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Values, Rights and Duties in Legal and Philosophical Discourse

Edited by

Christian Dahlman / Werner Krawietz

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HUMAN RIGHTS AND THE PHILOSOPHY OF LAW

Address at the Inauguration of the 21st IVR World Congress,
Lund, Sweden, 12 August 2003

By Stig Strömholm, Uppsala

If you are entrusted with the honourable task of giving one of the three introductory addresses on an occasion of this importance and dignity, you tend to be beset with the laudable ambition of trying, certainly not to cover, or even to summarize, but at least to give a glimpse of, the intellectual domains that will be ploughed and sown in the next few days, were it only by quick references and allusions to a selection of topics – allusions which are comprehensible at least to the few experts immediately involved and hopefully convey to them that feeling of being looked forward to which is not the least allurement by which active participants are attracted at international congresses. Alas, when considering the wealth, and breadth, of subjects proposed for discussion at the congress, that ambition is likely to be unrealistic. When pondering upon the possibility of realising it, an anecdote came to my mind: although the popular habit of telling anecdotes in serious contexts – 'cracking jokes' as it is called in some circles – is a cheap and despicable habit, I beg your leave to tell it. A rising but still young and unknown conductor had been invited to lead the Vienna Symphony Orchestra at a prestigious concert, and a local enthusiast put the question to an elderly member of the orchestra: 'What is he going to conduct?' – 'I have not the faintest idea, but we are going to play Beethoven's third symphony.'

This answer would seem to illustrate with brutal sincerity the impossibility of even referring, even by quick allusions, even to a small selection of the topics to be discussed. So you have to abandon any introductory conductory ambition and simply play your own fiddle.

The place where we are meeting today and the next few days is well chosen for our purpose, for it is rich in memories – and indeed not only in memories, but also in ongoing activities – related both to human rights and to the philosophy of law. Three hundred and thirty-six years ago, Samuel Pufendorf received from the King of Sweden the letters patent appointing him *professor iuris prudentiae primarius* in the new-

founded university of Lund, and it was here that he wrote and published, in 1672, his great treaty *De iure naturae et gentium libri VIII,* followed, one year later, by the shorter textbook *De officiis hominis et civis.* Many distinguished lawyers have taught, and written, in the law faculty of Lund in the course of the centuries which have passed since it was founded, but I shall dwell only on one of Pufendorf's successors, who is likely to have been, in his days, the most influential or at least the best-known, jurisprudential writer among them, both in a national and in an international perspective. That is Carl Olivecrona, who came from Uppsala, was appointed professor of procedural law in Lund in 1933, retired in 1964, and died in 1980. He was a prolific writer in several fields of legal science, but the publications which are of particular interest in the present context are his jurisprudential works. The first important one is *Law as Fact,* 1939, to which corresponds a Swedish version, published shortly afterwards. In 1966 he published, in Swedish, the book *Rättsordningen,* and in 1971 an English version, being at the same time an enlarged new edition of *Law as Fact* and also bearing that name.

Pufendorf's relevance for the history of legal philosophy cannot be questioned; he was one of the most influential of the great writers belonging to the movement commonly referred to as the classical, or the rationalistic, natural law school. He belonged to the generation following upon that of Hugo Grotius, and his works, in particular the shorter book, *De officiis,* would seem to be the most widely read textbook of its kind, at least in the Protestant parts of Europe. He was highly efficient and successful in developing to a high degree of precision and sophistication the method of analysing legal systems in terms of individual rights and duties; through that contribution to legal science he belongs to the forebears both of the human rights advocates of the Enlightenment, and of the systematizing German 18th and 19th century lawyers whose work determined the intellectual structure of the *Bürgerliches Gesetzbuch.*

There is no reason to believe that Pufendorf, any more than Grotius, doubted that God is the ultimate source of law, whether revealed by the Scriptures or by Nature. That last term means, in this context, something instilled, as it were, by nature, which is after all God's creation, into the minds of men, and thus part of their right reason. However, for motives which we do not really know but which can hardly have been completely unconnected with the growing intellectual confidence of scholars and more particularly of scientists in the late 17th century, and the concomitant growing irritation with the claims of theologians, Pufendorf tried to justify and give legitimacy to a concept of law which was 'natural' and 'rational' in as much as it was entirely based upon human reason, and which consequently, in its operation, did without the author-

ity of God's will and divine commands, as revealed in the Scriptures. The system of rules, organized whenever possible in the form of rights and duties, which Pufendorf thus built was a structure not in opposition, but in independent juxtaposition, to the realm of law revealed in the Scriptures and the precepts derived from moral theology.

Olivecrona's thinking is a continuation and development of what is called the Uppsala school or, as part of a broader spectrum of ideas, 'Scandinavian realism'. He competed for the position as the international figurehead of that movement with his contemporary, colleague, and adversary on the other side of the Sund, Alf Ross, of Copenhagen. I remember vividly being present, as a very young professor of jurisprudence in Uppsala, at a congress where these two then quite old, truly eminent and world-famous scholars met in a discussion which revealed both the close similarity between their ideas on the subject under consideration and their firm resolution not to recognize it. I left the congress convinced that being a great legal philosopher does not inevitably mean being a great philosopher in the Socratic sense, a sage.

Now, Olivecrona sets out to give to law, – as it obviously functioned in an occidental society at about the middle of the last century and on the whole still functions in that kind of community – a foundation and an explanation which do without not only God's revelation and a nature endowed with reason from its creation, but also the idea that the precepts of law are the expression of a will, as was supposed, knowingly or unknowingly, by the various schools of positivism which had supplanted natural law thinking as mainstream jurisprudence in the early decades of the 19th century and which still flourished at least at the time when the Uppsala school started its attacks on traditional jurisprudence, i.e. the first two or three decades of the 20th century. In many quarters positivism in one version or another prevailed much longer – it probably still prevails today as the bread-and-butter doctrine of practitioners. Olivecrona obviously treats Pufendorf's view of law as a historic phenomenon, as *überwunden,* as the German term goes, and consequently not as a contemporary erroneous theory that has to be criticized and overthrown. In the book *Rättsordningen* he presents a well-informed and nonpolemic interpretation of Pufendorf's most important ideas. One of the obvious reasons why he can refrain from criticism is that Olivecrona has moved away from what was an almost fanatically held creed of the early realists – the refusal to accept the notion of rights. Pufendorf, as just stated, has probably done more than any other writer to give that notion a key position both as a substantial element of any body of legal rules and as the foremost tool by means of which that body can be organized into a coherent structure, a system. In his later writing, Olivecrona accepts the