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LEGAL RIGHT IN SCANDINAVIAN ANALYSES*

Nils Kr. Sundby

I

It is characteristic of many discussions in jurisprudence that the questions group around a relatively small selection of so-called basic legal concepts. Some authors explicitly maintain that the main task of a philosophy of law should be conceptual analysis.¹ Authors expressing this view are usually classified as exponents of "analytical jurisprudence." Within analytical jurispru-

¹ See, for instance, Ross (30), p. 25.

* Many of the contributions commented on in this essay are written in a Scandinavian language. I would like to stress that translations of quotations from these are entirely my own responsibility.

Reference is made to the following literature, which I have numbered for convenience of reference in the footnotes.

1. AHLANDER, BJÖRN. *ÄR JURIDIKEN EN VETENSKAP?* ["Is Law a Science?"] (Stockholm, 1950).

2. ARNHOLM, CARL JACOB. *Olivecrona on legal rights. Reflections on the concepts of rights*, 6 SCANDINAVIAN STUDIES IN LAW 9-31 (1962).

3. ARNHOLM, CARL JACOB. *PRIVATRETT*, bind I ["Private Law," vol. I] (Oslo, 1964).

4. AUSTIN, JOHN. *PHILOSOPHICAL PAPERS* (ed. J. O. Urmson and G. J. Warnick, Oxford, 1961).

5. EKELOF, PER OLOF. *Juridisk slutledning och terminologi* ["Legal inference and terminology"], in *TIDSSKRIFT FOR RETTSVITENSKAP* 211-72 (1945).

6. EKELOF, PER OLOF. *Till frågan om rättighetsbegreppet* ["On the concept of legal right"], in *TIDSSKRIFT FOR RETTSVITENSKAP* 309-13 (1946).

7. EKELOF, PER OLOF. *Om begagnandet av termen rättighet inom juridiken* ["On the use of the term right in legal language"], in *FESTSKRIFT FOR B. EKEBERG* 151-77 (Stockholm, 1950).

8. EKELOF, PER OLOF. *Är termen rättighet ett syntaktiskt hjälpmedel utan mening?* ["Is the term right a syntactic tool without meaning?"], in *SVENSK JURISTTIDNING* 546-59 (1952).

9. HART, H. L. A. *DEFINITION AND THEORY IN JURISPRUDENCE* (Oxford, 1953).

10. HART, H. L. A. *THE CONCEPT OF LAW* (Oxford, 1961).

11. HEDENIUS, INGEMAR. *OM RÄTT OCH MORAL* ["On Law and Morals"] (Stockholm, 1963) (First published 1941).

12. HEMPEL, CARL G. *PHILOSOPHY OF NATURAL SCIENCE* (Englewood Cliffs, N.J. 1966).

13. HOHFELD, WESLEY NEWCOMB. *FUNDAMENTAL LEGAL CONCEPTIONS* (ed. by Walter Wheeler Cook, New Haven and London, 1964 [first published, New Haven, 1923]).

14. HONORÉ, A. M. *Ownership*, in *OXFORD ESSAYS IN JURISPRUDENCE* 107-47 (ed. by A. G. Guest, Oxford, 1961).

15. HÄGERSTRÖM, AXEL. *INQUIRIES INTO THE NATURE OF LAW AND MORALS* (ed. by K. Olivecrona, trans. by C. D. Broad, Stockholm, 1956).

16. LAZARSFELD, PAUL F. *Latent Structure Analysis*, in *PSYCHOLOGY: A STUDY OF A SCIENCE*, study I, vol. 3, pp. 476-543 (ed. by Sigmund Koch, New York, Toronto and London, 1959).

17. LUNDSTEDT, A. VILHELM. *LEGAL THINKING REVISED* (Stockholm, 1956).

18. NAESS, ARNE. *INTERPRETATION AND PRECISENESS* (Oslo, 1953).

19. OFSTAD, HARALD. *Om deskriptive definisjoner av begrepet rettsregel* ["On descriptive definitions of the concept of legal rule"], in *TIDSSKRIFT FOR RETTSVITENSKAP* 38-83 (1952).

dence itself there is considerable disagreement over such questions as what "analysis" is, what kind of methods the analyst ought to employ, etc. Most writers representing this school, however, have in common a marked interest in terminological problems. Their discussions typically take as a point of departure certain verbal expressions, and their primary task is to clarify the actual, or desired, meaning of these expressions, either generally or in certain connections.

I will refer to attempts to describe or to stipulate the meaning of verbal symbols as definitions. This expression is accordingly used in a very wide sense.² In order for something to be a "definition" I require no more than that it represent an attempt to clarify a relation of meaning. The relation may obtain between words or between words and nonverbal objects. Defini-

² The word "meaning" itself is also taken in a wide sense. In particular, it even covers what is sometimes called the "extensional meaning" or "range of application" of a word. Actually, this latter kind of meaning will occupy us a great deal in what follows.

20. OLIVECRONA, KARL. *LAW AS FACT* (Copenhagen and London, 1939).

21. OLIVECRONA, KARL. *THE PROBLEM OF THE MONETARY UNIT* (Stockholm, 1957).

22. OLIVECRONA, KARL. *The Legal Theories of Axel Hägerström and Vilhelm Lundstedt*, 3 SCANDINAVIAN STUDIES IN LAW 125-50 (1959).

23. OLIVECRONA, KARL. RÄTT OCH DOM ["Legal Right and Judgment"] (Stockholm, 1960).

24. OLIVECRONA, KARL. *Legal Language and Reality*, in *ESSAYS IN HONOR OF ROSCOE POUND* 151-91 (New York, 1962).

25. OLIVECRONA, KARL. RÄTTSORDNINGEN ["The Order of Law"] (Lund, 1966).

26. QUINE, WILLARD VAN ORMAN. *METHODS OF LOGIC* (rev. ed., New York, Chicago, San Francisco and Toronto, 1966).

27. ROBINSON, RICHARD. *DEFINITION* (Oxford, 1950).

28a. ROSS, ALF. *Tå-Tå*, in *FESTSKRIFT TIL H. USSING* 468-84 (Copenhagen, 1951).

28b. ROSS, ALF. *Tå-Tå* (English version of (28a)), 70 *HARVARD LAW REVIEW* 812-25 (1957).

29. ROSS, ALF. *Status i Rettighedsdiskussionen* ["Status in the discussion on rights"], in *SVENSK JURISTTIDNING* 529-40 (1953).

30. ROSS, ALF. *ON LAW AND JUSTICE* (London, 1958) (First published in Danish in Copenhagen 1953).

31. ROSS, ALF. *Om begreberne "stat" og "statsorgan" i statsforfatningsretten* ("On the concept of 'state' and 'organs of the state' in constitutional law"), in *TIDSSKRIFT FOR RETTSVITENSKAP* 106-23 (1958).

32. ROSS, ALF. Review of Olivecrona's *RÄTTSORDNINGEN*, in *TIDSSKRIFT FOR RETTSVITENSKAP* 281-301 (1967).

33. RYLE, GILBERT. *Systematically Misleading Expressions*, in *LOGIC AND LANGUAGE* (first series) 11-36 (ed. by Antony Flew, Oxford, 1963) (Originally published in *PROCEEDINGS OF THE ARISTOTELIAN SOCIETY* [1931-32]).

33a. SIMPSON, A. W. B. *The Analysis of Legal Concepts*, 80 *LAW QUARTERLY REVIEW* 535-58 (1964).

34. STRAHL, IVAR. *Till frågan om rättighetsbegreppet* ["On the concept of legal right"], in *TIDSSKRIFT FOR RETTSVITENSKAP* 204-10 (1946).

35. STRAHL, IVAR. *Till frågan om rättighetsbegreppet* ["On the concept of legal right"], in *TIDSSKRIFT FOR RETTSVITENSKAP* 481-514 (1947).

36. STRAHL, IVAR. *En allmän rettslära* ["A book on jurisprudence"]. Review of the Danish original of (30), in *SVENSK JURISTTIDNING* 289-315 (1955).

37. WEDBERG, ANDERS. *Some Problems in the Logical Analysis of Legal Science*, *THEORIA* 246-75 (1951).

38. WEDBERG, ANDERS. *Review of Ahlander's År JURIDIKEN EN VETENSKAP?*, in *SVENSK JURISTTIDNING* 117-26 (1952).

tions can be classified in various ways. In the first place, there may be great variety in the kind of "meaning" which a particular definition concerns. I will mention some of the various possibilities below, though without digressing in any detail into the problem of meaning. Secondly, we can distinguish between descriptive and normative definitions.³ Is a definition to be read as asserting how a word is actually used in the relevant contexts? Or is the purpose of the definition to prescribe a certain usage for the word, which may or may not coincide with the ways in which others use it? Confusion on this point has been the basis for much of the professional philosopher's criticism of writers in jurisprudence.⁴

Thirdly, we may distinguish between the various methods which can be used in order to clarify a relation of meaning. There has been a tendency to confine the term "definition" to cases where the method employed is of a certain type. The traditional requirement is that a definition be *per genus et differentiam*. This requirement implies that the meaning of a word must be clarified by means of a *definiens* which first refers to a class of objects, and then distinguishes between them by means of their special characteristics, as for example: "By the expression 'legal rules' I understand social norms which are sanctioned by force through a machinery of public authorities." In the present paper the term "definition" will be used in a sense wide enough to include cases where other methods than that of *per genus et differentiam* are used to throw light upon the meaning of an expression.⁵ In the context of law, I believe this terminology has certain advantages. It counteracts two tendencies: the tendency to think that all definitions of legal terms must be of the form "'x' is a (*genus*) which (*differentiae*)";⁶ and the tendency to regard certain legal terms as indefinable — in my opinion a misleading way of speaking.

In the Scandinavian countries the word "*rett*" is used in at least four main senses, each of them central for jurisprudence: 1) "*rett*" may mean what the Germans call "*das objektive Recht*"; i.e., the set of all current legal rules in a society. Here "*rett*" corresponds quite closely to the Anglo-American "law." 2) The word "*rett*" can be synonymous with the German "*Gericht*," i.e., "court." 3) In many connections "*rett*" means "worthy of ethical approval"; here it is a term of positive appraisal, and its application is less neutral than in other connections. 4) The word "*rett*" may mean what the Germans call "*das subjektive Recht*," i.e., legal right.

³ Næss (18) ch. IV. ROBINSON (27, p. 19, speaks of lexical and stipulative definitions.

⁴ See, for instance, the Norwegian philosopher Harald Ofstad (19), p. 38.

⁵ ROBINSON uses a similar wide concept in his book on definitions (27).

⁶ As HART (9) points out, many legal expressions cannot be defined in this traditional way, pp. 12-17.

