Law and Philosophy Library 108

Torben Spaak

A Critical Appraisal of Karl Olivecrona's Legal Philosophy

Springer

Law and Philosophy Library

Volume 108

The Law and Philosophy Library, which has been in existence since 1985, aims to publish cutting edge works in the philosophy of law, and has a special history of publishing books that focus on legal reasoning and argumentation, including those that may involve somewhat formal methodologies. The series has published numerous important books on law and logic, law and artificial intelligence, law and language, and law and rhetoric. While continuing to stress these areas, the series has more recently expanded to include books on the intersection between law and the Continental philosophical tradition, consistent with the traditional openness of the series to books in the Continental jurisprudential tradition. The series is proud of the geographic diversity of its authors, and many have come from Latin America, Spain, Italy, the Netherlands, Germany, and Eastern Europe, as well, more obviously for an English-language series, from the United Kingdom, the United States, Australia, and Canada.

More information about this series at http://www.springer.com/series/6210

Torben Spaak

A Critical Appraisal of Karl Olivecrona's Legal Philosophy

Springer

Torben Spaak
Department of Law
Stockholm University
Stockholm
Sweden

ISSN 1572-4395 ISSN 2215-0315 (electronic)
ISBN 978-3-319-06166-5 ISBN 978-3-319-06167-2 (eBook)
DOI 10.1007/978-3-319-06167-2
Springer Cham Heidelberg New York Dordrecht London

Library of Congress Control Number: 2014939450

Printed on acid-free paper

Springer is part of Springer Science+Business Media (www.springer.com)

Preface

It was Stanley Paulson who suggested that I take a closer look at Karl Olivecrona's legal philosophy, and I would like to thank him very much for doing that. At the time I did not realize that writing a monograph on Olivecrona's legal philosophy could be so rewarding, or that such a monograph could be of interest to the international community of jurisprudents. But over the past few years, I have learned that Paulson knew what he was talking about. In addition, my work on Olivecrona's legal philosophy has given me the opportunity to pay more attention to the legal-philosophical work done by Swedish and other Scandinavian jurisprudents and legal scholars than I have previously done, and this, too, has been rewarding. Many times the quality of Scandinavian legal philosophy is impressive, and one can only deplore that so little of it is available in English, or German, or some other world language.

I could not, of course, have written this book without the help from my colleagues in Uppsala and elsewhere, and this means that there are a number of people whose help I would like to acknowledge. To begin with, I would like to thank the participants in the advanced seminar in jurisprudence at the Department of Law, Uppsala University: Anders Fogelklou Åke Frändberg, Minna Gräns, Cyril Holm, Bo Wennström, Lennart Åqvist, and Mauro Zamboni for stimulating discussions over the past few years. Åke Frändberg, in particular, has been of great help to me ever since I wrote my doctoral dissertation under his supervision about twenty years ago, and he continues to help me, even though he is now retired. And Lennart Åqvist is usually at hand to discuss any finer logical or philosophical points.

I would also like to thank the participants in the advanced seminar in practical philosophy at the Department of Philosophy, Uppsala University, for helpful comments on various parts of the manuscript. Jan Österberg, in particular, has been a patient tutor in philosophical matters. I can only hope that I have been able to pick up some of the many things he has tried to explain to me again and again.

Moreover, I would like to thank the following colleagues for helpful comments on various parts of the manuscript: Brian Bix, Erik Carlsson, Christian Dahlman, Michael Green, Jaap Hage, Thomas Mautner, and Folke Tersman. Thomas Mautner, who has put his extensive knowledge of Axel Hägerström, Karl Olivecrona, and the other members of the Uppsala school at my disposal, deserves special mention here.

I have benefited enormously from Thomas's incisive comments. Another expert on the Scandinavian realists, Jes Bjarup, has been kind enough to provide extensive written comments on an earlier version of the whole manuscript, many of which have forced me to think more about particular issues. While I disagree with him on a number of issues, I appreciate his efforts to make me see the light.

In addition to the ones already mentioned, I would like to thank Uta Bindreiter, Mats Kumlien, Thomas Olivecrona, Erland Strömbäck, and Stig Strömholm for helpful comments on Chap. 2, Olivecrona: a Biographical Sketch, and two anonymous readers for Springer, who made a number of valid points. Uta Bindreiter has also helped me by suggesting English translations of German book titles and expressions and by finding relevant passages in Kelsen's voluminous German texts.

The usual caveat applies, of course. The author is solely responsible for any remaining mistakes and imperfections.

Finally, I would like to thank Robert Carroll very much for checking my English and for translating the Swedish, Norwegian, and German quotations into English, and the Bank of Sweden Tercentenary Foundation for generously financing my work on this project as well as Carroll's language review. Bob's attentive reading of my manuscript has been of great help to me, and the funding that I have received from the above-mentioned institution is what made this book possible.

Last but not least, I would like to thank my wife, Monica, and our children, Siri and Manne, for making my life a happy one, and for understanding that life is not only play, but also work. In this connection, I should perhaps also mention our cat and three guinea pigs. They, too, have been very helpful and have contributed to making my work environment pleasant, if at times somewhat noisy, by spending a considerable amount of time in my studio.

Chapter 10 was presented at the Albert Calsamiglia Workshop on Scandinavian Legal Philosophy at the Pompeu Fabra University of Barcelona on 18 June 2010, and I would like to thank the participants in the workshop, especially the designated commentator on my paper, José Ezequiel Páez, for a number of helpful comments. Other parts of the book have been published elsewhere as articles. Thus parts of Chaps 5 and 6 appeared in 'Naturalism in American and Scandinavian Realism: Similarities and Differences,' In Mattias Dahlberg, ed., *De Lege*. *Uppsala-Minnesota Colloquium: Law, Culture and Values*. Uppsala: Iustus förlag, 2009. Chapter 11 is a slightly revised version of 'Karl Olivecrona on Judicial Law-Making,' which was published in *Ratio Juris* 22 (2009). And Chap. 12 is a shorter version of 'Karl Olivecrona on Legislation,' which appeared in a special issue of *The Theory and Practice of Legislation* volume 1, number 1 (2013), edited by Pierre Brunet, Eric Millard, and Patricia Mindus and devoted to 'Realist Conceptions of Legislation.' In addition, parts of some other chapters have appeared in 'Karl Olivecrona's Legal philosophy: a Critical Appraisal,' which was published in *Ratio Juris* (2011), and in "Alf Ross on the Concept of a Legal Right" and "Realism about the Nature of Law," which are forthcoming in *Ratio Juris* 2014. I am grateful to the publishers for their permission to use the material in this book.

Contents

Chapter 1
Introduction

Abstract In this chapter, I explain the problem of the nature of law, as I see it, introduce the theories of natural law, legal positivism and Scandinavian realism, and present the main claims of the book. Following H. L. A. Hart and Robert Alexy, I take the problem of the nature of law to concern three distinct problem areas, namely (i) the relation between law and morality, (ii) the relation between law and coercion (or force), and (iii) the question about the components of law, and I point out that the idea that our object of investigation is not just law, but the nature of law, involves the idea that we are looking for properties of law that are in some sense necessary. My account of natural law theory and legal positivism is in keeping with contemporary writings on the topic and serves only to set the scene for the continued discussion. And I explain that I shall argue in the book that Olivecrona's critique of the view that law has binding force, the analysis of the concept and function of a legal rule, and the idea that law is a matter of organized force, make Olivecrona's legal philosophy a unique contribution to twentieth-century legal philosophy—and in regard to the latter question, a much needed foil against which we can view contemporary theories of law. In addition, I argue that the philosophical basis of Olivecrona's substantive legal philosophy, namely Olivecrona's naturalism and non-cognitivism, is an important part of what makes this legal philosophy so interesting.

1.1 The Problem of the Nature of Law

Jurisprudence can be conceived of as the philosophical study of theories and concepts that are common to all—or almost all—the various legal disciplines, such as private law, criminal law, procedural law, and constitutional law (see Frändberg 2005a). Thus conceived, the field of jurisprudence can be divided into an analytical and a normative part, and the former can in turn be divided into a part that concerns the analysis of fundamental legal concepts, including the concept of law itself, and a part that concerns legal reasoning (see, e.g., Hart 1983a; Cross and Harris 1991, pp. 1–2).

T. Spaak, *A Critical Appraisal of Karl Olivecrona's Legal Philosophy,*
Law and Philosophy Library 108, DOI 10.1007/978-3-319-06167-2_1,

As I see it, the fundamental part of jurisprudence is the part that concerns the inquiry into the nature of law. For one's thoughts about other fundamental concepts, such as the concepts of right and duty, one's approach to legal reasoning, and one's views on various normative issues, such as whether there is an obligation to obey the law, must rationally depend to some extent on one's view of the nature of law. For example, a natural law theorist, but not a legal positivist, will necessarily conceive of legal rights and duties as a special case of moral rights and duties and believe that the citizens have at least a prima facie obligation to obey the law; and a rule-skeptic, such as Jerome Frank (1970, pp. 3–13), will necessarily view court opinions in a different light than one who conceives of law as a reasonably determinate system of norms, and he will as a result have less faith in the values and principles of the *Rechtsstaat*, such as the value of predictability or uniformity of law-application.

Most contemporary jurisprudents, myself included, conceive of the inquiry into the nature of law as an analysis of the *concept* of law (see, e.g., Alexy 2008; Hart 1961; Raz 2009, Chap. 1).[1] The idea is that the existence of law is determined by the concept of law, in the sense that we recognize as law precisely what qualifies as law according to the criteria laid down in the concept of law. On this analysis, the term 'law' expresses the concept of law and refers (via the concept) to a certain phenomenon in the world, namely law. As Moore (2000, pp. 309–311) explains, this assumes belief in a *conventionalist* theory of meaning, as distinguished from a causal (or direct reference) theory of meaning. And, as I have said elsewhere (Spaak 2009c, p. 68), at least in the study of law, the former type of theory is clearly to be preferred to the latter (for more on this theme, see Coleman and Simchen 2003).

But what, exactly, is the problem about the nature of law? Following H. L. A. Hart (1961, pp. 6–13) and Robert Alexy (2008), I take this problem to concern three distinct problem areas, namely (i) the relation between law and morality, (ii) the relation between law and coercion (or force), and (iii) the question about the components of law. Alexy writes:

> The arguments about the nature of law revolve around three problems. The first problem addresses the question: In what kind of entities does the law consist, and how are these entities connected such that they form the overarching entity we call "law"? This problem concerns the concept of a norm and a normative system. The second and third problem are addressed to the validity of law. The second concerns its real or factual dimension. This is the area of legal positivism. Two centres are to be distinguished here. The first is determined by the concept of authoritative issuance, the second by that of social efficacy. The third problem of the nature of legal philosophy concerns the correctness or legitimacy of law. Here, the main question is the relationship between law and morality. To take up this question is to take up the ideal or critical dimension of law. It is this triad of problems that, taken together, defines the nucleus of the problem of the nature of law. (Alexy 2008, pp. 159–160)

Alexy (2008, pp. 283–284) further maintains that an inquiry into the nature of law is primarily a matter of the self-understanding of jurists (see also Raz 2009, p. 31),

[1] But not everyone agrees. Michael Moore, for example, insists that jurisprudents should concern themselves with the law, not the concept of law. See Moore (2000, pp. 309–311).

though he points out that it is also relevant to practical legal matters, such as judicial decision making. While I think more needs to be said about the precise sense in which knowledge of the nature of law can be relevant to our self-understanding and to legal thinking in general, I believe that Alexy is on the right track and that such knowledge is something we should seek. In any case, Olivecrona certainly did seek it, even though he had almost nothing to say about methodological questions of this type. And, as we shall see in the coming chapters, he was almost exclusively concerned with two of the three above-mentioned problem areas, namely the relation between law and coercion (force) and the question about the components of law—his thoughts on the third problem area, the one concerning the relation between law and morality, are essentially part of his analysis of the second problem area.

The view that the object of our investigation is not just law, but the nature of law, involves the idea that we are looking for properties of law that are in some sense *necessary*, that is, properties without which law would not be law (see, e.g., Alexy 2004, p. 162; Raz 2009, p. 17, 24–26). This idea is of special interest in the context of a study of Olivecrona's legal philosophy. For, as we shall see in Chap. 10, Olivecrona's claim that law is a matter of organized force raises the question whether he is concerned with necessary properties of the law at all, and if so, what kind of necessity he has in mind.

I believe it is right to say that the relevant type of necessity is *conceptual* or logical necessity. But given that an inquiry into the nature of law amounts to an analysis of the concept of law, and that (what I shall refer to as) the classical conception of conceptual analysis is that an analysis of a concept aims to establish an analytically true equivalence between the *analysandum* (that which is being analyzed) and the *analysans* (that which does the analyzing) on the format: "*X* is law if, and only if …", something needs to be said about the relation between analyticity and conceptual necessity. As Miller (2007, p. 54) notes, the majority view among philosophers is that whereas all analytic truths are logically necessary, not all logically necessary truths are analytic. For the purposes of this book, then, we might say that analyticity entails conceptual or logical necessity, and that therefore conceptual analysis in the classical sense aims to establish conceptual or logical truths.

While the precise difference between conceptual and logical necessity and between both these and analyticity may not be terribly important for most purposes, one who is concerned with conceptual analysis must never lose track of the important distinction between conceptual or logical necessity, on the one hand, and natural (or physical) necessity, on the other. We shall see how important this distinction is in Chap. 10.

To say that an inquiry into the nature of law amounts to an analysis of the *concept* of law is to raise new questions. For example, one might wonder whether we in the Western world operate with the same concept of law that people operate with in other parts of the world, such as Asia or Africa. And if there are different concepts of law, one might also wonder *which* concept of law the analysis should be concerned with, and whether an analysis of this concept can really tell us something about the nature of law, which (we assume) is independent of perspective. Following Joseph Raz (2009, p. 32), I shall assume that the concept of law we are concerned with in

the debate about the nature of law is "our" concept of law and that anything we recognize as a "foreign" concept of law at all must be a concept of law that is similar to our own concept of law. That is to say, we presuppose our own concept of law when we recognize other concepts of law.

An analysis of our concept of law can clearly be universal in the sense that it can establish necessary truths about this concept, and as a result it can show that our concept of law is or is not in use in other parts of the world. That is to say, from our standpoint, they may or may not have law (in our sense) in other parts of the world. Of course, this will not stop thinkers in other parts of the world from maintaining that we (say, in the Western world) do not have law (in their sense). We see that, on this analysis, the question of whose concept of law is the "real" or "true" concept of law is of little or nor importance—which is not to say that it may not be the subject of heated political debates.

1.2 Natural Law Theory and Legal Positivism

Theories about the nature of law have for a long time been divided into natural law theories and legal positivist theories, where natural law theorists maintain, roughly, that there is a higher law that is objectively valid and confers binding force on positive law, that is, law enacted by human beings for human beings, and legal positivists hold that there is only positive law in the sense just indicated and that we can determine what law is using factual criteria. Whereas natural law theories go all the way back to the days of Aristotle (1980, pp. 124–125 [1134b−1135a]), and Cicero (1928, p. 21), and have later been defended by thinkers like St. Thomas Aquinas (1948, QQ 90–95), Samuel Pufendorf (2001 [1672]), John Locke (1988 [1690], Chap. 2), Hugo Grotius (2005 [1738]), Jean-Jacques Rousseau (1968 [1762], Book I, Chaps. 6–8), William Blackstone (1902), Jacques Maritain (1951), Passerin d'Entrèves (1970) Gustav Radbruch (1956), John Finnis (1980), Lloyd Weinreb (1987), Michael Moore (2000), and Mark Murphy (2006), legal positivism is a relative newcomer on the jurisprudential scene. Unless we count Thomas Hobbes (1991, Chaps. 14–15 [1651]) as a legal positivist, we find that the legal positivists arrived on the scene in the eighteenth and nineteenth centuries, and that they include Jeremy Bentham (1988 [1776], 1970), John Austin (1998 [1832]), Karl Bergbohm (1973 [1892]), and others (on the history of legal positivism, see Olivecrona 1971, pp. 7–64). In the twentieth century, we find two figures that have been dominating the scene for quite some time now, namely Hans Kelsen (1984 [1923], 1934, 1999 [1945], 1960) and H. L. A. Hart (1958, 1961, 1982).

As Finnis (1980, pp. 25–29) points out, one may speak of natural law theory in a non-legal or weakly legal as well as in a legal sense. On this analysis, the non-legal or weakly legal version amounts to a theory about the rational foundations for moral judgment, and the legal version is the one described above. And since earlier writers appear to have been mainly concerned with natural law in the non-legal or weakly legal sense, it is not obvious that contemporary natural law thinkers are natural law

thinkers in exactly the same sense that, say, Aristotle and St. Thomas were natural law thinkers.

In any case, the twentieth century also saw a couple of new contenders for the jurisprudential crown, namely the Scandinavian realists, among whom we reckon Axel Hägerström (1953a, b, c, d, e, f), Vilhelm Lundstedt (1925, 1942, 1956), Karl Olivecrona, Alf Ross (1989 [1946], 1959), and others (such as Hedenius 1941; Strömberg 1980, 1988; and Ekelöf 1945, 1969); and the American realists, who include Oliver Wendell Holmes (1896–1897), Karl Llewellyn (1930, 1962), Jerome Frank (1970), Walter Wheeler Cook (1924), and Felix Cohen (1935, 1937), among others. But, as we shall see in Chap. 14, the Scandinavian realists were really legal positivists of one sort or another, and it appears that the same can be said about the American realists (on this, see Leiter 2007, pp. 59–80). It should be said, however, that whereas the Scandinavians were first and foremost concerned with the problem about the nature of law, the Americans were primarily concerned with the study of adjudication (on this, see Spaak 2009b. See also Leiter 2007).

It is worth noting in this context that there is an important ontological difference between natural law thinkers and others who see a conceptual connection between law and morality, on the one hand, and legal positivists and Scandinavian and American realists, on the other: Whereas thinkers in the former camp tend to conceive of the concept of law in non-naturalist terms (but see Moore 2000, pp. 294–332), thinkers in the latter camp tend to conceive of it in naturalist terms (but see Kelsen 1992, pp. 7–14). Robert Alexy (2008, pp. 292–296), for example, defends the dual-nature thesis, according to which law necessarily includes properties that belong to the factual dimension, such as coercion and social effectiveness, as well as properties that belong to an ideal (or critical) dimension, such as the claim to correctness. As he puts it (Alexy 2008, p. 284), "[t]he concept of law refers to an entity that connects the real and the ideal in a necessary way." Alf Ross, on the other hand, rejects in his book *Towards a Realistic Jurisprudence* precisely the view that law is "conceived at the same time as an observable phenomenon in the world of facts, and as a binding norm in the world of morals or values, at the same time as physical and metaphysical, as empirical and a priori, as real and ideal, as something that exists and something that is valid, as a phenomenon and as a proposition" (1989 [1946], p. 11). And Olivecrona sides with Ross. He explains, as we shall see in Chap. 5, that his aim is to reduce our picture of law in order to make it correspond with objective reality, and that anyone who asserts that there is something more in law than "mere" facts, will have to take on himself the burden of proof.

1.3 Scandinavian Realism

Since Karl Olivecrona was a Scandinavian realist, and a very prominent one at that, we need to begin with a few words about Scandinavian realism. Svein Eng (2007, p. 275, 290–299) makes a distinction between Scandinavian realism in a narrow, philosophical sense, according to which non-cognitivism is the correct meta-ethical

view and the belief in the binding force of law is an illusion, and Scandinavian realism in a wide, looser sense, which refers to a group of Swedish and Danish legal writers who are in various ways related to the representatives of Scandinavian realism in the narrow sense. In what follows, I shall focus on Scandinavian realism in the narrow, philosophical sense, though I wish to add to Eng's characterization that the Scandinavians are not only meta-ethical non-cognitivists,[2] but also legal positivists,[3] who maintain that conceptual analysis is a central task of legal philosophy, and that the analysis of legal concepts must proceed in a naturalist, anti-metaphysical spirit. As Jes Bjarup puts it in his monograph on Scandinavian realism,

> Hägerström's motto for his philosophy was "praeterea censeo metaphysicam esse delendam" ["Moreover, I propose that metaphysics must be destroyed"]… and this holds for Scandinavian realism as well. The origin of all vices in the sciences consists of metaphysical ideas, and we must destroy these in order to understand reality. The dividing line of legal philosophy is between idealism and realism…. Characteristic of the proponents of Scandinavian realism, such as Hägerström, Lundstedt, Olivecrona and Ross, is their critical attitude towards metaphysics and natural law. Law cannot be looked upon in the light of the idea of law or according to substantive norms of justice…. Rather, law must be seen as a purely factual manifestation of reality, and explanations of legal phenomena must be stated in empirical terms. For this reason, a conceptual analysis of the fundamental legal concepts, which arise from the fact of law, is absolutely necessary in order to determine if they refer to factual or possible situations in reality. (1978, p. 16)[4]

As I shall explain in Chaps. 4–5, the spiritual father of Scandinavian realism was the Swedish philosopher Axel Hägerström, who together with his colleague in Uppsala, Adolf Phalén, maintained (i) that conceptual analysis is a central philosophical task, (ii) that subjectivism (conceived as the view that the object of a person's consciousness exists only in this consciousness) is false, (iii) that metaphysics (conceived as the view that there is a reality beyond the world of time and space) is false, even pernicious, and (iv) that there are no objective values. It is, I believe, fair to say that the Scandinavians, including Olivecrona, aimed to construct their legal philosophies on a foundation consisting of these four tenets.

---

[2] As we shall see in Chaps. 4 and 6, both Hägerström and Olivecrona embraced at times an error-theoretical, rather than a non-cognitivist, analysis of moral and legal judgments.

[3] We shall see in Chap. 14 that Olivecrona explicitly rejects legal positivism conceived of as the theory that law is the content of a sovereign will.

[4] The German original reads as follows. "Hägerströms Motto für seine Philosophie war "praetera censeo metaphysicam esse delendam" ["Moreover, I propose that metaphysics must be destroyed"] … und das gilt auch für den skandinavischen Realismus. Der Anfang aller Laster in den Wissenschaften befindet sich in metaphysischen Vorstellungen, und diese müssen wir zerstören, um die Wirklichkeit zu verstehen. Die Scheidelinie der Rechtsphilosophie ist zwischen Idealismus und Realismus …. Kennzeichnend für die Anhänger des skandinavischen Realismus wie Hägerström, Lundstedt, Olivecrona und Ross ist die kritische Einstellung zur Metaphysik und zum Naturrecht. Das Recht kann nicht im Lichte der Rechtsidee oder nach materialen Gerechtigkeitsnormen betrachtet werden …. Vielmehr muss das Recht als eine rein tatsächliche Erscheinung der Wirklichkeit betrachtet werden, und Erklärungen juristischer Phänomene müssen in empirischen Termen abgefasst werden. Deshalb ist eine Begriffsanalyse der rechtlichen Grundbegriffe, die sich aus dem Faktum des Rechts ergeben, unumgänglich, um festzustellen, ob sie sich auf tatsächliche oder mögliche Sachlagen in der Wirklichkeit beziehen."

Hägerström devoted the bulk of his writings in legal philosophy to a comprehensive critique of will theories of law, but he also analyzed the concept of a declaration of intention, the concept of a right, and the concept of duty, and offered an interesting explanation of the tendency of judges and lawyers to ascribe binding force to law. His defense of an early and quite radical version of non-cognitivism was more of a constructive effort, however, and inspired his followers, including Olivecrona, to adopt a critical attitude to any and all pretensions of moral objectivity on the part of their fellow jurisprudents. Hägerström was, as we shall see, Olivecrona's primary philosophical source of inspiration. Exaggerating a little, I allow myself to suggest that we think of Olivecrona's legal philosophy as a competent elaboration and concretization of the central tenets of Hägerström's legal philosophy together with a certain amount of additions. But, as we shall see, the additions by Olivecrona to the main structure that he inherited from Hägerström make up a considerable, and valuable, part of his mature legal philosophy.

Vilhelm Lundstedt was a legal scholar and a social-democratic member of the Swedish parliament, and he was also Olivecrona's senior colleague when Olivecrona was still affiliated with the Department of Law at Uppsala University. Following Hägerström, he put forward a legal philosophy that was a least as radical as Olivecrona's legal philosophy. He expounded his mature legal philosophy in a rather heavy-going book entitled *Legal Thinking Revised* (1956), in which he argued, among other things, that (what he called) traditional legal science (*Rechtswissenschaft*) must be rejected and that legal scholars must instead conceive of legal science as a real science. His main objection to traditional legal science was that it operates with metaphysical concepts such as 'right,' 'duty,' 'wrong-doing,' and 'guilt.' Instead, he argued that legal science must be an empirical science, dealing with social facts. He added that legal science thus conceived will be concerned with "social evaluations and other psychological causal connections" (Lundstedt 1956, p. 126). Admitting that legal science thus conceived will be a rather inexact science, he pointed out that it will not be in a worse position in this regard than many other sciences.

Lundstedt also took an interest in questions of international law, especially the question of peace (see, e.g., Lundstedt 1932). He argued that international law—the law of nations—is based on metaphysical, even superstitious, notions, such as the ones considered above, and that as a result the world is a very dangerous place. He argued that while it is bad enough to assume that *individuals* have rights and duties, etc., this assumption is apt to lead to disaster when applied to *nations*. For, he reasoned, the idea that nations have rights and duties and can be guilty of wrongdoing that must be punished leads unavoidably to aggression and, in the last instance, to war (Lundstedt 1932, pp. 332–333). His idea, then, appears to have been that our use of metaphysical concepts has bad consequences. As Bjarup (2004, pp. 184–185) has noted, Lundstedt's method of social welfare is similar to the theory of utilitarianism. Lundstedt (1925, p. 24) denied, however, that his method of social welfare was in any way related to the ethical theories of Jeremy Bentham and John Stuart Mill.

On a more fundamental level, Lundstedt maintained that the above-mentioned metaphysical concepts are part and parcel of (what he referred to as) the "common

sense of justice," and that legal scholars ought to reject (what he referred to as) the *method of justice*, which he considered to be based precisely on the "common sense of justice," and embrace instead (what he referred to as) the *method of social welfare*, according to which the aim of all legal activities—such as legislation and judicial decision-making, including statutory interpretation—is to benefit mankind.[5] As should be clear, he believed that the method of social welfare is in keeping with, perhaps even required by, his anti-metaphysical approach—that is, his naturalism and his non-cognitivism—to the study and practice of law. (For more on Lundstedt's legal philosophy, see Bindreiter, forthcoming).

Alf Ross was the best-known Scandinavian realist on the international scene. His book *On Law and Justice* (1959) is well known, and his article "Tû-tû" (1957) has been widely read and has attracted great interest. His monograph on norms, *Directives and Norms* (1968), which includes a chapter on deontic logic, also deserves to be mentioned. Ross is not as radical as Olivecrona and Lundstedt, however, and seems more inclined to retain much of the traditional ways of thinking about law and legal problems. And, as we shall also see in later chapters, his legal philosophy differs in interesting ways from Olivecrona's legal philosophy. For example, Ross, but not Olivecrona, espouses the thesis of semantic naturalism in the narrow sense (to be discussed in Chap. 5), according to which an *analysis* of a concept is philosophically acceptable only if the concept thus analyzed refers to natural entities. And this explains why Ross espouses a predictive analysis of legal concepts, such as the concept of valid law, whereas Olivecrona rejects it. But, as we shall also see, Olivecrona holds that a *concept*—as distinguished from the analysis of that concept—is philosophically acceptable only if it refers to natural entities. And this latter thesis is rather easy to confuse with the thesis of semantic naturalism, just mentioned. They are, however, different theses.

The realists—the Scandinavians as well as the Americans—are commonly taken to make up a third school of jurisprudence, in addition to natural law theorists and legal positivists (see, e.g., McCoubrey and White 1999; Wacks 2005; Ratnapala 2013, pp. 103–104). But this may be a bit misleading, for even though both the Americans and the Scandinavians thought of themselves as giving in some sense a realistic picture of law and legal phenomena, they differed in their choice of primary study-object, but also to some extent in philosophical ambition and, perhaps, ability. Whereas the Americans focused primarily, but not exclusively, on the study of adjudication (on this, see Leiter 2007, Chap. 2), the Scandinavians concerned themselves almost exclusively with the analysis of fundamental legal concepts, such as the concept of law, the concept of a legal rule, and the concept of a legal right;[6] and whereas the Americans, except Felix Cohen, were lawyers rather than philosophers, the Scandinavians Ross and Olivecrona were accomplished philosophers of

[5] For an account of the method of social welfare, see Lundstedt (1956, pp 171–200).

[6] Ross devoted a couple of chapters to the sources of law and the judicial method in Ross (1959, Chaps. 3–4), and Olivecrona considered the problem of judicial law-making in Olivecrona (1971, pp. 199–215).

law.[7] The difference regarding the choice of study-object is particularly important, because it means that on the whole the Scandinavians, but not the Americans, operated on the same jurisprudential level as natural law theorists and legal positivists, such as Gustav Radbruch (1956), Hans Kelsen (1934, 1999, 1960), and H. L. A. Hart (1961, 1982). Indeed, as I have said, the Scandinavians were legal positivists themselves.

Nevertheless, it is tempting to think that the Americans and the Scandinavians shared a certain philosophical outlook. Indeed, Ross points out in the preface to his book *Towards a Realistic Jurisprudence* (1989) that Scandinavian and Anglo-American jurisprudents share the view that we must understand law and legal phenomena in terms of social facts and conceive of the study of law as a branch of social psychology:

> There should, I think, be good possibilities for a contact between Scandinavian and Anglo-American views in legal philosophy. In both these cultural circles a decisive tendency towards a realistic conception of the legal phenomena is traceable; by this I mean a conception which in principle and consistently considers the law as a set of social facts—a certain human behaviour and ideas and attitudes connected with it—and the study of law as a ramification of social psychology. (Hart 1961, 1982, p. 9)[8]

I believe Ross is right. Indeed, I shall argue in Chap. 5 that the realism espoused by the Americans and the Scandinavians alike is to be understood as a commitment to *naturalism*, though we shall also see that naturalism comes in different versions and that sometimes different realists embrace different versions of naturalism. For example, Olivecrona's above-mentioned rejection of the thesis of semantic naturalism sets him apart from the other Scandinavian realists.

1.4 Main Claims

I shall argue that Olivecrona's critique of the view that law has binding force, the analysis of the concept and function of a legal rule, and the idea that law is a matter of organized force, make Olivecrona's legal philosophy a unique contribution to twentieth century legal philosophy—and in regard to the latter question, a much needed foil against which we can view contemporary theories of law, such as those put forward by H. L. A. Hart, Joseph Raz, and Ronald Dworkin. But I shall also argue that the philosophical basis of Olivecrona's substantive legal philosophy is an important part of what makes this legal philosophy so interesting. As we shall see in Chaps. 5 and 6, Olivecrona was a naturalist and a non-cognitivist (and sometimes

[7] These differences have been observed by Pattaro (1968, p. 3). As for the Scandinavians, whereas Alf Ross was both a legal scholar and a philosopher, Karl Olivecrona and Vilhelm Lundstedt were rather legal scholars with a strong interest in philosophy. Hägerström was not a legal scholar at all, but a philosopher.

[8] H. L. A. Hart (1983b, p. 161) observed in a review of Ross (1959) that Scandinavian and English legal theorists "have long shared many points of view."

an error theorist), and it is these *methodological* commitments that make it possible (and to some extent necessary) for Olivecrona to put forward the substantive legal philosophy that he does.

Olivecrona is an ontological, but not a semantic, *naturalist*, and he is probably not a methodological naturalist either, though the evidence on this latter count is not unequivocal. Crudely put, his ontological naturalism leads him to reject the Kelsenian idea of a world of the ought in which one might locate law, and to attempt instead to locate law in the world of time and space; and his rejection of semantic naturalism leads him to reject any attempt to analyze legal concepts in terms of natural entities or properties, as Oliver Wendell Holmes, Alf Ross and others have done, and to seek instead alternative ways of analyzing legal concepts.

As I see it, the naturalism espoused by Olivecrona is more interesting than the naturalism defended by the American realists, as interpreted by Brian Leiter. Of particular interest in this context is the circumstance that Olivecrona is an ontological, but not a semantic, naturalist, and probably not a methodological naturalist either, whereas the Americans are first and foremost methodological naturalists, and in a few cases semantic naturalists. As a result, Olivecrona does not share the American realists' interest in the study of adjudication and their preference for analyzing legal concepts in terms of empirical entities or properties.

Olivecrona was also a *non-cognitivist*, arguing that a value judgment expresses the speaker's attitudes, preferences, or feelings, and can therefore not be true or false, though on some occasions he espoused a so-called error theory of value judgments, according to which such judgments are always false. The commitment to this theory leads Olivecrona to conceive of legal rules as so-called independent imperatives, and to maintain, *inter alia*, that people mistakenly believe that legal rules have binding force because they misunderstand the nature of value judgments, and that courts necessarily create law when deciding a case. Thus Olivecrona's frequent use of meta-ethical considerations in the analysis makes it clear that, generally speaking, the meta-ethics espoused by a legal philosopher may be of considerable importance to his legal philosophy, and that therefore Ronald Dworkin (1986, pp. 76–86, 1996) is wrong when he maintains that meta-ethical questions are a side-issue that should not detain us in our philosophizing about matters of law or morality.[9] Of course, Olivecrona was not the first legal philosopher to invoke meta-ethical arguments in his analysis. Just think of Gustav Radbruch's frequent invocation of such arguments, though Radbruch was not a non-cognitivist, but a meta-ethical relativist (see Radbruch 1950; Spaak 2009a). This fact does not make Olivecrona's use of meta-ethical arguments any less interesting, however.

It is worth noting that Olivecrona's frequent use of meta-ethically flavored arguments contrasts both with Kelsen's and Hart's styles of legal-philosophical analysis. Whereas Kelsen occasionally states that moral judgments are essentially subjective but does not go much further (1999, pp. 6–8), Hart appears to deliberately

[9] I am not assuming that all Olivecrona's claims involving meta-ethical considerations are correct, but only that non-cognitivism is a serious meta-ethical contender and that Olivecrona's use of meta-ethical arguments is, on the whole, coherent.

avoid invoking meta-ethical considerations in his legal philosophy, even though his own sympathies clearly lie with some version of the non-cognitivist theory (1982, pp. 159–60; Toh 2005). One suspects that Hart felt that a theory of law should not rest on controversial meta-ethical claims, which, if they turned out to be mistaken, might undermine the theory they were meant to support (on Hart's position, see Dworkin 1978, p. 349).

As a result of its dependence on these methodological commitments, Olivecrona's *substantive* legal philosophy is very interesting. As we shall see in Chaps. 7 and 8, Olivecrona's thoughts on the problem about the *binding force of law* are a case in point. Whereas legal positivists such as Hans Kelsen and H. L. A. Hart and their followers have made great efforts to account for the normativity of law, Olivecrona flatly rejects the very idea that law is normative, or, as he puts it, has binding force; and he infers from the lack of binding force that there are no legal entities or properties at all: no rights or duties, no corporations, no marriages, no judges, etc. Instead, he maintains that legal rules influence the citizens on account of their possessing a suggestive character, and that therefore law is part of (what he calls) the chain of cause and effect. We might say that in this sense Olivecrona aims to naturalize jurisprudence.

I shall also argue that while Olivecrona's view that *law is a matter of organized force* is perhaps not as philosophically interesting as the naturalism he espouses, it is an important counterweight to the large number of contemporary theories of law that give little or no consideration to the role of force in the machinery of law. While writers such as Hart (1961), Dworkin (1978, 1986), Raz (1979, 1980, 1990), and Alexy (1994, 2008) do not *deny* the role of force in the machinery of law, they do not offer an analysis of this role. To be sure, Dworkin (1986, p. 93) maintains that the "most fundamental point of legal practice is to guide and constrain the power of government," but he has nothing to say about the precise relation between law and force. Against this background, one is likely to find Olivecrona's claims about law and force quite interesting.

Of course, Olivecrona's legal philosophy comprises much more than a rejection of the binding force of law and the ensuing claim that legal rules, properly understood, are part of the chain of cause and effect, together with the claim that law is a matter of organized force. For example, Olivecrona analyzes the concept of a right, and he argues that courts necessarily create law when they decide a case. In addition, he introduces an intriguing distinction between the truth and the correctness of (external) legal statements — roughly, statements that a person has a legal right or duty—arguing that legal statements can be correct (or incorrect), but not true (or false). Although I shall argue that this distinction should be rejected, I believe that Olivecrona's analysis raises several interesting questions that one needs to consider carefully. And, as we shall see, his legal philosophy implies the main tenets of legal positivism as this theory is understood by contemporary jurisprudents. This latter consideration suggests that Scandinavian realism, although a valuable contribution to the debate about the nature of law, does not, after all, amount to a unique type of theory of law that is in competition with the theory of legal positivism.

Finally, Olivecrona's various discussions of important figures in the history of legal and political philosophy, such as Hugo Grotius, Samuel Pufendorf, John Locke, and Jeremy Bentham, are highly interesting contributions to our understanding of the legal and political philosophy of previous generations. For example, Olivecrona's focus on the concept of the *suum*, that is, the concept of a private sphere, makes it easier to understand not only the import of the fundamental laws of nature identified by Grotius and Pufendorf, but also Locke's theory of appropriation. And Olivecrona's critique of Bentham's will theory of law clearly depends on Olivecrona's own legal philosophy, in that it involves a critique of the will theory espoused by Bentham and an alternative account of the habit of obedience on the part of the citizens.

