to prove that the promise has really been made. The constraint is further strengthened by "social sanctions" for a breach of promise (loss of credit, disrepute, exclusion from business circles, etc.). The promise can never be fulfilled in a literal sense since it purports the transference of imaginary units to the creditor. But the situation of constraint incurred by the promisor is a reality; and he can obtain release from the constraint by performing certain acts that are held to imply the transference of monetary units. The same is true, of course, with respect to the situations of constraint created by judicial and administrative decrees. (1939, 136–7)

I agree that the situation of constraint is real enough, but I do not understand why one would want to ensure that the debtor does pay the creditor, 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 the creditor want to be paid in the first place?

In any case, in his essay on legal language and reality, Olivecrona repeats the claim put forward in the First Edition of *Law as Fact* that the term 'right' fulfills a *directive* function, in the sense that it functions as a permissive sign for the right-holder and as a prohibitive sign for other persons (1962a, 182–5). He considers a hypothetical case in which a person, *A*, owns a house with a garden, and asks: How does the idea that *A* owns the house with a garden influence our behavior? His answer is that *A* himself feels that he may do as he pleases with this piece of land, while others feel that they may not interfere with *A*'s enjoyment of it. He points out that this state of affairs involves two closely related sets of *ideas*, namely the idea of property (or ownership) and "certain consequential ideas" associated with the idea of property, and explains that while the relation between the two sets of ideas is normally firmly established, the occurrence of sanctions is necessary to ensure the firmness of the relation.

In the same essay, he also identifies a secondary function of the term 'right,' namely to *convey information* (1939, 185–9). There is, he points out, no doubt that one conveys information when one asserts, say, that a person owns a house. But, as he takes care to point out, this presupposes that the rights statement in question is made in accordance with an effective system of rules (1939, 188): "The case is similar with the word 'right.' If employed in conformity with law and custom, it has an important social function besides being a sign intended to influence behavior."

But Olivecrona sees a problem. The problem is that, on his analysis, there is no fact of the matter that corresponds to the term 'ownership.' Hence there can be no ownership! How, then, can one convey information by asserting that the person in question owns the house? To clarify the issue, Olivecrona considers a hypothetical case, in which *B* tells *C* that *A* is the owner of a certain house, and asks, what does *C* learn when told by *B* that *A* is the owner of the house? He answers that *C* learns that *A* has at some point *acquired* the house (and not sold it since), and that is all (1939, 186). But, he points out, although this piece of information is highly useful, it is not information about *A*'s *ownership* of the house, but about A's *acquisition* of the house (1939, 187).

The problem that occupies Olivecrona here is, of course, the same type of problem that I identified above: If there are no dollars, no pounds, etc. why would the creditor want to be paid in the first place? Here the question is: If there is no ownership, how can *B*, and why would *B* want to, inform *C* about *A*'s ownership?

Finally, Olivecrona points out that the term 'right' sometimes fulfills a *technical* function, in the sense that it connects two sets of rules in a way that makes it easy to render the content of those rules. On this analysis, he explains, 'right' plays the role of a railway junction. Having the concept of ownership in mind, he describes this function as follows:

> … the expression "right of property" serves as a connecting link between two sets of rules: on the one hand the rules about the acquisition of property, on the other hand penal rules and rules about damages, etc., which refer to the situation where one person is the owner of an object and another person does something with regard to the object.
> Suppose now that the connecting link were taken away. What would happen? The penal rules and the rules about damages, etc., would then have to be directly connected with the so-called titles. Every rule belonging to the latter class would have to refer to all the titles. It is hard to imagine how such a system of rules would look; without doubt, it would be cumbersome in the extreme. (1939, 189–90)

It is interesting to note that having both endorsed and rejected this type of analysis in the First Edition of *Law as Fact*, Olivecrona now endorses it on account of its practicality. And, as we shall see, he continues to endorse it in the Second Edition of *Law as Fact*. One wonders, however, why he gave up the interesting, albeit rather unclear, objection that he put forward in the First Edition of *Law as Fact*, namely that this type of analysis cannot account for the concept of a right as it occurs in the legal rules themselves because 'right' lacks independent meaning.