Often the expression "*rett*" in the fourth sense is used interchangeably with "*rettighet*," but the two terms are not fully synonymous. It is important to note that the term "*rett*" in the subjective sense may be used in two different ways, which, although related, must nevertheless be kept apart. The ambiguity appears to correspond to that of the Anglo-American term "right" in legal usage. In one sense "right" can be used in contexts where it is said that a person has a right to something. As examples we can take sentences like "A has a right to walk in the park," "The owner has a right to mortgage his property," "A creditor has a right to repayment by a debtor of a loan." It is occurrences of this type which Hohfeld has in view in his well-known analysis of legal relations.⁷ In these cases the term "right" is used to prescribe or describe how a certain action, or action-type, is to be judged according to the law. It is a common view, which I believe to be correct, that the expressions containing the term in this connection can always be paraphrased by other expressions, mentioning a person's duty to do something, or asserting that he shall or shall not do something.

However, "right" is used in a second sense in which a person is said to have a right even where this statement does not entail that there are definite actions which he has a right to do or not to do, or which others have a duty to do or not to do. "Right" is then used as a more complex term than in the examples above. In what sense it is "complex" in these uses will be elucidated in what follows. For the present I would suggest two factors: First, "right" functions in these contexts as a common designation for various more special rights; for instance, we talk about the right of ownership, mortgage, or contract.⁸ Secondly, all these special rights are considered to give the possessor or other persons several rights in the first sense. If a person has one or another complex right, he has normally a right to several different actions.⁹

The Scandinavian word "*rettighet*" refers primarily to complex subjec-

⁷ HOHFELD (13) showed that "right" in sentences like those above is used indiscriminately to characterize legal relations of a varied nature. His famous distinction between "right" in a strict sense (as synonymous with "claim" and correlative to "duty"), "privilege," "power," and "immunity" needs no repetition here. I would just like to stress that whether "right" stands for the one or the other of Hohfeld's categories, the term is used in a non-complex way which must be kept apart from the cases below.

⁸ Cf. Strahl (35), p. 493.

⁹ Cf. Ross (30), p. 169. HOHFELD (13) occasionally uses "right" in this complex sense. (For instance, at p. 30 he mentions the "right of way" which a person might have over another person's land.) For the most part, however, he does not speak of rights in this connection. He either uses the various special terms, like "ownership," or, wanting to discuss in general the complex cases, he talks about "aggregates of legal relations," "complex jural interests," etc. (*op. cit.*, p. 30, p. 64, p. 96). These "aggregates" are complex in the sense that they consist of many simple right-duty, privilege-no-right, power-liability, immunity-disability relations; the latter are "the lowest common denominators" (p. 64) of the complex legal interests.

tive rights. It is this concept which will be discussed in this paper.¹⁰ Other senses of "right" will be for the most part ignored. The concept of right in this sense has for many years been intensively debated in Scandinavian jurisprudence. I will try to give an account of some of the main points in this debate, and add some comments on the various contributions. I shall begin with the discussion initiated by Per Olof Ekelöf in a paper in 1945. Ekelöf's position was opposed by Ivar Strahl, and the discussion was given added depth through various contributions by Alf Ross. Several other writers have taken part,¹¹ the most recent contributor being Karl Olivecrona.¹²

II

LEGAL sentences may be general or individual. A general legal sentence expresses or describes a rule which can be applied to a class of cases, e.g., "Persons who commit theft are liable to imprisonment for three years." An individual legal sentence says that a legal situation exists, or shall exist, in a concrete case, e.g., "A has stolen this thing from B"; "A shall pay \$100 to B."

A general legal sentence is hypothetical in character: it says that if this or that action, event, or situation exists, then something shall or may take place. In other words, these sentences have the form of a conditional with an "if"-component (antecedent) and a "then"-component (consequent). The antecedent describes a class of the facts which have to exist if the rule is to be applied. Such facts will here be called the legal facts of the rule in question. The consequent prescribes or describes the significance it has according to the law that a certain set of legal facts exists. We may here speak of the legal consequences of the rule.¹³

It is familiar enough that the same legal consequence can be attached to different legal facts. As an example we can take A's duty to pay a certain amount of money to B. This duty may have arisen because B has granted A a loan, or sold A something without yet having received the purchase money, or A may through negligence have caused damage to B's property. Analogously, one and the same legal fact may have different legal consequences.

¹⁰ Some of the special expressions referring to rights might be used in both a complex and a noncomplex way. This is, for instance, true of the word "claim." In the complex sense (for illustrations, see Honoré (14) pp. 131-32) it sometimes seems to be synonymous with the Scandinavian "*fordringsrettighet*" (German: "*Forderungsrecht*") or "*obligation*." Below (Part IV and later) I shall have occasion to use the word in this sense as a translation of the Scandinavian originals. In other contexts (for instance in Hohfeld) it is used to designate a more simple legal relation.

¹¹ References in note 69 below.

¹² See note 70 below.

¹³ The expressions "legal facts" and "legal consequences" are discussed in detail by Ekelöf (5), pp. 224-29 and pp. 229-42.

As an example we may take the act of contracting a marriage. This legal fact has several consequences. Among other things, the parties concerned acquire a certain duty to support each other economically, their children become legitimate, they are prevented from contracting a new marriage as long as the old one exists, etc.

Another characteristic of general legal sentences is the following: Such sentences are very often fragmentary, in the sense that a legal fact or consequence is stated in an incomplete way. Consider as an example the Norwegian Act of Guardianship, Section 1. In its first part this rule states that when somebody is of "minor age" or "brought under guardianship," then he is a "ward." In the second part "minor age" is defined as "under 21 years." "Brought under guardianship" is also in need of some elucidation; in other statutes, which give detailed rules about the cases in which a person may be subjected to "guardianship orders" through a specified court procedure, the expression is given greater precision. The significance of being a "ward" is explained in Section 2 of the Act. It involves a person's incapacity to manage his own property and to bind himself by contracts, unless something to the contrary is specially stipulated. This latter reservation functions as a reference to other sections in the Act, which determine in more detail the limits of the ward's status.

As this example shows, we often have to combine two or more fragments in order to arrive at more precise sentences. The outcome of such a combination of fragments may be called a complete legal sentence. The expression "complete legal sentence" is relative, in the sense that a sentence is complete in relation to one or more other sentences, namely the fragments; and "the completeness" may be greater or lesser in proportion to the number and kind of fragments concerned.

Even the individual sentences must often be looked upon as fragments. Their form, however, is normally categorical, not hypothetical. Often they consist of just a legal-fact sentence, or a legal-consequence sentence, as, for example, "A has borrowed \$100 from B" (individual legal-fact sentence); "A shall pay \$100 to B" (individual legal-consequence sentence).

A final distinction I would like to mention as background for the following account, is the well-known one between the "internal" and the "external."¹⁴ This distinction has a long tradition in jurisprudence and moral philosophy. The Swedish philosopher Hedenius speaks of "proper" versus "nonproper" norms.¹⁵ Ross distinguishes between statements *in* norms and statements

¹⁴ HART (10), p. 55. See also Wedberg (37), pp. 252-53.

¹⁵ HEDENIUS (11), p. 58.

about norms.¹⁶ Various other designations are also to be found in the literature.

A sentence of the first kind is a norm, that is, a general directive or an individual command. The legal rules themselves belong to this class, as also, for instance, the conclusion of an ordinary judgment. Following Hedenius, I will refer to such sentences as proper legal sentences.

The second type consists of propositions *about* norms; the sentence here describes or reports a norm, without being a norm itself. Propositions belonging to the doctrinal study of law (in Scandinavia often called "legal science") are of this type, as, for example, the statement that the penalty for theft in Norway is imprisonment for up to three years. Individual sentences stating that certain legal relations exist between particular persons, such as the statement that A and B are married, are also of this class. We may refer to such sentences as nonproper legal sentences.

As will be clear from the examples, this last distinction cuts across the distinction between general and individual legal sentences. Accordingly we arrive at this diagram:

	Proper	Nonproper
General	e.g. The rules of law themselves	e.g. Doctrinal propositions about the rules ("legal science")
Individual	e.g. "A shall pay \$100 to B"	e.g. "A and B are married"

III

A DISTINCTIVE feature of the Scandinavian discussion has been that the contexts which the various authors had in mind during their search for a definition of the term "legal right," have been indicated explicitly. Generally speaking, it is of course important to point out what kind of occurrences are taken into account, regardless of whether the definition of a given word purports to be normative or descriptive. It is a trivial fact that the meaning of a word may vary according to person and to situation. Nevertheless, discussions of verbal questions in jurisprudence have been far too often obscured because too little information was given as to the kind of context to which the definition referred. By contrast, the Scandinavian discussion has been

¹⁶ Ross (30), pp. 9-10, n. 4.

on the whole strongly context-oriented — an approach which, in my opinion, has led to positive results.

The debate has almost exclusively concentrated upon the use of the terms in legal contexts, i.e., within statutory language, in the conclusions and premises of judgments, within legal science, and in the application of law in other fields. The various uses of "right" in sociological, economic, or ethical discourse have been disregarded. Even the scope of the legal contexts considered has been frequently quite restricted. The main focus has been on the use of the expressions in legal arguments and particularly in legal inferences. At a later stage the discussion developed in the direction of a general definition for the whole area of legal language; but the original contexts continued to play a central part.

IV

LET ME begin with a presentation of the original problem raised by Ekelöf in 1945 (5), and the various solutions he proposed. Ekelöf considers two types of common legal inferences:

A. If a loan is granted, a claim comes into being.¹⁷

Here a loan is granted.

Here there exists a claim.

B. If a claim exists, then payment shall be made on the day it falls due.

Here there exists a claim.

Here payment shall be made on the day it falls due.

Now Ekelöf undertakes the following task: to find a more specified expression which can be substituted for the term "claim" in these sentences, without destroying the legal function of the inferences. He arrives at the following result: In case A, "claim" can be replaced by an expression about legal consequences; in case B, by an expression about legal facts.

What kind of legal consequences and facts? Ekelöf rejects the possibility that "claim" in case A should only stand for the special consequence that payment shall be made on the day it falls due. Analogously, he holds that "claim" in case B does not stand only for the special legal fact that a loan is granted. He holds that the substitution in case A must bring in sentences about complex legal consequences; in case B, sentences about complex legal facts.

By the expression "complex legal facts" in this connection, he understands

¹⁷ On "claim" see *supra* note 10.

the set of all facts which according to the law are said to constitute the conditions for the existence of a claim. This set consists partly of the so-called "creative" facts (loan, act causing damage, nonliquidated purchase, etc.), partly of so-called "extinguishing" facts (prescription, compensation, remission). The expression which replaces "claim" in case B consequently becomes a disjunction of positive sentences (this or that creative fact exists) and negative sentences (this or that extinguishing fact does not exist).

Analogously, the replacement in case A, the "complex consequences," consists of the set of all the legal consequences which follow when a claim exists. These consequences are divided by Ekelöf into two groups: the present or actual consequences, e.g., that the claim normally may be transferred to a new creditor; and the hypothetical consequences, i.e., those which are conditional upon the existence of additional facts, as that a creditor has a right to require compensation, provided that a breach of contract occurs, or a right to announce his claim against the insolvent estate of the debtor, provided that the latter is adjudged bankrupt, etc.