1.5 Plan of the Book

I begin with a biographical sketch of Olivecrona (Chap. 2) and proceed to offer a preview of his legal philosophy (Chap. 3). Since, as we have seen, Olivecrona was very much influenced by the Uppsala School of Philosophy, I devote the following chapter to an outline of Axel Hägerström's legal and moral philosophy (Chap. 4). The idea is that a reader who has grasped the main lines of Hägerström's legal and moral philosophy will be in a better position to understand Olivecrona's legal philosophy, including the discussion in Chap. 15 of the dependence of Olivecrona's legal philosophy on Hägerström's philosophy. I then turn to a consideration of the philosophical foundations of Olivecrona's legal philosophy, namely the types of naturalism and the meta-ethical theory espoused by Olivecrona (Chap. 5–6). Having done that, I turn to consider Olivecrona's substantive legal philosophy, that is, the critique of the view that law has binding force (Chap. 7), the analysis of the concept of a legal rule (Chap. 8), the analysis of the concept of a right (Chap. 9), the claim that law is a matter of organized force (Chap. 10), the claim that courts necessarily create new law when deciding a case (Chap. 11), the account of how legal rules become incorporated into the legal machinery (Chap. 12), and the distinction between the truth and the correctness of legal statements (Chap. 13). This puts us in a position to get a clear view of the relation between Olivecrona's legal philosophy and the theory of legal positivism as it is understood by contemporary jurisprudents (Chap. 15), and of the relation of dependence, if any, of Olivecrona's legal philosophy on the legal philosophies of Axel Hägerström, Vilhelm Lundstedt, and Alf Ross (Chap. 16). Chapter 14 treats Olivecrona's excursions into the history of legal and political philosophy, which include an analysis of the natural law theories of Hugo Grotius and Samuel Pufendorf, John Locke's theory of appropriation, and Jeremy Bentham's will theory of law. My hope is that taken together these chapters will give the reader a reasonably complete picture of Olivecrona's legal philosophy and thus a fair opportunity to assess its merits and demerits. As should be clear, my own view is that Olivecrona's legal philosophy is highly interesting and deserves a central place in twentieth century jurisprudence.

References

Articles

Alexy, Robert. 2004. The nature of legal philosophy. *Ratio Juris* 17:156–167.

Alexy, Robert. 2008. On the concept and nature of law. *Ratio Juris* 21:281–299.

Cohen, F. S. 1935. Transcendental nonsense and the functional approach. *Columbia Law Review* 35:809–849.

Cohen, F. S. 1937. The problems of a functional jurisprudence. *Modern Law Review* 1:5–26.

Coleman, Jules L., and Ori Simchen. 2003. Law. *Legal Theory* 9:1–41.

Cook, Walter Wheeler. 1924. The logical and legal basis of the conflict of laws. *Yale Law Journal* 33:457–488.

Dworkin, Ronald. 1996. Objectivity and truth: You'd better believe it. *Philosophy and Public Affairs* 25:87–135.

Ekelöf, P. O. 1945. Juridisk slutledning och terminologi [Legal inference and terminology]. *Tidsskrift for rettsvitenskap*, 211–270.

Ekelöf, Per Olof. 1969. Uttrycket "gällande rättsregel" [The expression "valid legal rule"]. In *Nordisk gjenklang. Festskrift til C. J. Arnholm* [*Nordic Response*. *Festschrift for C. J. Arnholm*], ed. Knut S. Selmer, 109–123. Oslo: Tanum.

Frändberg, Åke. 2005a. Den allmänna rättsläran—tidlös och ständigt aktuell [Jurisprudence—timeless and constantly topical]. In *Rättsordningens idé* [*The idea of the legal order*], ed. Åke Frändberg, 9–20. Uppsala: Iustus förlag.

Hägerström, Axel. 1953a. General view. In *Inquiries into the nature of law and morals*, ed. Karl Olivecrona, 1–16. Trans: C. D. Broad. Uppsala: Kungliga humanistiska vetenskapssamfundet i Uppsala.

Hägerström, Axel. 1953b. Is positive law an expression of will? In *Inquiries into the nature of law and morals*, ed. Hägerström, 17–55. Uppsala: Almqvist & Wiksells.

Hägerström, Axel. 1953c. On the question of the notion of law. In *Inquiries into the nature of law and morals*, ed. Hägerström, 56–256. Uppsala: Almqvist & Wiksells.

Hägerström, Axel. 1953d. Kelsen's theory of law and the state. In *Inquiries into the nature of law and morals*, ed. Axel Hägerström, 257–298. Uppsala: Almqvist & Wiksells.

Hägerström, Axel. 1953e. The conception of a declaration of intention in the sphere of private law. In *Inquiries into the nature of law and morals*, ed. Hägerström, 299–347. Uppsala: Almqvist & Wiksells.

Hägerström, Axel. 1953f. On fundamental problems of law. In *Inquiries into the nature of law and morals*, ed. Axel Hägerström, 348–366. Uppsala: Almqvist & Wiksells.

Hart, H. L. A. 1958. Positivism and the separation of law and morals. *Harvard Law Review* 71:593–629.

Hart, H. L. A. 1983a. Problems of the philosophy of law. In *Essays in jurisprudence and philosophy*, ed. H. L. A. Hart, 88–119. Oxford: Clarendon. (Originally published in the *Encyclopedia of Philosophy*. Editor in chief Paul Edwards. 1967).

Hart, H. L. A. 1983b. Scandinavian realism. In *Essays in jurisprudence and philosophy*, ed. Hart, 161–169. Oxford: Clarendon. (Originally published in *Cambridge Law Journal* 1959).

Holmes, O. W. 1896–1897. The path of the law. *Harvard Law Review* 10:457–478.

Llewellyn, Karl N. 1930. A realistic jurisprudence–the next step. *Columbia Law Review* 30:431–465.

Lundstedt, A. V. 1932. The responsibility of legal science for the fate of man and nations. *New York University Law Quarterly Review* 10:326–340.

Pattaro, Enrico. 1968. Riflessioni su Olivecrona [Reflections on Olivecrona]. *Rivista Trimestrale di Diritto e Procedura Civile* [*Quarterly Review of Private Law and Civil Procedural Law*] 2:721–764.

Ross, Alf. 1957. Tû-tû. *Harvard Law Review* 70:812–825. (Originally published in Danish in O. A. Borum & Knud Illum, eds. 1951. *Festskrift till Henry Ussing*, 468–84. Copenhagen: Arnold Busck).
Spaak, Torben. 2009a. Meta-ethics and legal theory: The case of Gustav Radbruch. *Law and Philosophy* 28:261–290.
Spaak, Torben. 2009b. Naturalism in Scandinavian and American realism. In *De Lege*, eds. Petter Asp and Mattias Dahlberg, 243–293. Uppsala: Iustus.
Spaak, Torben. 2009c. Explicating the concept of legal competence. In *Concepts in law*, eds. Jaap C. Hage and Dietmar von der Pfordten, 67–80. Dordrecht: Springer.
Toh, Kevin. 2005. Hart's expressivism and his Benthamite project. *Legal Theory* 11:75–123.

Books

Alexy, Robert. 1994. *Begriff und Geltung*. 2nd ed. Freiburg: Karl Alber.
Aristotle. 1980. *Nichomachean ethics* [Translated with an introduction by David Ross]. Oxford: Oxford University Press.
Austin, John. 1998. *The province of jurisprudence determined and the uses of the study of jurisprudence* (With an introduction by H. L. A. Hart). Indianapolis: Hackett. (Previously published by Weidenfeld & Nicholson in 1954. Originally published in 1832).
Aquinas, Thomas. 1948. *Summa Theologica*. vol. III (Complete English Edition in Five Volumes. Trans. Fathers of the English Dominican Province). Allen: Christian Classics.
Bentham, Jeremy. 1970. Of laws in general. In *The collected works of Jeremy Bentham*, ed. H. L. A. Hart. London: Athlone.
Bentham, Jeremy. 1988. *A fragment of government* (Edited with an introduction by F. C. Montague). Oxford: Clarendon. (Originally published 1776).
Bergbohm, Karl. 1973. *Jurisprudenz und Rechtsphilosophie*. *I. Einleitung* [*Jurisprudence and legal philosophy. I. introduction*]. Glashütten im Taunus: Detlev Auvermann. (Originally published 1892).
Bjarup, Jes. 1978. *Skandinavischer Realismus* [*Scandinavian realism*]. München: Karl Alber.
Bjarup, Jes. 2004. *Rättsteori och rättsordning. Föreläsningar i allmän rättslära. Del 2* [*Legal theory and legal order. Lectures in jurisprudence*]. Stockholm: Stockholms Universitet.
Blackstone, William. 1902. *Commentaries on the laws of England*. *Book I*. Philadelphia: Rees Welsh & Company.
Cicero, Marcus Tullius. 1928. *De Re Publica, De Legibus*. Trans: Clinton Walker Keyes. Cambridge: Harvard University Press. (The Loeb Classical Library).
Cross, Rupert, and J.W. Harris. 1991. *Precedent in English law*. 4th ed. Oxford: Clarendon.
d´Entrèves, A. P. 1970. *Natural law*. 2nd ed. (revised). London: Hutchinson.
Dworkin, R. M. 1978. *Taking rights seriously*. 2nd ed. London: Duckworth.
Dworkin, Ronald. 1986. *Law's empire*. Harvard: Belknap.
Eng, Svein. 2007. *Rettsfilosofi* [*Philosophy of law*]. Oslo: Universitetsforlaget.
Finnis, John. 1980. *Natural law and natural rights*. Oxford: Clarendon.
Frank, Jerome. 1970. *Law and the modern mind*. (6th printing). Gloucester: Peter Smith. (Originally published 1930 by Brentano's Inc).
Grotius, Hugo. 2005. *The rights of war and peace*. *Book I*. Edited and with an Introduction by Richard Tuck (Natural law and enlightenment classics. General editor: Knut Haakonsen). Indianapolis: Liberty Fund. (Originally published 1738).
Hart, H. L. A. 1961. *The concept of law*. Oxford: Clarendon.
Hart, H. L. A. 1982. *Essays on Bentham*. Oxford: Clarendon.
Hedenius, Ingemar. 1941. *Om rätt och moral* [*On law and morals*]. Stockholm: Tiden.

Hobbes, Thomas. 1991. *Leviathan*. London: Andrew Crooke. (Repr. Cambridge texts in the history of political thought. ed. Richard Tuck. Cambridge: Cambridge University Press. Originally published 1651).

Kelsen, Hans. 1934. *Reine Rechtslehre*. Wien: Österreichische Staatsdruckerei. (Reprinted by Scientia Verlag, 1994).

Kelsen, Hans. 1960. *Reine Rechtslehre* [*The pure theory of law*]. 2nd ed. Vienna: Österreichische Staatsdruckerei.

Kelsen, Hans. 1984. *Hauptprobleme der Staatsrechtslehre*. Aalen: Scientia Verlag. (Originally published 1923 by J. C. B. Mohr, 2nd ed. Tübingen).

Kelsen, Hans. 1992. *Introduction to the problems of legal theory*. Trans: Bonnie Litschewski Paulson and Stanley L. Paulson. Oxford: Oxford University Press. (Originally published 1934 in German under the title *Reine Rechtslehre* by Österreichishe Staatsdruckeri, Vienna).

Kelsen, Hans. 1999. *General theory of law and state*. Trans: Anders Wedberg. Union: The Lawbook Exchange. (Originally published 1945 by the Harvard University Press, Cambridge, Mass).

Leiter, Brian. 2007. *Naturalizing jurisprudence*. Oxford: Oxford University Press.

Llewellyn, Karl N. 1962. *Jurisprudence. Realism in theory and practice*. Chicago: The University of Chicago Press.

Locke, John. 1988. The second treatise of government. In *Two treatises of government* (*Cambridge texts in the history of political thought*), ed. Peter Laslett. Cambridge: Cambridge University Press. (Originally published 1690).

Lundstedt, A. V. 1925. *Superstition or rationality in action for peace*? London: Longmans, Green and Co.

Lundstedt, A. V. 1942. *Det Hägerström-Lundstedtska misstaget* [*The Hägerström-Lundstedt mistake*]. Stockholm: Gebers.

Lundstedt, A. V. 1956. *Legal thinking revised*. Stockholm: Almqvist & Wiksell.

Maritain, Jacques. 1951. *Man and the state*. Chicago: University of Chicago Press. (Repr. by the Catholic University of America Press. Washington, DC 1968).

McCoubrey, H., and Nigel D. White. 1999. *Textbook on jurisprudence*. 3rd ed. London: Blackstone.

Miller, Alexander. 2007. *Philosophy of language*. 2nd ed. London: Routledge.

Moore, Michael S. 2000. *Educating oneself in public*. Oxford: Oxford University Press.

Murphy, Mark C. 2006. *Natural law in jurisprudence and politics*. Cambridge: Cambridge University Press.

Olivecrona, Karl. 1971. *Law as fact*. 2nd ed. London: Stevens & Sons.

Pufendorf, Samuel. 2001. *Om de mänskliga och medborgerliga plikterna enligt naturrätten* [*On human and civil duties according to the law of nature*]. Stockholm: City University Press. (Originally published 1672).

Radbruch, Gustav. 1950. Legal philosophy. In *The legal philosophies of Lask, Radbruch, and Dabin*. Ed. Erik Wolf, 43–224. Introduction by Edwin W. Patterson. Trans: Kurt Wilk, Cambridge: Harvard University Press. (20th Century Legal Philosophy Series: Vol. IV. Originally published 1932 in German under the title *Rechtsphilosophie*, 3rd ed by Koehler verlag, Stuttgart).

Radbruch, Gustav. 1956. *Rechtsphilosophie* [*Philosophy of law*]. 5th ed. In ed. Erik Wolf. Stuttgart: Koehler.

Ratnapala, Suri. 2013. *Jurisprudence*. 2nd ed. Cambridge: Cambridge University Press.

Raz, Joseph. 1979. *The authority of law*. Oxford: Clarendon.

Raz, Joseph. 1980. *The concept of a legal system*. 2nd ed. Oxford: Clarendon.

Raz, Joseph. 1990. *Practical reason and norms*. 2nd ed. Princeton: Princeton University Press.

Raz, Joseph. 2009. *Between authority and interpretation*. Oxford: Oxford University Press.

Ross, Alf. 1959. *On law and justice*. Berkeley: University of California Press.

Ross, Alf. 1968. *Directives and norms*. London: Routledge & Kegan Paul.

Ross, Alf. 1989. *Towards a realistic jurisprudence*. Trans: Annie I. Fausbøll. Aalen: Scientia Verlag. (Originally published 1946 by Munksgaard, Copenhagen).
Rousseau, Jean-Jacques. 1968. *The social contract*. Translated and introduced by Maurice Cranston. London: Penguin Classics. (Originally published 1762).
Strömberg, Tore. 1980. *Inledning till den allmänna rättsläran* [*Introduction to jurisprudence*]. 8th ed. Lund: Studentlitteratur.
Strömberg, Tore. 1988. *Rättsordningens byggstenar* [*The elements of the legal order*]. Lund: Studentlitteratur.
Wacks, Raymond. 2005. *Understanding jurisprudence*. Oxford: Oxford University Press.
Weinreb, Lloyd L. 1987. *Natural law and justice*. Cambridge: Harvard University Press.

Part I
Background

Chapter 2
Karl Olivecrona: A Biographical Sketch

Abstract Karl Olivecrona was born 1897 in Uppsala. Having received his law degree in 1920 and having clerked at the District Court in Uppsala 1921–1923, he began working on his doctoral dissertation at Uppsala University 1924 and received his doctorate 1928. He went on to specialize in procedural law and was appointed professor of procedural law at Lund University 1933. He retired 1964 at the age of 67, but kept on writing on jurisprudential questions through-out the 1970's. He had married Birgit Lange in 1929 and had two children with her, namely Christina and Thomas. Having had his first major jurisprudential work, *Law as Fact* (1st ed.) published in 1939, he came to devote most of his energies to work in the field of jurisprudence, and the second edition of *Law as Fact* was published in 1971. He also wrote two books of a more political nature in 1940 and in 1942, arguing in the first book, *England or Germany?* 1940 that Swedes and other Europeans ought not to fear, but to welcome, a German victory in World War II, since (he reasoned) this was necessary to bring about a peaceful, stable, and prosperous new order in Europe, which could replace the divided and inefficient old order, dominated by England. I argue briefly, however, that the alleged connection between Olivecrona's legal philosophy and Olivecrona's thoughts on German leadership in Europe is not a logical connection, but at most a psychological one. Olivecrona died 1980 in Lund and lies buried in Uppsala in the same cemetery as Axel Hägerström and Vilhelm Lundstedt.

2.1 Introduction

Karl Olivecrona was born on 25 October 1897 in Uppsala, Sweden, as the fifth of six children of Axel Olivecrona (1860–1948) and Ebba Olivecrona, born Ebba Mörner af Morlanda (1861–1955). Axel Olivecrona was district court judge and his father, Karl's grandfather, Knut Olivecrona (1817–1905), was professor of law at Uppsala University 1852–1867, justice on the Swedish Supreme Court 1868–1889, and member of the Permanent Court of Arbitration in the Hague from 1902. Knut Olivecrona was widely known as a leading advocate for the abolition of capital pun-

This chapter, especially Sect. 2.2, has benefited very much from several interviews in April and May 2009 with Karl Olivecrona's son, Thomas Olivecrona, who is also mentioned in the text.

Law and Philosophy Library 108, DOI 10.1007/978-3-319-06167-2_2,

ishment, arguing that capital punishment is not only cruel and morally repugnant, but also does not actually reduce crime the way it is intended to. Karl would later tell his son, Thomas, how proud he was that Knut had opposed the death penalty on scientific, rather than emotional, grounds, meaning the consideration that the death penalty does not reduce crime the way it is intended to. He would also tell Thomas that he was proud of the long line of honest and reliable public servants in the family.

The Olivecrona family can be traced back to 1719, when Hans Perman (1678–1741) was raised to the nobility by Queen Ulrika Eleonora for services rendered. Perman had successfully negotiated with the Russians on behalf of King Charles XII in the aftermath of the tumult at Bender (in today's Republic of Moldavia) in 1713. Having thus acquired a new name, Perman became the founder of the Olivecrona family. Comparing Olivecrona's family background with that of the former Secretary General of the United Nations, Dag Hammarskjöld, Stig Strömholm states the following:

> Both came from families belonging to the untitled nobility, a hereditary élite, originally very small, to which a fairly large number of public servants and successful entrepreneurs—some two thousand in all—had been admitted in the seventeenth and the first decades of the eighteenth century, Sweden's short period as a European great power. In this class, eldest sons, after a period of service, mostly in the army, traditionally returned to manage the family manor, usually a rather modest estate, whereas younger brothers continued to earn their living in the public service, as army officers or in the judiciary or the civil service. The originality of the Olivecrona family, if any, is the relative preponderance of the legal, and the relative scarcity of the military element. (2008/2009, p. 63)

It is of some interest to note that Knut Olivecrona's older brother, August Olivecrona (1806–1860), joined the merchant navy, rose to master of a ship, and traveled to New Zealand, where he settled down and raised a family. As a result, there is today in New Zealand an Olivecrona family, or rather, a number of Olivecrona families.[1]

Karl's mother, Ebba, was a devout and warm-hearted Christian, who was quite strict when it came to moral and other social rules. While Karl's brother, Herbert (1891–1980), who would later become a renowned professor of neurosurgery, broke free and left the home rather early, Karl stayed in the family home, submitting to his mother's authority. And later when Karl married, he and his wife, Birgit, lived for some years in an apartment on the top floor in Axel and Ebba's house in Uppsala. Karl and Birgit would also spend time with his parents during the summers in the family summer house in Finnbo in the province of Dalecarlia, where they would often be joined by Karl's brother, Helmer (1890–1921), and two of his sisters, Sigrid (1895–1986) and Ester (1900–1986), and their families, and sometimes by Herbert and his wife, Ragnhild. However, these visits came to an end in the 1930's, when Karl and his siblings each acquired their own summer house in different parts of Sweden.

Karl received his law degree in Uppsala in 1920, at the age of 23, his fledgling interest in legal philosophy having been stimulated by Vilhelm Lundstedt's lectures 1918–1919 and by his participation in Axel Hägerström's seminars on crimi-

[1] There is a Web site devoted to the Olivecrona family tree, run by one of the New Zealanders named Helen Bland. See http://www.igrin.co.nz/~hotchoc/Olivetre.htm.

nal law issues in the spring semester 1920 (Fries 1964, p. 10). He spent the years 1921–1923 as a law clerk at the *District Court of Central Uppland* [*Uppsala läns mellersta domsaga*], where his father was chief judge, and began working on his doctoral dissertation in the spring of 1924. He received his doctorate in Uppsala 1928, whereupon he was immediately employed by the Uppsala Faculty of Law as assistant professor of law. The subject of his doctoral dissertation was the concept of a juridical person in Roman and contemporary law (1928), a topic suggested to him by Vilhelm Lundstedt. Note that at the time this was a subject belonging to corporate law, not jurisprudence. Jurisprudence would not become a legal discipline with a professorial chair in Sweden until 1961.

Having received his doctorate, Olivecrona was advised by Lundstedt to focus on procedural rather than private law, in order to be able to apply for the chair in procedural law at Lund University that would soon become vacant after the retirement of Ernst Kallenberg, a giant in the field (Fries 1964, p. 11). He therefore wrote a book on the onus of proof and its relation to substantive law (Olivecrona 1930), and applied for the professorship. His qualifications were considered insufficient by the Lund Faculty of Law, however, though three of the four members of the expert panel had declared him competent (Professors Engströmer, Granfelt, and Munch-Petersen), albeit in lukewarm terms. The fourth member (Professor Hassler) had declared him insufficiently qualified (Ekelöf 1985, p. 142). Per Olof Ekelöf suggests that the lukewarm reception of Olivecrona's work on this occasion had to do with Olivecrona's legal philosophy, which the members of the expert panel found too abstract and critical (Ekelöf 1985, pp. 147–148). However, the chair in procedural law was again advertised about a year later. Having written yet another book on procedural law in the meantime (Olivecrona 1933), Olivecrona applied again and was appointed professor in 1933 (Ekelöf 1985, p. 142). He remained professor of procedural law at the Faculty of Law, Lund University, until he retired in 1964. As one might expect, his father, Axel, was very pleased that Olivecrona carried on the family tradition in the field of law so successfully (Olivecrona 1939, p. 89).

Olivecrona kept writing articles and books on procedural law matters throughout his career, including the mature and impressive work *Rätt och dom* [*Law and Judgment*] (1960), though his main interest was clearly in the field of jurisprudence. His jurisprudential work was, however, always informed by a deep understanding of doctrinal matters, though it is not so clear that his jurisprudential theories had much influence on his doctrinal work (on this, see Strömholm 2008/2009, p. 68). It is in any case worth noting that his doctrinal writings, especially his books on procedural law matters and real estate law, were for many years much used and appreciated by legal practitioners in Swedish courts and law firms.

2.2 Family Life

The Swedish philosopher Martin Fries, who knew Olivecrona well, observes in his introduction to the *Festschrift* Olivecrona received when he retired in 1964, that Olivecrona was a "matter-of-fact person," that is, a person who cares about events

and things for their own sake, as distinguished from an "I person," that is, a person who cares about events and things only insofar as they become merged in him or herself (1964, p. 20); and this may perhaps explain why not much has been written about Olivecrona's personal life.

Olivecrona married Birgit Lange (1901–1993) in 1929. Birgit was born and raised in Visby on the island of Gotland, and had also lived in the small town of Västervik, located on the Swedish East Coast. Her maternal grandfather was the managing director of *Ångbåtsbolaget*, a Swedish shipping company, as well as German consul in Visby, and her father held a Ph.D. in German and was the principal at the high school in Västervik. Birgit herself was a fun-loving and outgoing young woman, who was educated as a school teacher, and had worked as a secretary at the Stockholm Stock Exchange. She had also written a couple of children's books and a few novels and had translated William Thackeray's *Vanity Fair* into Swedish.

Later Birgit would also work as a secretary to her husband, who would often thank her in the prefaces to his books. For example, he writes in the preface to the First Edition of *Law as Fact* that "[m]y wife, besides stimulating my work with her untiring interest, has been of invaluable help to me through much clarification on questions of psychology." Birgit for her part wrote in the preface to Olivecrona's *Det rättsliga språket och verkligheten* [*Legal Language and Reality*] (1964), that she had for 40 years had the opportunity of standing beside her husband and, as far as she had been able, of following his scientific thinking. She added that she felt extremely privileged to have been allowed to live near someone whose primary aim was to search for the truth.

Birgit could not, however, accept the non-cognitivist meta-ethics embraced by Olivecrona—the so-called value nihilism—and it is arguable that she developed her deep interest in religious and spiritual matters more generally in response to Olivecrona's espousal of the non-cognitivist theory. Like others before and after her, she probably felt that the very idea of a world in which there are no moral or aesthetic values and standards is simply unacceptable. In any case, she would later write a number of books on religious and spiritual matters, most of which she published at her own expense. Here special mention should be made of the early novels *Ringmuren* [*The Ring-Wall*] (1935), for which she received the publishing company *Bonniers'* literary stipend in 1935, and *En man finner sig själv* [*A Man in Search of Himself*] (1938). The latter book is of particular interest, because it appears to be based on the life of Karl and Birgit.

Karl and Birgit had two children, Christina (1931–2007) and Thomas (born 1936); a third child, Agnes, died as an infant due to respiratory complications a year or two before Christina was born. Having gone to school at Lundsberg in Värmland, a well-known private boarding school, Thomas eventually became a highly regarded professor of medicine at Umeå University in Northern Sweden, a member of the Royal Swedish Academy of Sciences, and the winner of the prestigious Jahre Award for Medical Research in 1993. Christina, too, studied medicine, but only worked a short time as a medical practitioner. She then went on to help set up the information system at *Karolinska institutet*, the well-known medical research institute in Stockholm. She also learned Sanskrit quite well and would travel extensively to India to pursue her avid interest in meditation and yoga, an interest she shared with Birgit.

Karl also had two sons with Greta Hedlund, whom he had met some years before he met Birgit, namely Hans (1922–2006) and Sven (1924–2007). Hans would later receive a doctorate in medicine, and proceeded to work as an X-ray physician in Malmö, and Sven grew up to become an appreciated employee at Uppsala University Library. But whereas Hans, who was raised by Karl and Birgit and adopted by Birgit when she married Karl, was known to all as Karl's son, Sven, who was raised by Greta, was kept a secret by Karl, though not from Birgit, until he informed Thomas that he (Thomas) had another half-brother a year or so before he (Karl) died.

Having moved from Uppsala to Lund in 1933 when Karl was appointed professor of procedural law, Karl and Birgit lived for about 20 years with their children in a large house at Helgonavägen 9 in a part of Lund known as "Professor Town," the name obviously a reference to the large number of academics living there. Karl and Birgit did not have a very active social life in Lund, but spent most of their time at home together with their children. There they would read books and listen to classical music, and Birgit would read to the children. They would also play bridge. Indeed, they were both fairly accomplished bridge players.

The family also had a summer house in Båstad on the Swedish West Coast, where they would spend the whole summer each year. They would travel to Båstad by train with a couple of large suitcases, which were so heavy that Olivecrona had to hire porters to transport them to and from the train. In Båstad, he would work every weekday until lunch, and would then spend time with the family, or else go for long walks in the woods. Later, in the beginning of the 1950's, Karl and Birgit bought a car, and since at this time Thomas was in school at Lundsberg and Christina was a student at Uppsala University, they could spend more time in Båstad than they had been able to do a few years earlier.

On a few occasions, Olivecrona would let a student come to Båstad in the summer to undergo oral examination in jurisprudence. The few students who took the trouble to go to Båstad to be examined would usually be successful, though Thomas recalls that on at least one occasion Olivecrona had to fail a student, and that he (Olivecrona) was quite unhappy about this.

In the early 1950's the family moved to an apartment in Lund, but before long they acquired a house with a garden instead (also in Lund), where they would remain until Olivecrona died in 1980. It was Birgit in particular who wanted to leave the apartment and get another house. She wanted a garden where she could sit and read in the summertime.

2.3 Sources of Inspiration

Stig Strömholm points out that the life of a law professor in Uppsala in the second and third decades of the twentieth century was a life of considerable freedom, in that professors could engage in many extra-curricular activities and be quite eccentric (2008/2009, p. 67). But, he continues, although the intellectual world of the Uppsala Law Faculty must have been stimulating, a serious student of law with an interest in

jurisprudential questions must have found the teachings of Hägerström and Lundstedt to be the most interesting and exciting sources of inspiration available (Strömholm 2008/2009, p. 67). Indeed, as Strömholm points out (Strömholm 2008/2009, p. 66), a saying among law students in Uppsala in the early twentieth century had it that "Hägerström is Allah and Lundstedt is his prophet." Martin Fries describes the importance of Hägerström's and Lundstedt's legal philosophies to Olivecrona in the following terms:

> Karl Olivecrona's early-aroused interest in legal theory was stimulated by Vilhelm Lundstedt's lectures during the 1918–1919 school year, when Lundstedt for the first time started to propound his revolutionary viewpoints regarding jurisprudence. Decisive for O's [Olivecrona's] future development, however, was his participation in Hägerström's seminars in the spring of 1920, which took up Johan Thyrén's work "Principles for a Reform of Penal Law" (1910–1914). O. was very soon convinced that Hägerström's analyses paved the way for a rigorously realistic legal science. Owing to this, an early desire to embark upon a scientific career was confirmed and also set in a definite direction. (1964, p. 10)[2]

Olivecrona himself states in the preface to his doctoral dissertation that his work depended to a considerable extent on Lundstedt's pioneering legal works, and that Hägerström, too, had been a great source of inspiration during his work on the dissertation (1928, Preface).

As we shall see in the following chapters, Olivecrona did take it upon himself to develop (what he referred to as) a realistic legal philosophy based on the ideas put forward by Hägerström and developed or, more often, simply repeated, by Lundstedt. And, as we shall also see, he became quite successful in his attempts to develop such a legal philosophy. For he is by far the best-known Swedish legal philosopher to this day, and deservedly so; in the Nordic countries, he is in this regard second only to the Dane Alf Ross.

2.4 England or Germany?

When sketching Karl Olivecrona's biography, one cannot avoid the two pamphlets Olivecrona wrote about World War II and about international politics more generally. In the first book, *England eller Tyskland* [*England or Germany*] (1940), he argued that Swedes and other Europeans ought not to fear, but to welcome, a German victory in the on-going war, since (as he saw it) this was necessary to bring

[2] The Swedish original reads as follows. "Karl Olivecronas tidigt vaknade rättsteoretiska intresse stimulerades av Vilhelm Lundstedts föreläsningar under läsåret 1918–1919, då Lundstedt för första gången började framlägga sina revolutionerande synpunkter på juridiken. Avgörande för O:s [Olivecronas] framtida utveckling blev emellertid hans deltagande i Hägerströms seminarieövningar våren 1920 över Johan Thyréns arbete "Principerna för en strafflagsreform" (1910–1914). Mycket snart fick O. den uppfattningen, att Hägerströms analyser banade väg för en strängt realistisk rättsvetenskap. En tidig önskan att ägna sig åt den vetenskapliga banan befästes härigenom och fick då också en bestämd inriktning."

about a peaceful, stable, and prosperous new order in Europe, which could replace the divided and inefficient old order dominated by England.

Interestingly, Olivecrona did not touch on the Hitler administration in his book. Indeed, he did not touch on the subject of political ideologies at all—not a word about liberalism, socialism, Nazism, or Fascism—except to say that ideologies were secondary in relation to facts about the size of populations, geography, industrial production capacity, etc.: "The people and the geography are more important. The ideologies are conditioned by the current state of things and always evince a tendency to change with them." (Olivecrona 1940, p. 46)[3] Accordingly, he based his argumentation precisely on facts about geography, industrial-production capacity, and the size and qualities of the population in the different countries. Since the Germans numbered around 80 million at the time, whereas the English and the French approached the same figure only when taken together, and since the Germans, as Olivecrona saw it, were extraordinarily able, Germany—not England—should be the leader of Europe. Observing the anxiety felt by many people when contemplating a Europe under German leadership, he concluded the book with the following words:

> There is now great anxiety on account of Germany's power. However, the anxiety would perhaps be greater and more well founded if this power were to fall away. There is good reason to imagine what our situation would be like if, contrary to expectation, the English-American combination succeeded in starving and devastating the European Continent, especially Germany. Then maybe we would understand how much we need the friendship and support of our big, strong, courageous kindred nation. (Olivecrona 1940, p. 47)[4]

In his second book, *Europa och Amerika* [*Europe and America*] (1942a), Olivecrona argued that Europe must unite under the leadership of Germany, in order to be able to compete with the United States and certain other non-European countries, such as China and Japan. Focusing on the United States, he explained that this country had three important advantages compared with Europe, viz. (i) its prosperity, due to its considerable natural resources, (ii) its political unity, and (iii) its sheltered geographical position (Olivecrona 1940, Chaps. 1–2). Europe, on the other hand, was rather weak on all three counts. As a result of these differences, the United States was much stronger than Europe. Hence Europe had to respond by uniting behind a strong leader, namely Germany. For while the Europeans could do nothing about Europe's geographical position, or the scarcity of natural resources in Europe, they could at least achieve political unity (Olivecrona 1940, p. 24).

Olivecrona's idea, first put forward in *England eller Tyskland*, was that Germany must be the much needed leader of Europe, because Germany was the only European country that was powerful enough to accomplish such unification, and (he

[3] The Swedish original reads as follows. "Folket och geografin äro viktigare. Ideologierna äro betingade av rådande förhållanden och visa alltid en tendens att förändras med dem."

[4] The Swedish original reads as follows. "Oron för Tysklands makt är nu stor. Kanske skulle dock oron vara större och bättre grundad om denna makt fölle bort. Det är skäl att tänka sig in i hurudant vårt läge skulle bli om det mot förmodan skulle lyckas den engelsk-amerikanska kombinationen att utsvälta och ödelägga den europeiska kontinenten, främst Tyskland. Då förstår man måhända hur väl vi behöva vänskap och stöd från vårt stora, starka, modiga frändefolk."

added) because no non-European country wished (or had the power) to engage in this task. He wrote:

> We must make it clear to ourselves that this is not just a matter of stating what we consider to be pleasant. If anything is to be done, it must occur on the basis of objectively given factors, which we cannot ignore. We have had enough of illusory projects during the NF [League of Nations] period. A fundamental, dominating fact in any conceivable case is that the German nation, with its population of 80 million, its extraordinary competence and its centrally located land is at the core of Europe. It is around this core that the work of unification must be done. From whatever angle one looks upon this problem, whatever outcome of the war one imagines, one cannot get past this necessity. If this state of things is recognized generally, then the way is paved for the psychological adjustment that must occur. (Olivecrona 1940, p. 67)[5]

It is interesting to note that Olivecrona and Lundstedt exchanged letters on this topic in a rather heated way in the summer of 1941.[6] The starting point was an interview with Lundstedt in the Swedish newspaper *Göteborgs Handels- och Sjöfarts-Tidning* (the leading quality newspaper in the Gothenburg region, renowned for its uncompromising anti-Nazi stance) 27 June 1941, in which Lundstedt complained bitterly about attempts that had been made to invoke Axel Hägerström's philosophy in support of the Nazi ideology. He made it clear that there was no support for Nazism whatsoever to be found in Hägerström's writings, adding that Hägerström's widow was very upset about this business. Hägerström, he emphasized, was a full-blown humanist, and a democrat of the purest type.

Having read this interview, Olivecrona wrote Lundstedt and said that he was very unhappy with Lundstedt's talk about attempts that had been made to invoke Hägerström's philosophy in support of the Nazi ideology. Given recent writings in the newspapers, he said, the reader of the interview would immediately come to think of me (Olivecrona), and this you (Lundstedt) must surely have understood.

Lundstedt responded that he was quite happy with the interview, which had occurred on his own initiative, and that he had no intention of retracting anything. He explained that in the last year he had read a number of newspaper articles, in which the authors had asserted or implied a connection between the Nazi ideology and Hägerström's philosophy, and that he had been asked by several persons, some of them quite influential, to speak out in defense of Hägerström. This, he said, was the immediate reason for the interview. He added that Olivecrona must surely blame himself only, if the general public had misunderstood his writings, and added—as a

[5] The Swedish original reads as follows."Vi måste göra klart för oss att det här inte bara gäller att deklarera vad man anser vara trevligt. Skall någonting kunna göras, så måste det ske på grundval av vissa objektivt givna faktorer, som man inte kan sätta sig över. Overkliga projekt har vi haft nog av på NF:s tid. Ett grundläggande, under alla tänkbara förhållanden dominerande faktum är nu att det tyska folket med sina åttio miljoner, sin utomordentliga duglighet och sitt centralt belägna land är Europas kärna. Kring denna kärna måste eningsverket ske. Hur man än vänder på saken, vilken utgång av kriget man än må föreställa sig, kommer man omöjligen förbi denna nödvändighet. Inses detta förhållande allmänt, då banas väg för den psykologiska omställning som måste ske."

[6] The newspaper clippings and the letters are available in the ABF Archives in Stockholm. I would like to thank Jan-Olof Sundell for providing me with a transcription of the interview and the letters.

response to Olivecrona's complaint about the lack of objectivity in the interview—that someone who has published *England eller Tyskland* should be more careful when accusing others of lack of objectivity. He concluded the letter by saying that he did not wish to receive a reply from Olivecrona, since he could think of better and more productive ways of spending the summer than going over this business again and again.

Nevertheless, Olivecrona did reply in a brief letter, repeating his complaint that Lundstedt had failed to prevent misinterpretations of the interview, even though he could have done so, and that the relation between (what he referred to as) the German revolution and Hägerström's philosophy was more complicated than Lundstedt appeared to believe. He did not, however, elaborate on this. He concluded the letter by reiterating the claim—put forward in the two pamphlets—that Europe ought to unite under German leadership, since this was the only way forward.