In the Second Edition of *Law as Fact*, Olivecrona reiterates the claim put forward in the essay on legal language and reality that the term 'right' fulfills two main functions in legal language, namely to direct behavior and to convey information (1971, 186–200, 252–9).

The primary function of legal language, he explains, is to guide *human behavior*, and words can fulfill this function even though they do not refer at all, not even to imaginary entities (1939, 253): "Legal language is not a descriptive language. It is a directive, influential language serving as an instrument of social control. The 'hollow' words [that is, words that do not refer at all] are like sign-posts with which people have been taught to associate ideas concerning their own behavior and that of others." As Olivecrona explains elsewhere, 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. The relation between these two sets of ideas, he continues, has to do with the attitudes and feelings of those concerned, and he gives the example of a child who is learning how to understand the concept of a right:

> The child is well acquainted with the origin of its supposed rights over things and with the effects of those rights. It would be at a loss if asked to describe what a right is. The question would not be understood. But this is irrelevant from the point of view of behaviour. The attitude of the child will be largely determined by the connection between the ideas of having acquired things in the proper way, of therefore possessing them as its own, and of the consequences of ownership. The child will use the object freely and defend it against others as best it can using words like 'It's my ball' in order to impress its playmates; eventually the child may appeal to grown-ups for help because somebody has taken away its belongings. Conversely, with regard to objects not identified as the child's own there will be a connection between the ideas: not mine–not take it. Even if deviations are fairly common,

> the behaviour of the child with regard to the objects within its range of activity will, on the whole, be regulated by these two sets of inter-connected ideas. (1939, 187)

As should be clear, Olivecrona is putting forward in the previous paragraph the non-cognitivist view that moral, or more generally, normative, words lack cognitive meaning and do not refer at all, and this indicates that he now espouses non-cognitivism, not the error theory.

Having discussed the directive function, Olivecrona turns to consider the *informative* function and the difficulties that arise, on his analysis, when one tries to explain how a rights statement can be informative. He considers an example in which we learn that *A* is the owner of a certain house, and points out that the information we get is, strictly speaking, non-existent. When we learn that *A* is the owner of the house, we get the sentence "*A* is the owner of the house," and that is all. But we also make certain assumptions, such as "*A* is the one to deal with if I want to buy the house." Olivecrona concludes that we must distinguish between the *statement* about ownership and the *assumptions* we make when we hear this statement. For, he explains (1939, 196–7), "[t]he apparently informative function of statements about the existence of concrete rights actually consists in their giving rise to such assumptions as have been mentioned." He adds that these assumptions are always made within the framework of a working, that is, an effective, legal system:

> Outside a working legal system there would be no grounds for them. They presuppose that there are rules for the acquisition of property which are generally respected, that therefore the legal, or ideal, distribution of property has an actual counterpart in the distribution of the actual control over things, etc. Only when a great number of such conditions are realized, will the assumptions be fairly well founded; only then will they serve practical purposes. (1939, 197)

Olivecrona also reiterates the claim put forward in the essay on legal language and reality, that the concept of a right fulfills a *technical* function, while pointing out that this function has often been misunderstood. We must not, he points out, think that the technical function was deliberately introduced in order to help us render the content of a number of rules of conduct (1939, 199): "The rules have not been first conceived as rules of actions to be thereafter, for the sake of convenience, transformed into rules about rights. They were rules about rights from the beginning; and from the rules about rights, rules about action are supposed to follow."

I doubt, however, whether there is really a significant difference between the informative and the technical function of rights statements. As I see it, the technical function is just a special case of the informative function, which consists in conveying the information that a person has a right the import of which is made up of the content of the two distinct sets of rules that are connected by the right concept. And I cannot see that this difference is significant enough to justify the distinction between the informative and the technical function of the right concept.