Ekelöf chooses a very specific context as his starting point. He then employs a method of substitution to throw light upon the use of the expressions concerning rights in this connection; that is, he asks what expressions can be substituted for "claim" in the relevant context. How can we decide whether a given substitution is correct or not? Ekelöf provides us with a criterion: The substitution is correct if the inference still performs the same legal function after the new expressions have been introduced.

It is not evident just how we are to decide whether two inferences have the "same legal function." Ekelöf hints at answers to this question in several places.¹⁸ Probably his criterion could be rendered more precisely as follows: If the original inference and its premises are correct, then this must be true also of the new set of sentences incorporating the substitutions.¹⁹

¹⁸ Ekelöf (5), p. 245, and cf. p. 212; (7), p. 156, p. 165.

¹⁹ It can be assumed that Ekelöf will not talk of "same legal functions" unless this requirement is satisfied. Thus it constitutes a necessary condition in this respect. Whether it is also sufficient is perhaps doubtful. This question will not be pursued any further. As is well known, difficult problems quickly arise when one goes rather more deeply into the question of adducing criteria for the "correctness" of a legal inference. This question, too, will be disregarded here. Ekelöf has himself contributed to the discussion about so-called "normative inferences" (5), pp. 211-20. The criterion indicated in the text might presumably be sharpened through defining a concept of *equivalence* for legal sentences and expressions. Given an appropriate definition, we might say that Ekelöf asserts the equivalence of the particular terms concerning rights and the substitute expressions. See, for example, his remarks, *op. cit.*, p. 246. However, if one tries to define a concept of equivalence for legal expressions, similar difficulties as in connection with the concept of correct legal inference will have to be faced. The reason is that many sentences of law belong to the class of what I have called "proper legal sentences." These are norms, expressions which are neither true nor false. Accordingly, the concept of truth is not available in these cases. This explains why it is so difficult to state when two such expressions "imply" each other or are "equivalent." In the normal cases, definitions of such categories are based on the truth concept.

Ekelöf does not confine himself to asserting that both expressions give inferences with the "same legal function." He says in several places that the term "claim" designates the same, in the relevant context, as the fact- and the consequence-expressions, respectively;²⁰ or to put it more briefly, "claim" and other right-expressions designate a complex of legal consequences in case A, a complex legal fact in case B. In the terminology I myself prefer,²¹ it would be correct to say that Ekelöf gives a definition of the term "claim." Admittedly, the author himself asserts that he does not intend to present an analysis of "the concept of right itself." And he will not take a stand on whether the substitutions may serve as a "general definition of the term 'right.'"²² These reservations, however, are clearly derived from the fact that his investigation is limited to particular contexts, namely the two inferences A and B. All that he intends is to give a partial definition of "right" within one important area.²³

I would further classify Ekelöf's definition as descriptive, for the definition implies an assertion of what the term designates in the relevant legal context. However, the author emphasizes that he does not intend to take into account whatever ideas the persons in question — lawyers or others — associate with the use of the term.²⁴ It is symptomatic of these ideas that they are frequently accompanied by a more or less explicit belief in a right as a power or force which is "created" by certain legal facts and "entails" certain legal consequences, but which is not identical with these facts or consequences. An important part of the earlier Scandinavian criticism of the concept of right, e.g., from the Swedish philosopher Axel Hägerström and his disciple Vilhelm Lundstedt (cf. *infra* note 74) had been directed against the belief that this feeling of power has a counterpart in the objective world, that real "powers" are created when a right comes into existence. There was, at the same time, a reaction against an interpretation of the term "right" as implying such mystical powers. In short, it was objected that the terminology of "right" did not introduce the need to refer to any particular supernatural entity allegedly brought into being "between" legal facts and legal consequences.

²⁰ For instance at p. 246 (5) and p. 248.

²¹ *Supra* at fn. 2.

²² Ekelöf (5), p. 243.

²³ Cf. Strahl (35), p. 491, Ross (29), p. 533. To a certain extent Ekelöf, too, considers some other contexts. The discussion which follows becomes gradually more general. Cf. Part VII, below.

²⁴ Several times in the course of the discussion we find remarks about the insignificance of these "ideas" for the question of definition. See, in addition to Ekelöf (5), pp. 247ff., Strahl (35), p. 496, (36), p. 307, p. 309, Ross (28a), p. 483 n. 3 (not in [28b], the English version), (29), p. 532, AHLANDER (1), p. 157. By contrast, Olivecrona does not draw a sharp distinction between the question of what the terms designate and the question of what kind of "ideas" people associate with the words. Cf. fn. 78, below.

The main points in Ekelöf's important first contribution are, then, the following: He presents a partial descriptive definition of the terms referring to rights. He presupposes that the expressions designate something, a complex of legal consequences in case A and a complex legal fact in case B. On the other hand, the expressions do not designate anything which intervenes between legal facts and legal consequences. He employs a special method of definition quite different from the traditional definition *per genus et differentiam*. This method amounts to saying that when new expressions are substituted for the original ones, the substitution is correct when the new sentences, combined in an inference, have the "same legal function" as the old ones, and, to saying further that the new expressions denote the same thing as the old terms in the relevant context.

V

THE THEORY advanced by Ekelöf in his first paper was attacked on certain points by Ivar Strahl.²⁵ Strahl notes Ekelöf's view that the term "claim" designates two different things in case A and in case B, a complex of legal consequences and a complex legal fact, respectively.²⁶ But this, says Strahl, cannot be correct. A and B represent legal inferences. In the actual application of law, such elementary inferences are often combined into greater chains of inference; or, premises and conclusions taken from one inference are combined with elements from another inference, thus creating new inferences. In order for such combinations to be possible, the terms must not designate different things in case A and in case B. For it is evident that the terms must be analyzed in such a way that it is still possible for the original inferences to be correct. But then it is clear that the meanings in the two cases cannot be different; for otherwise we fall into the logical fallacy of *quaternio terminorum*.

It is easy to give examples of new inferences composed of sentences taken from case A or case B. The following inference, C, may be constructed through a simple combination of A and B:

If a loan is granted, a claim comes into being.

Here a loan is granted.

If a claim exists, then payment shall be made on the day it falls due.

Here payment shall be made on the day it falls due.

²⁵ Strahl (34) and (35); replies by Ekelöf in (6) and (7).

²⁶ *Supra* at fn. 20.

In this case the conclusion, and one of the premises, are still in the form of an individual legal sentence. Arguments of type C may accordingly be used in the application of law in a concrete case. The following instance, D, is another inference, combining elements from A and B:

If a loan is granted, a claim comes into being.

If a claim exists, then payment shall be made on the day it falls due.
Hence, if a loan is granted, then payment shall be made on the day it falls due.

In this instance there are only general legal sentences. The argument might be used as a preliminary to a concrete application of law. Or it might occur in a more abstract account of legal rules, such as we find in legal science. (Inferences of type D play an important part in Ross's analysis, as will be shown later.)

If "combined inferences" like C and D are to be justified, Strahl argues, the term "claim" cannot designate something different in the various premises. This is the essence of his criticism. On the other hand, Strahl himself, like Ekelöf, takes it for granted that legal-right terms do designate something in the relevant inferences; and he agrees that the terms do not stand for something different, or something more, than a complex legal fact or a complex of legal consequences. Strahl, accordingly, has to choose between the following two alternatives: to maintain that the terms designate either only legal facts, or only legal consequences. He takes the first course: the legal-right terms stand for a complex legal fact throughout the whole inference. Why? Because the terms seem to be used in the actual application of law after previous investigations of a factual nature; and, moreover, a court, in declaring that a right exists or does not exist, cannot be considered to have taken a stand as to what consequences this gives the grounds for.²⁷

Strahl received full support for his criticism as far as the fallacy of *quater-nio terminorum* was concerned, both from Ekelöf himself and from the other participants in the discussion who commented on this question.^{27a} Ekelöf agreed with Strahl's insistence that "claim" must designate the same thing throughout the whole inference in cases C and D.²⁸ However, Ekelöf maintained that this common *designatum* did not have to be the legal facts; it could be either the legal facts or the legal consequences, provided that the

²⁷ Strahl (35), pp. 489-90. As to Strahl's view on other context-types, see *infra* at fn. 56.

^{27a} See, for instance, Ross (28b), pp. 816, 823.

²⁸ Ekelöf (7), p. 155. On the other hand, he repeats that the terms cannot mean the same thing in the original A- and B-cases. As Ross points out (28a), p. 483 n. 13 (not in [28b]), this leads to the strange consequence that the major premises in the inferences A and B have a different content, depending on whether they are considered in isolation or not.

meaning were the same in both of the premises in which the word "claim" were used.²⁹

VI

EKELOF's fundamental approach found support among the various participants in the Scandinavian discussion. His emphasis on the importance of the context for the question of definition, his selection of specific legal contexts, his method of substitution — these points offered a permanent basis for the subsequent discussion. On this basis the analytical writers united against certain earlier theories.^{29a}

In particular, they rejected two forms of reasoning about law: first, what we may call the metaphysical fallacy, that is, the belief that terms concerning rights designate something which "comes between" legal fact and legal consequence, something "created" by a set of facts and "entailing" a set of consequences; second, what we may call the sociological fallacy, that is, the belief that the terms in legal contexts designate whatever actually represents the social counterpart of the right — for example, that "right" means the actual position of control which an owner of a property normally enjoys over the property in relation to other persons.

With Ekelöf and Strahl in agreement as to the basic approach but in disagreement as to what is designated by their central concepts, Alf Ross enters the arena and proposes a solution which is both attractive and surprising. His main thesis is that in legal usage, legal-right terms designate neither legal facts, legal consequences, nor anything else whatsoever. The words designate nothing at all; they are hollow words, without independent "semantic reference."³⁰ This is so notwithstanding the fact that the sentences in which the word forms a part, taken as a whole, have semantic reference. Certain of these sentences even have truth value, that is, they can be true or false.

Many lawyers naturally regard as strange the view that expressions concerning rights are "hollow words" which do not designate anything at all. Despite the undoubtedly provocative effect of his words upon his readers, Ross defends his views with great consistency. His main point turns out to be far simpler and more acceptable than might appear when his thesis is presented in isolation from its supporting ideas.

There was one feature of Ross's early work in this field which led to much misunderstanding. He set out to examine whether legal-right expressions

²⁹ Ekelöf (7), p. 155ff., esp. p. 165.

^{29a} Cf. especially Ross (29), pp. 530-32.

³⁰ See Ross (28b), p. 818.

designate anything. His answer was negative, and this result was given a "neutral" formulation: he said that the words lacked independent "semantic reference." But sometimes he expressed this thought by saying that the words concerned were "meaningless."³¹ It is manifest from what Ross writes that by this expression he only intended to say that they lacked semantic reference. Nevertheless, this mode of speaking gave rise to some misunderstanding; and it is misleading in some respects. It is plain enough that even if "right of ownership" lacks semantic reference, the expression may very well have "meaning" in several other senses of this term. By declaring a legal word "meaningless" one runs the risk of being understood as committed to the view that the word in question has the same semantic status as disconnected sounds or accidental scribbblings on a sheet of paper. Such a view would naturally lead to the condemnation of this particular word, for there should be no room for meaningless talk within legal language. Nothing, however, could be further from Ross's intention.³²

But let us turn to the material content of Ross's theory. First, I shall set out the main features of his argument. Then, I shall offer some comments on his notion of "semantic reference."