Olivecrona did recant, however, though it was rather late in the day. In the fall of 1944, Jöran Mjöberg, who would later become a professor of literature, wrote an article in the Lund University student magazine *Lundagård*, arguing that we must all be on our guard against any remaining Nazi ideology among the Swedes, and fight it forcefully and without mercy whenever necessary (1944a, p. 194). Olivecrona replied in the next issue of *Lundagård* that he regretted having spoken out in support of Germany during the war, while pointing out that he had had the best of intentions. He explained that he had argued in the above-mentioned pamphlets that the situation in Europe was unacceptable, that European unity was necessary, and that for economic, military, geographical, and population reasons such unity presupposed German leadership (1944, p. 223). And while he admitted that he had made an inexcusable mistake when he left the ideologies out of his analysis (Olivecrona 1944, p. 223), he insisted that he had acted in good faith. He also argued that Mjöberg treated the targets of his criticism, that is, the real or alleged Nazi sympathizers, unfairly, in that he accused them of stupidity and moral blindness. One must always make a distinction between the acting *person* and his *acts*, he explained, adding that it was characteristic of the Nazis to fail to make this distinction. He stated the following:

> In any event, one must agree that an honest conviction about what is best for one's own people, for the European nations or for the world in its entirety—if one goes that far—cannot as such be morally reprehensible. One can claim that a conviction rests on false assumptions or erroneous conclusions from real facts, and then one should try to elucidate this. It is as if Mjöberg, like so many others nowadays, simply presumed the absence of honest conviction on the part of those whom he attacks. But the conviction is there without a doubt to a great extent, often combined with devotion and readiness for great self-sacrifice. Some people have been deeply moved by the belief in National Socialism. Others have taken a more sober view—rightly or wrongly—and have thought that Europe's existence was dependent on Germany's coming to its aid. That was their honest conviction. (Olivecrona 1944, p. 224)[7]

[7] The Swedish original reads as follows. "I alla händelser måste man väl vara överens om att en ärlig övertygelse om vad som är bäst för ens eget folk, för de europeiska folken eller för världen i dess helhet – om man sträcker sig så långt – icke såsom sådan kan vara moraliskt förkastlig. Man

He also pointed to and deplored the cruelty and the fanatical race persecution on the part of the Nazis, and asked in a rhetorical manner whether this circumstance was not reason enough to denounce any positive view of Germany as completely unacceptable. He answered that even though there may have been those who overtly or covertly appreciated the German policy in this regard, as well as those who preferred to look the other way, there were also those who felt despair when they saw Western ideals trampled on by those who were supposed to take the lead in the effort to create a European organization for our time (Olivecrona 1944, pp. 224–225).

Mjöberg (1944b, p. 229) replied in turn that he had never thought of Olivecrona as an ordinary Nazi, but had considered him to be peculiarly naïve as well as very pessimistic regarding the possibility of securing solid peace without the use of organized force. He concluded his reply as follows: "If one is among those who have always considered violence and the absolute hostility toward all spiritual values as incompatible with a living culture, it is very difficult to understand and follow the development in Professor Olivecrona's idealism. It is perhaps an idealism, but it courses in such incomprehensible heights among the clouds." (Mjöberg 1944b, p. 230)[8]

I myself fail to see how the advantages that Olivecrona believed would result from a German victory in the war and a united Europe under German leadership could possibly outweigh the atrocities committed by the Nazis (on this, see Hedenius 1941, pp 155–156). Of course, Olivecrona never said that they would. As we have seen, he did not touch on the atrocities at all. I assume that Mjöberg in his criticism meant that Olivecrona must have been aware of what went on, perhaps thinking that the end justifies the means, or else that his lack of awareness was inexcusable. I share this view. For even though it appears to have been difficult to get a clear picture of what went on in Germany and elsewhere in Europe at the time (on this, see Oredsson 1996, p. 10), the fact remains that some people, such as Ingemar Hedenius (1941, pp. 149–156) and Vilhelm Lundstedt (in the above-mentioned letter to Olivecrona), were aware as early as 1941 that something was seriously wrong, that Jews and others were being persecuted and, indeed, murdered. For example, what happened during the so-called *Kristall Nacht* [Crystal Night] 9 November 1938 must have been clear to all people.

---

kan göra gällande, att en övertygelse vilar på felaktiga antaganden eller på felaktiga slutsatser från verkliga fakta, och då bör man försöka klargöra detta. Det är som om Mjöberg, liksom så många andra nu för tiden, utan vidare förutsatte frånvaron av ärlig övertygelse hos dem han angriper. Men den finns där utan tvivel i stor utsträckning, ofta förenad med hängivenhet och beredskap till stor självuppoffring. En del människor ha gripits av den nationalsocialistiska tron. Andra ha mera nyktert – med rätt eller orätt – sett saken så, att Europas bestånd var beroende av att Tyskland skulle stå bi. Detta har varit deras ärliga övertygelse." (Olivecrona 1944, p. 224)

[8] The Swedish original reads as follows: "om man hör till dem som alltid betraktat våldet och den absoluta fientligheten mot alla andliga värden som oförenliga med en levande kultur, har man mycket svårt att förstå och följa utvecklingen i professor Olivecronas idealitet. Det är kanske en idealitet, men den rör sig i så svårbegripliga banor i det blå."

2.5 Politics and Legal Philosophy

As we shall see in Chap. 10, Olivecrona maintains that law is a matter of organized force. One may perhaps wonder whether there is some sort of connection between Olivecrona's legal philosophy and Olivecrona's support for Germany. Anders Kjellström (1987, p. 65), for example, maintains that Olivecrona's political view, specifically the support for Germany, follows from Olivecrona's legal philosophy. Similarly, Sverker Oredsson suggests in his instructive book about Nazism at Lund University during World War II, that there is an unusually strong connection between Olivecrona's political views, what Oredsson (1996, p. 94) refers to as Olivecrona's pro-Nazi stance, and the legal philosophy espoused by Olivecrona. He mentions the claim of the Scandinavian realists that there is no law and no rights over and above statutes, and that the law is indeed created by legislation, as well as Olivecrona's claim in the First Edition of *Law as Fact* that it is war that determines the relation between states (Oredsson 1996, p. 94).

I am going to discuss this question in more detail in Chap. 10, which treats Olivecrona's thoughts on law, force, and morality, but I can say already that I can see no *logical* connection between Olivecrona's support for Germany and the legal philosophy espoused by Olivecrona. The main reason is simply that Olivecrona's legal philosophy aims to analyze the concept of law, not to prescribe a moral or political course of action. More specifically, Olivecrona argues that law *is* a matter of organized force, and it does *not* follow from this claim that the political leaders in any country *ought to* make use of the existing apparatus of organized force to persecute racial or other minorities. There is nothing in Olivecrona's analysis of the concept of law, or, more generally, in the analysis of the concept of law defended by legal positivists,[9] that must rationally lead anybody to support, or to not to object to, discrimination, oppression, persecution, or, as in the case of the Nazis, murder and genocide. This is not to say, however, that there is or can be no connection of any kind between Olivecrona's legal philosophy and Olivecrona's support for Germany. I will return to the question of a possible *causal* connection in Sect. 10.12.

2.6 The Post-War Period

It appears from all accounts that Olivecrona managed to maintain a position of good social standing in the post-war period, despite his earlier political stance. He was Dean of the Law Faculty at Lund University 1951–1958, he received a fine *Festschrift* (Leijman et al. 1964) when he retired in 1964, and he continued to write and publish throughout the 1970's on legal and legal-philosophical matters and to

[9] As I explain in Chap. 15, Olivecrona was a legal positivist in the sense that Hans Kelsen and H. L. A. Hart were legal positivists, though he did reject legal positivism conceived as the theory that law is the content of a sovereign will. On the relation between legal positivism and moral criticism of the law, see Kelsen (1960, p. 71), MacCormick (1985), Spaak (2003, pp. 475–476).

conduct advanced seminars in jurisprudence. As Kjell Å. Modéer notes in his entry in *Svenskt biografiskt lexikon*,

> [m]any legal scholars who have been fostered at the Faculty of Law in Lund have borne witness to O's [Olivecrona's] intellectually stimulating seminars, where the exchange of ideas was to a high degree controlled by the leader of the seminars, and where many found it difficult to assert their positions due to the domineering professor. He still held seminars more than ten years after his retirement for an interested group of doctoral students at the Department of Law. (1993, p. 128)[10]

Most of the contributors to the above-mentioned *Festschrift* were, of course, Swedish, but it is worth noting that the Norwegian legal theorist Torstein Eckhoff, the Polish legal theorist Kazimierz Opalek, and a few leading English and American philosophers and legal scholars, such as C. D. Broad, H. L. A. Hart, and Roscoe Pound, also contributed to the *Festschrift*. On top of it all, Martin Fries, mentioned above, wrote an enthusiastic introduction to the *Festschrift*. Having introduced the above-mentioned distinction between "I persons" and "matter-of-fact persons," he stated the following:

> Karl Olivecrona is without doubt a "matter-of-fact person". This is evidenced in his writings, in his way of arguing a standpoint or a differing point of view and especially in his practical attitude toward his fellowmen. His kind, warm heart and self-effacing generosity are hardly ever expressed in effusive phrases and gestures, but all the more in deeds. I have many times—especially in my collaboration with him on the Hägerström Committee—had occasion to observe these features of character. Added to this, there is a quality that explains the efficiency in his activities, both as a scholar and as a man of action: the alertness of his thoughts and his lack of prejudice and rigid dogmatism. All this, as well as his multifarious interests, make being together with him not only intellectually stimulating but also abundantly satisfying and cordial.
>
> One cannot but feel a deep delight and gratitude for having a friend such as Karl Olivecrona. At a time when there certainly is a need for persons with high moral stature, he is a bright spot. May he continue to work many years yet for the lasting benefit of science and for the joy of his many friends. (1964, p. 20)[11]

[10] The Swedish original reads as follows. "[å]tskilliga forskare som fostrats vid den juridiska fakulteten i Lund har vittnat om O:s [Olivecronas] intellektuellt stimulerande seminarier, där tankeutbytet i hög grad styrdes av seminarieledaren, och där många ansåg det svårt att kunna hävda sina positioner, på grund av den dominante professorn. Fortfarande mer än tio år efter sin pensionering höll han seminarier för en intresserad grupp doktorander på Juridicum."

[11] The Swedish original reads as follows. "Karl Olivecrona tillhör otvivelaktigt sakmänniskorna. Det visar sig i hans skrifter, i hans sätt att hävda en ståndpunkt eller en avvikande mening, och det visar sig inte minst i hans praktiska förhållande till sina medmänniskor. Hans goda, varma hjärta och självförglömmande generositet tar sig ytterst sällan uttryck i översvallande fraser och gester, men så mycket mera i handling. Jag har många gånger – inte minst i mitt samarbete med honom i Hägerströmkommittén – haft tillfälle att konstatera dessa drag. Härtill kommer en egenskap som förklarar effektiviteten i hans verksamhet både som forskare och som handlingsmänniska: hans tankes rörlighet och hans frihet från fördomar och stelbent dogmatism. Allt detta jämte hans mångsidiga intressen gör samvaron med honom inte bara intellektuellt stimulerande utan även rik och värmande.

To a present-day observer, Olivecrona's position of high consideration in the academic world after the war may be somewhat surprising. One must, however, remember that Olivecrona was far from being alone in having supported Germany, though more prudent supporters chose to keep a low profile. As Sverker Oredsson (1996) makes clear, there was considerable support for—though even more opposition to—Nazi Germany among students and professors at Lund University during the war, especially the first years, and there is little reason to assume that the situation was much different at other Swedish universities. Moreover, Staffan Thorsell points out in his recent book *Mein lieber Reichskanzler* [*My Dear Chancellor*] (2006) that even the Archbishop and certain members of the Cabinet and of the Swedish Royal Family had a positive view of Nazi Germany.

In any case, Olivecrona wrote a number of important books and articles after the war, notably "Realism and Idealism: Some Reflections on the Cardinal Point in Legal Philosophy" (1951), *The Problem of the Monetary Unit* (1957), *Rätt och dom* [*Law and Judgment*] (1960),[12] "Legal Language and Reality" (1962a), *Law as Fact* (1971), and *Rättsordningen* [*The Legal Order*] (1976, p. 2). And he also edited a collection of Hägerström's essays on legal and moral philosophy, which had been translated into English at Olivecrona's request by C. D. Broad, mentioned above. This collection of essays was published, with an introduction by Olivecrona, under the title *Inquiries into the Nature of Law and Morals* (Hägerström 1953a, b, c, d, e, f). In my view, Olivecrona's initiative and hard work with the Hägerström volume deserves the very highest recognition.

In the 1970's, Olivecrona published several essays on topics in the history of legal and political philosophy. He wrote about John Locke (1969, 1971/1972, 1974a, b), Jeremy Bentham (1975), Hugo Grotius and Samuel Pufendorf (1973, 1977), and Axel Hägerström and natural-law thinking (1978). He had earlier published an essay on the making of a king in medieval Sweden (1942b), a book on Roman Law (1949), and a book on the legal philosophies of Hägerström and Lundstedt (1962b, 2nd ed. 1964). He actually seems to have developed an appreciation of the natural law thinkers of the seventeenth century in his old age.

Karl Olivecrona died on 5 February 1980 in Lund at the age of 82. He is, however, buried in Uppsala at *Uppsala gamla kyrkogård* [Uppsala Old Cemetery], where Axel Hägerström and Vilhelm Lundstedt, too, rest. Thus the leading Scandinavian realists, with the exception of Alf Ross, now rest in the same cemetery together with their primary source of philosophical inspiration.

Man kan inte annat än känna en djup glädje och tacksamhet över att det finns en vän sådan som Karl Olivecrona. I en tid som sannerligen är i behov av personer med andlig resning är han en ljuspunkt. Må han ännu i många år få verka till forskningens fromma och till glädje för hans många vänner."

[12] A prominent Norwegian legal scholar, Carl Jacob Arnholm (1962, p. 31), referred in a review to *Rätt och dom* [Law and Judgment] as "a great and permanent achievement," expressing his hope that it, or at least parts of it, "be translated into one of the world's leading languages".

References

Articles

Arnholm, Carl Jacob. 1962. Olivecrona on legal rights. Reflections on the concept of rights. *Scandinavian Studies in Law* 6:10–31.

Ekelöf, Per Olof. 1985. En rättsvetenskaplig tragedi [A legal-scientific tragedy]. In *Festskrift till Henrik Hessler [Festschrift for Henrik Hessler],* ed. Torgny Håstad, 131–160. Stockholm: Norstedts.

Fries, Martin. 1964. Karl Olivecrona—forskaren och vännen [Karl Olivecrona—scholar and friend]. In *Festskrift tillägnad Karl Olivecrona*, eds. Fritjiof Leijman et al., 9–20. Stockholm: Norstedts.

Hägerström, Axel. 1953a. General view. In *Inquiries into the nature of law and morals,* ed. Karl Olivecrona, 1–16 (Trans: C. D. Broad). Uppsala: Kungliga humanistiska vetenskapssamfundet i Uppsala.

Hägerström, Axel. 1953b. Is positive law an expression of will? In *Inquiries into the nature of law and morals*, ed. Hägerström, 17–55. Uppsala: Almqvist & Wiksells.

Hägerström, Axel. 1953c. On the question of the notion of law. In *Inquiries into the nature of law and morals*, ed. Hägerström, 56–256. Uppsala: Almqvist & Wiksells.

Hägerström, Axel. 1953d. Kelsen's theory of law and the state. In *Inquiries into the nature of law and morals*, ed. Axel Hägerström, 257–298. Uppsala: Almqvist & Wiksells.

Hägerström, Axel. 1953e. The conception of a declaration of intention in the sphere of private law. In *Inquiries into the nature of law and morals*, ed. Hägerström, 299–347. Uppsala: Almqvist & Wiksells.

Hägerström, Axel. 1953f. On fundamental problems of law. In *Inquiries into the nature of law and morals*, ed. Axel Hägerström, 348–366. Uppsala: Almqvist & Wiksells.

Kjellström, Anders. 1987. Olivecrona och samtiden [Olivecrona and our time]. *Retfaerd* 37:62–66.

MacCormick, Neil. 1985. A moralistic case for a-moralistic law. *Valparaiso University Law Review* 20:1–41.

Mjöberg, Jöran. 1944a. Den eviga fronten [The everlasting front]. *Lundagård* 10:193–194.

Mjöberg, Jöran. 1944b. Svar till professor Olivecrona [Reply to Professor Olivecrona]. *Lundagård* 11:229–230.

Modéer, Kjell Å. 1993. Karl Olivecrona. *Svenskt biografiskt lexikon [Swedish Biographical Encyclopedia]* 28:126–129.

Olivecrona, Karl. 1933. Förfarandet vid försäljning av fast egendom [Real estate transactions]. Uppsala: Appelberg.

Olivecrona, Karl. 1944. Var går fronten? [Where is the front?]. *Lundagård* 11:223–225.

Olivecrona, Karl. 1951. Realism and idealism: Some reflections on the cardinal point in legal philosophy. *New York University Law Review* 26:120–131.

Olivecrona, Karl. 1962a. Legal language and reality. In *Essays in honor of Roscoe Pound*, ed. Ralph A. Newman, 151–91. Indianapolis: The American Society for Legal History.

Olivecrona, Karl. 1962b. Hägerströms rättsfilosofi [Hägerström's legal philosophy]. In *Grundtankar hos Hägerström och Lundstedt [Fundamental ideas of Hägerström and Lundstedt]*, ed. Karl Olivecrona, 2–19. 2nd ed. Lund: Juridiska föreningen i Lund. (1964).

Olivecrona, Karl. 1969. Begreppet "Property" hos John Locke [John Locke's concept of property]. In *Logik, rätt och moral. Filosofiska studier tillägnade Manfred Moritz på 60-årsdagen den 4 juni 1969 [Logic, law, and morality. Philosophical studies dedicated to Manfred Moritz on his 60th birthday 4 June 1969]*, ed. Sören Halldén et al., 149–163. Lund: Studentlitteratur.

Olivecrona, Karl. 1973. Das Meinige nach der Naturrechtslehre [The *meum* according to natural law theory]. *Archiv für Rechts- und Sozialphilosophie [Archive for Legal and Social Philosophy]* 59:197–205.

Olivecrona, Karl. 1974a. Appropriation in the state of nature: Locke on the origin of property. *Journal of the History of Ideas* 35:211–230.

Olivecrona, Karl. 1974b. Locke's theory of appropriation. *The Philosophical Quarterly* 24:220–234.
Olivecrona, Karl. 1975. The will of the sovereign: Some reflections on Bentham's concept of "a law." *American Journal of Jurisprudence* 20:95–110.
Olivecrona, Karl. 1977. Die Zwei Schichten im naturrechtlichen Denken [The two strata in natural law thinking]. *Archiv für Rechts- und Sozialphilosophie [Archive for Legal and Social Philosophy]* 63:79–103.
Olivecrona, Karl. 1978. Hägerström och naturrätten [Hägerström and natural law]. In *Uppsalaskolan—och efteråt [The Uppsala school—and afterwards]*, ed. Stig Strömholm, 25–31. Uppsala: Almqvist & Wiksell.
Spaak, Torben. 2003. Legal positivism, law's normativity, and the normative force of legal justification. *Ratio Juris* 16:469–485.
Strömholm, Stig. 2008/2009. Karl Olivecrona: Continuity and breach of tradition. *Juridisk tidskrift* 1:62–73.
Hedenius, Ingemar. 1941. *Om rätt och moral [On law and morals]*. Stockholm: Tiden.
Kelsen, Hans. 1960. *Reine Rechtslehre [The pure theory of law]*. 2nd ed. Vienna: Österreichische Staatsdruckerei.
Lange, Birgit. 1935. *Ringmuren [The ring-wall]*. 2nd ed. Stockholm: Gebers.
Lange, Birgit. 1938. *En man finner sig själv [A man in search of himself]*. Stockholm: Gebers.
Leijman, Fritjof, et al., eds. 1964. *Festskrift tillägnad Karl Olivecrona [Festschrift for Karl Olivecrona]*. Stockholm: Norstedts.
Olivecrona, Karl. 1928. *Studier över begreppet juridisk person i romersk och modern rätt [Studies on the concept of a juridical person in Roman and modern law]*. Uppsala: Appelbergs.
Olivecrona, Axel. 1939. *Minnen [Recollections]*. Agneta Olivecrona 1993.
Olivecrona, Karl. 1930. *Bevisskyldigheten och den materiella rätten [Substantive law and the onus of proof]*. Uppsala: A & W.
Olivecrona, Karl. 1940. *England eller Tyskland? [England or Germany?]*. Lund: Gleerup.
Olivecrona, Karl. 1942a. *Europa och Amerika [Europe and America]*. Lund: Sundqvist & Emond.
Olivecrona, Karl. 1942b. *Döma till konung [Becoming a king]*. Lund: Gleerup.
Olivecrona, Karl. 1949. *Three essays in Roman law*. Copenhagen: Munksgaard.
Olivecrona, Karl. 1957. *The problem of the monetary unit*. Stockholm: Almqvist & Wiksell.
Olivecrona, Karl. 1960. *Rätt och dom [Law and judgment]*. 2nd ed. Stockholm: Norstedts. (1966).
Olivecrona, Karl. 1964. *Det rättsliga språket och verkligheten* [*Legal language and reality*]. Lund: Gleerup.
Olivecrona, Karl. 1971. *Law as fact*. 2nd ed. London: Stevens & Sons.
Olivecrona, Karl. 1971/1972. *Äganderättens ursprung enligt John Locke [The origin of ownership according to John Locke]*. Uppsala: Kungliga humanistiska vetenskapssamfundet i Uppsala årsbok.
Olivecrona, Karl. 1976. *Rättsordningen [The legal order]*. 2nd ed. Stockholm: Liber. (1st ed 1966).
Oredsson, Sverker. 1996. *Lunds universitet under andra världskriget [Lund university during World War II]*. Lund: Lunds universitetshistoriska sällskap.
Thorsell, Staffan. 2006. *Mein lieber Reichskanzler! [My dear chancellor]*. Stockholm: Bonnier fakta.

Chapter 3
Olivecrona's Legal Philosophy: A Preview

Abstract In this chapter, I offer an overview of Olivecrona's legal philosophy in the hope that it might facilitate understanding of the exposition and critical discussion of it that follows in the coming chapters. I begin with a few words about Olivecrona's main publications, and proceed to introduce two important themes in Olivecrona's legal philosophy, namely naturalism and conceptual analysis, adding a few words about Olivecrona's meta-ethics. I then briefly discuss six central topics in Olivecrona's substantive legal philosophy, viz. (1) the critique of the view that law has binding force, (2) the analysis of the concept and function of a legal rule, (3) the analysis of the concept of a right, (4) the idea that law is essentially a matter of organized force, (5) the idea that courts necessarily create new law when deciding a case, and (6) the idea—which is in keeping with (1) and (2)—that the function of legislation is not to create binding legal rules, but to introduce independent imperatives into the legal machinery in a way that makes law part of the "chain of cause and effect." I then discuss, equally briefly, (7) the distinction between the truth and the correctness of legal statements, (8) Olivecrona's thoughts on some topics in the history of legal and political philosophy, (9) the relation between Olivecrona's legal philosophy and the theory of legal positivism, and (10) the relation between Olivecrona's legal philosophy and the legal philosophies put forward by Hägerström, Lundstedt, and Ross. Except for the question of judicial law-making, the division of Olivecrona's substantive legal philosophy into the topics (1)–(7) tracks the presentation in the First Edition of *Law as Fact*, and allows us to see how Olivecrona's legal philosophy developed over the years.

3.1 Olivecrona's Main Publications

Although Olivecrona had already published a few short articles in legal philosophy, notably a piece on legal concepts (Olivecrona 1928), his first major publication in the field was the First Edition of *Law as Fact* (Olivecrona 1939), which saw the light of day in 1939—the year in which World War II broke out and in which Olivecrona's mentor and primary source of philosophical inspiration, Axel Hägerström, passed away. After the publication of the First Edition of *Law as Fact*, Olivecrona began devoting himself to legal philosophy in earnest. His most important publications include *Om lagen och staten* [*On Law and the State*] (Olivecrona

T. Spaak, *A Critical Appraisal of Karl Olivecrona's Legal Philosophy,*
Law and Philosophy Library 108, DOI 10.1007/978-3-319-06167-2_3,

1940), which is a slightly expanded Swedish version of the First Edition of *Law as Fact*, *Lagens imperativ* [*The Imperative of the Law*] (Olivecrona 1942), "Realism and Idealism: Some Reflections on the Cardinal Point in Legal Philosophy" (Olivecrona 1951), *The Problem of the Monetary Unit* (Olivecrona 1957), *Rätt och dom* [*Law and Judgment*] (Olivecrona 1960, 2nd ed. 1966), "Legal Language and Legal Reality" (Olivecrona 1962a), "The Imperative Element in the Law" (Olivecrona 1963–1964), *Grundtankar hos Hägerström och Lundstedt* [*Fundamental Ideas of Hägerström and Lundstedt*] (Olivecrona 1962b), the Second Edition of *Law as Fact* (Olivecrona 1971), and *Rättsordningen* [*The Legal Order*] (Olivecrona 1976), which is a Swedish version of the Second Edition of *Law as Fact*, where the latter is a slightly expanded version of the former. His last legal-philosophical publication was an article on Axel Hägerström and natural law theory (Olivecrona 1978), which was published in a collection of essays on the legacy of the Uppsala School of philosophy.

3.2 Naturalism and Conceptual Analysis

Olivecrona's legal philosophy reflects the influence of the Uppsala School of philosophy. As we have seen in Chap. 1 and shall see again in Chap. 4, the Uppsala philosophers, led by Axel Hägerström and Adolf Phalén, maintained (1) that conceptual analysis is a central philosophical task, (2) that subjectivism (conceived as the view that the object of a person's consciousness exists only in this consciousness), (3) that metaphysics (conceived as the view that there is a reality beyond the world of time and space) is false, even pernicious, and (4) that there are no objective values. Thesis (3) constitutes, or perhaps depends on, a version of naturalism that I shall refer to in what follows as ontological naturalism.

Although Olivecrona devotes his writings to analysis of fundamental legal concepts, such as 'law,' 'legal rule,' 'right,' 'duty,' and 'court judgment,' he never discusses conceptual analysis in the abstract. One thing is clear, though: Unlike Alf Ross and Vilhelm Lundstedt, he does not accept the thesis of semantic naturalism, according to which an *analysis* of a concept is philosophically acceptable only if the concept thus analyzed refers to natural entities or properties (the narrow conception of semantic naturalism), or at least does *not* refer to *non*-natural entities or properties (the broad conception of semantic naturalism). What he does believe is that a *concept*—as distinguished from an analysis of a concept—is philosophically acceptable only if it refers to natural entities or properties. While the thesis of semantic naturalism, which he thus rejects, is easy to confuse with the view of concepts that he espouses, the two theses are really distinct. That this is so should be clear from the fact that Olivecrona defends an error theory of rights, according to which the concept of a right refers to non-natural entities or properties, while insisting that the concept of a right should be rejected precisely because it does not refer to natural entities or properties.

Olivecrona's view on naturalism is reasonably clear. As we shall see in Chap. 5, writers on naturalism make a fundamental distinction between (1) ontological (or metaphysical) and (2) methodological (or epistemological) naturalism. Ontological naturalism is the view that everything is composed of natural entities whose properties determine all the properties of that which exists. Methodological naturalism, on the other hand, is the view that philosophical theorizing must be "continuous with" the sciences, where the idea of continuity with the sciences may mean that philosophical theories are supported by scientific results, or else that they emulate the methods of inquiry and styles of explanation of the sciences. In addition, some writers speak of semantic naturalism (see the previous paragraph), according to which an analysis of a concept is philosophically acceptable only if the concept refers to natural entities. Although Olivecrona does not make use of these labels, he appears to be an ontological, but not a semantic, naturalist, and probably not a methodological naturalist either.

As we shall see in Chap. 6, Olivecrona rarely goes further than to assert that there are no objective values and that there is no objective ought. But this claim, or these claims, could be accepted not only by non-cognitivists, but also by error-theorists and meta-ethical relativists. Hence his meta-ethical position is somewhat unclear. I suggest, however, that he vacillated in his early writings between an error theory and a non-cognitivist theory in regard to rights statements and judgments about duty, while accepting non-cognitivism in regard to value judgments proper, and that in his later writings he embraced a non-cognitivist theory across the board. As we shall see in the following chapters, his present meta-ethical position can often be inferred from his more particular claims about rights and duties and legal rules. For example, his claim that the term 'right' does not refer at all suggests a non-cognitivist meta-ethics, whereas the claim that 'right' does not refer to anything real suggests acceptance of the error theory instead.

3.3 The Binding Force of Law

We shall see in Chap. 7 that Olivecrona rejects the view that legal rules have binding force, in the sense that they morally obligate those to whom they apply. Having considered and rejected the possibility that the binding force is nothing more than psychological pressure stemming from the likelihood that a person who violates the law will suffer a sanction, he maintains that if law had binding force, it would have to be located in a realm of its own beyond the world of time and space, where the idea of binding force could make sense. He maintains, however, that law could not exist in such a realm, because there could be no connection between this world and the world of time and space. As we shall also see in Chap. 7, this interesting objection draws on Hägerström's critique of Hans Kelsen's view that law exists in the so-called world of the ought. Olivecrona concludes that the very idea of a binding legal rule must be rejected as being meaningless, even contradictory, and takes the absence of binding force to imply (or to be equivalent with) the absence of legal

relations. As should be clear, the view that there are no legal relations and hence no legal rights or duties, no corporations, no marriages, no judges, etc. is quite radical, and requires an alternative account of the function of legal rules. And such an alternative account is precisely what Olivecrona offers.

3.4 Legal Rules as Independent Imperatives

As we shall see in Chap. 8, Olivecrona makes a distinction between the form and the content of a legal rule, and he explains that the content is an idea of an action by a judge in an imagined situation, and that the form, though not the grammatical form, is imperative. Pointing out that the command is the prototype of the imperative, he explains that commands have a suggestive character in the sense that they work directly on the will of the recipient of the command, that this means that they can cause human behavior, and that therefore legal rules are part of (what he refers to as) the chain of cause and effect. He also maintains that legal rules are not commands, but independent imperatives, which differ from commands in that they are not issued by anyone in particular and are not addressed to anyone in particular, and in that they can sometimes be replaced by sentences that express a judgment.

As we shall see, the claim that imperatives, including independent imperatives, are psychologically effective is of central importance to Olivecrona's naturalistic theory of law—if they were not psychologically effective, the theory would be incomplete, since (as I have just said), on Olivecrona's analysis, there can be no legal relations the knowledge of which could somehow motivate the citizens to act accordingly. And this means that the function of legal rules cannot be to establish legal relations, but must instead be to cause human behavior by influencing people.

3.5 The Concept of a Right

Chapter 9 treats Olivecrona's analysis of the concept of a right. Olivecrona maintains in his early works that the term 'right' does not refer to anything real, but to some sort of imaginary power. This means that in his early works he endorses an error theory of rights, according to which rights statements are always false. He argues, however, that the concept of a right nevertheless fulfills an important function in legal thinking, in that rights guide human behavior. The concept of a right, he explains, can fulfill this function by expressing an imperative, according to which the right-holder shall be allowed to act in such and such a manner and to maintain control over that to which he has a right, whereas others may not act in the same manner or interfere with the object of the right.

In a later essay, Olivecrona also identifies a secondary function of the term 'right,' namely to convey information. There is, he points out, no doubt that one conveys information when one asserts, say, that a person owns a certain house. The

problem, on his analysis, is that there is no fact of the matter that corresponds to the term 'ownership.' How, then, can one convey information by asserting that the person in question owns the house? Olivecrona's answer, as we shall in Chap. 13 (and below), is that in regard to its informative function a legal statement can only be correct (or incorrect), not true (or false). But, as we shall also see, this idea is not without its problems.

Olivecrona points out that the concept of a right also fulfills a technical (or connective) function, in the sense that it ties together two sets of rules in a way that facilitates our efforts to render the content of those rules. As we shall see, this analysis is similar to the well-known connective analyses proposed by Anders Wedberg (1951) and Alf Ross (1957), but does not add much to these analyses.

Finally, Olivecrona points out that the concept of a right also fulfills the function of exciting or dampening feelings, and he invokes this function of the right concept in his critique of international law as being conducive to war rather than to peace.

3.6 Law, Force, and Social Morality

Chapter 10 deals with Olivecrona's thoughts on law, force, and morality. Olivecrona maintains in the First Edition of *Law as Fact* that law is essentially a matter of organized force, and he puts forward a number of claims about the precise sense in which this is so. The first claim is that organized force is necessary to the existence of law, in the sense that law depends necessarily on the use of force by state organs, *inter alia*, in the case of police measures against disturbances. The second claim is that law chiefly consists of rules about the use of force. The third claim is that the force of law exerts its influence on social life chiefly indirectly. For, he explains, organized and irresistible force that is consistently applied by the state organs is much more important to the influence of law on social life than the immediate effects, say, of punishing some criminals. The fourth claim is that the law causes the citizens to internalize certain moral values and standards that make up the content of the legal rules. The main reason why we internalize the legal rules so readily, he explains, is that the suggestive effect of the rules, the imperatives, is enormous, especially when the power of the state is behind them. The fifth claim is that abolishing the force of law would likely result in important changes in the moral values and standards that we accept. He also maintains that organized force can serve the citizens only if there is an organization, namely the state, that has the monopoly on power in the relevant territory, that the Marxist theory of the state, according to which law and state will ultimately wither away, is mistaken; and that a belief in international law and the rights and duties involved is apt to lead to increased use of violence. In his later writings, he reiterates the first, the second, and the sixth claim, but does not have much to say about the other claims. He does, however, maintain that the coercive power of the state presupposes that the state also has psychological power, and vice versa, and that only judicial independence and a sound judicial ethics can guarantee legal certainty.

3.7 Judicial Law-Making

We shall see in Chap. 11 that Olivecrona maintains in the Second Edition of *Law as Fact* that in deciding a case the court necessarily creates law for the particular case. He argues, more specifically, that the judge must evaluate the purported operative facts or legal texts in order to decide the case, that evaluations are not objective, and that therefore the judge will necessarily be creating new law when he decides a case. As should be clear, this is a case where Olivecrona's meta-ethics plays a decisive role in the analysis.

3.8 Legislation

Olivecrona maintains, as we shall see in Chap. 12, that the function of acts of legislation is to incorporate rules in the shape of independent imperatives into the machinery of law, and that this presupposes that two conditions are satisfied, namely (1) that the citizens revere the constitution and (2) that there be an organization—the state—that handles the application and enforcement of the law. As we have already seen, his idea is that legal rules, conceived as independent imperatives, cannot establish legal relations, though they can cause human behavior by influencing the subjects of the law on the psychological level. And he maintains, in keeping with this, that the real significance of the act of legislating is to be found in the formalities that are attached to it, because these formalities confer on the legal rules a special nimbus that makes people take them as a pattern of conduct.

3.9 Truth and Correctness

As we shall see in Chap. 13, Olivecrona maintains in the Second Edition of *Law as Fact* that legal statements—such as rights statements or statements about duty—fulfill a directive, an informative, or a technical function in legal thinking, as the case may be, and that in regard to its informative function, a legal statement may be correct or incorrect, but not true or false. He explains that the correctness of a legal statement consists in conformity of the statement to an effective system of rules, whereas the truth of such a statement would consist in correspondence of the statement to brute—as distinguished from institutional—facts. So on this analysis, the statement that *A* owns an object, or that *B* is a judge, cannot be true or false, but only correct or incorrect.

3.10 Topics in the History of Legal and Political Philosophy

Beginning in the late 1960's, Olivecrona turned his eye to some important thinkers in the history of legal and political philosophy. He considers, *inter alia*, difficulties in the natural law theories advanced by Hugo Grotius and Samuel Pufendorf, John Locke's analysis of the appropriation of property, and Jeremy Bentham's attempt to construct a thoroughly naturalist legal philosophy. As we shall see in Chap. 14, Olivecrona had many interesting things to say about these thinkers and their theories. For example, his discussion of the role of the concept of *suum*, the concept of a private sphere, in the natural law philosophies of Grotius and Pufendorf is of considerable importance not only because it helps us understand the import of one of the two fundamental laws of nature identified by Grotius and Pufendorf, but also because it helps us understand Locke's important theory of appropriation. And he objects to Bentham's analysis, which he finds in many ways admirable, that it founders on the unjustified and unempirical assumption that law is an expression of a sovereign will.

3.11 Legal Realism and Legal Positivism

I argue in Chap. 15 that Olivecrona was actually a legal positivist, as that theory, or family of theories, is understood by contemporary jurisprudents. Legal positivism thus conceived is a theory of law, not a theory of legal reasoning or a theory about civil disobedience. What legal positivism offers is an account of the *concept* of law, in the sense that it lays down conditions that have to be satisfied by anything that purports to be law. The backbone of legal positivism thus conceived is to be found in the social thesis, according to which one can determine the law using (exclusively or essentially) factual criteria. But legal positivists also endorse the separation thesis, which has it that there is no conceptual connection between law and morality, and the thesis of social efficacy, according to which a legal system must be effective in order to exist. I shall argue that a commitment to all three theses is implicit in Olivecrona's analysis. As should be clear, this claim can easily be reconciled with Olivecrona's well-known rejection of legal positivism conceived as the theory that law is the content of a sovereign will.

3.12 Olivecrona, Hägerström, Lundstedt, and Ross

I argue in Chap. 16 that although Olivecrona adopts Hägerström's naturalism and non-cognitivism, his substantive legal philosophy is, in all essentials, an independent creation that nobody but Olivecrona can claim credit for. For example, while Olivecrona follows Hägerström closely in arguing that the term 'right' does not

refer to anything real and that therefore all rights statements are false, his claim that the right concept fulfills a directive, an informative, or a technical function in legal thinking cannot be traced back to Hägerström's writings. Moreover, although Olivecrona's rejection of the view that law has binding force is very much in keeping with Hägerström's view, it is clear that Olivecrona elaborates the implications of this claim in an independent and illuminating way. And Olivecrona's thoughts on judicial law-making do not reflect anything in Hägerström's writings, except of course the non-cognitivism that they share. I also argue that Olivecrona's legal philosophy is independent of Lundstedt's and Ross's legal philosophies, and that there are certain interesting differences between Olivecrona's and Ross's analyses. Perhaps the two most important differences between Olivecrona's and Ross's legal philosophies are that Olivecrona, but not Ross, (1) rejects the thesis of semantic naturalism (narrowly conceived), and (2) takes the absence of binding force (or validity) to imply (or to be equivalent with) the absence of legal relations.