Let us note, finally, that whereas Alf Ross maintains that 'right' does not refer at all, Olivecrona maintains, especially in the First Edition of *Law as Fact*, that it does not refer to anything *real*, but to an imaginary power. The difference has to do with the fact that whereas Ross was a non-cognitivist regarding rights statements as well as value judgments and judgments about duty, the *early* Olivecrona was a non-cognitivist

regarding value judgments but an error-theorist regarding rights statements and judgments about duty. Of course, this cannot explain the occasional claims in Olivecrona's *later* writings, that 'right' does not refer to anything real, since in his later writings Olivecrona was a non-cognitivist regarding rights statements, too. My guess is that the claims in his later writings are due to the fact that he was not very clear about the precise nature of the distinction between non-cognitivism and the error theory.

We see, then, that Olivecrona rejects the concept of a right as that concept is understood by most lawyers and legal scholars, on the grounds that it does not refer to natural entities, while identifying three distinct functions that the concept fulfills in legal thinking, namely (i) a directive, (ii) an information-conveying, and (iii) a technical function. We also see that while the analysis of the concept of a right conceived in terms of these three functions is compatible with ontological naturalism and with the broad conception of semantic naturalism, it is somewhat unclear whether it is compatible with the narrow conception of semantic naturalism. But since Olivecrona accepts neither the broad nor the narrow conception of semantic naturalism, we may of course leave the compatibility of Olivecrona's analysis with the narrow (and the broad) conception of semantic naturalism an open question.

9.3 Internal and External Rights Statements

Olivecrona's analysis is not as clear as it might have been, however. As we have seen in Sect. 6.5, we need to distinguish in legal thinking between internal and external legal statements, that is, between first-order, normative and second-order, descriptive legal statements, and to keep in mind that meta-ethical theories apply to internal legal statements only. In light of this, one wonders, does Olivecrona have internal or external rights statements in mind, when he maintains that 'right' refers to an imaginary power, or does not refer at all, and that the concept of a right fulfills three different functions in legal thinking?

Although Olivecrona seems to be rather unclear about the distinction between internal and external legal statements, I am inclined to think that in most cases he has *external*, not internal, rights statements in mind. For example, he considers, as we have seen, both the directive and the informative function in the context of a situation in which *B* tells *C* that *A* owns a house with a garden, and I find it natural to think of this statement as an *external* rights statement. But thus conceived, it can fulfill an informative, but hardly a directive, function. Moreover, since the non-cognitivist theory and the error theory apply to internal, but not to external, rights statements, we have no reason to believe that 'right' refers to an imaginary power, or does not refer at all, when 'right' occurs in this type of rights statement. If instead we conceive of the rights statement as an *internal* rights statement, we see that it can fulfill a *directive*, but not an informative, function. For, as we have just seen, when 'right' occurs in an internal rights statement, it refers to an imaginary power, or does not refer at all. In neither case does it seem possible to provide anyone with information using such a statement.

The lack of clarity on Olivecrona's part regarding the distinction between internal and external rights statements makes it difficult to fully understand Olivecrona's analysis. But I think we can solve these problems by saying that whereas internal rights statements can fulfill a directive, but not an informative, function, external rights statements can fulfill an informative, including a technical, but not a directive, function.[4] If we read Olivecrona's analysis in this way, it seems to be defensible.

9.4 The Choice Theory of Rights

We have seen that Olivecrona rejects the view that *A*'s right is identical with the favorable position enjoyed by *A* in regard to the legal machinery. For not only is the right thought of as being logically prior to the ability to set the legal machinery in motion, the right is also assumed to exist even if the right-holder never takes legal action (1939, 85–8).

I find neither objection convincing, however. In regard to the first objection, I believe we should simply change our way of speaking about rights, if and in so far as we speak as if the right were logically prior to the right-holder's ability to set the legal machinery in motion, and say instead that a person's right *consists in* his ability to set the legal machinery in motion. I cannot see that doing this would have to complicate or otherwise affect legal thinking negatively.

In regard to the second objection, I suggest that we operate not with a person's *actual* ability, but with (what we might call) his *hypothetical* ability to set the legal machinery in motion: *if* the right-holder takes legal action, *then* his action will be recognized by the law as a legal action (for more on the idea of a hypothetical ability, see Spaak 1994, 92–9). On this analysis, a person may be a right-holder, even if for some reason he is unable or unwilling to take legal action. Capitalizing on the distinction between a person's actual and hypothetical ability to take legal action, we might say that the right-holder is, in the words of H. L. A. Hart, a *small-scale sovereign* in relation to the other party's duty (or absence of claim, or liability, or absence of power) (for more on these concepts, see Hohfeld 2001 [1913 and 1917], 11–3).