1. Ross begins with an anthropological side-glance at the Noisulli Islands in the South Pacific, where the Noit-kif tribe lives. This tribe is regarded as among the most primitive peoples in the world today. The Noit-kifs are said to believe that a member of the tribe becomes *tû-tû* if he violates certain taboos; for instance, if he eats food which has been prepared for the chief or kills a totem animal. *Tû-tû* is conceived of as a sort of mystical or dangerous force, which attaches to the guilty person. If a person has become *tû-tû*, he will have to go through a special kind of purification ceremony.

It is obvious enough, Ross says, that the term *tû-tû* has no independent semantic reference whatsoever. In spite of this, the inhabitants of the tribe are able to speak quite meaningfully about *tû-tû*; the sentences in which this expression occurs have, if taken as a whole, reference to particular states of affairs. Take, for instance, the following two sentences which are in use within the Noit-kif tribe:

1. If a person has eaten the chief's food, then he is *tû-tû*.
2. If a person is *tû-tû*, then he shall go through a ceremony of purification.

These two sentences can, "in accordance with the usual rules of logic," be combined into a new sentence:

³¹ *Id.* at 821 (28b); cf. p. 815. Also p. 483, n. 3 and 3a (28a) (not in the English version).

³² Ross has later admitted that the "meaningless" terminology in these and similar connections is misleading (31), p. 118.

3. If a person has eaten the chief's food, then he shall go through a ceremony of purification — a sentence "without the slightest trace of mysticism."

The situation is quite similar with regard to legal-right expressions. Even the rules of law, and propositions about these, are to a great extent formulated in a *tû-tû* terminology. Consider, for example, a common type of inference in which the concept of ownership is employed (compare the inference D above). Notice the close analogy to the *tû-tû* inference:

1. If A has purchased an object, then ownership for A of the object is created.
2. If A has ownership of an object, then he has the right of recovery.
3. If A has purchased an object, then he has the right of recovery.

Within this inference, Ross asserts, the word "ownership" has no independent semantic reference whatsoever; but together the sentences 1 and 2 express the simple rule 3.

In what respect does Ross's position differ from those of Ekelöf and Strahl? Ross is of the opinion that isolated substitution for terms like "ownership" is impossible, because the assumption that the words have independent reference is untenable. Two distinctive features characterize Ross's view: (a) He takes as the object of substitution not the word "ownership" but the sentences in which the word occurs. (b) Furthermore, the sentences which contain "ownership" must not be considered in isolation either: the substitution must cover several sentences together. In the example above sentence 3 is substituted for sentences 1 and 2, taken together as one whole. We might express this in the following way: Ross regards sentences about ownership, etc., as fragments. Several such sentences can be replaced with new sentences which are more like complete legal sentences.³³

Why does the law adopt a manner of speaking which introduces "hollow" words without semantic reference? Ross answers that the terms in question have an important function as a systematic tool of presentation.³⁴ In

³³ On the distinction between fragmentary and complete legal sentences, see Part II, *supra*. Ross has several times in his works laid emphasis on the fragmentary nature of law. As Simpson (33a) remarks, p. 540, Ross even mentions some other instances of "tu-tu" words in addition to the legal-right terms, "marriage," "nationality," etc. But I cannot follow Simpson when he holds that Ross's analysis is supposed to apply to *all* legal words. Ross is not of the opinion that all legal expressions have the same typical systematic functions (cf. below) as terms like "ownership." Moreover, he certainly does not hold that all legal words lack semantic reference. This is particularly clear if "legal word" is understood in Simpson's broad sense, i.e., a word which is "rule-defined," p. 543. Cf. for instance, Simpson's own example "cat" in a Cats Act, p. 547.

³⁴ The right as a "technical tool of presentation" is a theme which constantly recurs in the Scandinavian discussion. The point is especially central for Ross (cf. for example (30), § 35). But similar ideas can be found in Ekelöf, Strahl, and Olivecrona. Thus none of these want to excommunicate the right-terminology. On the contrary, they repeatedly stress the

practice it would be very inconvenient to formulate the various legal rules in such a way that legal consequences were knit directly to legal facts. Such a practice would lead to needless reiteration whenever a cumulative plurality of legal consequences was connected to a disjunctive plurality of legal facts; that is, every time the legal facts $F_1, F_2, F_3, \dots, F_n$ all had the cumulative consequences $C_1, C_2, C_3 \dots C_n$. In these cases, the legal rules involved can be stated more simply on the basis of this model:

Here "R" (for instance, "ownership," "claim," "mortgage," etc.) stands for nothing at all, according to Ross. It is only a word brought in to facilitate the systematization of the rules. In the use of language one expresses oneself as if F_1, F_2 , etc., "create" R, and R itself "entails" C_1, C_2 , etc.

By these observations Ross explains why it is useful and well founded to apply the notion of a right although words like "claim," "ownership," etc., do not designate anything at all. Most of us, without much hesitation, will agree that it is useful for the law to stick to these concepts. Probably few lawyers would contest that this terminology has, among other things, important systematic functions. The significant thing about Ross's theory, however, is his assertion that legal-right terms have only systematic functions and do not designate anything. Let us examine more closely how he supports this part of his theory.

Ross sets out certain plausible ways of giving the expressions the needed semantic reference. He then attempts to demonstrate that none of these solutions are tenable. (1) Considering inferences of type D, one might be tempted to substitute sentences about an accumulation of legal consequences in the major premise, and sentences about a complex legal fact in the minor premise. But this solution gives "claim," "ownership," etc., different references in the two premises, and in that case they can no longer be combined into a correct inference, because of the logical fallacy of *quaternio terminorum*.

great practical advantage of the concept of right. (Some of the earlier writers in Scandinavia took a different view; a few of them took their criticism of the concept to extremes, rejecting the use of the terms in serious legal talk. Cf. in particular Lundstedt's posthumous work, mentioned in fn. 74, below.)

Consequently, Ross argues, this alternative is not tenable. His argument is identical with Strahl's objections to Ekelöf's first article. (2) In order to avoid the fallacy of *quaternio terminorum*, it might seem possible to substitute either sentences about legal facts or sentences about legal consequences in both premises (cf. Strahl, and Ekelöf's later position). But this will not do, says Ross, for in this case one or other of the premises becomes analytical: the major premise under the legal-fact alternative, the minor premise under the legal-consequence alternative. Under the former alternative, the major premise becomes: If A has purchased an object, then he has either inherited the object, acquired it by prescription, or by gift, or *purchased* it. . . . Under the latter alternative, the minor premise becomes: If A can lawfully use an object, sell it to a person, mortgage it, *recover* it, . . . then he can recover it.

Is this a fatal objection? Both Ekelöf and Strahl are aware that "something curious" happens to one of the premises under both of these alternatives. However, what does actually happen? I do not agree with Ross when he contends that one of the premises in these cases has to become analytical. There is one more possibility: that the major premise or the minor premise becomes a *statement of definition* and not an analytical statement, after the substitution has been effected.³⁵ Let us inspect this in some more detail. For the sake of simplicity I consider only the first alternative, substituting expressions about legal facts. The situation is analogous, however, with respect to the other alternative. In my opinion we can avoid the result that the major premise becomes analytical, and look upon it instead as giving a statement of definition. Under these circumstances the inference, *D'*, becomes:

If A has purchased an object, then there exists one of the legal facts designated by the expression "A's ownership of the object."

If there exists one of the legal facts designated by the expression "A's ownership of the object," then A has the right of recovery.

If A has purchased an object, then he has the right of recovery.

The major premise here states a definition. It says simply that purchase belongs to the complex legal fact which "ownership" designates. Under this interpretation it is possible to uphold the assertion that "ownership" denotes legal facts in both of the premises, without the result of one of the sentences becoming analytical.³⁶ The variant *D'* seems to agree well with remarks

³⁵ On this point I am indebted to Professor Torstein Eckhoff, of the University of Oslo.

³⁶ If the sentence is interpreted like this, viz., as a statement of definition, the objection that the word "ownership" is not eliminated in the new version has no relevance. (Ross touches on this objection in the Danish original of his *Tå-Tå* article (28a), p. 472).

found in Ekelöf and Strahl,³⁷ although these authors are far from clear on this point.³⁸

I now proceed to consider a second argument which Ross invokes in support of his thesis that legal-right terms lack independent semantic reference. We have seen his attempt to defend his position by examining some plausible alternative substitutions and finding them, for some reason or another, to be "unfit." The following argument has a somewhat different character. Ross finds support for his thesis by drawing attention to what we have called the metaphysical fallacy. We speak as if rights were something like substances which are "created," or "transferred," which "entail" legal consequences, are "extinguished," etc.; in other words, we speak as if the right were something which intervened between the legal facts and the consequences. This way of speaking may be misleading. It is hopeless to look for any really existing object which actually intervenes between legal facts and consequences and which, accordingly, could serve as reference for the word "ownership." Any such attempt is doomed to failure. If legal-right terms are conceived as referring to imaginary substances of this kind, we have a typical instance of the thought process called hypostatization.³⁹ Consequently, one must not suppose that these terms really denote what they ostensibly denote. (One might add that such expressions seem to be typical examples of what Ryle has called systematically misleading expressions,⁴⁰ i.e., expressions whose form suggests that they stand for something which it is quite obvious that they do not stand for.)

These observations are clearly of some importance. But they cannot give decisive support for Ross's far more radical thesis. It is one thing to say that "ownership" does not designate what the expression apparently designates. It is another thing to deny that the expression designates anything at all. The gap between legal facts and consequences cannot be filled by some mysterious substance; on this point Ross is evidently right. However, that the terms in

³⁷ See Ekelöf (5), p. 253, p. 256; (7) pp. 155-56 and especially (8), p. 550, where he comments on Ross's criticism. See also Strahl (34) pp. 208-09; (35), pp. 488-89.

³⁸ Some of the obscurity seems to be due to the fact that these authors do not distinguish clearly between analytical statements (tautologies) and statements giving definitions. (This is particularly true of what Ekelöf writes in his last article (8), pp. 550-51.) Definitions are not analytical sentences. The situation is rather this: in order to classify something as an analytical sentence, some sort of definition is presupposed. The following simple example brings this out. (Cf. also ROBINSON [27], p. 29 and pp. 158ff.) "'Bachelor' = 'unmarried male person' Df." is not an analytical sentence, but, for example (interpreted as a descriptive definition), a statement to the effect that the word "bachelor" in the English language is used in the same sense as the expression "unmarried male person." If we assume this definition the following sentence becomes analytical: "If A is the brother of B and A is unmarried, then B has a brother who is a bachelor."