References

Articles

Olivecrona, Karl. 1928. Några synpunkter på de juridiska begreppen [Some thoughts on legal concepts]. In *Festskrift tillägnad Axel Hägerström [Festschrift for Axel Hägerström],* eds. Filosofiska föreningen and Juridiska föreningen, 221–228. Uppsala: Almqvist & Wiksell.

Olivecrona, Karl. 1951. Realism and idealism: Some reflections on the cardinal point in legal philosophy. *New York University Law Review* 26:120–131.

Olivecrona, Karl. 1962a. Legal language and reality. In *1962 essays in honor of roscoe pound, 151–191,* ed. Ralph A. Newman. Indianapolis: The American Society for Legal History.

Olivecrona, Karl. 1963–1964. The imperative element in the law. *Rutgers Law Review* 18:794–810.

Olivecrona, Karl. 1978. Hägerström och naturrätten [Hägerström and Natural Law]. In *1978 Uppsalaskolan—och efteråt [The Uppsala school—and afterwards], 25–31,* ed. Strömholm Stig. Uppsala: Almqvist & Wiksell.

Ross, Alf. 1957. *Tû-tû. Harvard law review 70: 812–825. (Originally published in Danish in O. A. Borum & Knud Illum, eds. 1951. Festskrift till Henry Ussing, 468–484*. Copenhagen: Arnold Busck.

Wedberg, Anders. 1951. Some problems in the logical analysis of legal science. *Theoria* 17:246–275.

Books

Olivecrona, Karl. 1939. *Law as fact*. Copenhagen: Einar Munksgaard, London: Humphrey Milford.

Olivecrona, Karl. 1940. *Om lagen och staten [On law and the state]*. Copenhagen: Einar Munksgard, Lund: Gleerup.

Olivecrona, Karl. 1942. *Lagens imperativ [The imperative of the law]*. Lund: Gleerup.

Olivecrona, Karl. 1957. *The problem of the monetary unit*. Stockholm: Almqvist & Wiksell.

Olivecrona, Karl. 1960. *Rätt och dom [Law and judgment]*. Stockholm: Norstedts. (2nd ed. 1966).

Olivecrona, Karal. 1962b. *Grundtankar hos Hägerström och Lundstedt [Fundamental Ideas of Hägerström and Lundstedt]*. 2nd ed. Lund: Juridiska föreningen i Lund. (1964).
Olivecrona, Karl. 1971. *Law as fact*. 2nd ed. London: Stevens & Sons.
Olivecrona, Karl. 1976. *Rättsordningen [The legal order]*. 2nd ed. Stockholm: Liber. (1st ed. 1966).

Chapter 4
Axel Hägerström's Legal Philosophy: An Overview

Abstract Olivecrona's legal philosophy reflects the influence of the Uppsala school of philosophy, especially as put forward by Axel Hägerström. Hägerström developed his legal philosophy on a foundation consisting of ontological naturalism and a non-cognitivist meta-ethics. He was, more specifically, an ontological, but not a semantic or a methodological, naturalist, and there are actually also traces in his meta-ethical writings of so-called error theories of rights judgments and moral judgments, respectively. Hägerström devoted the bulk of his writings in legal philosophy to a comprehensive and thorough critique of will theories of law, but he also analyzed the concept of a declaration of intention, the concept of a right, and the concept of duty. In addition, he offered an interesting explanation of the tendency of judges, lawyers, and others to ascribe binding force to legal rules. And even though he did not put forward a positive account of the concept of law, he did maintain that law can be conceived of as a social machine in which human beings are the cogs. His defense of a non-cognitivist meta-ethics is a constructive effort, however, and it is arguably—together with the critique of will theories of law—his most important contribution to legal philosophy. Although this chapter aims at presenting Hägerström's legal philosophy, not assessing it, it does include some critical remarks on parts of it.

4.1 Introduction

We have seen in Chaps. 2–3 that Olivecrona's legal philosophy reflects the influence of the Uppsala school of philosophy, especially as put forward by Axel Hägerström, and Olivecrona was more than willing to acknowledge the influence of Hägerström's ideas on his legal philosophy. Here is how he expressed his feelings of indebtedness to Hägerström in the preface to the First Edition of *Law as Fact*.

> When this book was going to the press news arrived of the death of Professor Axel Hägerström. He was my revered and beloved master. I cannot make any attempt here to describe the nature and extent of his philosophical research, which will certainly in time be more

The reader who wants a fuller account of the philosophy of Hägerström, including biographical information, may want to read Mindus (2009).

T. Spaak, *A Critical Appraisal of Karl Olivecrona's Legal Philosophy,*
Law and Philosophy Library 108, DOI 10.1007/978-3-319-06167-2_4,

> widely known and appreciated than it is now. For my personal part it is enough to say that my endeavour to treat law as fact could not have been made without the basis supplied by his work. (1939, Preface)

As we have also seen, the Uppsala philosophers, led by Hägerström and Adolf Phalén, maintained (i) that conceptual analysis is a central philosophical task, (ii) that subjectivism (conceived as the view that the object of a person's consciousness exists only in this consciousness) is false, (iii) that metaphysics (conceived as the view that there is a reality beyond the world of time and space) is false, even pernicious, and (iv) that there are no objective values.[1] But since the rejection of subjectivism does not play any role in Olivecrona's legal philosophy, I shall discuss only points (i), (iii), and (iv) in this chapter.

Hägerström developed his legal philosophy on a foundation consisting of ontological naturalism, which comes to expression in his rejection of metaphysics, and a non-cognitivist meta-ethics. He devotes the bulk of his writings in legal philosophy to a comprehensive critique of will theories of law (Sects. 4.5–4.9), but he also analyzes the concept of a declaration of intention (Sect. 4.10), the concept of a right (Sect. 4.11), and the concept of duty (Sect. 4.12). In addition, he offers an interesting explanation of the tendency of judges, lawyers, and others to ascribe binding force to legal rules (Sect. 4.13). And even though he does not put forward a positive account of the concept of law, he does maintain that law can be conceived of as a social machine in which human beings are the cogs (Sect. 4.14). His defense of a non-cognitivist meta-ethics is a constructive effort, however, and it is arguably—together with the critique of will theories of law—his most important contribution to legal philosophy (Sect. 4.3–4.4). Let us, however, begin with a consideration of his views on naturalism and conceptual analysis (Sect. 4.2).

4.2 Naturalism and Conceptual Analysis

Hägerström was an ontological, but not a methodological or a semantic, naturalist. One way of expressing one's commitment to ontological naturalism is to say that there is one (and only one) *all-encompassing spatio-temporal framework*, and that everything that exists is to be found within this framework—if a contemplated entity, such as a unicorn or a legal norm, cannot find a place in this framework, then it doesn't exist. As Hägerström puts it in a critical review of Hans Kelsen's *Hauptprobleme der Staatsrechtslehre*:

> A legal prescript is, in fact, for him [Kelsen] a judgment concerning a supernatural existent, which nevertheless (at least in so far as his view is carried out consistently) must be completely realized in the world of nature. But this is an absurd idea. The supernatural juridical system cannot be thought of as even existing alongside the natural order. For no

[1] For more on these points, see Hägerström (1964a). Swedish-speaking readers may also wish to consult Oxenstierna (1938).

> knowledge of any reality is possible except through relating its object to a systematically interconnected whole. But the supernatural and the natural systems, as being different in kind, cannot be co-ordinated in a *single* system. Therefore, so far as I contemplate the one, the other does not exist for me. (1953d, pp. 267)[2]

Although Hägerström speaks of 'knowledge' instead of 'existence' in this quotation, he seems to be mainly concerned with a question of existence. What he is saying is that we cannot even conceive of the two worlds in question as existing side by side, since everything that exists is part of the one (and only one) all-encompassing spatio-temporal framework that he mentions.[3] That Hägerström is really concerned with a question of ontology in this quotation also gains support from the fact that what he says does not fit any of the two versions of methodological naturalism that we shall consider in Chap. 5, namely methodological naturalism that requires "results continuity" with the sciences, and methodological naturalism that requires "methods continuity."

As we shall see in Chap. 5, one may also distinguish a third main type of naturalism, which we shall refer to as *semantic* naturalism, according to which an analysis of a concept is philosophically acceptable only if it implies that the concept thus analyzed refers to natural entities or properties. But, as we shall see, one may make a distinction between a narrow and a broad conception of semantic naturalism. On the narrow conception, an analysis of a concept is philosophically acceptable only if it implies that the concept thus analyzed refers to natural entities or properties. On the broad conception, an analysis of a concept is philosophically acceptable only if it implies that the concept thus analyzed does *not* refer to non-natural entities or properties. But, as we shall see in Sect. 4.4 and 4.11, Hägerström accepted neither version of semantic naturalism. For his espousal of the error theory of rights and of moral judgments cannot be reconciled with any type of semantic naturalism. What he did accept was the view that a *concept*—as distinguished from an analysis of that concept—is philosophically acceptable only if it refers to natural entities or properties. But, as I have said above (in Sect. 3.1) that is really a different view than semantic naturalism as explained above.

I conclude that although Hägerström was an ontological naturalist, he was neither a methodological nor a semantic naturalist. For while he clearly believed that reality is precisely the interconnected whole that we experience in time and space, he does not appear to have accepted methodological naturalism of any type, and it is quite clear that he did not accept the view that an analysis of a concept is philosophically acceptable only if it implies that the concept thus analyzed refers to natural entities or properties, or that it does not refer to non-natural entities or properties.

---

[2] Hägerström's line of reasoning is based on a difficult and rather heavy-going analysis of the concept of reality put forward elsewhere (Hägerström 1964a), which I discuss briefly in Spaak (2013). Swedish-speaking readers may also wish to consult Konrad Marc-Wogau (1968a). And see Pattaro (2010).

[3] Bjarup (2005, p. 3) observes that Hägerström is an ontological naturalist, though he (Bjarup) does not use this term.

Hägerström also believed that philosophers, who focus on *conceptual analysis*, may be able to reveal contradictions in the concepts used in the special disciplines, such as legal science (*Rechtswissenschaft*), and he points out that this is important because a contradictory concept cannot refer to anything real. He assumes here that science aims at truth, and that scientifically acceptable propositions describe reality. He writes:

> The representatives of the special sciences have long ago issued to philosophers the command 'Hands off!' But what induces a certain boldness in the philosophers, notwithstanding this com-mand, is the fact that the notions which are used for describing what is actual may very well be delusive. If they disclose to analytic scrutiny a contradiction, they are notions only in appearance. In that case there is merely a concatenation of words without meaning. And the alleged fact, which is supposed to have a nature defined by the 'notion', would be no fact at all. Ever since Socrates' time it has been held that one of the highest tasks of philosophy is to analyze notions which are in common use in order to attain a *real* world of scientific concepts, which must be internally coherent. For the reality, with which science is concerned, cannot be described by means of judgments which contradict each other. No doubt it is always possible to put such judgments into words, but these words have no meaning. Therefore no science which claims to describe reality can evade a conceptual analysis of this kind. (1953e, pp. 299–300)[4]

Unfortunately, Hägerström does not have anything to say about the nature of conceptual analysis, or about the proper way to go about analyzing concepts, though we should remember that he wrote in the first decades of the twentieth century, that is, before the nature of conceptual analysis came to be seriously debated by philosophers.

4.3 Hägerström's Meta-Ethics 1907–1912: Non-Cognitivism

Following Bo Petersson (1973, Chaps. 2–3), whose careful analysis also takes into account Hägerström's unpublished lecture notes, I shall distinguish three phases in the development of Hägerström's meta-ethics: (i) Hägerström's meta-ethics 1907–1912, (ii) Hägerström's meta-ethics 1912–1913, and (iii) Hägerström's meta-ethics 1917. I shall treat them in turn.

Hägerström presented his non-cognitivist theory in a 1911 lecture called "Om moraliska föreställningars sanning" ("On the Truth of Moral Propositions") (1964b).[5] Having considered arguments for and against the view that moral judgments can be true or false, he concluded that a moral judgment as such "cannot be said to be either true or false. It is not at all a proposition to the effect that the action

[4] Note that whereas logicians take contradictions to be *false*, Hägerström appears to be saying that they are *meaningless*. For more on Hägerström's emphasis on conceptual analysis, see Oxenstierna (1938, pp. 8–43); Wedberg (1966, pp. 392–396).

[5] For a rich, although somewhat meandering, analysis of Hägerström's inaugural lecture, see Bjarup (2000). See also Mindus (2009, Chap. 3).

is actually or in truth the right one." (Hägerström 1964b, p. 92) It is, however, clear from the Swedish text that he did not speak of 'judgments', but rather of 'ideas' or 'conceptions,' which indicates that he conceived of semantic analysis as involving considerations of a psychological nature.

Hägerström's main argument in support of the non-cognitivist thesis was the following: Since the act of *evaluating* something presupposes the existence of a *feeling*, whereas the act of *making a judgment* does not, an evaluation must be something different from a judgment (see Petersson 1973, pp. 112–121).[6] And since, on Hägerström's analysis, only judgments are true or false, an evaluation can be neither true nor false. Hägerström writes:

> Kant says in one place that duty presents itself to us only in so far as we are acting or thinking about acting. In this statement there lies the idea that duty exists for us only in so far as that which we find ourselves in duty bound to do is an actual or possible way of acting. But in this idea, again, it is implied that the action must arouse an *interest* in us. This is undoubtedly true. If we stand as cold observers before ourselves, that is, in reality interested not in what is observed but only in the investigation of what is observed, what can we discover? We recognize, in the midst of a manifold of other phenomena, a feeling of duty in connection with a judgment of value and a direct interest in a certain action. But all this yields nothing more than a certain kind of *psychological* event. That the action *ought* to be done is not at all part of what we can discover. The keenest analysis of what is present reveals no such thing. Or in a similar way we investigate a certain action. We can establish that the action arouses the strongest appetite or the strongest desire or that it leads to my well-being or that of another. We can discover—let us feign the possibility—that it is commanded by a god or our unobservable being. But every attempt to draw out of the situation the conclusion that it is actually in the highest degree of *value* to undertake the action is doomed to failure. No obligation or supreme value can be discovered in such a way, for if we are standing indifferently before ourselves and our actions, only observing, we can only establish factual situations. But in the fact that something *is*, it can never be implied that it *ought* to be. That something is *better* than something else is meaningless for the *indifferent* observer. For him nothing is better or worse.
>
> But turn the situation around. We are considering an action, and different motives appear. Now it becomes immediately clear to us that we ought to act in a certain way. Here we no longer stand indifferently before ourselves and our actions, but we assume a certain posture towards that which is given. In this posture a supreme value really does signify something to us.
>
> Note that in so far as we consider that something is actually the case, i.e. that truth is present, we consider also that it is so entirely without regard for our subjective posture towards the fact, our feelings or our interests *vis-à-vis* the fact. Thus the result must be that in moral propositions as such we do not at all consider that obligatoriness actually belongs to the action. To say that it does would imply that it would hold without respect to any subjective posture regarding the fact. But that would be meaningless. (1964b, pp. 88–89)

He concludes that the task of moral philosophy conceived as a *science* can only be to indicate what is true, not to tell us what we ought to do (Petersson 1973, p. 95). Thus moral philosophy cannot be a science *in*, but only a science *about*, morality. Moral philosophy, he says, can deal with the origin of moral evaluations, and should

[6] For a critique of Petersson's interpretation, see Danielsson (1990). Petersson responds to Danielsson's critique in Petersson (1990).

be based on psychological analysis and guided by a critical philosophical analysis of actual ideas (Petersson 1973, p. 96).

Interestingly, Bjarup (2005, p. 5) maintains that it follows from Hägerström's non-cognitivism that there can be no moral knowledge and therefore no moral criticism of positive law. But I fail to understand why the lack of moral *knowledge* should have to imply that there can be no moral criticism of positive law. It is, of course, true that, on the non-cognitivist analysis, such criticism cannot be based on knowledge of what is morally right or wrong, good or bad. But that is another matter. As Hägerström himself says (1964b, p. 90), "one may not draw the conclusion from the foregoing [the presentation of his non-cognitivist theory] that it would be impossible to delineate an obligation for other persons in any sense." But despite Hägerström's protestations, critics have charged that it follows from the theory that everything is permitted, and that this means that theory is likely to facilitate the rise or maintenance of totalitarian regimes (on this, see Mindus 2009, pp. 104–106). I shall consider this question (or, rather, these questions) more closely below (in Sect. 10.12).

4.4 Hägerström's Meta-Ethics 1912–1913 and 1917: Non-Cognitivism and Error Theory

Very soon Hägerström came to embrace a mixed meta-ethical theory. Having made a distinction between *primary evaluations* and *value judgments*, he argued that whereas primary evaluations are neither true nor false, value judgments are always *false*. The reason why value judgments are always false is that they involve a claim that the object of evaluation has a certain property, namely a value, which does not exist. This means that Hägerström's non-cognitivist theory now applies only to primary evaluations, whereas (what we might call) the error theory applies to value judgments (for more on the idea of an error theory, see Mackie 1977a, Chap. 1; Joyce 2001; Tegen 1944).

But what, exactly, is a primary evaluation, and what is a value judgment? Hägerström does not have a lot to say on this important issue, at least in his published writings. But Petersson (1973, pp. 128–129) explains that on Hägerström's analysis, a primary evaluation is an evaluation by a person who is in a concrete situation of choice, whereas a value judgment is an evaluation by a person who is not in a concrete situation of choice; and that whereas an *agent* is typically emotionally involved, an *observer* is typically not thus involved. We see that Hägerström's analysis in the quotation in Sect. 4.3 concerns primary evaluations, not value judgments.

In 1917, Hägerström published an important work in meta-ethics, namely *Till frågan om den objektiva rättens begrepp* [*On the Question of the Notion of Law*] (1917a, 1953c) and finished two sets of lecture notes on the same topic, namely *Moralpsykologi* [*Moral Psychology*] (1917b) and *Värdelära och värdepsykologi* [*Value Theory and Value Psychology*] (1917c). Taken together these works contain a considerable amount of information about Hägerström's meta-ethics in this

period. In crude outline, we might say that Hägerström stayed in this period with the mixed theory that he had introduced in 1912–1913, but developed the theory further (see Petersson 1973, p. 133; Mindus 2009, pp. 77–85).

Hägerström's *non-cognitivist* analysis of moral judgments of duty is on display in the above-mentioned essay *Till frågan om den objektiva rättens begrepp*. Having observed that the grammatical form of sentences like "This action is my duty" or "I am under an obligation to act" suggests that we are here dealing with real judgments, which can be true or false, Hägerström goes on to invoke a very difficult argument that is clearly meant to refute the view that moral judgments are real judgments. He begins by pointing out that a sentence like "This action is my duty" is *equivalent* to a sentence like "This action ought to be undertaken by me." But, he continues, if moral judgments are real judgments, then the speaker would—through the latter claim—be representing a modification of reality as a real characteristic of the action in question, that is, the speaker would be ascribing to the modification of reality an absolute reality. But, he objects, this is impossible. As I understand Hägerström, he means that if a claim like "This action is my duty" were a true (or false) judgment, and if it implied a claim such as "This action ought to be performed by me," then the latter claim would assert a modification of reality in the shape of the action that could not be reconciled with the assertion that reality, that is, the action in question, also is what it is. That is to say, the idea appears to be that a claim such as "I ought to do *X*" cannot be a judgment, because it would then have to assert both that *X* is and that *X* is not. Hägerström therefore concludes that what lies behind "the ought" must instead be a *feeling*. He writes:

> … I should, in the judgment which lies behind the sentence, be representing to myself a certain modification of existence itself as a real characteristic of the action. I should thus be ascribing to the modification of reality an absolute reality. But this is as impossible as that I should be able to regard a certain limitation in what is black as absolutely black. Or, to put it in another way: *I should, in one and the same act of consciousness, ascribe reality in the absolute sense to the action, in so far as I take it as possessing a real characteristic, viz. oughtness-to-exist, and at the same time say that it merely ought to exist*. So there cannot be a genuine judgment at the back of the utterance of the sentence. But, if what is peculiar in the "ought" of duty cannot be a term in a judgment, because it would then be a modification of existence, it must be of such a nature that it cannot function as a cognized term in the context of reality. But this is exactly what is peculiar to a feeling-content as such. Thus it is shown that there lies at the back of the "ought" of duty a *feeling*. That this feeling is a conative one follows from the fact, stated above, that in our consciousness of duty we feel ourselves driven towards a certain course of action without being determined thereto by any valuation. (1953c, p. 135. Emphasis added.)

While it seems to me that Hägerström has a point here, I must leave it an open question whether this very complicated argument is really valid.[7]

Since the *error theory* allegedly embraced by Hägerström is not that easy to spot in his writings (1953c, pp. 162–163), I want to take a look at what Andries Mac Leod—who appears to have been the first to deal with Hägerström's error theory in print—has to say on this topic. Having discussed Hägerström's thoughts on the

[7] Hägerström's argument has been criticized by Marc-Wogau (1968b, pp. 161–163) and Petersson (1973, pp. 175–186).

consciousness of duty, Mac Leod proceeds to argue that on Hägerström's analysis, a sentence such as "This is the right thing to do" expresses a judgment that the rightness attaches to the action in an objective manner, and that all such judgments are false. He then states the following:

> That I have interpreted Hägerström correctly here and that he really meant this, is evident from the following claims in *Till frågan om den objektiva rättens begrepp* [*On the Question of the Notion of Law*]: "It should thus be the sense of duty that is behind the 'ought to occur' of the norm! This is however impossible, since, as has been said, it is precisely the assumption of the norm that *produces* the sense of duty. The consciousness that lies behind the expression must therefore be a real judgment"… "Should, then, such an obviously false notion be able to cause reverence even on the part of the modern, educated consciousness?"…. Thus a sentence of the type "this or that line of conduct is the right one" declares according to *Hägerström* a false judgment. One must… from that be able to draw the conclusion that it expresses a false statement. But according to value nihilism it expresses no statement at all; it does not express anything that is true or false. *Hägerström's* theory thus conflicts with value nihilism. (1973, pp. 19–20)[8]

I cannot say that I find Mac Leod's interpretation of Hägerström's text fully convincing, but I shall not go into this difficult question here. Suffice it to say that Mac Leod has not been the only Swedish philosopher who has maintained that Hägerström defended an error theory of moral judgments (see, e.g., Petersson 1973, pp. 131–132).

As we shall see in Sect. 4.11, Hägerström also puts forward an analysis of the concept of a *right*, according to which rights statements are always *false*. The reason is that rights statements involve a claim that the right holder possesses some sort of supernatural power, which cannot be found in the world of time and space. This means that Hägerström puts forward an *error theory of rights statements* in addition to his error theory of moral judgments. He does not, however, clarify the relation between these two error theories.

4.5 The Critique of Will theories I: Circular Reasoning

Hägerström's critique of will theories of law runs along two different paths. There is both (i) the idea that there simply is no will of the relevant type, and (ii) the idea that will theories surreptitiously introduce ideas taken from natural law theory (on this,

[8] The Swedish original reads as follows. "Att jag härvidlag tolkar *Hägerström* riktigt och att han verkligen menar så, framgår av följande yttranden i *Till frågan om den objektiva rättens begrepp*: "Alltså skulle det då vara pliktkänslan, som ligger bakom normens 'bör ske!' Nu är emellertid detta omöjligt, emedan, som sagt, det är just antagandet av normen, som *verkar* pliktkänslan. Det bakom uttrycket liggande medvetandet måste sålunda vara ett verkligt omdöme"…. "Skulle då en så påtagligt falsk föreställning kunna föranleda vördnad äfven hos det modernt bildade medvetandet?"…. Alltså en sats av typen "det och det handlingssättet är det rätta" tillkännagiver enligt *Hägerström* ett falskt omdöme. Man måste… därav kunna draga den slutsatsen, att den uttrycker ett falskt påstående. Men enligt värdenihilismen uttrycker den inget påstående alls, uttrycker den icke något, som är sant eller falskt. *Hägerströms* teori strider alltså mot värdenihilismen."

see Olivecrona 1962b, pp. 11–16). I treat the first type of critique in Sects. 4.5–4.8 and the second type in Sect. 4.9 (the questions considered in Sect. 4.5–4.8 are also considered in Mindus 2009, Chap. 4).

Hägerström (1953b, pp. 17–18) explains that the central claim of will theories is that law is the content of a certain will: "Law is regarded as an actual existent, as being the content of a certain will, endowed with power and active in a society; the content being expressed in a certain way." But, he objects, no such will can be found in reality.

To arrive at this conclusion, he considers and rejects three commonly discussed ways of conceiving of the will in question. First, he considers the view that *law is the content of a will determined by law*, and he mentions as an example the view that law is the content of the will of the state (Hägerström 1953b, pp. 18–20). However, he objects that this analysis moves in a circle. This objection is clearly well-founded: To define the concept of law in terms of a will—namely, the will of the state—that is in its turn conceptually dependent on law is undoubtedly a case of circular reasoning.

Secondly, he considers the view that *law is the content of a collective or general will* (Hägerström 1953b, pp. 20–28). He begins by considering a version of this view that is derived from natural law theory and operates with the idea of a will that is common to all the active individuals in the society in question (Hägerström 1953b, p. 20). The main problem with this version of the view, he points out, is that it mistakenly assumes that each individual has knowledge of all the relevant legal rules. But he also objects that no individual *could* will that all rules enacted by a certain authority be applied and enforced (Hägerström 1953b, p. 21): "no particular rule of law can *be* a demand of the general will, on this view, since its special content is not demanded by that will but is a matter of indifference to it." I agree with Hägerström that it is unlikely that any individual could have knowledge about all rules. I cannot, however, say that I understand why no particular legal rule can be demanded by this general will, if the will is indifferent to the *content* of the rule in question and is concerned only with the *formal* quality of the rule, say, that it has been issued by a certain institution. How could it matter that the relevant individuals do not also will that a given rule be applied because of its content?

Hägerström then considers a version of this view that derives from the philosophy of Hegel, according to which the will in question is some sort of *super-individual will that has individuals as its organs* (Hägerström 1953b, p. 25). He explains (Hägerström 1953b, p. 26) that such a will can be conceived of either as the will of a psycho-physical organism that is analogous to the natural organism, or as a "purely spiritual reality, autonomous in relation to the psycho-physical context, which acts within individuals and determines them to perform certain actions." Unsurprisingly, he rejects both these alternatives.

Thirdly, he considers the view that *law is the content of the will of the sovereign*, that is, the "de facto" supreme personal authority, a view held by Jeremy Bentham and John Austin, among others (Hägerström 1953b, pp. 28–29). The problem with this view, he explains, is that the power of the sovereign is dependent on the existing law—if there were no law, there could be no sovereign. He reasons as follows:

> Let us confine ourselves to constitutionally governed states. Is it not true that, just as the private individual must appeal to the positive law when making claims on other individuals if he is to get his rights, so too must the political authority base himself on the existing constitution in making his regulations for social relationships if those regulations are to have the force of law? Note, *e.g*., the difference between a monarch's purely personal decisions and those which he makes in council, from the standpoint of their respective legal force. Must not constitutional law have first gained authority, no matter in what way this may have happened, in constitutionally governed states, in order that a person shall have any authority from the legal point of view? When, after a revolution, there is a question of establishing a constitutional authority in the state, whose decisions shall have actual application, the *first* thing to be done is to give force to certain constitutional rules. The same is true when it is a question of establishing a new constitutional state. (Hägerström 1953b, pp. 30–31)

While Hägerström's *reasoning* is clearly sound—if the power of the sovereign is factually dependent on the existing law, then law cannot be the content of the sovereign's will—one may wonder about the truth of the *premise*, that is, the claim that the power of the sovereign is factually dependent on the existing law. As we have seen, Hägerström maintains in the quotation above that the sovereign must "base himself on the existing constitution," if his regulations are to have "the force of law." One might, however, object that the real question is whether the sovereign *could exercise power over the people*—with or without the help of the legal machinery—not whether his commands could have the force of law if he didn't base them on the constitution. However, Hägerström might with some justification respond to this objection that there is simply no other practical way for the sovereign to exercise his power than to make use of the existing legal system, and this means that the relevant question is indeed whether the sovereign's commands could have the force of law if he didn't base them on the constitution.

4.6 The Critique of Will Theories II: A Futile Anthropomorphization of the Various Forces that Maintain the Legal System

Having considered and rejected the above-mentioned ways of conceiving the relevant will, Hägerström turns to consider the possibility that the will may be understood as the driving force behind the various forces—such as class interest, fear of anarchy, lack of organization among the discontented part of the population, and the inherited custom of observing the law of the land—that uphold the legal system.

Hägerström rejects this analysis, however, arguing that these individual wills could not constitute a unitary will aimed at upholding the law, even if each and every individual did will that the law be upheld, and that in any case no such will actually exists in modern societies. He states the following about the latter difficulty:

> Whole strata of the population are desirous of a revolutionary alteration in the foundations of the law, although this desire does not issue in action because of certain inhibiting factors. Other layers of the population are indifferent, or do not in general direct their attention to the question of the value of the continued existence of the law. But, in spite of this division,

> the legal order persists, without too great disturbances, in a given society, because of the cooperation of the factors of the kind already mentioned. (Hägerström 1953b, pp. 39–40)

He points out that the anthropomorphization of the above-mentioned forces, although unscientific, would be fairly harmless, if it did not also constitute the basis for ostensibly scientific claims about the *content* of law, specifically claims about the ranking of various sources of law (Hägerström 1953b, pp. 41–42). To illustrate this, he points out that on certain legal analyses, one source of law, typically statute law, rather than another, say, customary law, is considered to be determinative of the will of the state. But, he points out, this is arbitrary, given that in some cases customary law has a derogatory effect on statute law (Hägerström 1953b, pp. 47–48).

I believe Hägerström is right to object to such anthropomorphization: There neither is nor could be a will of the relevant kind. He is also right to question the assumption that the will of the state should have to be expressed by statute law rather than by customary law. This assumption is simply question-begging.

4.7 The Critique of Will Theories III: Older Legal Systems

Hägerström maintains that even though will theories may have a certain initial plausibility when we focus on modern legal systems, their weaknesses are exposed when we focus on older systems of law. The relevant difference between older and modern legal systems, he explains, is that whereas modern law is to a large extent the result of legislation, older law is not.

Having explained that in Roman law there was no separation between divine and human law, and that the law was assumed to exist independently of the will of the ruler(s) or the will of the people, Hägerström objects that to speak of popular acceptance, express or implicit, of the law is to introduce without justification modern points of view (1953c, pp. 57–58).

He also considers, *inter alia*, the common law in England, the Roman *ius gentium*, and the situation in the Athenian democracy, and points out that in none of these cases was the law dependent upon the will of the ruler(s), or the state, or the people. He states the following about the view that the common law depends on the will of the *state*:

> It is a perversely modernized interpretation of the facts to say that the state gives binding force by an 'express or tacit law' to 'ancient customs.' Neither the facts themselves nor the notions of law which prevailed at the time correspond to anything of the kind. The reality, which underlies the assumption of a 'tacit law,' a '*Gestattung*,' on the part of the state, is *simply* the fact that the rules in question are effective in actual life, whether the supreme organ of the state wishes it or not. (Hägerström 1953c, pp. 60–61. Footnote omitted.)

Hägerström concludes his analysis with a consideration of an attempt by John Salmond to defend the applicability of the will theory to older systems of law despite the difficulties just mentioned. Salmond's idea, Hägerström explains, is that the

status of legal norms depends on the power and the will of the state, whereas the *content* of the norms does not (Hägerström 1953c, p. 72). But Hägerström objects to Salmond's line of reasoning that in this context "the power of the state" may mean either (i) the supreme personal power in the state, or (ii) the organized power of the people, and that neither option is workable. The problem with (i) is that the supreme personal power owes his power in part to the existing law, and that therefore law cannot depend on his will (Hägerström 1953c, pp. 72–73).[9] The problem with (ii) is that we simply do not need to invoke a will of the relevant kind in order to account for the fact that there is a legal system in a society. For, as we saw in Sect. 4.6, Hägerström believes that the legal rules that constitute a legal system may be effective in a certain territory whether or not there is any will aiming at maintaining the system (Hägerström 1953c, p. 73).

4.8 The Critique of Will Theories IV: Adjudication

Hägerström further objects to will theories that the judgment handed down by the judge in the particular case need not be identical with the content of the *lawmaker's* will (Hägerström 1953c, pp. 74–85). For, he explains, the lawmaker might not have thought about the issue under consideration; or the judge might interpret the relevant provision in light of the surrounding body of law (systemic interpretation), or, perhaps, in light of moral considerations in order to avoid an absurd result. Since these factors need have nothing to do with the lawmaker's will, the law as applied by the judge need not be identical with the lawmaker's will.

He considers the possibility that it may be the *judge's*—not the lawmaker's—will that is relevant, because he reasons that the judge may be authorized by the lawmaker to decide the case before him according to his own will within the legal framework drawn up by the lawmaker (Hägerström 1953c, p. 85). On this analysis, the judge's will takes the place of the lawmaker's will, which means that the lack of identity between the law and the content of the lawmaker's will becomes irrelevant. Hägerström rejects this possibility, however, on the grounds that it cannot be squared with the separation of powers doctrine, or, as he puts it, "general legal opinion," according to which the judge is merely authorized to apply (or declare) pre-existing law, not to create new law. Among other things, "it should be quite unquestionable that a judge regards himself as proceeding in accordance with objectively valid norms, not only when in a given case he interprets the law according to his own judgments of value, but also when he supplements it or even decides *contra legem*." (Hägerström 1953c, p. 86. Footnotes omitted.)

I agree with Hägerström that we cannot save the will theory by allowing that the lawmaker has delegated legal power to the judge in the way explained above. For not only would it contradict the separation of powers doctrine, it would also be very

[9] As should be clear, this is essentially the circularity objection that Hägerström leveled at will theories in Section 5 above.

difficult to say that a judge ever applied the law incorrectly on this analysis. I am not, however, convinced by Hägerström's claim that (it is obvious that) the judge always considers himself to be applying pre-existing law when deciding a case. But, unlike Hägerström, I do not consider this circumstance to be very important to Hägerström's main claim.

4.9 The Critique of Will Theories V: The Surreptitious Introduction of Ideas from Natural Law Theory

As if the above difficulties weren't enough, Hägerström also maintains that will theories should be rejected on the grounds that they include ideas that have been surreptitiously introduced from natural law theory (1953b, pp. 48–55). The reason why will theorists have introduced such ideas, he explains, is that they need to assume that the judge has an extra-legal, namely a *moral*, duty to apply the law, in order to explain why the judge ought to apply the law rather than some other rules, and that they cannot account for such an extra-legal duty within the will-theoretical framework.

Hägerström thus appears to assume that a theory of law needs to explain *why* the judge ought to apply the law rather than some other rules, or at least that will theorists feel that their theory has to explain this—the reason why he believes that will theorists need to assume that this duty is *extra-legal* is of course that any reference to the existence of a *legal* duty to apply the law would be patently question-begging. He writes:

> When a judge is engaged in deciding a legal case, and applies the statutes in force in accordance with the constitution, is there any rule of law according to which he decides that the statutes in force, and not some other rule, are to be the principles of his decision? What could this rule of law be, which would in effect determine the validity of the constitution itself? It obviously will not do here to refer to the instructions to the judges, since their legal validity itself depends on the constitution. [The legal writer] Adickes asserts that there is such a rule of law; but he himself says that it is a rule of law which depends on "the nature of the case," *i.e.*, a rule of *natural*, not of positive, law. According to W. Jellinek there is a supreme rule of law which gives to all legal systems their validity. "If there is in a human corporative activity a supreme holder of power, that which he ordains must be followed." This proposition, which according to Jellinek himself, is a "necessity of thought" and therefore not a prescript, obviously belongs to natural law; and it certainly cannot be said to be of much value. (Hägerström 1953b, p. 49. Footnotes omitted.)

The main problem with Hägerström's line of argument is that it is not clear *why* will theorists should have to explain why judges ought to apply the law.[10] The will theory is clearly a version of *legal positivism*, in the sense that it holds that we can determine the law using factual criteria; and a legal positivist would simply say

[10] Moreover, it is not clear why we should think of the rules mentioned by Hägerström in the quotation as rules of natural law. Hägerström appears to assume that every rule that cannot be traced back to a recognized source of law must be a rule of natural law. But surely this is an overbroad use of the term 'natural law.'

that judges have a *legal* duty to apply the law, that it depends on the circumstances whether they also have a *moral* duty to apply the law, and that that is all there is to it.

Consider in this regard H. L. A. Hart's theory of law, in which the so-called *rule of recognition* plays a crucial role. This rule constitutes, identifies, and ranks the sources of law, such as legislation, precedent, custom (1961, pp. 97–107), and imposes a *legal* duty on the officials to apply all and only rules that meet the criteria of validity laid down in it (on this, see, Dworkin 1978, pp. 48–51; MacCormick 1981, p. 110; Raz 1980, p. 199). The rule of recognition is a *customary* or, if you will, a *social* rule, which is to say that it is a rule by virtue of being accepted or practiced by a certain group of people, in this case legal officials. So under Hart's theory, if there is a rule of recognition, judges have a *legal*, though not necessarily a moral, duty to apply the law. And to my knowledge no one has ever objected to Hart's theory that it doesn't explain why the judge ought to apply the law rather than some other rules.

To be sure, Hart does not assume that law is morally binding, as will theorists appear to do. But this is not an important difference in this context. The problem Hägerström points to is that one cannot explain why judges ought to apply the *law* by pointing to a *legal* rule that requires them to apply the law, since that would amount to circular reasoning. Similarly, one cannot explain why one ought to be *moral* by pointing to a *moral* norm that requires one to be moral.[11] So whether or not you accept the claim that law and morality are conceptually connected, you will have to agree that a legal duty to apply the law cannot explain why you ought to apply the law—and this means that anyone who assumes the existence of a legal duty to apply the law will have assumed what Hägerström wants him to prove. But, as I have said, I cannot see that a theory of law has to answer this question.