On Hart's choice-theory analysis, *A* has a claim-right vis-à-vis *B*, regarding subject matter, *X*, if, and only if, *A* controls *B*'s duty in regard to *X*, in the sense that *A* has the (hypothetical) ability to waive *B*'s duty, or the ability to take legal action if *B* refuses to honor the duty. Hart writes:

> The crucial distinction, according to this view of relative duties, is the special manner in which the civil law as distinct from the criminal law provides for individuals: it recognizes

[4] To be sure, an external legal statement can fulfill a directive function in an *indirect* way in certain circumstances, that is, when the audience already has an appropriate attitude, which gives rise to action when combined with the relevant information. What I have in mind is the obvious fact that an ordinary statement of fact, such as "Your house is on fire," can guide behavior indirectly, provided that the agent is *motivated* to save his (or her) own life and that of his (or her) spouse or children who happen to be in the house. But this type of indirect guidance is of course not what Olivecrona has in mind when he maintains that a legal statement can fulfill a directive function.

> or gives them a place or *locus standi* in relation to the law quite different from that given by the criminal law. Instead of utilitarian notions of benefit or intended benefit we need, if we are to reproduce this distinctive concern for the individual, a different idea. The idea is that of one individual being given by the law exclusive control, more or less extensive, over another person's duty so that in the area of conduct covered by the duty the individual who has the right is a small-scale sovereign to whom the duty is owed. The fullest measure of control comprises three distinguishable elements: (i) the right holder may waive or extinguish the duty or leave it in existence; (ii) after breach or threatened breach of a duty he may leave it 'unenforced' or may 'enforce' it by suing for compensation or, in certain cases, for an injunction or a mandatory order to restrain the continued or further breach of duty; and (iii) he may waive or extinguish the obligation to pay compensation to which the breach gives rise. (1973, 191–2)

Of course, a defender of Olivecrona might object that in so far as we are concerned with claim-rights, the choice theory presupposes the concept of *duty*. And since, on Olivecrona's analysis, the concept of a duty presupposes the concept of binding force, the choice theory cannot offer a naturalistic analysis of the concept of a right. Hence Olivecrona's critique of the concept of a right applies to the choice-theory analysis, too.

I do not believe, however, that we have to analyze the concept of duty in non-natural terms. If we are legal positivists, we might simply say that *A* has a legal duty to do *X*, if there is a legal rule that requires *A* to do *X*, and that *R* is such a legal rule if, and only if, we can trace *R* back to one of the recognized sources of law. It is, of course, true, as we have seen (in Sects. 7.5 and 7.6), that a legal duty, conceived within the framework of legal positivism, is more or less devoid of normative content and does not necessarily give the agent a reason to perform (or not perform) the action in question. But the same goes for all legal concepts when conceived within the framework of legal positivism. As we have also seen (in Sect. 7.3), the binding force of law is conditional only when conceived within the framework of legal positivism. This is simply the price one has to pay to get the benefits that come if one accepts a legal positivist analysis of the concept of law. Moreover, in many cases a legal duty will to some extent be a *moral* duty, and it will therefore give the agent a (genuine) reason to perform (or not perform) the action in question.

To be sure, it is difficult to square the choice theory with the common sense assumption that people have various constitutional and human rights, and that children have rights. The problem is that in these cases the right holder *cannot* control the other party's duty, etc., but rather benefits in a passive manner from the other party's duty, etc.[5]

The scope of the choice theory is thus narrower than some of its adherents have assumed. But the theory works quite well within its (limited) area of application, which is essentially the field of private law. Since this is so, I believe the choice theory is sufficiently plausible to serve as a counter-example to Olivecrona's contention that there are no rights – legal or moral.

[5] For criticism of the choice theory on this and similar points, see MacCormick (1976, 1977). For objections to the criticism, see Simmonds (2002, 304–12).