³⁹ Ross (28b), pp. 822-23 and (30), p. 178.

⁴⁰ Ryle (33), especially pp. 13-14.

question do not designate something other than things of this kind remains to be shown. The latter result is no "simple consequence of the fact that the word 'ownership' does not correspond with anything really intervening between conditioning fact and consequence . . ." ⁴¹ Ekelöf has criticized the passage quoted. ^{41a} Nevertheless, we meet similar arguments in Ross's later works. ⁴²

Ross has still one more argument in favor of his thesis that "ownership" is a hollow word. Together, he says, the premises express the more complete legal rule which is stated in the conclusion. ⁴³ However, this operation of thought, namely the leap from fragments to complete rules, can be effected correctly regardless of what "ownership" stands for, indeed even if the word does not stand for anything at all. "For 'ownership' there could be substituted 'old cheese' or 'tû-tû,' and the conclusion would be just as valid." ⁴⁴

This last remark is correct. Nevertheless, it cannot give any conclusive support for Ross's thesis. Ostensibly, the argument has the following form: "If a term *x* in a given inference can be replaced by any other term whatsoever, without spoiling the validity of the argument, this shows that the term *x* has no independent reference." This might seem plausible at first sight, but the "proof" loses all its cogency as soon as we bring to the surface an important assumption upon which Ross's argument is based. It is presupposed that the relevant substitution is performed in every place where the word "ownership" occurs, and with the same substitute in all occurrences. Accordingly, his assertion actually amounts to this: "If a term *x* in an inference can be replaced by any other term whatsoever, without spoiling the validity of the argument, *assuming that the substitution is performed in every place where *x* occurs and in the same way in all occurrences*, then this shows that *x* has no independent reference."

This last contention is obviously untenable. It is possible to replace every term in every correct inference in this fashion, including terms to which everybody would assign independent reference. ⁴⁵ Ekelöf has pointed this out in a criticism of Ross's argument. ⁴⁶ He draws attention to a well-known syllogism:

- (a) Socrates is a human being,
- (b) All human beings are mortal,
- (c) Socrates is mortal.

⁴¹ Ross (28a), p. 479.

^{41a} Ekelöf (8), p. 555, n. 1.

⁴² See, for example (29), p. 535, p. 537. However, in the English version of the *T4-T4* article (28b), the quoted passage is omitted.

⁴³ Ross (28b), p. 823.

⁴⁴ *Id.* at 823.

⁴⁵ See, for example, QUINE (26), p. 99 and pp. 140ff. on this principle.

⁴⁶ Ekelöf (8), pp. 552-53.

Here the term "human being" can be replaced in the same way in both of the premises with any other expression without spoiling the validity of the argument. But this, of course, does not prove that "human being" lacks semantic reference.

In a later article Ross modifies his argument in order to protect it against this objection. He accepts Ekelöf's criticism insofar as the interchange of terms in inferences is concerned. But he introduces a distinction which proposes to demonstrate what is nevertheless an important difference between a mode of reasoning of type D and the Socrates example. D reads: (1) If A has purchased an object, then ownership for A of the object is created. (2) If A has ownership of an object, then he has the right of recovery. (3) If A has purchased an object, then he has the right of recovery. Ross maintains:

The important distinction is this: While (a) + (b) express something different and something more than (c), (1) + (2), on the other hand, express nothing more than (3). Or: While (a) + (b) - (c) constitutes a real inference, in which a particular state of affairs is subsumed under a more general, (1) + (2) is only a verbal rephrasing of (3).⁴⁷

Ross here introduces a distinction between "a real inference" — the Socrates example — and "a mere verbal rephrasing" — D. If I have understood it correctly, this distinction may be reformulated by means of the concepts of implication and equivalence. In the Socrates case we have a deductive relationship between (a) + (b) and (c), i.e., (a) + (b) imply (c); while in the D case we have something stronger than this deductive relation between (1) + (2) and (3), namely a relation of equivalence, i.e., (1) + (2) are equivalent to (3), in such a way that (3) may replace (1) + (2) without "something different" being said.

There is no doubt that the distinction is an important one. I will not involve myself in any detailed examination of the distinction and of the argument based upon it, but in my opinion the amended version of the argument seems to give much stronger support to Ross's position than any of the other arguments presented above.⁴⁸

2. I have now finished my examination of the main arguments presented

⁴⁷ Ross (29), p. 538.

⁴⁸ A more penetrating analysis on this point would lead us far into specialties of logic. Such an analysis should obviously deal with the concept "equivalence" introduced here, together with a closer discussion of the relationship between this concept and Ross's "rephrasing." (Cf. also fn. 19, *supra*.) In general it can be said that the force of Ross's argument is contingent on the following assumption: "Given any sentence (3) and a conjunction of two other sentences (1) and (2); the latter two sentences each contain one occurrence of the term x; this term does not occur in (3), but (3) is nevertheless equivalent to (1) + (2). This kind of equivalence can be found only if the term x lacks semantic reference." It is not evident to me that this assumption is correct. So-called "intervening variables"

by Ross in support of his thesis that legal-right expressions lack independent semantic reference. I suspect that readers may have long since felt that in the absence of any clarification of the fundamental expression "semantic reference" the discussion loses all contact with reality. What, then, does Ross mean by this phrase?

Ross never gives any explicit explanation of what he understands by the semantic reference of a word. (But he has some remarks about the reference of a sentence, see below.) He admits that such an explanation might perhaps have been desirable, but he considers the task a difficult one and hopes that his point is clear enough without a general discussion of the question.⁴⁹ However, in a rejoinder to Ross's first article, Ekelöf maintains that Ross's thesis is in need of somewhat more precision on this point.⁵⁰ The problem Ekelöf takes up is, naturally, couched in Ross's own terminology. This led to the criticism following what I believe to be a somewhat unfortunate line, because of the tendency, noted above, of Ross in his earlier work to identify the "semantic reference" of a word with the "meaning" of the word. Consequently, his main thesis about the absence of a semantic reference had been sometimes given a provocative alternative formulation: The legal-right terms are meaningless! This unhappy terminology led Ekelöf to take up a general discussion of the concept of meaning as applied to an analysis of legal terms.

Fortunately it is not necessary to tackle this gigantic problem in order to take a stand on the actual content of Ross's main thesis. From much of what he says it seems clear that his basic concept corresponds rather closely to familiar categories in the literature of logic and semantics. Where in Ross's terminology we would say a word may have independent "semantic reference," I think that others would say that the word may "designate," "stand for," or "denote" something. The words which have such a denoting function are traditionally called *terms* in a narrow use of this expression. The relation between a term and what the term designates may be elucidated by means

in psychology and in the social sciences (like "trait," "intelligence," "hunger") seem to represent an obvious set of counterinstances. The trouble with such terms is, however, that Ross probably would declare that they are just as void of independent semantic reference as the word "ownership" and other expressions concerning rights in the complex sense within legal language. And indeed the structure of the intervening variables seems to be similar in many respects to that of the legal-right terms. This can be seen quite clearly from the account given by Lazarsfeld (16), pp. 479-84. A final solution of the difficult problems here indicated would probably have to be based on a more detailed examination of Ross's concept of semantic reference than the one presented in the text following. As pointed out by Simpson (33a), pp. 539-40, 552, there is, of course, a sense in which the sentences (1) + (2) "say more" than the sentence (3). But I think that Ross would reply that the greater "cash value" (Simpson, p. 540) of the first two sentences is irrelevant for his theory on the lacking semantic reference of the key-word; although it may have some relevance for the "meaning" of the word, if this term is taken in a broad sense.

⁴⁹ Ross (28a), p. 483 n. 3a (not in (28b)). Cf. further (29), pp. 537-38.

⁵⁰ Ekelöf (8), pp. 547ff.

of the true/false distinction. Admittedly, terms in isolation, e.g., "book," cannot be characterized as either true or false; truth and falsity are attached to certain sentences, not directly to the terms which form parts of sentences. But it is a characteristic of a term that it can be said to be true or false of something. For instance, the term "book" is true of all books, false of everything else.⁵¹ The class of all the objects of which a given term is true, is often called the extension of the term. Schematically we may represent, for example, the term "book" by the expression "x is a book." What objects is such an expression true of? It is true of those objects which are such that, if we put a name or a description of the actual thing for "x" in this expression, we get a true sentence.⁵²

The concepts "true of" and "false of" allow us to explicate what a term "designates" or "denotes." These concepts can also be used to give more precision to what Ross means by "semantic reference."⁵³ According to Ross, he is asserting the following in his main thesis: terms like "ownership," "claim," "mortgage," are not true of anything; and this is so although the sentences in which such words occur, when taken as a whole, have reference to a particular state of affairs, and "nonproper legal sentences" may even be true or false.

There is still another important distinction, though one which is not taken up by Ross. Terms⁵⁴ are traditionally divided into two groups: Absolute terms (e.g., "book") and relative terms (e.g., "lies between," "is the father of"). We may speak of relative terms as true or false of something, but they differ from absolute terms in a characteristic way. What is the nature of this difference, and how can it serve to throw light on the controversy between Ross on the one hand and Ekelöf and Strahl on the other? This last question will be taken up in Part IX.

VII

UP TO NOW I have concentrated almost exclusively on the uses of the legal-right terms in legal inferences. These contexts play a dominant part in the Scandinavian discussion, mainly because of Ekelöf's approach to the problems. However, Ekelöf and the other writers also deal with other context-types, and as the discussion proceeds it takes on the character of a more general

⁵¹ See QUINE (26), pp. 65-66, pp. 90-91, pp. 119-120 on these concepts.

⁵² *Id.* at pp. 90-91.

⁵³ The extensional interpretation here given with respect to *terms* agrees well with Ross's remarks on the semantic reference of *sentences*. His explanation of this latter notion is based on extensional expressions like "true-false," "state of affairs," etc. See (28b), p. 813.

⁵⁴ I have in mind only so-called general terms, i.e., expressions which can be true or false of several objects, as contrasted with singular terms (proper names, definite descriptions).

analysis of legal contexts. In all the writers here considered, answers to questions of definitions, held to be correct with regard to legal inferences, are by and large automatically transferred to legal contexts in general.

Thus Ekelöf holds that in other legal contexts, too, it is correct to say that this same terminology is used in two main senses, sometimes denoting a complex legal fact, sometimes a complex of legal consequences. He also considers other possible designata such as complex legal rules or social facts, but these alternatives are rejected.⁵⁵ Strahl, in setting out to defend his view that "ownership" always denotes legal facts, not legal consequences and not other things, also extends his position to cover fields other than the original inferences.⁵⁶ He does consider the possibility that in some connections the expressions may denote legal consequences. But even then "every legal consequence presupposes a legal fact It therefore leads to no inconvenience if we shift the meaning over to the situation which constitutes the conditioning fact for the given legal consequence."⁵⁷ Ross, in his turn, contends generally that legal-right expressions lack semantic reference; they do not denote anything at all, neither a legal fact, a legal consequence, nor anything else.⁵⁸

It should not surprise us to find this harmony. In other words, we should reasonably expect each author's view on the application of the terms in legal inferences to correspond to his conception of "the notion of right itself."⁵⁹ Taking a look at the various relevant contexts, it becomes immediately clear that they are all closely "connected with" sentences of the type which occur in legal inferences. Consequently, it seems plausible that results valid for these sentences can be transferred to the other contexts. In order to throw some light on this issue, let us inspect some of the other occurrences.