Hägerström (1953b, pp. 50–51) concludes by pointing out that in so far as some writers still believe, in spite of these difficulties, that we can determine and rank the various sources of law by reference to the will of the state, they trade on an ambiguity in the concept of positive law. For, he points out, these writers operate with a state will, which they derive from the existence of an effective system of legal rules, and they assume that the legal rules will be interpreted and applied to concrete cases by judges and other legal officials. The problem with these assumptions, he continues, is that judges will sometimes deviate from a legal rule by applying it analogically or *contra legem*, that will-theorists have to *justify* such deviations by reference to the will of the state, and that this involves bringing an element of *natural law* into positive law. The reason, he explains, is that whereas the "state-will" derived from an effective legal system concerns rules that are *actually* applied, the state-will that is needed here must concern the rules that *ought* to be applied, and this means that an element of natural law has entered into the system of rules in question:

> That the will of the state wills this or that rule now means, not that the rule *actually* is enforced, but only that it *ought* to be enforced. At that stage the notion of *positive* law, in so far as it is bound up with the will of the state, has acquired the meaning that certain rules *ought* to be applied. But at that point an element of natural law has entered into "posi-

[11] For an illuminating account of the difficulties involved in giving an answer to the question "Why be moral?", see Frankena (1980, pp. 75–94).

> tive law" as the object of jurisprudence. This element, however, is disguised because it is thought that one is concerned only with what the will of the state actually wills; though really what is meant by the state's willing here is simply that certain rules ought to be followed. (Hägerström 1953b, p. 51)

I accept the substance of Hägerström's claim. As I understand him, he reasons as follows. If one infers from the existence of an effective legal system that the state wills that the rules of the system be applied in a certain way, *X*, one cannot also infer that the state wills that a certain rule be applied differently, *Y*, say, analogically or contrary to its wording. I do not, however, believe that the best way of putting this point is to say that an element of natural law has been brought into positive law.

4.10 The Concept of a Declaration of Intention

Hägerström has analyzed the concept of a declaration of intention (*Willenserklärung*) in the field of private law and has found some problems. He points out that a person who makes a declaration of intention naturally intends to achieve certain legal consequences, such as acquiring a certain object, *X*. But, he continues, a *will* to achieve an end involves the *means* to that end—if it didn't, it wouldn't be a will, but a mere *wish*. He then points out that since the means in question cannot be anything other than the very declaration of intention to acquire *X*, the declaration of intention to acquire *X* (call it *A*) must be a declaration of intention to acquire *X* by means of another declaration of intention to acquire *X* (call it *B*). But *B* must in turn be a declaration of intention to acquire *X* by means of yet another declaration of intention to acquire *X* (call it *C*), and so on and so forth (1953e, pp. 300–301); and this means that we are faced with a problem of infinite regress.

I am inclined to accept Hägerström's objection, though I must admit that I am not sure I fully understand it. It is, however, worth noting that both Eng (1993, pp. 10–17) and Svensson (1996, pp. 67–75) have considered the objection and rejected it. Both of them argue, *inter alia*, that Hägerström mistakenly assumes that a declaration of intention is a declaration of intention in the literal sense contemplated here. But, one wonders, if it isn't a declaration of intention in the literal sense, what is it? Luckily, we may leave the question about the validity of Hägerström's line of reasoning open here. Instead, we shall focus on Hägerström's positive account of the concept of a declaration of intention.

According to Hägerström (1953e, p. 305), "a 'declaration of intention' within the sphere of private law is, in its essence, a declaration made by a private individual, which expresses in the imperative form an imaginative idea concerning the coming into being of certain rights and duties." So on Hägerström's analysis, the concept of a declaration of intention includes two elements: (i) an idea concerning certain rights and duties, and (ii) an imperative element. Hägerström has, *inter alia*, the following to say about these two elements:

> Now a declaration of intention in the sphere of private law is always a declaration concerning certain legal relationships or certain rights and duties. From this it follows that the

> 'declaration of intention' in question does not express either an awareness of the actual nature of one's own volition or an awareness of certain rights and duties as actually existing, but yet it does indicate an idea of certain rights and duties. That is to say, it expresses what is called an *imagination*, as opposed to a *judgment* which is as such an awareness of reality./…/The imperative form, like a gesture of command, has in social intercourse simply the function of mechanically influencing action in a certain direction. Legislation constantly uses the imperative form, *e.g*., '*Let* it be so', '*Let* him know', 'He *shall* be punished', etc. And it obviously does so because of the psychological effect which the imperative form has, *especially* when there is authority behind the words, as there is in legislation which is constitutional in form. But a person who as a private individual makes a legal 'declaration of intention', whether alone or in conjunction with others, functions as a legislator within a certain sphere, either by himself or with them. In so far as the declaration has legal effect, he has behind him, in making it, the authority represented by the law governing the validity of such declarations of intention. And so the imperative form acquires a special force in this case too. (Hägerström 1953e, pp. 302–304)

Hägerström points out that both a legislator who legislates about rights and duties and an individual who makes a declaration of intention have in mind actual situations, such as a situation in which a person is able to make use of his property as he pleases. But they also have something more in mind, he explains, namely some sort of *supernatural power* (Hägerström 1953e, pp. 322–323): "As regards 'juridical obligation' in particular, this is supposed to be present in the 'obliged' party, be it noted, quite regardless of whether he does or can fulfil it, and even of whether he actually feels any obligation whatever to perform the action which is said to be his 'duty'."

He adds that the right-holder's enjoyment of the advantages of that to which he has the right amounts to the exercise of the *supernatural right* (Hägerström 1953e, pp. 322–323): "This 'exercise' issues from the right; but the latter exists independently, even if it cannot be exercised because of natural obstacles." But, he points out, the concept of a right thus conceived is a logical absurdity, because the right is elevated above the world of time and space while having as its object an advantage that belongs precisely to the said world (Hägerström 1953e, p. 324). He seems to have in mind here the same difficulties that he pointed to in connection with his critique of Kelsen's analysis, discussed above in Sect. 4.2.

Let us also note in conclusion that when Hägerström speaks (in the quotation above) of the "psychological effect which the imperative form has," he has in mind precisely the suggestive character that (as we shall see in Chapter below) Olivecrona ascribes to legal rules conceived as so-called independent imperatives (for more on on Hägerström's view of the suggestive character (or effect) of imperatives, see Mindus 2009, pp. 142–144).

4.11 The Concept of a Right

On Hägerström's analysis, rights statements are always *false*, since they involve the ascription of a supernatural power to the right-holder, which power does not exist. Hence we might say that Hägerström is putting forward an *error theory* of rights.

Hägerström begins by pointing out that the concept of a right does not correspond to any facts. Focusing on *legal* rights, he considers the possibility that the factual basis of such rights (rights to property as well as rights to performance) might be found either (i) in the protection guaranteed by the legal system, or (ii) in commands issued by the state that those concerned respect the right, but he rejects both possibilities (1953a, p. 4).

The problem with (i) is that the legal system simply cannot guarantee that the right-holder will *always* be in possession of his property. For the state does not step in until the owner has actually lost possession of the property. "All that it can do," Hägerström points out (Hägerström 1953a, p. 102), "is to enable me to regain the house if it should already be in possession of another person." But, one may wonder, is it really necessary to maintain that the protection guaranteed by the legal system means that the owner can *never* lose possession of his property? Why can't we conceive of state protection as including helping an owner who has lost possession to get his property back? I suspect that Hägerström's idea is that a reason must be given to *justify* state protection in such a case, and that this reason must be that the aggrieved party has the right of ownership, and that therefore such an analysis would be moving in a circle.

Hägerström then turns to consider the second possibility, namely that a person's right consists in the state's *commanding* everybody else to respect his right and threatening to impose sanctions if they do not. The problem with this type of analysis, he points out, is that there is not necessarily disobedience in a situation where a right has been infringed. This is so, he explains, because disobedience to a command presupposes *awareness* of the command—if the addressee believes that he is within his rights to do what he is doing, he is not disobeying the command. Indeed, as Hägerström sees it, in such a case the addressee has not even received the command, since "… an order which does not reach the person for whom it is intended is only an empty sound and not a real order." (Hägerström 1953a, pp. 2–3)

I do not find Hägerström's reasoning persuasive, however. I do not think it is reasonable to say that a person must be aware of the (purported) command in order to have been commanded. And Hägerström's claim that a person who believes that he is within his rights to make use of an object, say, cannot be said to have been commanded to stay away from the object, strikes me as bizarre. Surely it must be enough that he understands that the commander purports to command him to do something. His belief about the rightness or wrongness of the relevant action seems to me to be irrelevant to the question whether or not he has been commanded.

Hägerström also considers the possibility of analyzing the concept of a right in terms of our *moral intuitions of right and wrong*. He rejects this alternative, however, because he believes that it cannot be squared with the common-sense assumption that the right-holder has a right to protection from the state, or at least a right to self-help. For, he reasons, such a right to protection, or self-help, presupposes that the right is a *supernatural* power. This is so because this type of right cannot follow from the fact that the right-holder does nothing wrong when he uses the object for his own purposes, but presupposes that the object *belongs* to the right-holder. But, he continues, since the object of ownership is not part of the right-holder, but must

be external to him, the right of ownership must be a power that is independent of the right-holder's physical (or actual) power (Hägerström 1953a, pp. 4–5).

Hägerström concludes that we conceive of rights as some sort of supernatural power that enables the right-holder to do certain things:

> It seems… that we mean, both by rights of property and rightful claims, actual forces, which exist quite apart from our natural powers; forces which belong to another world than that of nature, and which legislation or other forms of law-giving merely liberate. The authority of the state merely lends its help to carry these forces, so far as may be, over into reality. But they exist before such help is given. So we can understand why one fights better if one believes that one has right on one's side. We feel that there are mysterious forces in the background from which we can derive support. Modern jurisprudence, under the sway of the universal demand which is now made upon science, seeks to discover facts corresponding to these supposed mysterious forces, and it lands in hopeless difficulties because there are no such facts. Traditional points of view overmaster us, which we try to fit into the framework of modern thinking, unsuccessfully because they are not adapted to it. (Hägerström 1953a, pp. 5–6)

I cannot, however, accept Hägerström's starting point: that the right of property implies a right to state protection or self-help. To be sure, there is an important tradition going back to Hugo Grotius, according to which the right of property implies a right to self-help if not a right to state protection. But today the received opinion is rather that the concept of a right implies neither a right to state protection, nor a right to self-help. On this analysis, when a person has a right to property, the law will to some extent protect his exercise of this right, even though there may be no correlative obligation on the part of other people to not interfere (and thus no corresponding right on the property owner's part to state protection or self-help).[12] But this correlative obligation is another matter altogether. We may therefore conclude that since the premise of Hägerström's argument (or inference) cannot be accepted, the conclusion—that the concept of a right is a supernatural power—cannot be well founded in the sense that it follows from *this* premise.

Let us note in conclusion that Hägerström's analysis of the concept of a right makes it clear that Hägerström did not accept the theory of semantic naturalism (in any version). For it is clear that while he believed that the *concept* of a right would be philosophically acceptable only if it referred to natural entities or properties, he did not believe that an *analysis* of the concept of a right would be philosophically acceptable only if it implied that the concept thus analyzed refers to natural entities or properties. In other words, if you accept some version of the error theory, you cannot also accept the theory of semantic naturalism (in any version).

[12] As H. L. A. Hart (1982, pp. 179–180) puts it, "at least the cruder forms of interference… will be criminal or civil offences or both, and the duties or obligations not to engage in such modes of interference constitute a *protective perimeter* behind which liberties exist and may be exercised." (Emphasis added)

4.12 The Concept of Duty

Hägerström maintains that the concept of duty—just like the concept of a right—does not correspond to any facts. He considers the possibility of analyzing the concept of duty in terms of facts, either (i) as an action the omission of which is likely to bring about a sanction, or (ii) as an action that is commanded by the legislative authority. But he rejects both alternatives, on the grounds that they do not comport with our ordinary understanding of the existence of a duty.

The problem with (i), he explains, is that we accept that a duty may exist, even though its infringement does not involve any sanction whatsoever (Hägerström 1953a, p. 6). Similarly, the problem with (ii) is that we believe that a person may have a duty, even though he is unaware of any command by the legislative authority addressed to him (Hägerström 1953a, pp. 7–8). But to this one may object (as I did in the case of Hägerström's analysis of the concept of a right) that a person's lack of awareness of a command directed to him does not mean that he has not been commanded.

Hägerström concludes that the concept of duty has a *mystical basis*, in the sense that it cannot be defined in terms of any fact (Hägerström 1953a, p. 11). Thus his view that a concept—as distinguished from an analysis of the concept—is philosophically acceptable only if it refers to natural entities or properties is evident here, too. He adds that it would be futile to try to analyze the concepts of right and duty in terms of the lawmakers' will. "For", he points out, "that there is a real will which expresses itself in law is not confirmed by the facts." (Hägerström 1953a, p. 11)

4.13 The Belief in the Binding Force of Law

Hägerström's thoughts on the belief on the part of judges, lawyers, and others that legal rules are binding is of considerable interest, given the central role the rejection of the view that law has binding force plays in Olivecrona's legal philosophy.

Hägerström begins by pointing out that commands are *categorical*, in the sense that they do not include any reference to a value that the recipient of the command is supposed take into account, and that therefore threats and sanctions are extraneous to the concept of a command (1953c, pp. 117–118). He adds that the commander can influence the recipient simply by uttering the command, because the idea of an imperative expression is to create *directly* an intention to act in the addressee of the command (Hägerström 1953c, p. 120. See also 1953e, p. 304).

Turning to an analysis of the concept of *duty*, he maintains that the feeling of duty is a *feeling of conative impulse divorced from evaluation*. Having argued that the feeling of compulsion that we experience as part of the feeling of duty is determined neither by looking at the action in question as a means to avoid unpleasant consequences, nor by reference to objective values, he concludes that what we have here is simply an impulse toward an action that is felt to be compulsive: "The

impulse imposes itself on us, no matter what evaluatory attitude we may take towards the action. That is to say, the feeling of duty is a *conative feeling*, and, to put it more definitely, *a feeling of being driven to act in a certain way*. Undoubtedly a free valuation of the action is not the determining factor in this feeling." (1953c, p. 130. Emphasis added.)

Hägerström explains that the state of consciousness of the recipient of a *command* and the state of consciousness of one who has a *duty* are similar, in that in each case there is present a feeling of conative impulse as well as a feeling of compulsion, while pointing out that there are also important differences. He writes:

> In command the expression acts through the recipient's peculiar relation to the giver of the order. But in the case of the idea of duty the expression acts independently of its concrete perceptible form. It appears as an objective property of the action, with the idea of which the feeling of conative impulse is associated. This action is referred to a norm, viz., the idea of a system of conduct as something which essentially goes along with the expression of command, and it stands out as the one which is right from that standpoint. Thus it comes about that a consciousness of an *obligation to do the action*, which is wholly absent in the case of a recipient of a command, is bound up with the feeling of duty. (Hägerström 1953c, pp. 192–193. Emphasis added.)

Of special interest is Hägerström's claim that the state of consciousness of a recipient of a command easily passes over into the state of consciousness of one who is under a duty, and that therefore people are likely to think of the commands of the authorities as binding norms, provided that the authorities manage to assert themselves (Hägerström 1953c, p. 196). Applying this line of reasoning to the *legal* situation, he maintains that there is an ever-present tendency in jurisprudence to view legal rules as statements about what *ought* to happen, that is, as binding norms or rules, even though they are also viewed as commands (or imperatives):

> Here we are concerned with conceived imperatives, which seem to issue from an authority or a system of authorities, and which assert themselves effectively and unanimously in society. As a result the expression of command easily transforms itself in the popular consciousness into an objective property of a system of conduct. The fact that this system is regarded as holding only for the members of the society in question, and only so long as the authorities who officially determine the system adhere to it, does not alter the fact that it is regarded as part of the absolute system of norms. The latter appears to be adjusted for a particular society, with regard to the existing situation, by the officially determinative authorities. That the content alters means only that a change in the situation causes the authorities to decree a different content as that which "ought to be actualized." Conversely, the idea of such a system, with "ought to be actualized" as an objective property of it, easily passes over into the idea of imperatives. So nothing is more natural than that one who contemplates the facts should have a tendency to regard a legal rule as at once an effectual imperative and a statement, regarded as authoritative by the members of a society, about what actions "ought to be undertaken." (Hägerström 1953c, p. 198)

He maintains in another publication, in keeping with this, that the existence of an effective legal system is a necessary condition for the maintenance of positive morality—if the law were not thus enforced, our ideas of rights and duties would evaporate and our behavior would change accordingly. Discussing rules of private law, he states the following:

> The mere idea of rights and duties would not be a sufficient force for maintaining the order that is necessary for the promotion of the cooperation among private persons through all sorts of legal transactions. Of course, the threat of reactions is also always needed when this order is transgressed. Without this even the ideas of rights and duties would lose their own psychic force. A right that cannot be asserted through coercion becomes attenuated in this way to a purely supersensual power, so that it loses all connection with the real power. But with that the idea also loses its natural foundation. (1963a, p. 205. See also 1963b, p. 247)[13]

4.14 Law as a Social Machine

Having argued that the very idea of law conceived as a set or a system of binding rules evaporates into nothingness, once we take into account the insight of ontological naturalists that social reality is the only reality there is, Hägerström goes on to maintain that there is indeed in any society a set of rules that are actually applied by courts and other law-applying organs, and that we may well refer to this system of rules as the law of the land:

> Owing to all sorts of social-psychological factors, a system of rules for behavior is really maintained in a certain society by and large by persons determined in the rules themselves, and laws are passed and ordinances are issued according to the ideas of behavior expressed in the constitution. The laws and ordinances lead to compliance through persons determined in them, e.g. judges. This is a fact that can be determined irrespective of all interests./…/Naturally, the rule system that is, on the whole, actually maintained in a society can be characterized as this society's law, and knowledge of what actually occurs, and what most likely will occur, on the basis of the actual power of the rule system to determine actions, can be called legal science. (1931, pp. 83–84)[14]

He maintains in a later publication, in keeping with this, that law conceived of as a legal system is essentially a *social machine*, in which human beings are the cogs (1953f, p. 354). And he identifies what he considers to be three distinct and necessary conditions for the existence of a legal system, namely (i) social instinct, (ii) a positive moral disposition, and (iii) fear of external coercion.

---

[13] The Swedish original reads as follows. "Den blotta idén om rättigheter och skyldigheter skulle icke vara en tillräcklig kraft för upprätthållande av den ordning som är nödvändig för befordrande av privatpersonernas samverkan genom allehanda rättstransaktioner. Det behövs givetvis också alltid hotet med reaktioner vid överskridandet av denna ordning. Därförutan skulle till och med idéerna om rättigheter och skyldigheter förlora sin egen psykiska kraft. En rättighet som ej kan göras gällande genom tvång förtunnar sig så till en rent översinnlig makt, att den tappar all förbindelse med den verkliga makten. Men därmed förlorar också idén sitt naturliga underlag."

[14] The Swedish original reads as follows. "På grund av allehanda socialpsykologiska faktorer upphålles verkligen i ett visst samhälle i det stora och hela ett system av handlingsregler av i reglerna själva bestämda personer, stiftas lagar och utfärdas förordningar enligt i författningen uttryckta handlingsidéer. Lagarna och förordningarna leda till efterföljd genom däri bestämda personer t.ex. domare. Detta är nu ett faktum, som kan bestämmas oberoende av alla intressen./…/Naturligtvis kan nu det i ett samhälle i det hela faktiskt upprätthållna regelsystemet betecknas som detta samhälles rätt och kunskapen om vad som faktiskt sker och vad som med sannolikhet kan antagas komma att ske på grund av regelsystemets faktiska kraft att bestämma handlandet betecknas som rättsvetenskap."

He explains (Hägerström 1953f, p. 350) that he means by the term 'social instinct' the circumstance that "in a certain community the members are inclined, *in general independently of all reflexion*, to follow certain general rules of action, whereby co-operation at least for maintenance of life and propagation within the group becomes possible." He then explains that social instinct is more fundamental than the positive moral disposition and the fear of external coercion, in the sense that the latter presuppose the former. He develops his thoughts on this matter as follows:

> Without it [social instinct] morality would not lead to such action as is free from legal coercive reaction. Without it such reactions would not be possible as regular occurrences, and therefore fear of external pressure could not become a factor constantly operating in the direction of such action. Nevertheless the other factors are important, because social instinct does not infallibly act on its own account, but may be overcome by interests or passions which lead to antisocial action. They become active where the directly operating social instinct fails, and, together with the instinct as directly active in maintaining the rules of coercion, they make possible the stable existence of the legal order as a power. (Hägerström 1953f, pp. 352–353)

Hägerström adds that these factors contribute to the maintenance of the legal system as a *power*, in the sense that they help bring about a systematic application of coercive rules within a group of people (Hägerström 1953f, pp. 353–354).

It is worth noting in this context that Mindus (2009, p. xix) maintains that as a matter of fact Hägerström did not believe that humans were "mere cogs" in the machinery of law, and she offers an interesting and quite plausible analysis of this metaphor (Mindus 2009, Chap. 5, especially pp. 151–152). She argues that in order to understand the sense in which Hägerström thought of humans as cogs in the machinery of law, we need to consider, *inter alia*, his thoughts on the above-mentioned suggestive character (or effect) or legal rules, on (what she calls) the feedback effect of the law, on the role of the constitution, and on justice. Unfortunately, a fuller treatment of Mindus's analysis would fall outside the scope of this overview of Hägerström's legal philosophy.

References

Articles

Bjarup, Jes. 2000. Ought and reality. In *Legal theory,* ed. Peter Wahlgren, 11–72. Stockholm: Stockholm Univ. Law Faculty.

Bjarup, Jes. 2005. The philosophy of Scandinavian realism. *Ratio Juris* 18:1–15.

Danielsson, Sven. 1990. Hägerströms huvudargument [Hägerström's main argument]. *Filosofisk tidskrift* 11 (2): 16–22.

Eng, Svein. 1993. Hva er en viljeserklæring? [What is a declaration of will?]. *Svensk juristtidning* 1993:1–42.

Hägerström, Axel. 1917b. Moralpsykologi [Moral Psychology] (article manuscript).

Hägerström, Axel. 1917c. Värdeteori och värdepsykologi [Value Theory and Value Psychology] (article manuscript).
Hägerström, Axel. 1931. Till frågan om begreppet gällande rätt [On the question of the concept of valid law]. *Tidsskrift for rettsvitenskap* 1931:48–91.
Hägerström, Axel. 1953a. General view. In *Inquiries into the nature of law and morals,* ed. Karl Olivecrona. (Trans. C. D. Broad), 1–16. Uppsala: Kungliga humanistiska vetenskapssamfundet i Uppsala.
Hägerström, Axel. 1953b. Is positive law an expression of will? In *Inquiries into the nature of law and morals,* ed. Axel Hägerström, 17–55. Uppsala: Kungliga humanistiska vetenskapssamfundet i Uppsala.
Hägerström, Axel. 1953c. On the question of the notion of law. In *Inquiries into the nature of law and morals,* ed. Axel Hägerström, 56–256. Uppsala: Kungliga humanistiska vetenskapssamfundet i Uppsala.
Hägerström, Axel. 1953d. Kelsen's theory of law and the state. In *Inquiries into the nature of law and morals,* ed. Axel Hägerström, 257–298. Uppsala: Kungliga humanistiska vetenskapssamfundet i Uppsala.
Hägerström, Axel. 1953e. The conception of a declaration of intention in the sphere of private law. In *Inquiries into the nature of law and morals,* ed. Axel Hägerström, 299–347. Uppsala: Kungliga humanistiska vetenskapssamfundet i Uppsala.
Hägerström, Axel. 1953f. On fundamental problems of law. In *Inquiries into the nature of law and morals,* ed. Axel Hägerström, 348–366. Uppsala: Kungliga humanistiska vetenskapssamfundet i Uppsala.
Hägerström, Axel. 1963a. Stat och statsformer [The state and forms of the state]. In *Rätten och staten [Law and the state],* ed. Axel Hägerström, 120–218. Stockholm: Natur och kultur.
Hägerström, Axel. 1963b. Förhållandet mellan staten och rätten [The relation between the state and law]. In *Rätten och staten,* ed. Axel Hägerström, 220–272. Stockholm: Natur och kultur.
Hägerström, Axel. 1964a. A summary of my philosophy. In Hägerström, Axel. 1964. *Philosophy and religion*. (Muirhead library of philosophy) ed. H. D. Lewis. Trans. Robert T. Sandin, 33–74. New York: Humanities Press. (Originally published under the title "Selbstdarstellung" in *Die Philosophie der Gegenwart in Selbstdarstellungen*. *Axel Hägerström*. ed. Raymund Schmidt, 111–59. Leipzig: Felix Meiner.)
Hägerström, Axel. 1964b. On the truth of moral propositions. In Axel Hägerström, *Philosophy and religion*, 77–96. (Originally published under the title "Om moraliska föreställningars sanning" in Axel Hägerström, *Socialfilosofiska uppsatser*. ed. Martin Fries, 35–65. Stockholm: Bonniers.)
Mac Leod, Andries H. D. 1973. Om ett värdeobjektivistiskt inslag i Hägerströms moralfilosofiska teorier [On a value-objectivist feature of Hägerström's moral-philosophical theories]. In *Tre uppsatser om Hägerström, Zenon från Elea och relativitetsteorin [Three essays on Hägerström, Zeno of Elea and the relativity theory],* ed. Andries H. D. Mac Leod, 1–28. Uppsala: Filosofiska föreningen och Filosofiska institutionen vid Uppsala universitet.
Marc-Wogau, Konrad. 1968a. Hägerströms verklighetsteori [Hägerström's theory of reality]. In *Studier till Axel Hägerströms filosofi [Studies in Axel Hägerström's Philosophy],* ed. Konrad Marc-Wogau, 85–112. Stockholm: Prisma.
Marc-Wogau, Konrad. 1968b. Om rätt och rättighet [On law and right]. In *Studier till Axel Hägerströms filosofi,* ed. Konrad Marc-Wogau, 153–166. Stockholm: Prisma.
Olivecrona, Karl. 1962b. Hägerströms rättsfilosofi [Hägerström's Legal Philosophy]. In Karl Olivecrona, *Grundtankar hos Hägerström och Lundstedt [Fundamental Ideas of Hägerström and Lundstedt],* 2–19. Lund: Juridiska föreningen i Lund. 2nd ed. 1964.
Pattaro, Enrico. 2010. I will tell you about Axel Hägerström: His ontology and theory of judgment. *Ratio Juris* 23:123–156.
Petersson, Bo. 1990. Tolkningen av Hägerströms huvudargument [The interpretation of Hägerström's main argument]. *Filosofisk tidskrift* 11:16–24.

Spaak, Torben. 2013. Naturalism and non-naturalism in legal philosophy: Hägerström vs. Kelsen. In *Axel Hägerström and modern social thought,* eds. Sven Eliaeson et al., 231–255. Oxford: The Bardwell Press.
Tegen, Einar. 1944. The basic problem in the theory of value. *Theoria* 10:28–52.

Books

Dworkin, R. M. 1978. *Taking rights seriously*. 2nd. ed. London: Duckworth.
Frankena, William K. 1980. *Thinking about morality*. Ann Arbor: The Univ. of Michigan Press.
Hägerström, Axel. 1917a. *Till frågan om den objektiva rättens begrepp [On the question of the notion of law]*. Uppsala: AB Akademiska bokhandeln, Leipzig: Otto Harassowitz.
Hart, H. L. A. 1961. *The concept of law*. Oxford: Clarendon Press.
Hart, H. L. A. 1982. *Essays on Bentham*. Oxford: Clarendon Press.
Joyce, Richard. 2001. *The myth of morality*. Cambridge: Cambridge Univ. Press.
MacCormick, Neil. 1981. *H. L. A. Hart*. Stanford: Stanford Univ. Press.
Mackie, J. L. 1977a. *Ethics: Inventing right and wrong*. London: Penguin.
Mindus, Patricia. 2009. *A real mind: The life and work of Axel Hägerström*. Dordrecht: Springer.
Olivecrona, Karl. 1939. *Law as fact*. Copenhagen: Einar Munksgaard, London: Humphrey Milford.
Oxenstierna, Gunnar. 1938. *Vad är Uppsalafilosofin*? *[What is Uppsala philosophy?]*. Stockholm: Bonniers.
Petersson, Bo. 1973. *Hägerströms värdeteori [Hägerström's theory of value]*. Uppsala: Filosofiska föreningen.
Raz, Joseph. 1980. *The concept of a legal system*. 2nd ed. Oxford: Clarendon Press.
Svensson, Ola. 1996. *Viljeförklaringen och dess innehåll [The declaration of intention and its content]*. Stockholm: Nerenius & Santérus förlag.
Wedberg, Anders. 1966. *Filosofins historia. Från Bolzano till Wittgenstein [The history of philosophy. From Bolzano to Wittgenstein]*. Stockholm: Bonniers.

Part II
Philosophical Foundations

Chapter 5
Naturalism

Abstract I said in Chap. 1 that the realism espoused by the Scandinavian realists is to be understood as a commitment to naturalism, conceived as the ontological claim that everything is composed of natural entities whose properties determine all the properties of whatever it is that exists, or as the methodological (or epistemological) claim that the methods of justification and explanation in philosophy must be continuous with those in the sciences, or as the semantic claim that an analysis of a concept is philosophically acceptable only if the concept thus analyzed refers to natural entities or properties.

In this chapter, I distinguish between ontological, methodological, and semantic naturalism and between a broad and a narrow conception of semantic naturalism, and I argue that the broad conception of semantic naturalism is difficult to square with (what I refer to as) the classical conception of conceptual analysis. I also argue that Olivecrona is an ontological naturalist, that he is not a semantical naturalist, and that he is probably not a methodological naturalist either. In addition, I discuss Alf Ross's analysis of the concept of valid law, in order to gain a better understanding of both methodological and semantic naturalism, and I consider the question whether a commitment to naturalism is compatible with a commitment to conceptual analysis as a central philosophical task.

5.1 Introduction

Ever since W. V. Quine published an essay entitled "Epistemology Naturalized" (1969), naturalism has again been an important topic in core areas of philosophy, such as epistemology (Kornblith 2002), the philosophy of language (Devitt and Sterelny 1999), and the philosophy of mind (Churchland 1988), and it has now—much thanks to the writings of Brian Leiter (2002, 2007)—reached jurisprudence. But, as we noted in Chap. 1, the American and the Scandinavian realists, including Olivecrona, advocated a naturalist approach to jurisprudence, and, more generally, to the study of law, already in the 1920's, 1930's, and the 1940's. Indeed, naturalism was an issue in the German-speaking legal world even earlier, when Hans Kelsen (1934) defended normativism against naturalism. In any case, the naturalism espoused by Olivecrona—together with his non-cognitivism or, in some cases, his

T. Spaak, *A Critical Appraisal of Karl Olivecrona's Legal Philosophy,*
Law and Philosophy Library 108, DOI 10.1007/978-3-319-06167-2_5,

error theory—is at the foundation of Olivecrona's legal philosophy, and an important part of what makes this legal philosophy so interesting. I therefore want to devote this chapter to a discussion of Olivecrona's naturalism, and to include some words about naturalism in general.

I said in Chap. 1, and I have argued elsewhere (Spaak 2009), (1) that the realism espoused by the Americans and the Scandinavians alike is to be understood as a commitment to naturalism, conceived as the ontological claim that everything is composed of natural entities whose properties determine all the properties of whatever it is that exists, or as the methodological (or epistemological) claim that the methods of justification and explanation in philosophy must, as they say, be continuous with those in the sciences, or as the semantic claim that an analysis of a concept is philosophically acceptable only if the concept thus analyzed refers to natural entities or properties. In the same essay, I also argued (2) that the Scandinavians and the Americans were more alike, philosophically *and* legally speaking, than one might have thought. For even though the Scandinavians were primarily ontological and semantic naturalists, and the Americans were mainly methodological naturalists, two of the Scandinavians (Lundstedt and Ross) also embraced methodological naturalism and some of the Americans (Holmes, Cook, and Cohen) also accepted semantic (and, it seems, ontological) naturalism; and even though the Scandinavians were primarily interested in the analysis of fundamental legal concepts, and the Americans were mainly interested in the study of adjudication, some of the Americans also appear to have been interested in the analysis of fundamental legal concepts.

I begin with a few words about naturalism in general (Sect. 5.2), and proceed to consider the sense in which Olivecrona was a naturalist (Sect. 5.3). I then consider Alf Ross's analysis of the concept of valid law, in order to illustrate the import of a type of methodological naturalism that Olivecrona seems not to accept, and a type of semantic naturalism that Olivecrona clearly does not embrace (Sect. 5.4). The chapter concludes with a brief consideration of the question whether a commitment to naturalism is compatible with a commitment to conceptual analysis as a central philosophical task (Sect. 5.5).

5.2 Naturalism

Although the term 'naturalism' appears to lack a definite meaning in contemporary philosophy (Papineau 2007, p. 1; Bedau 1993), writers on naturalism make a fundamental distinction between (1) ontological (or metaphysical) and (2) methodological (or epistemological) naturalism. John Post (1999, pp. 596–597), for example, explains that metaphysical naturalism is the view that "everything is composed of natural entities… whose properties determine all the properties" of whatever it is that exists, and that methodological naturalism is the view that "acceptable methods of justification and explanation are continuous, in some sense, with those in science." (See also Wagner and Warner 1993, p. 12)

Ontological naturalism is a thesis about the nature of what exists: there are only natural entities and properties (see Post 1999). I shall assume here that a natural entity or property is an entity or property of the type that is studied by the social or the natural sciences,[1] though I recognize that it is difficult to find a fully satisfying characterization of natural entities or properties.[2] Some writers prefer, however, to say instead that a natural entity or property is an entity or property that can be found in (what I shall refer to as) the *all-encompassing spatio-temporal framework*. Thus Thomas Mautner puts it as follows:

> In this paper, "naturalism" will primarily be understood as the ontological thesis that every object and every event, indeed all there is, is part of nature. Nature is all-encompassing: there is nothing beyond, above or beneath. It is a system to which we ourselves as psycho-physical beings belong: the world of experience, the spatio-temporal world. Any metaphysics which postulates entities that exist independently of nature, or in any sense separately from it, is rejected. Many philosophical "isms" are naturalist, among them philosophies known as evolutionism, logical positivism and physicalism. (2010, p. 411)[3]

Although I myself find the characterization of ontological naturalism in terms of an all-encompassing spatio-temporal framework illuminating, I shall in what follows stick to the first characterization, on the grounds that it appears to be the one that is preferred by the majority of contemporary ontological naturalists. The reason why they do so, as I understand it, is that the latter characterization of ontological naturalism makes the theory too demanding, since it excludes entities such as meanings and natural numbers from the natural realm. The second characterization of ontological naturalism is, however, closer to Olivecrona's own view of the matter, and to that of Hägerström and the other Scandinavian realists.

Methodological naturalism, on the other hand, requires that philosophical theorizing be continuous with the sciences. But what, exactly, does "continuity with the sciences" mean? Brian Leiter makes a distinction between methodological naturalism that requires "results continuity" with the sciences and methodological naturalism that requires "methods continuity," and explains that whereas the former requires that philosophical theories be supported by scientific results, the latter requires that philosophical theories emulate the methods of inquiry and styles of explanation employed in the sciences. He states the following about "methods continuity":

> Historically, this has been the most important type of naturalism in philosophy, evidenced in writers from Hume to Nietzsche. Hume and Nietzsche, for example, both construct "speculative" theories of human nature—modelled on the most influential scientific paradigms of the day (Newtonian mechanics, in the case of Hume; 19th century physiology, in the case of Nietzsche—in order to "solve" various philosophical problems. Their speculative theo-

[1] This seems to be the view taken in Brink (1989, pp. 22–23) and in Lenman (2008).

[2] Discussing moral non-naturalism, Ridge (2008) calls the attempt to make a choice between the various available characterizations "a fool's errand." See also Copp (2007, Chap. 1).

[3] Armstrong (1978, p. 261) appears to accept a similar view, claiming as he does that (ontological) naturalism is "the doctrine that reality consists of nothing but a single all-embracing spatio-temporal system." For more on this topic, including references to other philosophers who share this view, see Mautner (2010).

> ries are "modelled" on the sciences most importantly in that they take over from science the idea that we can understand all phenomena in terms of deterministic causes. Just as we understand the inanimate world by identifying the natural causes that determine them, so too we understand human beliefs, values, and actions by locating their causal determinants in various features of human nature. (2007, pp. 34–35. Footnotes omitted)

But one may well wonder whether talk about "continuity with the sciences" is not too abstract a formulation to be helpful. The question, of course, is: Which sciences do the naturalists advocating such continuity have in mind? While it seems that today many naturalists have the natural sciences in mind (Wagner and Warner 1993, p. 1), it is clear that Olivecrona had in mind the *social* sciences, such as sociology and psychology.[4]

One may also wonder about the logical relation between ontological and methodological naturalism. It is tempting to assume that methodological naturalism implies ontological naturalism.[5] For one might argue that it wouldn't make sense to aim at emulating the methods of inquiry and styles of explanation employed in the sciences, unless one also believed that the world is such that this approach is likely to be successful, that is, that everything that exists is composed of natural entities, and that the properties of these entities determine all the properties of that which exists. Nevertheless, I am inclined to think that a believer in methodological naturalism may be *agnostic* about the ontological question, in the sense that he may allow that there may or may not be non-natural entities, such as a God, provided that these entities are unable to causally interact with the natural world—if there is a God, who can causally interact with the natural world, we cannot really *know* that metal expands when heated, say, since God might then choose to stop a heated piece of metal from expanding.[6]

Leiter also distinguishes a third main type of naturalism, which I shall refer to as *semantic* naturalism, according to which a concept must be analyzable "in terms that admit of empirical inquiry," if the analysis is to be philosophically suitable. Leiter calls it semantic S-naturalism, because he conceives of it as a special kind of substantive naturalism. He writes:

> S-naturalism in philosophy is either the (ontological) view that the only things that exist are *natural* or *physical* things; or the (semantic) view that a suitable philosophical analysis of any concept must show it to be amenable to empirical inquiry./…/ In the semantic sense, S-naturalism is just the view that predicates must be analyzable in terms that admit of empirical inquiry: so, e.g., a semantic S-naturalist might claim that "morally good" can be analyzed in terms of characteristics like "maximizing human well-being" that admit of

[4] Olivecrona never addresses the question of whether there might be kinds of psychological or sociological research that are *not* acceptable from the standpoint of naturalism.