9.5 Rights and Magic

Following Hägerström, Olivecrona points to a connection between a belief in non-natural entities and properties, such as rights, duties, and binding force, and a belief in *magic*. He explains that in Roman law the so-called *obligatio* was a mystical bond, which arose from words with magical significance, that the debtor could free himself from this bond by doing what he was obligated to do, and that failure to thus free himself meant that the supernatural power of the creditor was transformed into an actual power on the part of the creditor over the body of the debtor (1939, 112–3). The right of ownership, he concludes (1939, 112–3), was a supernatural power over the object in question: "The old formal transactions of the law such as e.g. *mancipatio* and *stipulatio* are clearly magical, designed to create or transfer the supernatural powers."

He is, however, careful to point out that contemporary legal thinking does not operate with magical concepts in the same way that legal thinking in ancient Rome did, while insisting that the affinity between our beliefs and the magical beliefs of the Romans is probably greater than we like to think. For, as he puts it (1939, 114–5), "[t]he chain of development has never been broken: We cannot say: here magic stops and wholly rational thinking begins. Modern thinking in legal matters is far from being wholly rational." But while modern legal thinking may not be wholly rational, it does not follow from this that it is somehow magical. For, as we have seen (in Sect. 7.6), we may account for the existence of rules, rights, and duties, etc. in terms of human conventions.

As we have also seen (in Sect. 8.2), Olivecrona holds that we make use of *performative utterances* to create legal relations. And in the essay on legal language and reality, he is explicit that performatives are magical, in the sense that they involve the idea that one can command ideal or supernatural effects into being. Thus if *A* says to *B*, "I hereby offer you to buy my bicycle for $50," *A* makes a legally valid offer, which *B* may or may not accept; and if *B* accepts it, there will be a legally valid contract between *A* and *B*. Thus a new legal entity – a contract – has come into existence, in addition to the offer and the acceptance conceived separately. As Olivecrona puts it (1962a, 175), "[t]he sense of all truly performative statements is, indeed, magical. They purport to create something. That which is held to be performed is the creation of a non-physical relationship or property through the pronouncing of some words. Such doings fall under the category of magic."

One may, however, wonder why our belief in rules, rights, and duties, etc. is not a belief in magic in the same way that the Romans believed in magic, if, as Olivecrona maintains, we believe that non-natural powers and bonds are created by contracts, and if a belief in such entities is tantamount to a belief in magic. What, exactly, is the difference? Olivecrona does not consider this question in his discussion of the concept of a right. But, as we have seen (in Sect. 8.2), he holds that the main difference is that whereas the Romans imagined that *words* alone could bring about the relevant effects, we now believe that it is the acting person's *will* that brings about the effects (1971, 230–1). This does not seem to be a very important difference, however.

Olivecrona concludes his analysis in the 1962 essay by pointing out that although the origin of legal language is to be found in the language of magic, we should not reject legal language as being non-sensical. Since it is clearly useful, we should try to understand it as it is (1962a, 177). But one must then surely wonder why he doesn't proceed and consider in more detail the analysis of performatives put forward by J. L. Austin (1975) and John Searle (1969). Both writers are quite clear that performatives work because they are made in accordance with social rules. If the ship owner's wife smashes a bottle of champagne against the side of the ship, uttering "I hereby christen you 'Queen Mary,'" then the name of the ship will for all intents and purposes be 'Queen Mary.' The reason is simply that we all accept a rule, according to which this is what the ship thus named should be called. Hence there is no reason to maintain that the belief that the name of the ship is 'Queen Mary' is a belief in magic.

I believe the reason why Olivecrona deems performatives to be magical is that he focuses exclusively on the physical world and does not consider the possibility considered above (in Sect. 7.6), that we can account for the existence of rules, institutions, and normative relations, in terms of human conventions. On this analysis, to promise somebody to do something, to name a ship, or to marry a couple, is to bring about effects that depend for their existence on the beliefs and attitudes of human beings. Olivecrona's mistake is to take it for granted that these effects have to be *non-natural* in the sense of being located in a supernatural world. If you do not believe in such a world, you will have to reject those effects, just as Olivecrona does. But rejecting them is not an attractive option, because it makes it more or less impossible to account for legal thinking – past as well as present.

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