As a starting point, we may consider the four-field diagram which was presented above at the end of Part II. In inferences of type A, B, and C alike, the "right"-terms partly occurred in what we called general legal sentences. And in type D we only meet such sentences. Accordingly, the two upper fields in the diagram should be fairly well covered by the foregoing analysis. Nothing indicates that when words like "ownership" or "claim" occur in general legal sentences, they should be applied differently according to whether the sentences form part of inferences or are considered in isolation. We may conclude that two important areas have already been mapped as

⁵⁵ Ekelöf (5), pp. 261ff.; (7), pp. 166ff.

⁵⁶ Strahl (35), pp. 490ff.

⁵⁷ *Id.* at 500, 502. The quoted passage is far from clear. Moreover, Strahl's presentation sometimes suffers from confusion on the distinction between "*rett*" and "*rettighet*." Cf. Part I, above.

⁵⁸ Ross (28b), pp. 817ff.; (29), pp. 534ff.

⁵⁹ Ekelöf's phrase; cf. at fn. 21, above.

to how such terms are to be conceived in the *legal rules* themselves, i.e., within "proper general legal sentences," and as to the use of the terms within legal science, i.e., in propositions about the rules, or in "nonproper, general legal sentences."⁶⁰

The chief task remaining to us is to examine somewhat more closely the lower part of the diagram, occurrences of the terms in individual legal sentences. Through the analysis of the various inferences A, B and C we have already gained an insight into some of these occurrences. A few of the sentences earlier examined were of the individual type (e.g., "Here there exists a claim" in A and B). In general, it seems clear that whenever individual statements about rights form part of legal arguments, their structure is analogous to the abstract inferences of type D. Take, for example, the argumentation of a lawyer in court, or consider the premises of a judgment. If it is a question of giving grounds for the existence of ownership, for instance, we get a "because-sentence," which corresponds closely to the major premise in inference D ("Smith owns this object, because he has inherited it from his father"). If somebody is to use ownership as the "basis" for certain claims, once more we get a "because-sentence," which in this case corresponds to the minor premise in D ("Smith has the right of recovery versus Jones, because he is the owner of the thing"). It would certainly be very strange if "owns" and "owner" in these cases stood for something other than in the corresponding general sentences.

But let us now consider individual sentences which do not, at least *prima facie*, form part of arguments of this type. Three different cases may be put:

- (1) Brown and Jones are discussing who is the owner of the impressive bungalow near the sea. Brown is convinced that "Smith owns this house." Jones holds that Brown is wrong.
- (2) Brown and Jones are signing a document together, where Brown among other things says: "I hereby declare that from now on Jones shall be the owner of my Opel car reg. no. A-73703."
- (3) A judge is settling a legal dispute between Brown and Jones and pronounces these words: "Jones is the owner of the 'Wild Oaks' manor."

The first of these utterances seems to express a genuine proposition, i.e., a statement which is true or false, according to whether Smith really is the owner of the bungalow or not. The second utterance is obviously not a proposition about somebody being the owner or not. On the contrary, it expresses a declaration to the effect that Jones *shall* become the owner of the

⁶⁰ Ross (28a), pp. 483-84 n. 5 (not in (28b)), explicitly says that the analysis of the general sentences has exactly the same relevance for the doctrinal statements about the rules of law as for these rules themselves.

car. Such declarations become "effective," because of certain general legal sentences about the "creation" of ownership. Jones is from now on owner because Brown says that he shall become the owner. Following Austin,⁶¹ such utterances may be called performatives.

Focusing now on the lower part of our diagram, utterances of the first type apparently belong to the right side, while the performatives can be placed on the left. As to sentences of type (3), the situation is less clear. Such utterances appear as conclusions in judgments. The disagreement between the parties might have been as to whether one or the other was the possessor of certain rights, or whether a given right existed at all. In Scandinavia there has been some discussion of the "nature" of these utterances, that is, the question of whether they ought to be classified as "propositions," "imperatives," or as something else.

Several works by Olivecrona have played a central part in this discussion. This problem has also been taken up by Ekelöf and Strahl.⁶² However, I will not go into any more detail on this point, since it is not, I think, relevant to our theme. Our main problem concerns the definition of words like "ownership." In relation to this problem, I put forward the hypothesis that the result of the analysis will be independent of whether legal-right expressions are considered in declarative, performative, or imperative contexts. It is granted that the sentences in which the terms occur can be held to have different functions in these three cases. But these different functions seem to be immaterial to the question of whether the terms denote anything and, if they do, what.⁶³

Even with respect to these individual sentences, it seems as if the analysis will lead to the same result as with inferences of type D. Every one of these utterances must be seen against the background of certain general sentences in the following sense: The statement in case (1) is true or false according to whether it is correct to apply certain general rules to Smith.⁶⁴ What rules? Obviously those rules in which terms like "ownership" or "owner" occur, that is, sentences of the type which enter into D.⁶⁵ The declaration in case (2) is neither true nor false. It becomes "effective" because certain general

⁶¹ AUSTIN (4), pp. 220ff. Cf. Olivecrona's view, *infra*, fn. 95.

⁶² Strahl (35), pp. 486-88, pp. 500-02; Ekelöf (7), pp. 156-59, pp. 159-60.

⁶³ I would like to interpose a remark here. It seems obvious to me that a term might very well designate something, in the sense of being true of something, even though the term occurs in a sentence which is not true or false but, for example, an imperative. Moreover, nobody would assert that, for instance, the term "horse" stands for something different in the sentence "Bring me a horse!" than in the sentence "There is a horse in the garden." Cf. AHLANDER (1), p. 101, on the point here indicated. I return to some of these observations below, where Olivecrona's view is examined.

⁶⁴ Cf. *infra*, Part IX, 4.

⁶⁵ *Infra*, at fn. 90.

rules about the "creation" of "ownership" can be applied to Brown's utterance. Further, due to this declaration, certain rules are hereafter applicable to Jones, rules in which the ownership terms occur as part. As I remarked earlier, it is a matter of controversy whether sentence (3) uttered by the judge can be true or false. However, it is perfectly clear that we may ask whether it is correct of the judge to utter such a sentence. Again the answer is yes or no, according to whether certain general rules about ownership can be applied to Jones or not. Similarly with the declaration in case (2): because of the utterance from the judge, certain rules about ownership may hereafter be applied to Jones and the manor "Wild Oaks"; and this is so regardless of whether it was "not correct" to apply these rules to Jones before the judge's declaration.

Due to the close relationship between general and individual sentences involving rights, it seems plausible that the solution of the problem of definition must be the same in all cases. In saying this, I do not want to hold that there is no ambiguity in the use of legal-right expressions within legal language. It is still possible that these expressions are ambiguous, as Ekelöf's view suggests. What I regard as likely, however, is that the question of definition will have to be answered in the same way whether the contexts considered consist of general or individual legal sentences. The answer, moreover, seems to be independent of whether the sentences have declarative, performative, imperative, or other "functions." If one believes that the word "ownership" is ambiguous in one type of context, it is probable that one will arrive at the same results in other connections. If one thinks, as Ross does, that the word is "hollow" in inferences of type D, it will be natural to regard the word just as hollow in other legal contexts.

I find that the correctness of these observations is well illustrated by the authors in the Scandinavian discussion. As an example we may consider Ross's analysis. He explicitly discusses individual statements about this or that person being the owner of this or that object.⁶⁶ He holds that even in sentences of the type "A is the owner of x" or "A has ownership of x," the terms "owner" and "ownership" lack independent semantic reference. This is so although the sentence taken as a whole by no means lacks reference and indeed in this case can even be true or false.⁶⁷

⁶⁶ Ross (28b), p. 822; cf. p. 814.

⁶⁷ Ross ([28b], p. 814; cf. p. 822) holds that this sentence, taken as a whole, refers to "two states of affairs"; partly that there exists one of those legal facts which are said to establish ownership; partly that A can obtain recovery, use the particular object more or less as he wants, sell it to a third person, etc.—thus what Ekelöf calls the complex of legal consequences connected with ownership. (As far as I can see, this concept of Ekelöf's corresponds to that which is called the "incidents of ownership" in Anglo-American terminology. Cf., for example, Honoré (14), pp. 112ff.)

VIII

UP TO NOW I have considered mainly the contributions to the Scandinavian discussion by Ekelöf, Strahl, and Ross. As I indicated earlier, this discussion has its deeper roots. In particular, important lines of thought show the unmistakable influence of the Swedish philosopher Axel Hägerström.⁶⁸ In a single article, however, I cannot comment on all the various contributions.⁶⁹

The last participant in the discussion whose contribution I wish to examine, is Karl Olivecrona, who has dealt with the question of the nature of legal rights at several places in his works. The clearest and most comprehensive treatment is to be found in his book written in Swedish in 1960, *Rätt och dom* (23) ("Legal Right and Judgment").⁷⁰ Like Ekelöf, Ross and Strahl, Olivecrona's work aims mainly at clarifying the actual use of the terms in legal contexts. His treatment has a very general reference, and to illustrate his leading ideas he takes a great variety of legal contexts into account. There are special sections on the functions of "rights" terminology in "general communication," within legislation, and in the application of law by the courts.

Olivecrona distinguishes sharply between two main problems: (1) First, one may ask for the meaning of terms like "ownership," "claim," etc. In the

⁶⁸ Cf. *supra* at fn. 24, *infra* at fn. 74.

⁶⁹ In addition to some other contributions from the authors examined, we may particularly mention AHLANDER (1), pp. 144 ff., WEDBERG (37) pp. 261 ff., and ARNHOLM (3), first part. Wedberg, who is a philosopher by profession, brought many new and stimulating aspects into the discussion. Among other things he focuses on one particular problem which is especially well chosen for throwing light upon some important characteristics of legal concepts: Let us assume that we eliminate words like "ownership," etc., by means of a substitution method. Following, for instance, Ross's version, we take two fragments together and substitute for them one (more) complete legal sentence. Thus the two sentences "If A has purchased an object, then ownership for A of the object is created" and "If A has ownership of an object, then he has the right of recovery" will be interchanged for the (more) complete sentence "If A has purchased an object, then he has the right of recovery." In this new sentence the term "ownership" is eliminated. However, if we try to make this sentence somewhat more precise, will not the notorious word "ownership" turn up again? The sentence we consider is clearly far from "complete" in its present form. For one thing, the proviso about A having "purchased" the object has to be elaborated, roughly along the following lines: "If A has entered into a contract of purchase with B, who at this time had ownership of the object . . . and . . ." Thus, when attempting to describe more closely the legal facts which "create" ownership, the word "ownership" quickly reappears. This new occurrence can, of course, be eliminated anew through a repeated substitution. But again, if we want to make the result more precise, the notorious word enters the arena once more. In this way, are we not led to an infinite regress? Wedberg answers no. He holds that the apparently infinite regress can be terminated through a particular recursive method of definition. The problem certainly deserves closer examination; however, because it falls somewhat outside the range of subjects included in this survey, I refrain from any further discussion on this point.