[5] This appears to be the view of Wagner and Warner (1993, p. 12). I shall leave it an open question whether the reverse holds, that is, whether ontological naturalism implies methodological naturalism.

[6] I would like to thank Folke Tersman as well as Brian Bix and Michael Green for having emphasized in conversation and in email correspondence the possibility of a believer in methodological naturalism who is agnostic about the ontological question. Leiter (2007, p. 35, n 96), too, holds that methodological naturalism does not imply ontological naturalism.

> empirical inquiry by psychology and physiology (assuming that well-being is a complex psycho-physical state). (2002, p. 3).

I believe, however, as I have said above (in Sect. 4.2), that we should make a distinction between a narrow and a broad conception of semantic naturalism.[7] On the narrow conception (NCSN), which Leiter appears to accept, an analysis of a concept is philosophically acceptable only if it implies that the concept thus analyzed—strictly speaking, the *term* that expresses the concept—refers to natural entities or properties. On the broad conception (BCSN), on the other hand, an analysis of a concept is philosophically acceptable only if it implies that the concept thus analyzed does *not* refer to *non*-natural entities or properties. Thus the conditions laid down—reference to natural entities or properties and non-reference to non-natural entities or properties, respectively—are *necessary*, but not sufficient, for an analysis of a concept to be philosophically acceptable.

This distinction between a narrow and a broad conception of semantic naturalism is of interest in this context because the non-cognitivist analysis embraced by Olivecrona on most occasions, especially in his later writings—according to which normative or evaluative terms like 'right,' 'duty,' or 'good' have no cognitive (or descriptive) meaning,[8] and do not refer at all—is in keeping with the broad, but not the narrow, conception. For, on this type of analysis, while such terms do not refer to natural entities or properties, they do not refer to non-natural entities or properties either.

But there is a problem here. While the non-cognitivist analysis of normative or evaluative concepts is in keeping with the broad conception of semantic naturalism, it is difficult to square it with what we might call the *classical conception of philosophical analysis*, according to which such an analysis aims to establish an analytically true equivalence between the *analysandum* (that which is to be analyzed) and the *analysans* (that which does the analyzing).[9] The reason is that since on the non-cognitivist analysis, normative or evaluative terms have no cognitive meaning and do not refer at all, one does not and cannot specify the analysans by saying "*A* has a right to *X* if, and only if,…" or "*A* ought to do *X* if, and only if,…." Hence somebody who embraces the classical conception of philosophical analysis is likely to prefer the *narrow* to the broad conception of semantic naturalism, in order to avoid the problem with the non-cognitivist analysis of normative or evaluative concepts. Of course, such a person might also reason that a non-cognitivist analysis of such concepts is no genuine analysis at all, but rather clarifies not the content of normative or evaluative concepts, but the *role* these concepts play in moral or legal thinking (Gibbard 1990, pp. 30–31; Toh 2005, p. 81), and that therefore there is after all no tension between a commitment to non-cognitivism and a commitment to the classical conception of analysis. Alternatively, he might restrict his attempts

[7] I would like to thank Jan Österberg for suggesting that this (or a similar) distinction might be useful here.

[8] Instead of cognitive meaning, they may have emotive meaning. On this, see Stevenson (1937).

[9] On the classical conception of philosophical analysis, see, e.g., Langford (1942); Urmson (1956, pp. 116–118); Sosa (1983); Strawson (1992, Chap. 2); Anderson (1993).

at classical analysis to normative or evaluative concepts as they occur in *external*, as distinguished from internal, legal (or moral) statements, since the non-cognitivist theory does not apply to external legal (or moral) statements.[10]

The error-theoretical analysis, on the other hand, which Olivecrona embraced off and on in his early writings—according to which normative or evaluative terms do have cognitive meaning and refer to non-natural entities or properties, and the corresponding statements are all false—comports neither with the broad nor with the narrow conception of semantic naturalism, because it implies what neither version can accept, viz. that normative or evaluative terms do refer to non-natural entities or properties. Note, however, that unlike the non-cognitivist analysis, the error-theoretical analysis can be squared with the classical conception of philosophical analysis. On the error-theoretical analysis, one might say, for example, that *A* has a right to *X* if, and only if, *A* possesses a supernatural power over *X*". If successful, this analysis establishes an analytically true equivalence between the *analysandum* (*A* has a right to *X*) and the *analysans* (*A* possesses a supernatural power over *X*), even though there are no supernatural powers on the error-theoretical analysis and therefore no true statements asserting the existence of a right. That is to say, the adequacy of the analysis does not establish the existence of any rights, and this is precisely as it should be.

Now it seems to me that the *narrow* conception of semantic naturalism does *not* imply ontological naturalism[11]—that the *broad* conception of semantic naturalism does not imply ontological naturalism is obvious. Like the methodological naturalist, the narrow semantic naturalist may allow that there may or may not be non-natural entities or properties, provided that these entities or properties are unable to causally interact with the natural world. For the view that an analysis of a concept is philosophically acceptable only if it implies that the concept thus analyzed refers to natural entities or properties (*NCSN*) is clearly compatible with the belief that there may or may not be non-natural entities or properties that cannot influence the natural entities.

While I find the theses of ontological and epistemological naturalism plausible, I doubt whether the narrow conception of semantic naturalism is defensible. The reason, as we shall see in Sect. 5.3, is that there seem to be concepts that could not possibly be adequately analyzed in terms of natural entities or properties, and should perhaps be analyzed in terms of non-natural entities or properties instead, and that therefore a philosophically acceptable analysis of such a concept should not imply that the concept thus analyzed refers to natural entities or properties—if it did, the analyst would have changed the subject.

---

[10] I mean by an internal normative or evaluative statement a norm or a first-order (normative or evaluative) statement of this type, and by an external normative or evaluative statement a statement *about* a norm or a second-order (descriptive) statement of this type. For more on this topic, see Sect. 6.5.

[11] I shall leave it an open question whether the reverse holds, that is, whether ontological naturalism implies semantic naturalism.

5.3 Naturalism in Olivecrona's Legal Philosophy

I believe that Olivecrona was an *ontological*, but not a *semantic*, naturalist, and that he probably was not a methodological naturalist either. For he clearly believes that everything that exists is composed of natural entities whose properties determine all the properties of that which exists, and he equally clearly does not believe that an analysis of a concept is philosophically acceptable only if it implies that the concept thus analyzed refers to natural entities or properties, or that it does not refer to non-natural entities or properties. He also does not seem to accept the view that philosophical theorizing must be continuous with the sciences in the sense explained in the previous section.

Olivecrona's adherence to *ontological* naturalism is clear from the insistence in the First Edition of *Law as Fact* that any adequate theory of law must eschew metaphysics and treat law as a matter of *social facts*. The aim, Olivecrona explains, is to *reduce* our picture of law in order to make it correspond with objective reality:

> I want to go straight to this question [of law as fact] and treat directly the facts of social life. If in this way we get a coherent explanation, without contradictions, of those facts which are covered by the expression "law", our task is fulfilled. Anyone who asserts that there is something more in the law, something of another order of things than "mere" facts, will have to take on himself the burden of proof./…/ The facts which will be treated here are plain to everybody's eyes. What I want to do is chiefly to treat the facts as facts. My purpose is to reduce our picture of the law in order to make it tally with existing objective reality, rather than to introduce new material about the law. It is of the first importance to place the most elementary and well-known facts about the law in their proper context without letting the metaphysical conceptions creep in time and again. (1939, pp. 25–27).

That Olivecrona rejects the *narrow* conception of semantic naturalism is clear from his rejection of the predictive analysis of legal concepts espoused by Oliver Wendell Holmes and others. The problem with this analysis, he explains, is that it simply cannot account for the concepts of right and duty as traditionally understood (1962, p. 158): "[i]f I make the assertion that I have a claim for damages against another person, I am not making a prediction as to what will happen if he does not liquidate the claim at once. I mean that I have a claim now, that he ought to comply with it, and that I am entitled to a favourable judgment by the court because I have a right." Thus the gist of Olivecrona's critique, which I consider to be well founded, is that the predictive analysis does away with the *normative* aspect of the concepts in question, that it cannot account for the circumstance that judges and lawyers treat legal rules and rights and duties as *reasons for action*. What Olivecrona is saying here is that an analysis of a legal concept must capture the import of this concept as it is understood by lawyers, judges, and others who concern themselves with the concept, even if this means that the import of the concept is in some sense metaphysical.

That Olivecrona rejects the *broad* conception of semantic naturalism is clear from his defense of an error-theoretical analysis of the concepts of right, duty, and binding force. Since on the error-theoretical analysis, a concept that is analyzed refers to non-natural entities or properties, such as supernatural powers, and since he must reasonably believe that such an analysis offers a philosophically accept-

able analysis of the concepts in question, Olivecrona cannot also hold, as semantic naturalists do, that an *analysis* of a concept is philosophically acceptable only if it implies that the concept thus analyzed either refers to natural entities or properties, or that it does not refer to non-natural entities or properties. Instead, his position must surely be that while his (error-theoretical) *analysis* of the concept is philosophically acceptable, the *concept* itself is not, referring as it does to non-natural entities or properties. That is to say, he considers his *analysis* of the concept in terms of non-natural entities to be philosophically acceptable, because it captures the import of the concept as it is understood by lawyers and judges, or by people in general, even though he also holds that the *concept* itself is not philosophically acceptable, precisely because there is nothing in the natural world that corresponds to the concept. One could perhaps refer to this stance, too, as a version of semantic naturalism, but I shall not do so because the term 'semantic naturalism' is already in use in the sense explained above.

We should, however, keep in mind that since Olivecrona abandoned the error-theoretical analysis in his later writings, we should not rule out the *possibility* that he might have come to accept the broad conception of semantic naturalism in his later writings. For if we accept the view that a non-cognitivist analysis of normative or evaluative concepts is an analysis of those concepts, albeit in a rather loose sense, we will see that once Olivecrona abandoned the error theory, his analyses of legal concepts were always in keeping with the *broad* conception of semantic naturalism.

I am inclined to believe that Olivecrona was *not* a methodological naturalist. The evidence is ambiguous, however. Since methodological naturalism of the type that requires "methods continuity" with the sciences aims at causal explanations, a methodological naturalist of this type is likely to have an interest in such explanations, and to choose a study-object that lends itself to analysis in causal terms, such as the study of adjudication, or to advocate a predictive analysis of legal concepts. But, as we have just seen, Olivecrona rejects the predictive analysis of legal concepts, on the ground that it does away with the *normative* aspect of the concepts in question, and he does not seem to be interested in the study of adjudication. This suggests, though it does not prove, that he does *not* accept this type of methodological naturalism. He does, however, maintain that while legal rules cannot establish legal relations, they can influence human behavior because they have a suggestive character, and that this means that they are part of (what he referred to as) the chain of cause and effect (see Chaps. 7–8). This suggests, though it does not prove, that he does accept methodological naturalism of the type that requires "methods continuity" with the sciences.

That Olivecrona's commitment to and understanding of naturalism remained the same in all essentials throughout his long career is clear from his treatment of the various legal-philosophical problems that he engaged with, but also from what he said on the few occasions when he explicitly considered his methodological stance. For example, having introduced a distinction between realism and idealism in legal philosophy in a later article (1951), he goes on to characterize realism, that is, naturalism, in the following way:

> *Realism* tends to regard all legal phenomena as part of the existing social order, that is to say, as being purely *factual*. Therefore, realism as such means observation, fact-gathering, and analysis, but not valuation. Legal science as a whole becomes part of social science. There is only a necessary division of labour in that legal science directs its attention primarily to certain aspects of the social context, while sociology, political science, and other branches of social science take up other aspects./…/ Modern realism… is striving to give a consistently factual explanation of the law without immixture of an ought. According to the *psychological* theories all legal phenomena are reduced to certain basic psychological regularities; law is said to consist only of a sum of subjective representations. Another group of theories might be called *sociological*. Their various contents cannot, however, be summarized in a brief formula; the characteristic feature of them all is that law is identified with a set of social facts. (Olivecrona 1951, p. 120, 124)

Moreover, he explains in the preface to the Second Edition of *Law as Fact*, that even though it is not a second edition in the usual sense, but rather a new book, the fundamental ideas are the same, viz. "to fit the complex phenomena covered by the word law into the spatio-temporal world." (1971, p. vii)

Olivecrona's naturalism comes to the fore, *inter alia*, in the critique of the view that law has binding force, and in the analysis of the concept of a legal rule. We shall take a closer look at these analyses in Chaps. 7 and 8. Here I would just like to offer a sketch of the arguments that Olivecrona adduces in support of his claims, and to point to the sense in which these arguments draw on naturalism of one type or the other.

Olivecrona maintains that anyone who believes that legal rules have binding force will have to locate law in a supernatural world, where the peculiar idea of binding force can make sense, that there can be no connection between the supernatural world and the world of time and space, and that therefore we have to reject the view that legal rules have binding force. This means that Olivecrona's critique of the view that law has binding force is premised on a commitment to ontological naturalism. Since Olivecrona is an ontological naturalist, he cannot accept the existence of a world located beyond the world of time and space. And since he also believes that a *concept* is philosophically acceptable only if it refers to natural entities, he cannot accept a concept, such as the concept of binding force, that does not so refer.

Olivecrona conceives of legal rules as independent imperatives, that is, as imperatives that are not issued by a certain person and are not addressed to a certain person or persons, and that may sometimes be expressed by a sentence in the indicative mood, such as "It is the case that you shall not steal." While legal rules thus conceived cannot establish legal relations, they can influence human behavior because they have a suggestive character. Hence, on Olivecrona's analysis, legal rules are part of the chain of cause and effect. One could perhaps argue, then, that Olivecrona's analysis of the concept and function of a legal rule reflects a commitment to methodological naturalism of the type that requires "methods continuity" with the sciences. For the analysis sees legal rules as psychologically effective, as parts of the chain of cause and effect, in a way that could—in principle—be empirically tested. The only problem with this line of reasoning, as we have seen, is

that it is contradicted by Olivecrona's rejection of the predictive analysis of legal concepts.

Let us now briefly consider Alf Ross's analysis of the concept of valid law, in order to gain a better understanding both of methodological naturalism of the type that requires "methods continuity" with the sciences and of the narrow conception of semantic naturalism, which Olivecrona rejects. As we shall see, the circumstance that Ross embraces the narrow conception of semantic naturalism, whereas Olivecrona rejects not only the narrow, but also the broad, conception of semantic naturalism means that the legal philosophies defended by these two Scandinavian realists differ in important ways.

5.4 Alf Ross on the Concept of Valid Law

Beginning with a preliminary analysis of the concept of valid law, Ross takes his starting point in an analysis of the game of chess. Pointing out that chess players move the chess pieces in accordance with a set of rules, he explains that one must adopt an introspective method if one wishes to ascertain which set of rules actually governs the game of chess—if one were content to observe behavioral regularities and nothing more, one would never be able to distinguish chess rules from regularities in behavior that depend on custom or the theory of the game (1959, p. 15). More specifically, the problem is to determine which rules are felt by the players to be binding (Ross 1959, p. 15. Emphasis added.): "The first criterion is that they are in fact *effective* in the game and are outwardly visible as such. But in order to decide whether rules that are observed are more than just customary usage or motivated by technical reasons, it is necessary to ask the players by what rules they *feel themselves bound*." He maintains, in keeping with this, that a rule of chess is valid if, and only if, the chess players (1) follow the rule (2) because they feel bound by it (Ross 1959, p. 16).

He then points out that we must apply a similar method to the study of *law* and advances the following hypothesis:

> The concept "valid (Illinois, California, common) law" can be explained and defined in the same manner as the concept "valid (for any two persons) norm of chess." That is to say, "valid law" means the abstract set of normative ideas which serve as a scheme of interpretation for the phenomena of law in action, which again means that these norms are effectively followed, and followed because they are experienced and felt to be socially binding." (Ross 1959, pp. 17–18)

He is, however, careful to point out that this analysis is not as banal as one might think if one approached the problem with no preconceived notions. The novelty of the analysis is precisely its naturalist, anti-metaphysical quality, which rules out the traditional view that the validity of law is "… a pure concept of reason of divine origin existing *a priori*… in the rational nature of man". (Ross 1959, p. 18)

Turning to a full analysis of the concept of valid law, Ross points out (Ross 1959, p. 34) that in regard to its *content*, a national legal system is a system of norms "for

the establishment and functioning of the State machinery of force." To say that such a system is *valid*, he explains (Ross 1959, p. 35), is to say that judges (1) apply the norms (2) because they feel bound by them.

The concept of valid law is thus analyzed in naturalistically acceptable terms, viz. in sociological and psychological terms. For not only does Ross take into account natural entities and properties and nothing else (ontological naturalism), he also analyzes the concept in question in terms of such entities and properties (the narrow conception of semantic naturalism), employing methods of inquiry and styles of explanation—claims about social facts that can be empirically verified or falsified—that are "continuous with" the sciences (methodological naturalism of the type that requires "methods continuity"). So, on this analysis, there is no non-naturalistic (idealistic) residue that could embarrass the naturalist.

But, as we have seen, a non-cognitivist meta-ethics, according to which normative or evaluative terms have no cognitive meaning and do not refer, cannot be squared with the narrow conception of semantic naturalism, according to which an analysis of a moral or legal concept is acceptable only if it implies that the concept thus analyzed refers to natural entities or properties. Does this mean that the non-cognitivist Ross *contradicts* himself when he accepts the narrow conception of semantic naturalism and applies it to the analysis of legal concepts? I do not think so, because I believe Ross could invoke a distinction between *internal* legal statements, that is, norms and first-order value judgments (the legal object-language), on the one hand, and *external* legal statements, that is, statements *about* norms and second-order value judgments (the legal meta-language), on the other hand (on this distinction, see Sect. 6.5). Specifically, he might argue that the non-cognitivist theory applies *only* to the legal object-language, and that, while 'right,' as it occurs in the legal object-language, does not refer, his analysis concerns 'right' as it occurs in the legal meta-language. On this interpretation, Ross's analysis of the concept of a legal right simply does not come within the scope of the non-cognitivist theory. Of course, this means that the scope of Ross's analysis turns out to be rather narrow, and this takes value away from the analysis.

Let me point out in conclusion that some prominent legal philosophers, such as Jules Coleman (2001a, pp. 202–203; 2001b, p. 116), seem to have inferred from Ross's espousal of a predictive analysis of the concept of valid *law* that all Scandinavian realists espouse a predictive analysis of *all*, or at least most, legal concepts. But, as we saw in Sect. 5.3, and as Enrico Pattaro (2005, pp. 543–546) has pointed out, this is not so. Not only does Olivecrona—together with Ross the most prominent Scandinavian realist—reject predictive analyses across the board, Ross himself does not espouse a predictive analysis of other legal concepts, such as the concepts of right and duty. What Ross is saying is that a rule is a *valid* legal rule if, and only if, judges apply the rule because they feel bound by it (on Ross's understanding of the term 'validity,' see Ross 1968, p. 104, footnote 2). And it does not follow from this that Ross must rationally hold that a person has a legal *duty* if, and only if, he is likely to suffer a sanction in case he does not do what he is required to do, or a legal *right* if, and only if, his enjoyment of that to which he has the right is actually protected in a certain way by the state (on Ross's analysis of the concept of a legal

right, see Ross 1959, Chap. 6). The reason why this does not follow is that a rule—whether valid or invalid—is one thing and a statement about that rule another. A legal rule, as Ross explains, is a normative entity, a directive in Ross's terminology (Ross 1959, pp. 7–9), whereas a statement that a rule is a valid legal rule is not a normative entity at all. In other words, whereas the valid legal rule itself is a normative entity, that is, an *internal* legal statement, the statement that a rule is a valid legal rule is an *external* legal statement.[12] And since legal rules, valid or invalid, are normative, Ross may without contradiction conceive of legal rights and duties in non-reductive, that is, normative terms.

Of course, Coleman might object to my line of argument that a person, *p*, could not have a legal duty, unless the rule in question, *r*, were legally valid, that this means that *p* could not have a legal duty, unless *p* was likely to suffer a sanction if *p* did not do what he was required to do, and that therefore he (Coleman) is justified in attributing to Ross a predictive analysis of the concept of a legal duty. But such an objection would not be persuasive, however, because it ignores the important distinction between *r* and the legal order, *LO*, of which *r* is a member. On Ross's analysis, *LO* is valid only if *LO* is, on the whole, effective, and *r* may be a member of *LO* even if *r* is itself is not effective, and this means precisely that Ross may without contradiction conceive of legal rights and duties in non-reductive terms and, indeed, that he should do so.

5.5 Naturalism and Conceptual Analysis

It is clear that Olivecrona, following in the footsteps of Hägerström, believed in and practiced conceptual analysis, while embracing ontological, but not semantic, naturalism, and probably not methodological naturalism either. One may, however, wonder whether a commitment to conceptual analysis can be squared with a commitment to naturalism, given that appeal to *a priori* intuitions—against which the conceptual analyst is supposed to test the proposed analysis—is said to be incompatible with naturalism. George Bealer (1992, pp. 108–118), for example, maintains that naturalists accept a principle of empiricism, according to which a person's experience and/or observations comprise his *prima facie* evidence of beliefs or theories, and that appeal to *a priori* intuitions contradicts the principle of empiricism.[13]

What to do? Well, to begin with, we have seen that Olivecrona does not seem to have accepted *methodological* naturalism, and this means that we have no reason to believe that he accepted the principle of empiricism, mentioned above. And if he didn't accept this principle, there seems to be no reason to doubt the compatibility of naturalism and conceptual analysis in his case.

[12] On the distinction between internal and external legal statements, see Sect. 6.5 below.

[13] Bealer also argues that this means that we should reject naturalism, not conceptual analysis, but that is another matter. See also Bealer (1987, pp. 289–365).

Moreover, it seems to me that naturalists might adopt a more relaxed understanding of conceptual analysis, which does not involve appeal to *a priori* intuitions. For example, they might follow Frank Jackson, who defends "modest" conceptual analysis, which aims to determine not what the world is like, but "what to say in less fundamental terms given an account of the world stated in more fundamental terms" (1998, p. 44. See also Coleman 2001a, p. 179) and who recommends that, if necessary, we do opinion polls to become clear about what people think about the application of the relevant concept (1998, pp. 36–37).

Alternatively, they might go in for *explication* or rational reconstruction of concepts. To explicate (or rationally reconstruct) a concept, *C*, amounts to transforming *C*, which we may call the *explicandum*, into a concept that is more exact, which we may call the *explicatum*, while retaining its intuitive content, in order to make it more functional for a certain purpose (Carnap 1950, pp. 3–5). This involves starting out from the (abstract or concrete) objects that are commonly thought to fall under *C*, and proceeding to provide an explication of *C* that fits most of, though not necessarily all, those objects. To explicate a concept, then, involves changing the *extension* of the term that expresses the concept, in order to make the concept more functional for a given purpose, and this means that an explication is partly prescriptive.

But one might object to this, as Brian Leiter does, that if legal philosophers were to analyze concepts in a more relaxed manner, or to give up conceptual analysis in favor of explicating concepts, they would no longer be in the business of establishing *analytical* truths about the concepts in question, but only "strictly ethnographic and local" truths (2007, p. 177). And, as Leiter sees it (Brian 2007, p. 177), conceptual analysis would then "become[] hard to distinguish from banal descriptive sociology of the Gallup-poll variety."

I am not sure that this would be a serious problem, however. Surely even conceptual analysis of the "strictly ethnographic and local" kind may be valuable. The interesting question, as I see it, is just how general the proposed analysis is. The more people you poll about the application of the concept, the more general the analysis will be. Against this background, I find Hilary Kornblith's characterization of conceptual analysis on the model of the investigation of natural kinds appealing and a possible model for the analysis of legal concepts, even though the latter type of analysis clearly concerns *artificial*, not natural, kinds. Kornblith writes:

> The examples that prompt our intuitions are merely obvious cases of the phenomenon under study. That they are obvious, and thus uncontroversial, is shown by the wide agreement that these examples command. This may give the resulting judgments the appearance of a priority, especially in light of the hypothetical manner in which the examples are typically presented. But on the account I favor, these judgments are no more a priori than the rock collector's judgment that if he were to find a rock meeting certain conditions, it would (or would not) count as a sample of a given kind. All such judgments, however obvious, are a posteriori, and we may view the appeal to intuition in philosophical cases in a similar manner. (2002, p. 12)

What, then, about Olivecrona's position? Can his commitment to conceptual analysis be reconciled with his commitment to ontological naturalism? He himself certainly appears to have thought so, though he never touched on this question in his

writings. I believe, however, that he was indeed right to assume that there was no serious problem here, because he practiced conceptual analysis in a modest way that did not involve appeal to *a priori* intuitions, but rather appeal to what judges and legal scholars in general believe.

References

Articles

Anderson, C. Anthony. 1993. Analyzing analysis. *Philosophical Studies* 72:199–222.
Armstrong, D. M. 1978. Naturalism, materialism and first philosophy. *Philosophia* 8:261–276.
Bealer, George. 1987. The philosophical limits of scientific essentialism. *Philosophical Perspectives. Vol. 1. Metaphysics,* 289–365.
Bealer, George. 1992. The incoherence of empiricism. *Proceedings of the Aristotelian Society. Supplementary Volumes* 66:99–138.
Bedau, Mark. 1993. Naturalism and teleology. In *Naturalism: A critical appraisal,* eds. Steven J. Wagner and Richard Warner. Notre Dame: University of Notre Dame Press.
Coleman, Jules L. 2001b. Incorporationism, conventionality, and the practical difference thesis. In *Hart's postscript,* ed. Coleman Jules, 99–147. Oxford: Oxford University Press.
Langford, C. H. 1942. The notion of analysis in Moore's philosophy. In *The philosophy of G. E. Moore,* ed. P. A. Schilp, 319–342. Evanston and Chicago: Northwestern University Press.
Leiter, Brian. 2002. Naturalism in legal philosophy. In *The Stanford internet encyclopedia of philosophy,* ed. Edward N. Zalta, 1–16. 2002 ed. Fall. http://plato.stanford.edu/archives/fall2002/entries/lawphil-naturalism. Accessed 12 Feb 2006.
Lenman, James. 2008. Moral naturalism. In *The Stanford encyclopedia of philosophy,* ed. Edward N. Zalta, 2008 ed. Forthcoming. http://plato.stanford.edu/archives/sum2008/entries/naturalism-moral/. Accessed 2 Oct 2013.
Mautner, Thomas. 2010. Some myth about realism. *Ratio Juris* 23:411–427.
Olivecrona, Karl. 1951. Realism and idealism: Some reflections on the cardinal point in legal philosophy. *New York University Law Review* 26:120–131.
Olivecrona, Karl. 1962. Legal language and reality. In *Essays in honor of Roscoe Pound,* ed. Ralph A. Newman, 151–191. Indianapolis: The American Society for Legal History.
Papineau, David. 2007. Naturalism. In *The Stanford encyclopedia of philosophy,* ed. Edward N. Zalta, 1–36. 2007 ed. Spring. http://plato.stanford.edu/archives/spr2007/entries/naturalism/. Accessed 21 Aug 2013.
Post, J. F. 1999. Naturalism. In *The Cambridge dictionary of philosophy,* ed. Audi Robert, 596–597. 2nd ed. Cambridge: Cambridge University Press.
Quine, W. V. 1969. Epistemology naturalized. In *Ontological relativity and other essays,* ed. W. V. Quine, 69–90. New York: Columbia University Press.
Ridge, Michael. 2008. Moral non-naturalism. In *The Stanford encyclopedia of philosophy,* ed. Edward N. Zalta, 69–90. 2008 ed. Fall. http://plato.stanford.edu/archives/fall2008/entries/moral-non-naturalism/. Accessed 11 Feb 2008.
Sosa, Ernest. 1983. Classical analysis. *The Journal of Philosophy* 80:695–710.
Spaak, Torben. 2009. Naturalism in Scandinavian and American realism. In *De Lege*, eds. Petter Asp and Mattias Dahlberg, 243–293. Uppsala: Iustus.
Stevenson, Charles Leslie. 1937. The emotive meaning of ethical terms. *Mind, New Series* 46:14–31.
Toh, Kevin. 2005. Hart's expressivism and his Benthamite project. *Legal Theory* 11:75–123.

Wagner, Steven J., and Richard Warner. 1993. Introduction. In *Naturalism: A critical appraisal,* eds. Steven J. Wagner and Richard Warner, 1–21. Notre Dame: University of Notre Dame Press.

Books

Brink, David O. 1989. *Moral realism and the foundation of ethics*. Cambridge: Cambridge University Press.
Carnap, Rudolf. 1950. *Logical foundations of probability*. Chicago: The University of Chicago Press.
Churchland, P. M. 1988. *Matter and consciousness*. Revised ed. Cambridge: MIT Press.
Coleman, Jules L. 2001a. *The practice of principle*. Oxford: Oxford University Press.
Copp, David. 2007. *Morality in a natural world. Selected essays in metaethics*. Cambridge: Cambridge University Press.
Devitt, Michael, and Kim Sterelny. 1999. *Language and reality*. 2nd ed. Cambridge: MIT Press.
Gibbard, Alan. 1990. *Wise choices, apt feelings.* Cambridge: Harvard University Press.
Jackson, Frank. 1998. *From metaphysics to ethics: A defence of conceptual analysis.* Oxford: Oxford University Press.
Kelsen, Hans. 1934. *Reine Rechtslehre*. Wien: Österreichische Staatsdruckerei. (Reprinted by Scientia Verlag, 1994.)
Kornblith, Hilary. 2002. *Knowledge and its place in nature*. Oxford: Clarendon Press.
Leiter, Brian. 2007. *Naturalizing jurisprudence*. Oxford: Oxford University Press.
Olivecrona, Karl. 1939. *Law as fact*. Copenhagen: Einar Munksgaard (London: Humphrey Milford).
Olivecrona, Karl. 1971. *Law as fact*. 2nd ed. London: Stevens & Sons.
Pattaro, Enrico. 2005. *The law and the right*. Dordrecht: Springer.
Ross, Alf. 1959. *On law and justice*. Berkeley: University of California Press.
Ross, Alf. 1968. *Directives and norms*. London: Routledge & Kegan Paul.
Strawson, P. F. 1992. *Analysis and metaphysics. An introduction to philosophy*. Oxford: Oxford University Press.
Urmson, J. O. 1956. *Philosophical analysis. Its development between the two World Wars*. Oxford: Clarendon.

Chapter 6
Meta-ethics

Abstract In this chapter, I argue that Olivecrona's meta-ethics plays an important role in Olivecona's legal philosophy, and that Olivecrona (and the other Scandinavian realists) differ in this regard from other prominent legal philosophers, such as Kelsen and Hart, who have been careful to develop their legal philosophies in a way that does not depend on controversial meta-ethical assumptions. I also argue that while Olivecrona preferred to speak in a general way of values, rights, or obligations, etc., it is clear from the context that he usually had in mind also moral values, rights or obligations. However, he rarely went further than to assert that there are no objective values and that there is no objective 'ought.' But this claim, or these claims, could be accepted not only by non-cognitivists, but also by meta-ethical relativists and error-theorists, and as a result the precise nature of his meta-ethical position is somewhat unclear. I suggest, however, that in his early writings he vacillated between an error theory and a non-cognitivist theory in regard to rights statements and judgments about duty, while accepting non-cognitivism in regard to value judgments proper, and that in his later writings he embraced a non-cognitivist theory across the board. The chapter also includes a discussion of the important distinction between (what I refer to as) first-order and second-order legal statements, the intriguing notion of a legal statement with a fused modality, and the question whether, if non-cognitivism is true, a second-order normative or evaluative statement can correctly render the content of the corresponding first-order normative or evaluative statement.

6.1 Introduction

Olivecrona accepts, as we have seen, the main tenets of the Uppsala School of philosophy, including the tenet that there are no objective values. But, as we have also seen, the leading meta-ethicist among the Uppsala philosophers, Axel Hägerström, was not content simply to assert that there are no objective values. He defended a fairly radical version of emotivism, a species of non-cognitivism, arguing that moral judgments express the speaker's feelings or attitudes and cannot be true or false (1964). We have also seen, however, that Hägerström is said to have at times defended an error theory of moral judgments.

T. Spaak, *A Critical Appraisal of Karl Olivecrona's Legal Philosophy,*
Law and Philosophy Library 108, DOI 10.1007/978-3-319-06167-2_6,

Olivecrona never spoke of *moral* values, rights or obligations, as distinguished from other types of value, right, or obligation, but preferred to speak more generally of values, rights, or obligations, etc. Nevertheless, it is clear from the context that he usually had in mind also moral values, rights or obligations. However, he rarely went further than to assert that there are no objective values and that there is no objective ought. But this claim, or these claims, could be accepted not only by non-cognitivists, but also by meta-ethical relativists, such as Harman (1975, 1996) and error-theorists, such as Mackie (1977, Chap. 1) and Joyce (2001). As a result, the precise nature of his meta-ethical position is somewhat unclear. I suggest, however, that in his early writings he vacillated between an error theory and a non-cognitivist theory in regard to rights statements and judgments about duty, while accepting non-cognitivism in regard to value judgments proper, and that in his later writings he embraced a non-cognitivist theory across the board.

I begin with a very brief introduction to the subject of meta-ethics (Sect. 6.2), and proceed to consider two difficulties that plague the non-cognitivist theory (Sect. 6.3). Having done that, I point to some cases where meta-ethical considerations appear to play an important role in Olivecrona's analysis (Sect. 6.4). I then turn to consider the question whether Olivecrona fails to distinguish between internal and external legal statements in a way that hampers his analysis (Sect. 6.5), as well as the question whether we should take into account a third category of legal statements, viz. legal statements with a fused modality (Sect. 6.6). The chapter concludes with a few words about another difficulty for non-cognitivists (Sect. 6.7), and about the significance of meta-ethical considerations to Olivecronas substantive legal philosophy (Sect. 6.8).

6.1.1 Meta-ethics: A Very Brief Introduction

Crudely put, meta-ethical questions are questions about, rather than in, morality. More specifically, meta-ethics concerns the ontological, epistemological, psychological, and semantic status of moral and other normative or evaluative judgments (Bergström 1990, pp. 8–10; Brink 1989, pp. 1–2; Frankena 1975, pp. 96; Miller 2003, Chap. 1; Schafer-Landau and Cuneo 2007, pp. 1–2; Smith 1994, pp. 1–3). That is to say, it concerns, among other things, the nature and existence of moral values and standards, whether, and if so how, we can have knowledge of them, whether a sincere moral judgment is intrinsically motivating, and whether we are to understand moral judgments as stating facts or as expressing feelings or attitudes.

On the ontological level, moral philosophers make a distinction between *moral realism*, which has it that moral facts are mind-independent in the sense that they are conceptually independent of our moral beliefs or desires, and *moral antirealism*, which has it that moral facts do not exist at all (non-cognitivism or error theory), or else that they are conceptually dependent on the beliefs or desires of human beings (constructivism) (Brink 1989, Chap. 2). Since Olivecrona was a moral anti-realist, we shall pay special attention to non-cognitivism, error-theory, and constructivism. Let us, however, begin with a few words about moral realism.

Moral realism, then, is the theory that moral facts exist independently of our beliefs and desires: As Russ Schafer-Landau (2003, p. 13) puts it, "[a]t the simplest level, all realists endorse the idea that there is a moral reality that people are trying to represent when they issue judgments about what is right and wrong. The disagreements that arise among realists primarily have to do with the nature of this reality." More specifically, such disagreements give rise to two main versions of moral realism: (1) moral naturalism and (2) moral non-naturalism. Moral *naturalists*, such as Boyd (1988) and Brink (1989), believe that moral facts are just a species of ordinary natural facts, such as those studied in the natural and social sciences. The difficulty with this view is to handle the problem of naturalist reduction: What kind of natural facts are moral facts? How do we know whether a certain natural fact, such as the fact that some people are very happy, or that there is widespread unemployment, is a moral fact? Moral *non-naturalists*, such as Moore (1993 [1903]) and McDowell (1998), on the other hand, maintain that moral facts are *sui generis*, and they therefore face the problem of accounting for the nature and existence of such facts, and for our knowledge of them (Schafer-Landau 2003, pp. 65–72).

As we shall see in later chapters, Olivecrona follows Hägerström and does not accept the belief in the objectivity of moral or legal values and standards. His own arguments against such views concern chiefly those coming to expression in natural law theories and in Kelsen's view that the *legal* ought is objective but *sui generis*.

Moral anti-realism, as we have seen, comes in three main forms: (1) error theory, (2) non-cognitivism, and (3) constructivism. Non-cognitivism differs from error theory and constructivism on the *semantic* plane, in that error-theorists and constructivists conceive of moral judgments as judgments (or statements), which have truth-value, whereas non-cognitivists do not conceive of them as judgments (in this sense) at all; and constructivism differs from non-cognitivism and error theory on the *ontological* plane, in that constructivists believe that there are moral facts, whereas non-cognitivists and error-theorists believe that there are no moral facts at all. Let us consider these types of theory in turn. (For some thoughts on which level the discussion ought to be located, see Hare 1988.)

Error theorists believe that there are no moral facts and that there is no moral knowledge, that moral judgments assert something about something, and that therefore moral judgments are always false. John Mackie (1977, p. 35), for example, denies the existence of objective moral values and maintains that ordinary moral judgments include a claim to objectivity, that this claim has been incorporated into the conventional meaning of moral terms, and that therefore the denial of objective moral values has to be put forward as an error theory. Mackie's analysis has been carried forward by Richard Joyce (2001, Chap. 3), who explains that the problem about moral judgments is not that they are thought to be intrinsically motivating, as Mackie might have thought, but that they involve a claim about moral *inescapability*. To maintain that a person, A, ought to perform an action, ϕ, Joyce explains, is to maintain that A has a reason to perform ϕ independently of his wishes, preferences, or goals. But, Joyce objects, this is precisely what is wrong with our ordinary moral judgments. As he sees it, asking for reasons that exist independently of a person's wishes or desires is to ask too much of the world. Hence we must conclude that moral judgments are always false.

Note that it follows from the error-theoretical analysis that there can be no moral relations, no moral rights or duties, no fact of the matter as to what is morally good, or how one ought morally to act, etc. In other words, there can be no moral normativity. Hence if there are moral rules, they do not confer moral rights or impose moral duties.

The error theory may be attractive to those who accept a natural-scientific view of the world, in that it does not assume the existence of moral values or standards. And the idea that moral judgments are straightforward, albeit false, claims about the existence of moral values and standards will likely be attractive to many of those who feel that moral judgments are in some sense subjective. However, the error theory has been criticized by some recent authors. Steven Finlay (2008), for example, objects not only that the assumption on the part of error theorists that moral value has absolute authority (in the sense of a categorical imperative) is false, but also that even if it were true we would have no reason to accept the claim that this assumption "contaminates" the meaning and truth-conditions of moral judgments, making them systematically false. I am not sure that this interesting criticism is justified, but I shall have to leave this an open question.

Like error theorists, *non-cognitivists* maintain that there is no moral reality or moral knowledge, but unlike error theorists, they maintain that moral judgments do not assert anything about anything and that therefore they cannot be true or false. Instead, they maintain that a person who makes (what appears to be) a moral judgment is simply expressing his feelings, attitudes or preferences (Ayer 1947, Chap. 6; Blackburn 1998; Gibbard 1990; Hägerström 1964; Hedenius 1941, pp. 14–38; Stevenson 1944), or prescribing a course of action (Hare 1981). On this type of analysis, the function of moral judgments is to influence people. Schafer-Landau offers the following characterization of non-cognitivism:

> As non-cognitivists see it, the point of moral discourse is not to report some fact about oneself, one's group, or the larger world, but instead to give vent to one's feelings and to persuade others to share them… prescribe some rule of conduct for oneself and others… or express one's commitment to norms regulating guilt and anger…. Such judgments do not… admit of truth and falsity—indeed, there is nothing that could make them true. There is no world of moral facts against which the truth of a moral judgment can be checked. There are no moral properties whose instantiations can determine the qualities of persons, traits, actions, practices, or institutions. There is the familiar world that science speaks of. And there is us, responding to that world. And that is it. (2003, p. 20)

This means that on the non-cognitivist analysis, terms like 'right,' duty,' and 'ought' lack cognitive meaning and do not refer, though they may have so-called emotive meaning (on emotive meaning, see Stevenson 1937). Ingemar Hedenius puts it as follows:

> The thesis of value nihilism that the phrase "this is right" does not express any assumption or statement about anything means… that the word "right" does not denote anything; that this word is, in this particular sense, a meaningless word. For a comparison, one can take the phrase "this is round", which is a phrase of the opposite, theoretical type, and which expresses an assumption or a statement about something. Seen from one perspective, the difference is that the word "round" denotes a fact of a certain sort, viz. a certain form. Precisely because the word "round" thus denotes or "means" something, the phrase "this is

> round" can have theoretical meaning or (which is another side of the same thing) express an assumption or a statement about a state of affairs. In this particular respect, the phrase "this is right" is supposed to relate in the opposite way. The same must hold for all phrases that are equivalent to this phrase. (1941, p. 62)[1]

Note that it follows from the non-cognitivist analysis, too, that there can be no moral relations, no moral rights or duties, no fact of the matter as to what is morally good, or how one ought morally to act, etc. And this was precisely the view of Olivecrona and the other Scandinavian realists. For example, having discussed Alf Ross's book *Theorie der Rechtsquellen* (1929) at length, Axel Hägerström (1931, p. 83) concludes that Ross has convincingly shown that there is no such thing as binding law, that the very idea of binding law evaporates into nothingness. And Ross himself offers the following objection to Hans Kelsen's view that law is a system of norms:

> … a normative claim does not have any meaning that can be expressed in abstraction from the reality of experience. It is not a "thought" the truth or falseness of which can be tested as something that is absolutely independent of its psychological experience. No, a normative claim can only be considered in its actual occurrence itself as a psychophysical phenomenon that brings certain other psychophysical phenomena (emotions, attitudes) to expression. But this "bringing to expression" has nothing to do with meaning, but only means that a normative claim is considered a fact in a real causal relationship to other, not immediately observable psychophysical phenomena, the existence of which we can infer in this way. (1936, p. 13)[2]

As Schafer-Landau points out (in the quotation concerning non-cognitivism on the previous page), non-cognitivism is very much in keeping with a natural-scientific world-view, in that it does not assume the existence of moral values or standards. Moreover, it explains in a straightforward manner the rather widespread view, often called *internalism*, that moral judgments are intrinsically motivating. Since, on the non-cognitivist analysis, a person who makes a moral judgment expresses his

[1] The Swedish original reads as follows. "Värdenihilismens tes, att frasen 'detta är rätt' icke uttrycker något antagande eller påstående om något, innebär… att ordet 'rätt' icke betecknar någonting, att detta ord är, just i denna mening, ett meningslöst ord. Som jämförelse kan man ta frasen 'detta är runt', som är en fras av motsatt, teoretisk typ och som uttrycker ett antagande eller påstående om något. Skillnaden består, från en synpunkt sett, däri, att order 'runt' betecknar ett faktum av visst slag, nämligen en viss form. Just emedan ordet 'runt' sålunda betecknar eller 'betyder' något, kan frasen 'detta är runt' ha teoretisk mening eller (vilket är en annan sida av samma sak) uttrycka ett antagande eller påstående om ett sakförhållande. I just dessa avseenden skall frasen 'detta är rätt' förhålla sig på ett motsatt sätt. Detsamma måste gälla alla fraser, som är ekvivalenta med denna fras."

[2] The Danish original reads as follows. "Det normative Udsagn besidder alltsaa netop ingen Mening, der lader sig fremstille i Abstraktion fra den psykologiske Oplevelsevirkelighed. Det er ingen 'Tanke', hvis Sandhed eller Falskhed kan pröves som noget, der er absolut uafhengigt af dens psykologiske Oplevelse. Nej, det normative Udsagn kan alene betragtes i sin faktiske Forekomst selv som et psykofysisk Faenomen, der bringer visse andre psykofysiske Faenomener (Fölelser, Indstillinger) til Udtryk. Men denne 'Bringen til Udtryk' har intet med Mening at göre, men betyder blot, at det normative Udsagn betragtes som et faktum, der staar i faktisk Aarsagssammenhang med andre, ikke umiddelbart iakttagelige psyko-fysiske Faenomener, til hvis Eksistens man ad denne Vej kan slutte sig."

feelings or attitudes, non-cognitivism easily explains the assumption that moral judgments are intrinsically motivating.

Moral constructivists (Harman 1975, 1996; Korsgaard 1996; MacCormick 2008, pp. 102–103; Milo 1995; Rawls 1971, 1980; Scanlon 1998) believe that moral judgments are indeed judgments that can be true or false, depending on whether they describe correctly the relevant moral facts, though they insist that those facts are constructed in some way on the basis of our (current or refined) moral views. This means that constructivists are *cognitivists*, in the sense that they believe in moral truth and falsehood, and in our ability to figure out which moral judgments are true and which are false. Different constructivists differ above all in their views about the constructivist procedure. Thus whereas meta-ethical relativists like Gilbert Harman maintain that moral right or wrong, good or bad, depend on our current, unrefined moral views, an objectivist constructivist like John Rawls maintains that moral right or wrong, good or bad, depend on our choices in the original position, in which the agents choose moral principles behind the so-called veil of ignorance. Schafer-Landau offers the following characterization of moral constructivism:

> Constructivists endorse the reality of the domain, but explain this by invoking a constructive function out of which the reality is created. This function has morality as its output. What distinguishes constructivist theories from one another are the different views about the proper input. Subjectivists claim that individual tastes and opinions are the things out of which moral reality is constructed. Relativists cite various conventions or social agreements. Kantians cite the workings of the rational will. Contractarians cite the edicts of deliberators situated in special circumstances of choice. What is common to all constructivists is the idea that moral reality is constituted by the attitudes, actions, responses, or outlooks of persons, possibly under idealized conditions. In short, moral reality is constructed from the states or activities (understood very broadly) undertaken from a preferred standpoint. The absence of this standpoint signifies the absence of moral reality. (2003, p. 14)

Moral constructivism thus conceived is not without its problems, however. As Schafer-Landau (Schafer-Landau 2003, pp. 41–43) makes clear, constructivists must make a choice between imposing moral constraints on the procedure that is meant to generate moral truth and not imposing such constraints. If the constructivist chooses to impose moral constraints, he is necessarily invoking moral considerations that were not the upshot of the constructivist procedure, thus undermining his constructivism. If, on the other hand, he chooses to impose no such constraints on the procedure, he cannot be sure that the procedure will generate anything that we will recognize as moral judgments. Hence constructivism appears to be an unstable position. Of course, this critique does not touch *subjectivist* versions of moral constructivism, such as Harman's relativism.

6.2 Non-cognitivism: Two Difficulties

As I have said, and as we shall again see in Sect. 6.4, Olivecrona was above all a non-cognitivist, even though he appears to have endorsed an error-theoretical analysis at times, at least as regards rights statements and judgments about duty. But at

the time Olivecrona wrote, non-cognitivists were not much concerned with the difficulties of non-cognitivism, but were mainly bent on driving home the truth that moral objectivism (in its various shapes) was untenable and that (some type of) non-cognitivism must be the true meta-ethical theory. Contemporary moral philosophers, including the proponents of non-cognitivism, have concerned themselves more with the troublesome aspects of the non-cognitivist analysis, and in this section I wish to point to two of those difficulties.

The main difficulty that mars the non-cognitivist analysis has to do with the tacit assumption that norms and value judgments can be part of logically valid inferences (for a survey of these difficulties, see Schafer-Landau 2003, pp. 22–37). I shall not here revisit the old difficulty that, on the non-cognitivist analysis, norms and value judgments lack truth values, and that this appears to mean that the laws of logic cannot apply to norms and value judgments (on this see, Alchourrón and Martino 1990). Instead, I shall focus on the so-called Frege-Geach problem (or the problem of embedding), which has been much discussed by moral philosophers in the past 15 years or so (see, e.g., Blackburn 1993; Gibbard 1990; Sinnott-Armstrong 2000; Stoljar 1993; Unwin 1999). This is the problem that, on the non-cognitivist analysis, moral terms like 'right,' 'duty,' and 'ought' do not have the same meaning (sense) in asserted and unasserted contexts, and that therefore an inference such as the one below involves the fallacy of equivocation (*quaternio terminorum*).

(P1) If it is wrong to lie, then it is wrong to ask your friend to lie for you.

(P2) It is wrong to lie.

——

(C) It is wrong to ask your friend to lie for you.

The equivocation arises from the circumstance that on the non-cognitivist analysis, the word 'wrong' lacks cognitive meaning in (P2) and in (C), because both (P2) and (C) are asserted. In (P1), on the other hand, 'wrong' is part of the antecedent, which is not asserted—what is asserted is the whole conditional—and this means that the non-cognitivist analysis does not apply to it. And while it is not always clear just how non-cognitivists conceive of the cognitive meaning of moral terms in unasserted contexts, it is clear that it cannot be the same as in asserted contexts since there is none in such contexts. Hence one who argues in the above-mentioned way is guilty of the fallacy of equivocation.

If we assume that this problem can somehow be solved, we should consider a second difficulty, which concerns our understanding of normative questions. Schafer-Landau describes the situation as follows:

> We commonly ask ourselves what we should do (or think or feel) in a given situation. For non-cognitivists, there isn't anything we should do, really. Doing different things will bring about different consequences, but no result is such that one *ought* to do it, since no result—no state of affairs in the world—could possess value or be obligatory. Value and obligation are normative notions that never refer. There is no such thing as normativity; we live in a value-free world, the world as science describes it. But then what is going on when we ask ourselves, in any given case, how we ought to proceed? (2003, pp. 27–28)

He suggests that the non-cognitivist will answer that one will have to consider the result of the suggested course of action and ask oneself what one's attitude would

be to that result. But, he objects, that cannot be all: We were asking a normative, not a descriptive, question. The question was: Is this attitude of mine a good or proper attitude? He points out that the non-cognitivist will have to answer this question by pointing to yet another attitude or attitudes, perhaps saying that the attitude in question is good or proper if it coheres with one's other attitudes. But then one must ask why one should value coherence, and the non-cognitivist will likely answer that we value coherence because coherence is conducive to other things we want.

But, Schafer-Landau points out, this line of reasoning is unsatisfactory, because it means that one keeps deferring the important, normative, question about the goodness or propriety of one's attitude(s). That is to say, the problem is this:

> Each question in the series is answered by reference to our existing attitudes; yet each question represents another variation on the one that keeps getting deferred, namely: are our existing attitudes fit to be the primary source of evaluation? Since evaluative attitudes are, for the cognitivist, just beliefs, cognitivists will assess the fitness of the relevant attitudes by reference to whether they are true./…/The non-cognitivist, by contrast, continually refashions the question of what we ought to do so that its answer can be given just by an introspective psychological enquiry. But asking and answering normative questions does not seem to be the same thing as asking and assuring ourselves about the implications of our existing mental states. (2003, pp. 28–29)

I find the two difficulties discussed significant. I should add, however, that I find other meta-ethical views, too, problematic, especially the various versions of moral realism. My aim in introducing and briefly discussing these difficulties was to make it clear that part of the philosophical foundation of Olivecrona's substantive legal philosophy is problematic, and to say that any conclusion that follows from a non-cognitivist premise will therefore be equally problematic. But when we assess Olivecrona's substantive legal philosophy, we need to consider the possibility that any other meta-ethical position is just as problematic. I leave it an open question whether this insight should encourage a legal philosopher to minimize the impact of meta-ethical considerations on his or her legal philosophy.

6.3 The Role of Meta-ethical Considerations in Olivecrona's Analysis

I said in Sect. 6.1 that Olivecrona vacillated in his early writings between an error theory and a non-cognitivist theory in regard to rights statements and judgments about duty, while accepting non-cognitivism in regard to value judgments proper, and that in his later writings he embraced a non-cognitivist theory across the board. I believe the analysis in this section supports this claim.

As we shall see in Chap. 7, Olivecrona maintains in his early writings that the reason why judges, legal scholars, and others mistakenly believe that law has *binding force* is that they misunderstand the nature of rules and value judgments (1939, p. 46; 1951, pp. 129–130). I take him to be saying that they wrongly assume that a binding rule or a true value judgment somehow establishes a moral relation, that is,

generates a moral entity or property. For example, they assume that a binding legal rule providing, say, that a person born by a Swedish woman will become a Swedish citizen, necessarily confers the property of being a Swedish citizen on anyone who was born by a Swedish woman. Olivecrona objects, however, to this line of reasoning that legal rules cannot be binding and that value judgments cannot be true (or false): A person who issues a rule or makes a value judgment does not assert that anything is the case, but simply expresses his feelings, attitudes, or preferences. Since this is so, the rule in our example does not and cannot confer the property of being a Swedish citizen on those who satisfy the conditions in the rule. What it can do is to *influence* the subjects of the law on the psychological level and in this way cause human behavior.

And, as we shall see in Chap. 8, Olivecrona conceives of *legal rules* as independent imperatives and maintains that a person who issues an imperative aims to influence the addressee(s) of the imperative. As we shall also see, he maintains that there is no real judgment behind the independent imperatives (1939, p. 46); and this indicates that he embraces non-cognitivism.

Furthermore, we shall see in Chap. 9 that in his earlier writings Olivecrona argues that *rights* and *duties* are illusions. Focusing on the concept of a right, he maintains that even though we believe that rights exist as objective realities, on closer inspection it becomes clear that they exist only in our imagination (Olivecrona 1939, pp. 75–77). His idea here appears to be that rules and value judgments are judgments about entities or properties that do not exist in the natural world, and that therefore they are all false. This indicates an error-theoretical rather than a non-cognitivist account of the concept of a right.

Olivecrona returns to the topic of *legal rules* and *value judgments* some years later in an article on realism and idealism in legal philosophy (1951). Having reiterated the claim put forward in the First Edition of *Law as Fact*, that the grammatical form of value judgments deceives us into believing in objective values and an objective ought, he proceeds to clarify the real nature of value judgments:

> These statements have the *verbal form* of judgments; that is to say, they are verbal propositions concerning reality. When we, for instance, qualify actions as good or bad, we apparently ascribe the property of goodness or badness to them. Yet, it is obvious that no such property can be detected in the actions among their natural properties. The qualification represents our own emotional attitude; it would be senseless to describe an action as either good or bad if it were to leave us completely unmoved. The statements on goodness or badness are supplied with meaning by the corresponding feelings. But our feelings are entirely subjective; it is senseless to ask whether they are true or not. They exist, or do not exist: that is all. (Olivecrona 1951, pp. 129–130. Footnote omitted.)

The reference to "our emotional attitude," and the claim that it would be senseless to describe an action as good or bad if one were completely unmoved and to ask whether our feelings are true or not, indicate quite clearly that Olivecrona now espouses non-cognitivism, rather than the error theory.

Olivecrona returns briefly to the concept of *binding force* in the Second Edition of *Law as Fact*, where he asserts that the question whether or not a legal rule is binding is not a scientific problem, since the binding force—the 'oughtness'—of a rule is no *conceivable* property:

> Ascribing binding force to a rule means proclaiming that it ought to be followed, objectively speaking. This is a value judgment. It has the linguistic form of a proposition concerning a property in the rule. But the 'oughtness' is no conceivable property. To discuss whether certain rules possess oughtness or not is therefore useless. This is no scientific problem./…/… to ask whether a certain system of rules at this or that time was really binding would seem very strange. Indeed, no answer could be given to such a question. (1971, p. 112)

This appears to be a non-cognitivist analysis, because Olivecrona maintains (1) that oughtness is not even a *conceivable* property, and (2) that no answer could be given to the question whether a certain system of rules was really binding.[3] Specifically, claim (1) is in keeping with the non-cognitivist idea that terms like 'binding force' and 'duty' have no cognitive meaning and do not refer at all, and claim (2) is in keeping with the idea that a value judgment is not a judgment at all—if it were a judgment, it would be true or false.

Olivecrona also considers the concept of a *right* in the Second Edition of *Law as Fact*, making a distinction between two different ways of rejecting the reality of rights. He explains that we may say that there is no *facultas moralis* of natural law theory and no *Willensmacht* of the imperative theory of law, or we may say instead that the noun 'right' as commonly used "does not signify anything at all," not even something that exists in imagination only, such as a centaur (1971, p. 183). It is clear that the first is the error-theoretical and that the second is the non-cognitivist alternative. Olivecrona is explicit that he now prefers the second, non-cognitivist analysis, though he does not comment on the fact that he used to prefer the first, error-theoretical analysis.

Let us note, finally, that Konrad Marc-Wogau (1940) argues that Olivecrona vacillates between two different ways of understanding the existence of rights, duties, and the binding force of law. On the first interpretation, these entities or properties exist only as ideas or conceptions in human minds. As Marc-Wogau puts it, on this interpretation they have *subjective*, but not objective, existence. On the second interpretation, the entities or properties exist neither in reality nor as ideas or conceptions in human minds. On this interpretation, they have neither objective nor subjective existence. Marc-Wogau suggests that Olivecrona really wants to defend the second interpretation, although he frequently speaks as if he were concerned with the first. Marc-Wogau's analysis thus supports my claim that Olivecrona vacillated in his early writings between an error-theory and a non-cognitivist theory in regard to rights statements and judgments about duty.[4]

Olivecrona (1941) responds to Marc-Wogau's criticism, saying that he always meant to endorse the second interpretation, the non-cognitivist analysis, according

[3] I thus assume that in this case Olivecrona means that a statement in which the speaker ascribes binding force to law is an *internal*, not an external, legal statement. This is worth pointing out since it seems to me that, generally speaking, it is more natural to conceive of such a statement as an *external* legal statement. On the distinction between internal and external legal statements, see Sect. 6.5 below.

[4] For more on this topic, Swedish-speaking readers may wish to consult Mac Leod (1973, pp. 19–20) and Petersson (1973, pp. 162–165). Note also that Åqvist (2008, pp. 277–280) agrees with Marc-Wogau's criticism.

to which the entities lack both subjective and objective reality. But despite his protestations, it seems to me that at least in his earlier writings he was not very clear about the distinction between non-cognitivism and error theory either in general or in the case of his own analysis.

6.4 Internal and External Legal Statements

In a celebrated book entitled *Om rätt och moral* (1941, pp. 60–85), the Swedish philosopher Ingemar Hedenius maintains that Axel Hägerström, Vilhelm Lundstedt, and Karl Olivecrona failed to maintain a distinction between internal statements, that is, first-order value judgments and rules, and external statements, that is, second-order value judgments and statements *about* rules, and as a result wrongly concluded that there is no law and that there are no rights and duties. In the same book, he also maintains that in their analyses Hägerström et al. confused the meaning of normative terms, such as 'right,' 'duty,' and 'ought,' with a mistaken *theory* about the meaning of these terms, namely the theory that these terms have a magical meaning (Hedenius 1941, p. 81), and that this caused them to wrongly conclude that there is no law and that there are no rights and duties. Although Hedenius appears to hold that Hägerström et al. committed both these mistakes, he does not make it clear precisely how they relate to one another. I shall, however, focus in this section only on the former (alleged) mistake, viz. that of failing to maintain a distinction between internal and external legal statements.

The distinction between internal and external legal statements is clearly important to legal (and moral) thinking, especially for those who embrace a non-cognitivist meta-ethics, as Hedenius and the other Scandinavian realists do; and even though it may seem obvious in the abstract, it turns out to be quite difficult to maintain the distinction consistently when analyzing legal or moral problems, especially in light of the fact that it is not always clear from the wording of a sentence whether it is of the one or the other type. The significance of the distinction should also be clear from the fact that since Hedenius introduced it, it has been accepted by a number of distinguished legal scholars or philosophers, such as Bulygin (1982, p. 127), Kelsen (1999, pp. 162–164), and von Wright (1963, pp. 103–105).[5]

Hedenius attributes the following line of reasoning to Hägerström, Lundstedt, and Olivecrona. Since according to the non-cognitivist theory, a sentence such as "This is right" (which in its Swedish translation may mean either "This is right" or "This is the law") is *meaningless*, in the sense that the word 'right' lacks cognitive meaning and does not refer, and since on one common interpretation (namely, "This is the law") this sentence is equivalent to the sentence "This rule has binding force," this latter sentence, too, will be meaningless. Moreover, since the sentence "This

[5] Note that A. J. Ayer (1947, pp. 105–106) makes the very same distinction. Note also that H. L. A. Hart's distinction (1961, pp. 52–57) between internal and legal statements of law is closely related to, if not identical with, Hedenius's distinction. On this, see Hedenius (1977, p. 131).

rule has binding force" is in turn equivalent to "This rule belongs to the law," the latter sentence can never be true (or false) either. Hence no rule can belong to the law. Hence there can be no law. Hedenius puts it as follows:

> The phrase "this rule has binding force" is equivalent to a common use of the phrase "this is right". This must mean that the words "binding force of law", and similar expressions, in the meaning they have in everyday conversations as well as in the law, do not refer to any kind of fact. If one draws the conclusions, the results are patently paradoxical. The phrase "this rule belongs to the law", which is equivalent to the phrase "this rule has binding force", can never be true. The law, which according to ordinary usage is the sum of everything that has binding force in a legal sense, is *nothing at all*. There is nothing that these words can refer to according to the use that the words have in ordinary legal language. Worse yet, the whole legal order, which is supposed to be the sum of what we call the law and its application in society, must be thrown out of the world of reality. *There does not exist any legal order.* This blunt assertion must be true in an unrestricted way: the term "legal order", precisely according to common usage, cannot refer to any facts whatsoever. And as that which we call "the state" necessarily involves maintaining a legal order, then there do not exist such things as states. The sentence "some states are monarchies while others are republics", which is based solely on terms with legal quality, cannot "be about" anything at all: it is made up of meaningless words, it does not express any assumption or assertion about anything, it cannot be true or false. (1941, pp. 62–63)[6]

But, Hedenius objects, clearly something has gone wrong here: We have to admit that at least in some cases, a sentence, such as "Brian owns the blue Volvo" or "This is prohibited", expresses a statement *about* something, typically about the law, and can therefore be true or false (Hedenius 1941, p. 63). That is to say, he points out that in some cases such a sentence will express an external legal statement.

As I said in the beginning of this section, the significance of Hedenius's objection to Olivecrona's (and Hägerström's and Lundstedt's) line of reasoning is that Hedenius believes that it may have led Olivecrona (and Hägerström and Lundstedt) to wrongly conclude that there is no law and that there are no rights and duties—if

[6] The Swedish original reads as follows. "Frasen 'denna regel har bindande kraft' är ekvivalent med en vanlig användning av frasen 'detta är rätt'. Detta måste innebära, att orden 'rättens bindande kraft' och likvärdiga uttryck, i den mening de ha både i dagligt tal och i juridiken, icke beteckna något faktum av något slag. Drar man ut konsekvenserna får man uppenbart paradoxala resultat. Frasen 'denna regel tillhör gällande rätt', som är likvärdig med frasen 'denna regel har bindande kraft', kan aldrig vara sann. Gällande rätt, som enligt vanligt språkbruk är summan av det som har bindande kraft i juridisk mening, är överhuvud taget *ingenting alls*. Det finns ingenting som dessa ord skulle kunna beteckna enligt den användning orden ha i det vanliga juridiska språket. Än värre, hela rättsordningen som ju skall vara summan av det vi kalla gällande rätt och dess tillämpning i samhället, åker också ut ur verklighetens värd. *Det existerar icke någon rättsordning*. Denna hårda sats måste vara sann på ett oavkortat sätt: ordet 'rättsordning' kan, just enligt vanligt språkbruk, icke referera sig på några fakta av något slag. Och eftersom det vi kalla 'staten' nödvändigt innebär upprätthållandet av en viss rättsordning, så existerar det icke något sådant som stater. Satsen 'somliga stater äro monarkier medan andra är republiker', som uteslutande bygger på termer med rättslig valör, kan över huvud taget icke 'handla' om något: den är sammansatt av meningslösa ord, uttrycker icke något antagande eller påstående om något, kan icke vara vare sig sann eller falsk."

he (they) had not reasoned in this way, Hedenius implies, he (they) would not have arrived at this mistaken conclusion. Let us therefore take a closer look at the various steps in the argument, as Hedenius portrays it.

If we do, we see that the line of reasoning attributed by Hedenius to Olivecrona et al. starts with the sentence

(1) This is right, and proceeds via the sentences
(2) This is the law, and
(3) This rule has binding force, to
(4) This rule belongs to the law.

The idea is clearly that (1) implies (2), that (2) implies (3), and that (3) implies (4), and that since (1) lacks truth-value, so does (4). But the inference is obviously invalid. For (1) implies (4) *only* if (1) is construed as an *external* statement. If, however, (1) is construed as an external statement, the term 'right' does have cognitive meaning and does refer. More specifically, the equivocation is between (1a) "This is right," which is an internal statement, and (1b) "This is the law," which is an external statement. If (1) is construed as an *external* statement, as in (1b), then (1) is equivalent to (2), though neither (1) nor (2) will be meaningless in the sense contemplated by Hedenius. If instead (1) is construed as an *internal* statement, as in (1a), then (1) is *not* equivalent to (2), which is an external statement; So, either way, the inference is rendered invalid.[7]

I am not convinced that Hedenius' criticism is justified, however. Certainly, both Lundstedt (1942, pp. 24–26, 43–44) and Olivecrona object that they never doubted that we might make statements *about* rules or value judgments, that is, external legal statements. For example, Olivecrona points out that somebody who maintains that German law underwent a radical transformation with the introduction of the *Bürgerliches Gesetzbuch*, is making a true statement:

> As has been pointed out above… the idea that someone has a right can function as an imperative. The very notion that this thing belongs to someone else acts as a prohibition: you must not touch it! But that is of course not to say that all sentences containing the word "right" as subject or predicate could be characterized as independent imperatives or theoretically meaningless phrases for pressuring. Everything depends on the context. The word in question can obviously, like other relevant words such as law in the objective sense (legal order), occur as subject or predicate in real judgments. There is no independent imperative or pressuring phrase if one says, for example, that German law underwent a radical transformation with the introduction of the *Bürgerliches Gesetzbuch*. To be sure, a more or less metaphysical notion of the nature of law can come into play here. Still, the sentence expresses a judgment, and that judgment would seem to be true insofar as it

[7] Moreover, if the relevant sentences are construed as internal statements, which lack truth value, then one sentence could not *imply* another. As is well known, the received view is that the laws of logic apply only to *statements* (or propositions), which can be true or false. On this difficulty, see Ross (1941); Alchourròn and Martino (1990).

> explicitly states that a change in a certain system of rules has taken place. (1942, pp. 42–43. See also Lundstedt (1942).)[8]

Of course, the fact that Olivecrona readily acknowledges the distinction when it is pointed out to him does not mean that he has upheld it in his earlier analysis. But the following consideration makes it clear that Olivecrona did not *need* to reason in the way suggested by Hedenius in order to arrive at the conclusion that there is no law and that there are no rights and duties. As we have seen in Sect. 6.4, Olivecrona maintains that the *reason* why people believe that law has binding force is that they do not realize that internal statements are not genuine statements, but only express feelings, attitudes, or preferences. That is to say, he seems to be saying that someone who accepts a non-cognitivist analysis of internal statements has no reason to think that there is such a property as binding force or such entities as rights and duties, but rather a reason to think that there is no such property and no such entities. For example, if an internal statement that one ought to keep one's promises can be neither true nor false, it cannot be true that one ought to keep one's promises. But if correct, this line of reasoning makes it clear that it follows immediately from the non-cognitivist theory, applied to internal statements, that there can be no binding force and no rights and duties. And if this is so, Olivecrona did not need to commit the Hägerström-Lundstedt mistake in order to arrive at the relevant conclusion.

6.5 Legal Statements with a Fused Modality

Svein Eng (2000) maintains that we need to supplement the distinction between internal and external legal statements with a third category of legal statements, namely legal statements with a fused modality. On Eng's analysis (Eng 2000, pp. 247–248), whereas some legal statements fall into the well-known categories of internal or external legal statements, some legal statements fall into the hitherto unnoticed category of legal statements with a fused modality, that is, legal statements that are neither exclusively normative nor exclusively descriptive, but a bit of both. As Eng puts it (Eng 2000, pp. 247–248), "Squeezing layers' propositions *de lege*

[8] The Swedish original reads as follows: "Såsom framhållits ovan… kan idén om att någon har en rättighet fungera som ett imperativ. Själva föreställningen att denna sak tillhör någon annan verkar som ett förbud: du får icke röra den! Men därmed är naturligtvis inte sagt, att alla satser, där ordet rättighet förekommer som subjekt eller predikat, skulle kunna karakteriseras som fristående imperativer eller teoretiskt meningslösa påtryckningssatser. Allt beror på hurudant sammanhanget är. Ordet i fråga kan självfallet i likhet med andra hithörande ord såsom t.ex. rätt i objektiv mening (rättsordning) förekomma såsom subjekt eller predikat i verkliga omdömessatser. Det föreligger icke något fristående imperativ eller någon påtryckningsfras, om man säger t. ex. att den tyska rätten undergick en genomgripande omdaning i och med införandet av Bürgerliches Gesetzbuch. Naturligtvis kan här en mer eller mindre metafysisk föreställning om lagens natur spela in. Likväl uttrycker satsen ett omdöme, och detta omdöme är tydligen sant så tillvida som det utsäger att en förändring i ett visst regelsystem ägt rum."

lata into these dichotomies is liable to obscure their distinctiveness in the modality dimension."

We see that if Eng is right, we cannot rest content with the distinction between internal and external legal statements when we analyze legal or jurisprudential problems. For example, it will not be enough to distinguish internal from external legal statements, and to apply meta-ethical theories to internal, but not to external, legal statements, if it turns out that there is yet another category of legal statements that need to be analyzed in a different way. I shall, however, argue that there are only two types of legal statements, namely internal and external, and that therefore Eng is wrong.[9]

Eng focuses on (what he refers to as) propositions *de lege lata*, that is, propositions about what the law of the land is, either in general or in the particular case, explaining that it is an empirical question whether any given legal statement (or, as Eng says, proposition *de lege lata*) is a legal statement with a fused modality or not (Eng 2000, p. 240). And he explains that when he speaks of legal statements with a fused modality, he has in mind the intention of the *speaker* regarding the meaning of the statement, not the meaning according to some type of objective standard (Eng 2000, pp. 237–238).

Eng's claim, then, is that the majority of legal statements made by practicing lawyers have a fused modality (Eng 2000, pp. 246–248). To show that this is so, Eng considers hypothetical examples of legal statements and the responses he believes these statements would elicit from an audience consisting of lawyers. He considers, more specifically, responses in cases where there is a discrepancy between a given legal statement, such as (Eng's example) "Section 422 of the Criminal Justice Act covers pleasure crafts" (Eng 2000, p. 241), and a court decision. He reasons that if a lawyer were to withdraw his statement in the face of such discrepancy, we may infer that he intended his statement to be descriptive; if instead he were to stick with it, we may infer that he intended his statement to be normative.

On Eng's analysis, internal and external legal statements, as they are usually understood, appear as limiting points on a scale that goes from legal statements that are 100% descriptive, through legal statements that are 99% or 98% or 97%, etc., descriptive and 0%, 1% or 2% or 3% etc., normative, to legal statements that are 100% normative and 0% descriptive. As Eng puts it (Eng 2000, p. 251), "[i]n the middle of this dimension one has pure fusions. From the middle towards the extremes one has degrees of preponderance of descriptive or normative elements." The mistake that believers in the dichotomy between internal and external legal statements make, Eng explains, is to focus exclusively on a small number of legal statements that are either exclusively descriptive or exclusively normative, and to neglect, or misunderstand the nature of, other legal statements.

Eng explains that the reason why we find statements with a fused modality in legal thinking is that the existence of legal institutions that try cases and make decisions gives rise to the need for lawyers to *predict* the outcome of court cases (Eng 2000,

[9] For a sympathetic and illuminating discussion of Eng's analysis, see Bindreiter (2000, pp. 158–166).

pp. 241–244), and that lawyers aim to *solve conflicts* (Eng 2000, pp. 244–246). Whereas the former circumstance explains the presence of the descriptive, the latter explains the presence of the normative component. And since these phenomena are absent in other forms of discourse, we do not find statements with a fused modality elsewhere (Eng 2000, pp. 254–256). He explains that he does not wish to maintain that it is logically impossible to make a distinction between internal and external legal statements in all cases, but only that it is impossible to make a distinction between internal and external legal statements in all cases, while also accepting the doctrine of the sources of law and the interest of lawyers to predict court decisions and to solve legal problems (Eng 2000, p. 258). And thus conceived, Eng's claim is, pace Dahlman (2004, p. 81), a *logical*, not a psychological, claim, and it is strong enough to be quite interesting.

Christian Dahlman (2004) has objected to Eng's analysis that there is no such thing as a fused modality, and that legal statements with an alleged fused modality are either legal statements with a confused modality, or legal statements with an undecided modality. He also asks, very pertinently, what it could possibly mean to maintain that a statement is 70% descriptive, say, pointing out that since it cannot reasonably mean that it does not make its descriptive claim fully, that is, to a 100%, it is quite unclear what it means.

In a response to Dahlman's critique, Eng (2005) maintains that Dahlman fails to understand the idea of a fused modality, because he is stuck within the narrow confines of an empiricist and formal-logical framework, introduced by Austin, Hägerström, Hart, and others, which framework ignores the temporal and institutional aspect of legal thinking (Eng 2005, pp. 431–432). Eng's idea appears to be that the correct or defensible interpretation of the relevant legal materials will never be *fixed*, that this means that a legal statement can never be completely true, and that the theory of fused modality is an adequate response to this circumstance. Eng puts it as follows:

> Within the institutional framework that is constituted by the practice of those enforcing the law, and more broadly, by other lawyers' views, it will never be possible to identify any definitive fixed point that can serve as the factual reference of our propositions *de lege lata*. What the law is, is left to *our* continual determination in and in relation to the temporal dimension. My theory of fused modality relates to and demonstrates the significance of this temporal and institutional framework of our thinking *de lege lata*. In the first place, the theory demonstrates that lawyers adopt the standpoint that there shall be a certain undecidedness in relation to what is constantly taking place in the temporal dimension. Further, the theory shows that in this undecidedness the descriptive and the normative components fuse, constituting the distinctive modality of lawyers' propositions *de lege lata*. Finally, the theory demonstrates that in this fusion lies the connection in the legal dogmatic concept of law with normativity and morals. Thus, fusion represents a clear and conscious choice with an implied claim to rationality and has nothing to do with confused modality in Dahlman's sense, i.e., propositions whose only information is that the sender does not know what he is talking about. (Eng 2005, p. 432)

I do not find Eng's analysis convincing, however. Although I find the idea of a fused modality intriguing and well worth exploring, I nevertheless believe that in the end it must be rejected. Let me explain why.

First, it seems to be self-contradictory (P&-P) to maintain that a particular legal statement can be simultaneously both descriptive (P) and not descriptive (-P), that is, normative, whether the descriptive part amounts to 50 % and the normative part amounts to 50 %, or the proportions are different, say 80–20 %. I assume here, of course, that the categories of normative and descriptive statements are defined so as to be mutually exclusive and jointly exhaustive: If a statement is normative, then it cannot also be descriptive, and vice versa. But I take this to be in keeping with ordinary legal and philosophical thinking.