⁷⁰ Olivecrona's earlier presentation can be found in his work *LAW AS FACT* (1939) (20). In 1966 Olivecrona issued a new major work in jurisprudence entitled *RÄTTSORDNINGEN* ["The Order of Law"] (25). This includes a section on legal concepts, particularly the concepts of right, as well as a section on legal language. See also his essay from 1962, "Legal Language and Reality" (24). A comment on Olivecrona's view in *Rätt och Dom*, written in English, has been given by ARNHOLM (2).

terminology which I prefer, this is the problem of definition.⁷¹ It is this question, or rather a special part of it, which has occupied us in the preceding parts of this paper. It is to this part of Olivecrona's theory that we will give special attention. (2) The question of definition must be kept apart from another problem, namely the examination of the functions of the terms in various fields: "This is a question of causal relations."⁷² Here the task is to investigate the various effects, or functions, which the actual use of the terms has in different areas. Olivecrona discusses the question of functions more extensively than the question of meaning. In particular, he examines the following three types of functions. First, statements like "A is the owner of x" have a *directive* function; these bring about the effect that other persons actually keep away from x, so that x comes to be considered as an area reserved for A. The word "owner" functions as a sign of prohibition for others than A, in a way similar to red traffic lights. For A himself the term functions as a green light, as permission within certain limits to do what he likes with x. Secondly, sentences about rights can have an *informative* function. We acquire a certain piece of information when we come to know that A is the owner of x; in addition, our course of action may or may not be influenced by this statement. Thirdly, there is a *technical* function of the terms, e.g., in the formulation of statutes.⁷³

Olivecrona draws a dividing line between the problem of meaning and the problem of function, but in his actual treatment of these questions there is a close relationship between them. He first advances a theory about the meaning of the terms, and then he asks whether the various given functions of the term can be explained in a satisfactory manner, if the correctness of his particular theory of meaning is assumed. The answer is affirmative, and this answer is taken as support for the solution of the first problem.

In order to give the proper background for an examination of Olivecrona's theory, it is necessary to make some brief remarks on the most important basis for his thesis — the criticism of the concept of rights developed by the Swedish philosopher Axel Hägerström (1868-1939).⁷⁴ One of Hägerström's main

⁷¹ Cf. Part I, above.

⁷² (23), p. 102.

⁷³ Cf. *supra* at fn. 34.

⁷⁴ Hägerström's works are the most important source of inspiration for the so-called Uppsala school in Swedish philosophy. The critical works of this school on basic ethical and legal concepts, as well as its strong antimetaphysical outlook, have had a notable influence on most of the writers belonging to "Scandinavian realism" in jurisprudence. Hägerström's criticism of the concept of right is spread over several works. Two of the most important ones are available in English in the collection *INQUIRIES INTO THE NATURE OF LAW AND MORALS* (15). His criticism was developed in a radical direction by his disciple Vilhelm Lundstedt. In his latest works Lundstedt is inclined to ban all use of terms referring to rights in serious legal discourse. See particularly his presentation in the posthumous work

points was to demonstrate that legal-right terms do not refer to anything factual. He examined several attempts to identify the rights with something factual and rejected them all. Thus the right of ownership is not identical with the fact that the owner can normally enjoy his property alone, undisturbed by others; nor can a person's ownership be identified with his actual chances of proving and maintaining his position to the authorities of state, the courts, and the executive officials. In this respect, Hägerström's criticism was directed towards what we called the sociological fallacy.⁷⁵

As to the ideas people have about rights, these are often, according to Hägerström, associated with some supernatural power. This power, or force, does not exist in real life; the belief in such mysterious powers which are "created" by certain legal facts and "constitute" certain legal consequences, and the belief that terms referring to rights designate these supernatural powers, are what we referred to above as the metaphysical fallacy.⁷⁶ According to this analysis, people form in their minds the idea of something which does not exist, a force of some kind. The object of this vague idea is obscure and difficult to describe — obscure to such an extent, indeed, that Hägerström and Olivecrona conclude that the idea itself does not really exist either, at least as a genuine idea. We have an idea about the word "ownership," but no genuine idea about the right itself.

Olivecrona holds that Hägerström's criticism has an important bearing on the problem of the meaning of legal-right terms; it shows that expressions like "ownership" or "claim" are hollow words which denote nothing. Alternatively, the terms do not express any "genuine concept,"⁷⁷ or do not express any "idea."⁷⁸ In this view, Olivecrona's doctrine is parallel to that of Ross. They are both of the opinion that the term "ownership" has no denotation whatsoever, is a hollow word, or lacks "semantic reference."⁷⁹

Olivecrona, however, takes a far more radical step. While Ross holds that the sentences in which the expressions occur have semantic reference, Olivecrona holds that the sentences must meet the same fate as the words. Even a sentence like "A is the owner of x," which is ostensibly informative, does

LEGAL THINKING REVISED (17), pp. 16-17ff., pp. 77ff. (1956). Olivecrona has given a survey of Hägerström's and Lundstedt's criticism (22), written in English. See also (24), pp. 160-67.

⁷⁵ Cf. *supra*, Part VI.

⁷⁶ *Id.* Part VI.

⁷⁷ (23), p. 91 n. 3.

⁷⁸ *Id.* at 97, 101-02. As already mentioned (note 24) Olivecrona, contrary to the other writers we have examined, does not distinguish sharply between the question of what expressions referring to rights designate and the question of what kind of "ideas" people associate with the terms. Personally I think this weakens his presentation.

⁷⁹ Olivecrona holds that Ross does not develop his position with due consistency. The details of his (in my opinion untenable) criticism are omitted here.

not convey any direct information; and the sentence is neither true nor false.⁸⁰ Olivecrona is more "consistent" than Ross. Nevertheless, the consequences Olivecrona draws for sentences are so peculiar that it is hard not to suspect something wrong. I do not want to contest that a word like "ownership" may occur in sentences which are neither true nor false. That such words may should be clear from what I have said above. The point is duly emphasized by Olivecrona, and is not, of course, denied by Ross. It is sufficient to note the occurrences of the words in the rules of law themselves, and in those individual legal sentences which are performative (e.g., contracts) or imperative (e.g., judgments). But, naturally, this kind of occurrence is not peculiar to legal-right terms. Moreover, Olivecrona's view is much more extreme: he explicitly discusses the sentence "A is the owner of x" in such contexts, for example, as a disagreement as to who owns a certain house.⁸¹ In his view even this sentence has no truth value; it cannot be true or false.

Intuitively one is tempted to exclaim: Surely a proposition stating that a person owns a thing is true or false! Surely it is true that I am the owner of the watch on my wrist! Surely it is false that my friend John owns it! Indeed it quickly becomes apparent that Olivecrona involves himself in several unnecessary difficulties. He naturally acknowledges that we acquire information through the sentence "A is the owner of x"; sentences referring to rights frequently have what he calls an informative function. For Olivecrona the trouble starts when he sets out to "explain" this informative function; for he holds, after all, that the sentence does not express any genuine proposition. He "solves" the dilemma through an explanation which is at best artificial. He says that when we come to know that A is the owner of x, we do not receive any direct information about anything; on the other hand, we receive some indirect information, because we can infer that certain states of affairs exist, or that they probably exist. Thus we may infer that one of the legal facts relevant to the creation of ownership obtains in relation to A, but the sentences do not directly refer to any of these facts, nor to a disjunctive collection of them. Moreover, we may infer that it is very likely that in certain ways x is actually at A's disposal, but the sentences do not directly refer to any of these actual possibilities. In order to be able to draw such "in-

⁸⁰ (23), pp. 107-08; (24), p. 187.

⁸¹ Occasionally one gets the impression that Olivecrona considers this sentence as a sort of imperative, in spite of its indicative form. Thus he ascribes to such sentences two attributes, which are characteristic of imperatives: (1) they regularly have a directive function; (2) moreover, they do not express any proposition about a certain state of affairs—they are neither true nor false. It is thus hardly surprising that one finds Olivecrona's view represented as a sort of "imperativistic" doctrine in the discussion on right. Cf., for example, ARNHOLM (3), pp. 18-20; (2), p. 12. In my opinion, this interpretation has no clear support in Olivecrona's writings. Thus he explicitly admits that the attribute (1) is frequently of little or no importance. Cf., for example, (24), p. 185, p. 188.

ferences," the statements about rights must be used in a regular way, more specifically "in coherence with the rules of law."⁸²

This doctrine on indirect informative function is developed further in a complicated and often obscure fashion. A detailed criticism of Olivecrona's position would lead too far into basic problems of semantics.⁸³ However, I shall attempt to show that a far simpler analysis of terms referring to rights may be found, which at the same time takes into consideration the various illuminating observations to be found in Olivecrona's discussion.

IX

1. FROM MY account of Ross's and Olivecrona's position, it should be clear that there is one central point of view to which these authors return: Suppose that we go out into the world and search high and low for objects which legal-right terms can be said to designate. We will never find any such objects; one possibility after the other will have to be rejected. "Ownership" does not denote the actual position of control which an owner normally enjoys, nor the special psychological attitudes which people regularly have toward the owner, nor any metaphysical "force" created by so-called legal facts and constituting so-called legal consequences, nor the complex of those very legal facts or consequences. In the actual use of language, the terms in question are simply not true of any of these objects, nor true of any other objects in the world. In other words, there is no object *x* which is such that the sentence "*x* is a legal right" can be true.

As I see it, there are two possible ways of explaining why the sentence "*x* is a legal right" never can be true. The first explanation leads to the now familiar conclusion that legal-right terms denote nothing at all, that they are "hollow" words. The second explanation is simply this: the sentence "*x* is a legal right" is never true because the legal-right expressions do not represent absolute terms, i.e., terms which are true of single objects. On the contrary, the legal-right expressions are to be conceived as relative terms, terms which are true not of single objects, but of several objects, pairwise, triplewise, quadruplewise.⁸⁴ What characterizes a relative term is precisely this: that it is true of several objects at a time. For instance the relation of larger-than

⁸² (23) p. 114, p. 116; (24), p. 187.

⁸³ In his essay from 1962 (24) we find a more general presentation of Olivecrona's views on the nature of legal language (cf. also [25], pp. 214 ff.). His doctrine about terms referring to rights is further elucidated through some remarks on words which stand for monetary units—"dollar," "pound," etc. In his book from 1960 the author informs us that he arrived at his treatment of the legal-right terms through a study of such expressions. Cf. *THE PROBLEM OF THE MONETARY UNIT* (21).

⁸⁴ Cf. QUINE (26), pp. 119-20.

is expressed by means of the relative term "larger than," and this term is true of objects pairwise. In addition we have three-place relations, such as lies-between, four-place, five-place relations, and so on.⁸⁵

It is at best misleading to insist that relative terms do not denote anything. Thus a relative two-place term can be expressed by a formula with two variables. The term "larger than" can be expressed by the formula "x is larger than y." The term itself, as well as this expression, is true of a number of pairs. Thus it is true of the Norwegian capital and the most northerly town in the world. If we want to find out whether a term is true of a given pair, the procedure is to use a name or description for both of the objects which constitute the pair, and then to insert the names for the two variables in the relational expression.⁸⁶ The term in question is true of the particular pair whenever the outcome of this process is a true sentence, as in the example above where the sentence is "Oslo is larger than Hammerfest." If a relative term is true of an ordered pair in this sense, it is natural to say that the term denotes this pair. The extension of the given relative term is the class of all the ordered pairs of which the term is true.

Turning now to legal-right expressions, it seems obvious against the background of the actual use of language that they are to be classified as relative terms. For that reason alone it is plain that any attempt to detect a single object which "ownership" denotes is doomed to failure. I agree with Ross and Olivecrona that these expressions are misleading, insofar as the contexts in which they occur suggest that such objects can be found. Thus lawyers, and others, express themselves as if a right of ownership were a certain object which is created, transferred to a new possessor, or extinguished. The expressions maintain an illusion, and it is important to lay bare the deceptiveness of this way of speaking. But the remedy is not to declare that the terms are "hollow" words. There is the third alternative, which I believe to be true, that expressions like "ownership" or "claim" are disguised relative terms. They stand for relations and may always be rephrased in such a way as to clearly demonstrate this. Suppose one comes across a general legal sentence of this type: "If a lawful purchase has been performed, then ownership is created." This sentence is, of course, to be understood as short for: "If a person, A, has lawfully purchased an object, then A acquires ownership of the object." Similarly, that a "claim" exists, always means that a person A has a claim against another person B. In every case the term referring to a right can be reformulated by expressions such as "x has ownership of y," "x is the

⁸⁵ Thus relative terms are true of pairs (triples, quadruples, etc.)—more specifically, of *ordered* pairs. A pair of objects x, y is ordered if it can be distinguished from the pair y, x.

⁸⁶ In ordered series, cf. fn. 85.

owner of y," "x has a claim against z." These expressions are true of pairs of objects: a certain person and a certain thing, two persons, and so on. It is just these particular pairs that they denote.

2. These observations are somewhat trivial. However, they contribute to the explanation of why, in the history of jurisprudence, the hunt for denotata for legal-right terms has caused so much trouble. Naturally, as yet the analysis is by no means complete; indeed it has barely begun. In a review of Ahlander's *Är juridiken en vetenskap?* Wedberg puts it in this way: to point out that the expressions in question are relative terms "is not to give a definition, but at the most a prescription for how a definition is to be made, or — perhaps better — this is just a prescription for the making of prescriptions for definitions."⁸⁷

We must certainly go on and inquire more closely into the nature of the relation expressed by these terms. What are the characteristics of this relation? In order to elucidate this question we may ask under what conditions, for example, the sentence "A is the owner of x" is true. Examining truth-conditions for whole sentences where the words "ownership" or "owner" occur, may thus be regarded as one particular method of definition. In this way the legal-right word is given what is often called an "implicit" or "contextual" definition. As stressed by Hart, this method may frequently be the only one available for definitions of certain legal words and phrases.⁸⁸

Ross's and Olivecrona's observations are also of great interest as to the relations expressed by such terms. Olivecrona, following Hägerström, stresses that the terms do not denote anything *factual*. This statement might be given at least three interpretations:

- 1) The terms do not denote single objects (IX, 1, *supra*).
- 2) The terms do not denote anything at all (Ross, Olivecrona).
- 3) If the terms are conceived as standing for relations between objects, this relation is at any rate not purely factual.

Olivecrona explicitly points out that the terms do not stand for purely factual relations: For A to be the owner of a given property, it is not a condition that he physically possess the property or that he have some other actual control over it. For A to have a claim against B, it is not necessary that A can subject B to some sort of effective compulsion. The terms do not stand for anything "purely" factual, in the sense that the application of the expressions presupposes a reference to a system of legal rules. In order to decide whether

⁸⁷ Wedberg (38), p. 126.

⁸⁸ HART (9), pp. 8ff.

the sentence "A is the owner of x" is true, one must always bring in certain legal rules.

This last point is essential. Our most frequent use of individual legal sentences involving rights is in order to draw a particular conclusion of law.⁸⁹ These sentences will be true if and only if the reference to the rules is correct — in other words, if the sentence expresses a correct statement about the application of certain rules to the person A and the object x. To what rules do such statements refer? Obviously to just those general sentences of law which contain the words "ownership," "owner" or the like.⁹⁰

We may say appropriately, then, that individual legal sentences are formulated "against the background of" presupposed rules. In order to check whether the given statement is true, it is necessary to ask if the conditions for the application of the particular rules are satisfied. For example, one is led to investigate whether A has "purchased" or "inherited" x. At this stage it is relevant to find out whether certain "factual" events have taken place or not. But this is something different from the contention that "ownership" denotes these facts. On this point I fully agree with Ross.

3. To find out what relation "... is the owner of ..." stands for, we must discover the truth-conditions for the corresponding individual legal sentence, e.g., the sentence "A is the owner of x." This sentence is true if certain general rules exist and can be applied correctly to A and x. By reference to those rules we can then arrive at a contextual definition of "... is owner of ..." As Hart says, this procedure should be considered the normal method of definition in these cases.

But what about the occurrences of legal-right terms in the general legal sentences themselves, for example, in the sentence "If A has purchased an object, then ownership of the object is created for A"? Here, too, it seems as if we must be content with a contextual definition. For these sentences Ekelöf tried to find a substitute for the word "ownership," taken in isolation, without ruining its "legal functions." I agree with Ross when he points out that this task was hopeless. What we can do instead is to take several sentences in which "ownership" occurs. We can then treat them as fragments and form a new and more complete legal sentence in which the term is eliminated. But the fact that we have to use such a contextual method of definition by no

⁸⁹ Cf. *id.* at 14-17. Honoré (14), p. 136, says: "... modes of acquisition [i.e., of ownership], original and derivative, are many and various; one of the functions of expressions such as 'he is owner' is precisely to draw similar legal conclusions from varying states of fact." Then he, most surprisingly, adds a note wherein he remarks: "This is overlooked by A. Ross, *Tû-Tû* (1956-7), 70 HARV. L. R. 812." This remark certainly leads one to suspect that Ross has been seriously misunderstood by some of his Anglo-American readers.

⁹⁰ Cf. *supra* at fn. 65.

means shows that the terms in question lack semantic reference. Here we can draw a parallel between law and other fields. Even outside legal language it is well known that one may elucidate what a particular term "stands for" by considering several of the sentences in which the term occurs. Take, for instance, many of the so-called "theoretical terms" in physics ("mass," "electron," etc.). There was a time when the view that some of these terms lacked reference had strong advocates, while today, as far as I can understand, the general opinion is otherwise.⁹¹

4. The account I have given in this section has taken for granted that there are conditions under which "A is the owner of x" is true. But, as noted, Olivecrona rejects even this fundamental assumption,⁹² and I have remarked critically upon it.⁹³ Olivecrona himself makes a distinction which helps to clarify his position further. We are told to distinguish between the question of truth on the one hand and the question of accordance with certain rules of law on the other.⁹⁴ The fact that the sentence "A is the owner of x" may be uttered in accordance with a system of rules does not, in Olivecrona's view, mean that it can be true or false; it does not mean that it refers to any "state of affairs."

But what is wrong with the "state of affairs" that certain rules can be correctly applied to A and x? Let it be admitted that the application of rules in certain cases may cause doubt. In most of the cases it is fairly simple to judge whether the rules can correctly be applied to A or not. According to the outcome of this judgment, it seems appropriate to declare "A is the owner of x" true or false, respectively.

A position such as Olivecrona's manifestly runs contrary to our intuitions to such an extent that one is tempted to ask for supplementary explanations of why he has been led to hold his peculiar thesis. Olivecrona's general view on the nature of legal language is clearly one important factor. According to this view, a considerable proportion of legal sentences are to be conceived as performatives or other imperatives.⁹⁵ Sentences so classified cannot be true or false. On the other hand, he seems to admit that "A is the owner of x" can be used in "neutral" situations, that is, situations where the directive aspect of this utterance is quite insignificant.⁹⁶

I believe that Olivecrona's stress on the important nondescriptive func-

⁹¹ Cf. HEMPEL (12), pp. 79-82.

⁹² See, for example, (24), p. 187; (23), p. 107, p. 113.

⁹³ *Supra* at fn. 80-83.

⁹⁴ See, for example, (24), p. 188.

⁹⁵ The author uses the expression "performative" in a sense somewhat different from Austin's. For Olivecrona, the performatives become a sort of *imperatives*. The latter term is taken in a very wide sense. See (25), pp. 118-40 and pp. 233-54.

⁹⁶ Cf. *supra* fn. 81.

tions of many legal sentences is of great value. However, it appears as if he attached too little importance to a distinction I have mentioned several times before, the distinction between proper and nonproper norms.⁹⁷ In some way or another every legal sentence "relates to" rules of law. These rules can be regarded as norms proper. This does not imply, however, that every legal sentence expresses a general or individual norm. Some of these sentences, rather, have the status of statements about certain norms; they state that certain norms exist or that they can be applied correctly in a concrete case. Sentences of this type will most naturally be conceived as either true or false. If one keeps this distinction clear, it is difficult to adopt Olivecrona's position that every sentence concerned with rights lacks a truth-value.⁹⁸

In my view, sentences like "A is the owner of x" can frequently be interpreted as true or false statements to the effect that certain rules of law can correctly be applied to A and x.⁹⁹ It must be added that a more precise formulation of the truth-conditions for this statement would obviously involve us in the general problem of giving criteria for the "correct" application of a rule. This latter problem, familiar as one of the basic controversies of jurisprudence, cannot be dealt with here. Following Ross,¹⁰⁰ I would just stress this: the view that every individual sentence concerning rights lacks descriptive content clearly has enormous consequences. Among other things, it follows from this position that even theoretical statements within "legal science" about existing rules and their application are to be judged in the same way.

⁹⁷ *Supra* in Part II. As mentioned, this distinction is relevant also in connection with the individual sentences. Thus the sentence "A is the owner of x" should frequently be put in the lower right part of our four-field diagram in Part II, not in the left part.

⁹⁸ In a review of Olivecrona's latest work from 1966 (25), Ross (32), pp. 299-301, puts forward the hypothesis that one important reason which explains why Olivecrona adopts his particular position is negligence of this distinction (which Ross here calls the difference between "norm-expressive" and "norm-descriptive" talk).

⁹⁹ Cf. Hart's position (9), sec. II and III.

¹⁰⁰ Ross (32), p. 301.