It is true, of course, that many philosophers hold that value judgments are composed of one normative or evaluative component and one descriptive component (Hare 1952, pp. 17–20), and that many also recognize the existence of so-called thick concepts, such as 'courage,' 'brutality,' 'greed,' and 'carelessness' (Williams 1985, pp. 129–130).[10] But it is also true that these value judgments feature any modality philosophers do not conclude from this that of the type Eng contemplates. To the contrary, they all hold that any given statement that could reasonably be said to be normative (or evaluative) or descriptive is either normative (or evaluative) or descriptive.

Secondly, Eng's analysis does not seem to be internally consistent. For his claim (in the quotation above) that "it will never be possible to identify any definitive fixed point that can serve as the factual reference of our propositions *de lege lata*" clearly contradicts the claim that there are indeed legal statements that are purely descriptive—if there is never any definitive fixed point in the sense explained, then how (on the basis of what) can a purely descriptive legal statement be purely descriptive? True, Eng might respond that a lawyer can *intend* his legal statement to be purely descriptive, even though it could nevertheless never be purely descriptive. But such a claim would be too weak to be of much interest.

Thirdly, it seems to be very difficult to handle a legal statement with a fused modality. For example, the application of meta-ethical theories to legal statements with such a fused modality, will surely be very complicated. How exactly should we apply the non-cognitivist theory or the error theory to a legal statement with a fused modality? If, as Eng suggests, a legal statement with a fused modality may be 75 % descriptive and only 25 % normative, it seems that it would have to be 75 % true or false and 25 % true or false (error theory) or 75 % true or false and 25 % neither true nor false (non-cognitivism). But this is very difficult to understand, and presumably even more difficult to handle in legal analysis. While these difficulties do not show that Eng's analysis is *mistaken*, they do give us a reason to prefer an alternative analysis should such an analysis turn out to be available.

I believe, however, that one can adequately handle the institutional and temporal aspects of legal thinking emphasized by Eng, such as the truth, if it is a truth, that the correct interpretation of the legal materials is never fixed, by making use of what Dahlman (2004, pp. 82–83) refers to as a legal statement with an *undecided* modality. The idea is simply that a lawyer might make a legal statement while remaining undecided regarding the relevant modality. As far as I can see, Eng does

[10] I would like to thank Erik Carlsson for reminding me of this.

not explain *why* the idea of a fused modality is a more adequate response to the institutional and temporal aspect of legal thinking than the idea of an undecided modality, suggested by Dahlman. And since the idea of an undecided modality is easy to comprehend and does not require revision of a well-functioning intellectual framework, namely the empiricist and formal-logical framework identified by Eng, whereas the introduction of the idea of a fused modality requires precisely such a revision, perhaps even the abandonment, of the relevant framework, the latter idea is strongly preferable.

I might add that in his response to Dahlman's critique, Eng does not say anything about the intellectual framework that he himself is operating within and which presumably is capable of accommodating the idea of a fused modality. This is unfortunate, given that on Eng's own analysis the acceptability of the idea of a fused modality appears to turn on the prior acceptance of such an intellectual framework. In any case, I suspect that providing more information about that framework would prove to be easier said than done.

6.6 Non-cognitivism: A Third Difficulty

We have seen in Sect. 6.3 that non-cognitivists confront the Frege-Geach problem. In this section, we shall consider a related problem for non-cognitivists, which is just as disturbing. As we have seen, both Olivecrona and Hedenius (1) maintain that we need to distinguish between (a) internal statements, which express the speaker's feelings or attitudes and which cannot be true or false, and (b) external statements, which are true or false; and (2) assume as a matter of course that an external statement can render the content of an internal statement correctly.

At a first glance, this seems reasonable enough. But on closer inspection, we see that problems arise in regard to (2). If terms like 'right,' 'duty,' and 'binding force' have no cognitive meaning and do not refer when they occur in an internal statement, and if the same holds when they occur in an external statement, then the external statement cannot assert anything about the internal statement and can therefore be neither true nor false. If, on the other hand, these terms do *not* have the same meaning in internal and external statements, as seems to be the case on the non-cognitivist analysis, then an external statement cannot render the content of an internal statement correctly.[11] Either way, the analysis is inadequate.

Konrad Marc-Wogau objects to this line of reasoning that the *conclusion*, that a statement in which a term like 'right' occurs cannot assert anything about anything and therefore cannot be true or false, does not follow from the *premise*, that 'right' does not refer. As Marc-Wogau sees it, a term like 'right' has the same meaning in

[11] That there is a problem here has been pointed out by Åke Frändberg (2005, pp. 66–67). He explains that terms such as 'right' must have the same meaning in internal and external statements—if they don't, the very distinction between internal and external statements will break down. Åqvist (2008, pp. 285–286) agrees with Frändberg and offers a subtle discussion of the problem.

internal and external statements: in neither case does it refer. But, he insists, this does *not* mean that an external statement cannot be a meaningful, that is, a true or false, statement:

> It seems to me now to be a mistake to believe that a sentence could not express a meaningful assertion because it contains meaningless words. The sentence "this rule belongs to the class of rules to which one usually ascribes 'binding force'" is a meaningful sentence, but the expression "binding force" does not for that reason have to be meaningful. The assumption that the sentence "there is a system of rules that is applied in a society and characterized as a 'legal order'" is a meaningful sentence is quite compatible with the proposition that the term "legal order" is meaningless. That these sentences must be meaningless is, in other words, not a consequence of the non-cognitivist thesis that the words "right", "binding force", "legal order"—as they are used in ordinary language—are meaningless words. If this is correct, then Hedenius's argumentation loses its validity. In any case, it remains unproven that the assumption that the sentence "this is right" sometimes has meaning presupposes—as Hedenius assumes—that the word "right" which occurs in the sentence must have a meaning. (1968, pp. 172–173)[12]

Marc-Wogau's line of reasoning is not convincing, however. The problem is that the example he invokes is rather atypical. He may be right that a sentence such as "There is a system of rules that is applied in a society and is characterized as a 'legal order'" makes good sense even if the term 'legal order' does not refer. But once we eliminate the qualifier 'is characterized as' things begin to look different. If we consider the revised sentence "There is a system of rules that is applied in a society and is a legal order," we see that it will not make any sense unless the term 'legal order' refers. So while Marc-Wogau may be right about cases where the term 'legal order' and similar terms are *mentioned*, he is wrong about cases where these terms are *used* (on the use/mention distinction, see Suppes 1957, Chap. 6); and the latter must surely be considered the normal case.

I conclude that the Hedenius-Olivecrona exchange of views has brought a new difficulty for non-cognitivism to the fore, or at least an interesting variant of the Frege-Geach problem, namely that we cannot explain just how an external statement can render the content of an internal statement correctly. To solve this problem we would have to accept something like Marc-Wogau's claim that an external statement can be meaningful even if 'right' and similar terms do not refer. But I cannot see how such a proposal could be made to work.

[12] The Swedish original reads as follows. "Det förefaller mig nu vara ett misstag att tro att en sats inte skulle kunna uttrycka ett meningsfullt påstående av det skälet att den innehåller meningslösa ord. Satsen 'denna regel tillhör klassen av regler som man brukar tillskriva 'bindande kraft'' är en meningsfull sats, men uttrycket 'bindande kraft' i den behöver för den skull inte vara meningsfullt. Antagandet att satsen 'det finns ett system av regler som tillämpas i ett samhälle och betecknas som 'rättsordning'' är en meningsfull sats är mycket väl förenlig med tesen att uttrycket 'rättsordning' är meningslöst. Att dessa satser måste vara meningslösa är med andra ord ingen konsekvens av den värdenihilistiska tesen att orden 'rätt', 'bindande kraft', 'rättsordning'—såsom de används i vanligt språkbruk—är meningslösa ord. Är detta riktigt, så förlorar Hedenius argumentation sin beviskraft. I varje fall förblir det obevisat att antagandet att satsen 'detta är rätt' ibland har mening förutsätter—såsom Hedenius antar—att ordet 'rätt' som förekommer i satsen måste ha mening."

6.7 The Significance of Olivecrona's Meta-ethics

We have seen that Olivecrona erects his substantive legal philosophy on a foundation consisting of ontological naturalism and a non-cognitivist (and at times an error-theoretical) meta-ethics, and that he invokes such methodological considerations fairly often. On this count, he and the other Scandinavian realists differ from other prominent legal philosophers, such as Kelsen and Hart, who are careful to develop their legal philosophies in a way that does not depend on controversial meta-ethical theories. Of course, while the emphasis on meta-ethical considerations makes Olivecrona's legal philosophy more interesting from a general philosophical point of view, it also makes it more vulnerable to attacks aimed precisely at its philosophical foundation. Nevertheless, I believe Olivecrona's emphasis on methodological questions is on the whole commendable, since it amounts to a serious effort to think things through.

References

Articles

Alchourròn, Carlos E., and Antonio A. Martino. 1990. Logic without truth. *Ratio Juris* 3:46–67.

Åqvist, Lennart. 2008. Some logico-semantical themes in Karl Olivecrona's philosophy of law: A non-exegetical approach. *Theoria* 74:271–294.

Blackburn, Simon. 1993. Attitudes and contents. In *Essays in quasi-realism,* ed. Simon Blackburn, 182–198. Oxford: Oxford University Press.

Boyd, Richard. 1988. How to be a moral realist. In *Essays on moral realism,* ed. Sayre-McCord Geoffrey, 181–228. Ithaca: Cornell University Press.

Bulygin, Eugenio. 1982. Norms, normative propositions, and legal statements. In *Contemporary philosophy. A new survey. vol. 3. Philosophy of action*, ed. Fløistad Guttorm, 127–152. The Hague: Nijhoff.

Dahlman, Christian. 2004. Fused modality or confused modality? *Ratio Juris* 17:80–86.

Eng, Svein. 2000. Fusion of descriptive and normative propositions. The concepts of 'descriptive proposition' and 'normative proposition' as concepts of degree. *Ratio Juris* 13:236–260.

Eng, Svein. 2005. Fused modality. An integral part of lawyers' form of life. *Ratio Juris* 18:429–433.

Finlay, Stephen. 2008. The error in the error theory. *Australasian Journal of Philosophy* 86:347–369.

Frändberg, Åke. 2005. An essay on the systematics of legal concepts. In *Rättsordningens idé,* ed. Åke Frändberg, 63–96.

Hägerström, Axel. 1931. Till frågan om begreppet gällande rätt [On the Question of the Concept of Valid Law]. *Tidsskrift for rettsvitenskap* 48–91.

Hägerström, Axel. 1964. On the truth of moral propositions. In *Philosophy and Religion,* ed. Axel Hägerström, 77–96. (Originally published under the title "Om moraliska föreställningars sanning" In Axel Hägerström, *Socialfilosofiska uppsatser,* ed. Martin Fries, 35–65. Stockholm: Bonniers.)

Hare, R. M. 1988. Ontology in ethics. In *Essays in ethical theory,* ed. R. M. Hare, 82–98. Oxford: Clarendon Press.

Harman, Gilbert. 1975. Moral relativism defended. *Philosophical Review* 85:3–22.

Harman, Gilbert. 1996. Moral relativism. In *Moral relativism and moral objectivity,* eds. Gilbert Harman and Judith Jarvis Thomson, 3–64. London: Blackwell.
Hedenius, Ingemar. 1977. Begreppet äganderätt ["The concept of ownership"]. In *Filosofien i ett föränderligt samhälle* [Philosophy in a Changing Society], ed. Ingemar Hedenius, 130–155. Stockholm: Bonniers.
McDowell, John. 1998. Values and secondary qualities. In *Mind, Value*, *and Reality,* ed. John McDowell, 131–150. Cambridge: Harvard University Press.
Mac, Leod, and H. D. Andries. 1973. Om ett värdeobjektivistiskt inslag i Hägerströms moralfilosofiska teorier [On a value-objectivist feature of hägerström's moral-philosophical theories]. In *Tre uppsatser om Hägerström, Zenon från Elea och relativitetsteorin* [Three essays on Hägerström, Zeno of Elea and the relativity theory], ed. Andries H. D. Mac Leod, 1–28. Uppsala: Filosofiska föreningen och Filosofiska institutionen vid Uppsala universitet.
Marc-Wogau, Konrad. 1940. Über die Begriffe 'bindende Kraft des Rechts,' 'Rechtspflicht,' und 'subjektives Recht.' Bemerkungen zu Karl Olivecronas Kritik dieser Begriffe [On the concepts 'binding force of law,' 'legal duty,' and 'legal right.' remarks on Karl Olivecrona's critique of these concepts.] *Theoria* 6:227–237.
Marc-Wogau, Konrad. 1968. Värdenihilismen i rättsfilosofin [Value Nihilism in the philosophy of law]. In *Studier till Axel Hägerströms filosofi,* ed. Marc-Wogau, 167–178. Stockholm: Prisma.
Milo, Ronald. 1995. Contractarian constructivism. *Journal of Philosophy* 92:181–204.
Olivecrona, Karl. 1941. Zum Begriff des subjektiven Rechts. Bemerkungen zu Konrad Marc-Wogaus Kritik in Theoria 1940 S. 227 ff. [On the concept of a legal right. Comments on Konrad Marc-Wogau's criticism in theoria p. 227 ff.] *Theoria* 7:46–52.
Olivecrona, Karl. 1951. Realism and idealism: Some reflections on the cardinal point in legal philosophy. *New York University Law Review* 26:120–31.
Rawls, John. 1980. Kantian constructivism in moral theory. *The Journal of Philosophy* 77:515–572.
Ross, Alf. 1936. Den rene Retslæres 25-Aars-Jubilaeum [The twenty-fifth anniversary of the pure theory of law]. *Tidsskrift for rettsvitenskap* [*Journal for Legal Science*] 304–331.
Ross, Alf. 1941. Imperatives and logic. *Theoria* 7:53–71.
Schafer-Landau, Russ & Terence Cuneo. 2007. General introduction. In *Foundations of ethics,* eds. Russ Schafer-Landau and Cuneo Terence, 1–5. Oxford: Blackwell.
Sinnott-Armstrong, Walter. 2000. Expressivism and embedding. *Philosophy and Phenomenological Research* 61:677–693.
Stevenson, Charles Leslie. 1937. The emotive meaning of ethical terms. *Mind, New Series* 46:14–31.
Stoljar, Daniel. 1993. Emotivism and truth conditions. *Philosophical Studies* 70:81–101.
Unwin, Nicholas. 1999. Quasi-realism, negation, and the frege-geach problem. *Philosophical Quarterly* 49:337–352.

Books

Ayer, A. J. 1947. *Language, truth, and logic*. 2nd ed. London: Victor Gollancz.
Bergström, Lars. 1990. *Grundbok i värdeteori* [Fundamentals of value theory]. Stockholm: Thales.
Bindreiter, Uta U. 2000. *Why grundnorm? A treatise on the implications of Kelsen's Doctrine*. Lund: Department of Law, Lund University.
Blackburn, Simon. 1998. *Ruling passions*. Oxford: Oxford University Press.
Brink, David O. 1989. *Moral realism and the foundation of ethics*. Cambridge: Cambridge University Press.
Frankena, William K. 1975. *Frankena, ethics*. 2nd ed. Englewood Cliffs: Prentice-Hall.
Gibbard, Alan. 1990. *Wise choices, apt feelings*. Cambridge: Harvard University Press.
Hare, R. M. 1952. *The language of morals*. Oxford: Oxford University Press.

Hare, R. M. 1981. *Moral thinking*. Oxford: Oxford University Press.
Hart, H. L. A. 1961. *The concept of law*. Oxford: Clarendon Press.
Hedenius, Ingemar. 1941. *Om rätt och moral* [On law and morals]. Stockholm: Tiden.
Joyce, Richard. 2001. *The myth of morality*. Cambridge: Cambridge University Press.
Kelsen, Hans. 1999. *General theory of law and state*. Trans. Anders Wedberg. Union, New Jersey: The lawbook exchange. (Originally published 1945 by the Harvard University Press, Cambridge).
Korsgaard, Christine M. 1996. *The sources of normativity*. Cambridge: Cambridge University Press.
Lundstedt, A. V. 1942. *Det Hägerström-Lundstedtska misstaget* [*The Hägerström-Lundstedt Mistake*]. Stockholm: Gebers.
MacCormick, Neil. 2008. *Practical reason in law and morality*. Oxford: Oxford University Press.
Mackie, J. L. 1977a. *Ethics: Inventing right and wrong*. London: Penguin.
Miller, Alexander. 2003. *An introduction to contemporary meta-ethics*. Cambridge: Polity.
Moore, G. E. 1993. *Principia ethica*. Revised edition. Edited and with an introduction by Thomas Baldwin. Cambridge: Cambridge University Press. (Originally published 1903 by Cambridge University Press, Cambridge).
Olivecrona, Karl. 1939. *Law as fact*. Copenhagen: Einar Munksgaard & London: Humphrey Milford.
Olivecrona, Karl. 1942. *Lagens imperativ* [The imperative of the law]. Lund: Gleerup.
Olivecrona, Karl. 1971. *Law as Fact*. 2nd ed. London: Stevens & Sons.
Petersson, Bo. 1973. *Hägerströms värdeteori* [Hägerström's theory of value]. Uppsala: Filosofiska föreningen.
Rawls, John. 1971. *A theory of justice*. Oxford: Oxford University Press.
Ross, Alf. 1929. *Theorie der Rechtsquellen* [Theory of the sources of law]. Leipzig: Deuticke.
Scanlon, T. M. 1998. *What we owe to each other*. Cambridge: Harvard University Press.
Schafer-Landau, Russ. 2003. *Moral realism*. *A defence*. Oxford: Oxford University Press.
Smith Michael. 1994. *The moral problem*. Oxford: Blackwell.
Stevenson, Charles L. 1944. *Ethics and language*. New Haven: Yale University Press.
Suppes, Patrick. 1957. *Introduction to logic*. Princeton: D. van Nostrand Company.
von Wright Georg Henrik. 1963. *Norm and action*. London: Routledge and Kegan Paul.
Williams, Bernard. 1985. *Ethics and the limits of philosophy*. Cambridge: Harvard University Press.

Part III
Substantive Legal Philosophy

Chapter 7
The Binding Force of Law

Abstract Olivecrona rejects the view that law has binding force, on the grounds that the (alleged) binding force is such a peculiar property that one must locate legal rules that have binding force in some sort of supernatural world, where this property can make sense, and that there can be no connection between such a world and the world of time and space. He also maintains that since legal rules do not and cannot have binding force, they cannot confer rights and impose duties, or more generally, establish legal relations. This critique is at the foundation of Olivecrona's substantive legal philosophy. I argue, however, that while Olivecrona is right to maintain that legal rules do not have binding force in the strong, moral sense that he contemplates, and that they cannot establish legal relations in this sense, legal rules can nevertheless establish legal relations in a weaker, non-moral sense, and that we can account for the existence of legal relations by invoking the idea of a convention. Following Eerik Lagerspetz, I propose that we say that a source of law, *SL*, exists if the members of the relevant group of people (1a) believe that *SL* exists and (1b) believe that the others in the group believe that *SL* exists, and (2) act accordingly, that is, speak of *SL* as existing and, if occasion arises, treat *SL* as existing, at least partly because they have the beliefs (1a) and (1b). If we do, we may then say that a legal rule exists if it can be traced back to such a source of law.

7.1 Introduction

Olivecrona rejects the view that law has binding force. The problem, he explains, is that the (alleged) binding force is such a peculiar property that one must locate legal rules that have binding force in some sort of supernatural world, where this property can make sense, and that there can be no connection between such a world and the world of time and space. He also maintains that since legal rules do not and cannot have binding force, they cannot confer rights and impose duties, or more generally, establish legal relations. This critique is at the foundation of Olivecrona's substantive legal philosophy. As he puts it (1939, p. 77), the rejection of this view entails "the demolishing of all metaphysical conceptions in the law, or… that these conceptions appear in their true light." And since Olivecrona maintains that legal rules cannot have binding force and cannot establish legal relations, he cannot maintain that their function is to guide human behavior by establishing legal

T. Spaak, *A Critical Appraisal of Karl Olivecrona's Legal Philosophy,*
Law and Philosophy Library 108, DOI 10.1007/978-3-319-06167-2_7,

relations. Instead, he argues that the function of legal rules is to cause human behavior, and that legal rules can fulfill this function because they have (what he calls) a suggestive character. I treat the first idea in this chapter and the second in the next.

I argue (1) that Olivecrona is right to maintain that legal rules do not have binding force in the strong, moral sense that he contemplates, and that therefore they cannot establish legal relations in this sense. But I also argue (2) that law can nevertheless establish legal relations in a weaker, non-moral sense, and that we can account for the existence of legal relations in this sense with the help of a conventionalist analysis.

I begin by introducing and discussing Olivecrona's thoughts on the binding force of law and the existence of legal relations (Sect. 7.2) and proceed to consider Kelsen's thoughts on these questions (Sect. 7.3). I then consider a difficulty with the idea of non-moral legal relations (Sect. 7.4) and, by way of comparison, Alf Ross's thoughts on binding force and legal relations (Sect. 7.5). Having done that, I discuss a convention-based account of legal relations (Sect. 7.6). The chapter concludes with a consideration and rejection of Svein Eng's objection that Olivecrona's naturalist and non-cognitivist legal philosophy is self-refuting (Sect. 7.7).

7.2 Olivecrona on the Binding Force and Legal Relations

Olivecrona begins the First Edition of *Law as Fact* with a consideration and rejection of the view that law has binding force. He introduces the topic to be discussed in the following way:

> The most general definition of law seems to be that law is a body of rules, *binding* on the members of the community. Vague as it is, we may take this as our starting point for our investigation into the true nature of the law. It contains at least one element which, beyond doubt, is common to practically all those who have treated the subject. This is the assumption that the law is *binding*. Leaving aside for the time being the question how a rule is to be defined, we will first ask what is meant by the binding force of the law and try to decide whether the binding force is a reality or not. (1939, p. 9)

While Olivecrona does not explain what, exactly, he takes the binding force of law to be, the core idea must surely be that a binding legal rule "binds" the subjects of the law in the sense that it *obligates* them (see Olivecrona 1951, p. 125, 1971, p. 10).

Having rejected several attempts to define the concept of binding force by reference to social facts, such as feelings of being bound, or inability to break the law with impunity, Olivecrona concludes that binding legal rules have no place in the world of time and space, but must be located in some sort of supernatural realm, where the property of bindingness can make sense (1939, p. 14). But, he objects, law cannot be located in a world beyond the world of time and space, because there can be no *connection* between such a world and the world of time and space:

> There is one very simple reason why a law outside the natural world is inconceivable. The law must necessarily be put in some relation to phenomena in this world. But nothing can be put in any relation to phenomena in the world of time and space without itself belonging

> to time and space. Therefore all the talk of a law, which in some mysterious way stands above the facts of life, is self-contradictory. It makes no sense at all. (Olivecrona 1939, pp. 15–16)[1]

As Olivecrona sees it, we have here the dividing line between realism and metaphysics, between scientific method and mysticism in legal thinking. To believe that law has binding force and that therefore it must belong in a supernatural world is to give up any attempt at a scientific explanation of law and legal phenomena and to indulge in metaphysics (Olivecrona 1939, p. 17): "The binding force of the law is a reality merely as an idea in human minds. There is nothing in the outside world which corresponds to this idea." We see that Olivecrona is here thinking of the binding force in error-theoretical terms, that he takes the term 'binding force' to refer to a non-natural property of some sort, which does not and cannot exist in the world of time and space.

Olivecrona does not, however, explain *why* there can be no connection between the world of the ought and the world of time and space; he just asserts that there can be no such connection. But even though he does not say so, his critique owes a lot to Axel Hägerström's critique of Hans Kelsen's theory of law, put forward in a 1928 review of Kelsen's *Hauptprobleme der Staatsrechtslehre* (Hägerström 1953). As we saw in Chap. 4, Hägerström argued that the very idea of the 'world of the ought' is absurd, since this world cannot be thought of as even existing alongside the world of time and space. For, he reasoned, no knowledge of any reality is possible, except through relating its object to a systematically interconnected whole, and the fact that the two worlds—the world of the ought and the world of time and space—are different in kind means that they cannot be coordinated in a systematically interconnected whole. As he puts it (Hägerström 1953, p. 267), "so far as I contemplate the one [world], the other [world] does not exist for me."

Although Olivecrona does not say so in the First Edition of *Law as Fact*, it is clear from his analysis in the Second Edition of *Law as Fact* that he takes the absence of binding force to imply, or to be equivalent to, the absence of legal entities and properties, that is, the *absence of legal relations*: Since legal rules do not and cannot have binding force, they cannot establish legal relations. As we shall see in Chap. 8, Olivecrona introduces in the Second Edition of *Law as Fact* the concept of a performatory imperative, in order to account for those legal rules that do not immediately concern human behavior (1971, Chaps. 5, 8). The introduction of this concept is of interest in this context, because Olivecrona adds to it a consideration of the nature of the *legal effect* that is commonly supposed to follow from the utterance of a performatory imperative (Olivecrona 1971, pp. 221–226. But see also 1940, pp. 40–41). Such legal effects, he points out, are clearly *supersensible*. Having pointed out that already the Romans operated with legal effects of this type, he explains that the situation is the same today:

[1] Olivecrona adds that as a matter of fact law is part of the world of time and space, and that therefore it cannot also be part of some supernatural world. (Olivecrona 1939, pp. 16–17)

> Relatively uniform ideas of ownership, monetary claims, many other kinds of right, corresponding duties, and legal qualities are disseminated among the general public. These rights, duties, and legal qualities are supposed to be created, modified, transferred, and extinguished through operative facts by virtue of the law. They form a supersensible world: in the sensible, natural world there are no rights and duties, or legal qualities. (1971, p. 223)

He adds that in the world of time and space, there is only the psychological fact that people tend to *believe* that there is a legal effect, and, of course, the (sociological) fact that they tend to *act* accordingly (Olivecrona 1971, pp. 224–226).

It is not absolutely clear from his account whether Olivecrona (1) takes the claim that legal rules have no binding force to imply, or to be equivalent to, the claim that there are no legal relations, or whether he (2) takes these two claims to be *synonymous*, to be two sides of the same coin, as it were. Although I do not think much depends on whether (1) or (2) is the better interpretation, I am inclined to think that (1) is closer to the truth. I find it natural to assume that he means that it is the obligatory quality of rules that gives rise to legal relations—if the rules were not binding, there would be no legal relations.

In any case, Olivecrona turns to consider Kelsen's theory of law, because he believes that this theory illustrates the necessity for believers in the binding force of law to make a distinction between the 'world of the ought' and the world of time and space (1939, pp. 17–18). He seizes on the fact that on Kelsen's analysis, there is a connection between operative facts and legal consequence in legal norms that is as *unshakeable* as the connection between cause and effect in nature. And this connection, he points out, is such that the legal consequence *ought* to ensue when the operative facts are at hand. He writes:

> A legal rule, according to Kelsen, has a peculiar effect in that it puts together two facts, e.g. a crime and its punishment, in a connexion which is different from that of cause and effect. The connexion is so described that the one fact ought to follow upon the other though it does not necessarily do so in actual fact. The punishment ought to follow the crime, though it does not always follow. Now this "ought" is not, in Kelsen's theory, a mere expression in the law or jurisprudence. It signifies an objective connexion that has been established by the law. (Olivecrona 1939, p. 18)

But, Olivecrona objects, it is simply impossible to explain in a rational way how facts in the world of time and space, such as the activity of the legislature, can produce effects in the 'world of the ought.' As he puts it (Olivecrona 1939, p. 21), "[a]t one time Kelsen bluntly declared that this is 'the Great Mystery.' That is to state the matter plainly. A mystery it is and a mystery it will remain forever."[2]

Let us now turn to brief consideration of Kelsen's theory, in order to gain a better understanding of the idea that Olivecrona rejects, that is, that legal rules have binding force.

[2] Kelsen (1984, p. 411) had said that "[e]s ist das große Mysterium von Recht und Staat, das sich in dem Gesetzgebungsakte vollzieht und darum mag es gerechtfertigt sein, daß nur in unzulänglichen Bildern das Wesen desselben veranschaulicht wird." I am not, however, convinced that Kelsen had in mind the question of how the activity of the legislature can produce effects in the 'world of the ought' when he spoke of the "great mystery." But I am inclined to think that he was concerned rather with the question of how the state can obligate itself.

7.3 Kelsen on the Binding Force of Law

As is well known, Kelsen (1960, p. 1) maintains that his theory of law is pure, in the sense that it holds that law—conceived as a system of valid norms—is conceptually independent of both nature and morality. What Kelsen means by the separation of law and nature is that law exists in a realm beyond time and space, in the 'world of the ought.'[3] His idea is that the peculiar property that turns an alleged judicial decision, say, into a (genuine) judicial decision cannot find room in the world of time and space (Kelson 1960, p. 2). For, he reasons, if we analyze a piece of legislation or a judicial decision, we will find that it consists of two elements, namely one element that belongs to the world of time and space, such as a human action or an event, or a series of human actions or events, and another element that does not exist in the world of time and space, namely a specifically legal, normative *meaning*, which legal norms confer on it. This normative meaning is that the norm *ought* to be applied or obeyed, and it is this property that Kelsen refers to as *validity* or, occasionally, as *bindingness*. As he puts it, "[t]o speak… of the validity of a norm is to express first of all simply the specific existence of the norm, the particular way in which the norm is given, in contradistinction to natural reality, existing in space and time. The norm as such, not to be confused with the act by means of which the norm is issued, does not exist in space and time, for it is not a fact of nature." (1992, p. 12)

Kelsen does not, of course, deny that the legal raw-material—statutes, cases, customs, etc.—is to be found in the world of time and space. What he denies is that *valid* (binding) legal norms—that is, norms that are binding not only when seen from the point of view of the person or organ who issues the norms, but also when seen from the point of view of an independent third party (1960, p. 7)—exist in the world of time and space. He reasons that since one cannot deduce an 'ought' from an 'is' (Kelson 1960, p. 5) and since there is no conceptual connection between law and morality (Kelson 1960, pp. 68–69), a person who wishes to conceive of the legal raw-materials as a system of valid norms needs to presuppose the *basic norm* (*Grundnorm*),[4] which can be formulated schematically as follows (1992, p. 57): "Coercion is to be applied under certain conditions and in a certain way, namely, as determined by the framers of the first constitution or by the authorities to whom they have delegated appropriate powers."

The presupposition of the basic norm, he explains, is necessary for anyone who wants to conceive of law as a system of valid norms, while remaining within the framework of legal positivism (1999, p. 116): "To interpret these acts of human beings as legal acts and their products as binding norms, and that means to interpret the empirical material which presents itself as law as such, is possible only on the condition that the basic norm is presupposed as a valid norm." The reason, of course, is that the separation thesis of legal positivism—which has it that law and

[3] Kelsen (1984[1923], p. 8) points out that the essential difference between the categories 'Is' and 'Ought' allows these categories to appear as two separate worlds: "Die prinzipielle Verschiedenheit beider Denkformen läßt Sein und Sollen als zwei getrennte Welten erscheinen."

[4] For a thorough and illuminating discussion of the theory of the basic norm, see Bindreiter (2000).

morality are conceptually distinct—bars the legal positivist from grounding the validity of law in morality, say, by reference to democracy or human rights, or, for that matter, by reference to the will of God.

Kelsen emphasizes, however, that although one *may*, one does not have to, presuppose the basic norm, which is to say that although one *may*, one does not have to, conceive of law as a system of valid norms. On this analysis, then, the validity of law is *conditional* upon the presupposition of the basic norm, and the presupposition of the basic norm in turn is conditional upon the wish of the person making the presupposition to conceive of law as a system of valid norms. As Kelsen puts it, the basic norm plays only an *epistemological*—not a justificatory—role in the analysis (1992, pp. 58, 64, 1960, p. 224).

Although Kelsen does not say so, it seems to me that his non-naturalism about valid legal norms is not too different from the non-naturalism defended by G. E. Moore (1993 [1903]). On Kelsen's analysis (1960, p. 5, footnote*), the property of validity (or bindingness) is precisely undefinable and non-natural. Speaking of the concept of ought,[5] Kelsen states the following: "Von dem Begriff des Sollens gilt dasselbe, was George Edward Moore… von dem Begriff 'Gut' sagt: ''good' is a simple notion just as 'yellow' is a simple notion.' Ein einfacher Begriff ist nicht definierbar und—was auf dasselbe hinausläuft—nicht analysierbar." And this, it seems to me, is the reason why Kelsen feels that he has to introduce the theory of the basic norm—if he did not operate with such a strong notion of validity, why would he argue that we need to presuppose the basic norm?

7.4 Ross on the Binding Force and Legal Relations

While Olivecrona thus takes the rejection of the view that law has binding force to imply, or to be equivalent to, the rejection of the view that there are legal relations, Alf Ross, although he agrees with Olivecrona in rejecting the view that law has binding force, appears to assume the existence of legal relations. Let us consider Ross's reasoning on this point.

Ross is a dyed-in-the-wool naturalist, who accepts ontological naturalism, the narrow conception of semantic naturalism, and methodological naturalism of the type that requires "methods continuity." He explains in his book *On Law and Justice* (1959) that jurisprudential *idealism* rests on the assumption that there are two distinct worlds with two corresponding modes of cognition, namely (1) the world of time and space, which comprises the usual physical and psychological entities that we apprehend with the help of our senses, and (2) the "world of ideas or validity", which comprises "various sets of absolutely valid normative ideas" and is apprehended by our reason (Ross 1959, p. 65); and that jurisprudential *realism* is con-

[5] Strictly speaking, Kelsen is speaking here about the concept of ought, not the property of validity (or bindingness). But I find it natural to assume that what he means is precisely that the property of an action that it ought to be performed (by somebody) is a non-natural and undefinable property.

cerned with the world of time and space, and aims to attain knowledge of law using the methods of modern empiricist science. As he puts it (Ross 1959, p. 67), "[t]here is only one world and one cognition. All science is ultimately concerned with the same body of facts, and all scientific statements about reality—that is, those which are not purely logical-mathematical—are subject to experimental test."

On the basis of his naturalism, he then rejects the idea of binding force, or as he puts it, the idea of a specific legal *validity*, in both the moral and the non-moral sense:

> From the standpoint of such presuppositions a specific "validity" cannot be admitted, neither in terms of a material a priori idea of justice [natural law theory] nor as a formal category [Kelsen's theory]. Ideas of validity are metaphysical constructions built on a false interpretation of the "binding force" experienced in the moral consciousness. Like all other social sciences the study of law must in the final analysis be a study of social phenomena, the life of a human community; and jurisprudence must have as its task the interpretation of the "validity" of the law in terms of social effectivity, that is, a certain correspondence between a normative idea content and social phenomena. (Ross 1959, p. 68)

What is interesting in this context about Ross's rejection of the view that law has binding is thus that he does not proceed to maintain that there are no legal relations. Although he does not address this question explicitly, his view is clear from the fact that he conceives of law as a system of norms, which norms function as schemes of interpretation (Ross 1959, p. 34), and that he considers it possible to describe legal relations in terms of Hohfeld's fundamental legal concepts (Ross 1959, Chap. 5).[6] Generally speaking, there is nothing in Ross's analysis that suggests that he does not accept the view that an effective legal system gives rise to legal relations in a non-moral sense that can be described in terms of rights, duties, and other fundamental legal concepts.

7.5 Legal Relations in the Non-Moral Sense: A Difficulty

As we have seen, Olivecrona and Kelsen, but not Ross, appear to believe that the existence of legal entities and properties, and more generally, legal relations presupposes that legal rules have binding force in the strong, *moral* sense. I suppose they simply believe that it does not make sense to speak of legal rights and duties in a non-moral sense, as legal positivists do. But, as I have said, I believe that if there is an effective legal system, the subjects of law will have legal rights and duties in a non-moral sense, and there will be corporations, professors, judges, and more. I prefer, however, not to speak of "binding force in a non-moral sense," because I consider the binding force thus conceived to be too weak to be interesting.

[6] Ross does not even pause to consider the possibility that the rejection of the view that law has binding force might imply the absence of legal relations. To be sure, Ross could not have considered Olivecrona's analysis of the concept of a legal effect in his own On Law and Justice, since Olivecrona's book was published 1971 and Ross's was published 1959. But he was definitely familiar with Olivecrona's 1939 critique of the view that law has binding force.

The objection that the idea of non-moral legal rights and duties, etc., is uninteresting, indeed vacuous, is not, of course, novel. For example, when Lon Fuller (1958, p. 656) complains that legal positivism "never gives any coherent meaning to the moral obligation of fidelity to law," that it seems to conceive of this obligation "as sui generis, wholly unrelated to any of the ordinary, extralegal ends of human life", he is really saying that one cannot coherently conceive of this obligation in non-moral terms because to do so would be more or less vacuous.

One might be tempted to object to this line of argument that Olivecrona (and Kelsen) could not possibly share Fuller's view, since (unlike Fuller) they do not accept the view that there is a conceptual connection between law and morality. One should, however, keep in mind that Olivecrona's conclusion is not just that there are no legal relations in the moral sense (that is, the rejection of the view that legal rules have binding force), but that there are no legal relations at all. We might perhaps say that he believes that our view of law and legal matters is such that it involves the idea that legal norms are binding (in the moral sense), and that this view is simply false, premised as it is on an untenable metaphysical assumption. Hence he could without contradiction share Fuller's view. But whatever Olivecrona's precise view on this matter, I believe that we may coherently speak of legal relations in non-moral terms, and I therefore believe that Olivecrona was wrong to conclude from his (well-founded) rejection of the view that legal rules have binding force (in the moral sense), that there can be no legal relations at all. Let us now consider the question of legal relations in a non-moral sense more closely.

7.6 Legal Relations: A Matter of Convention

In this section, I shall elaborate on my claim (put forward in Sect. 7.2 above and mentioned briefly again in Sect. 7.4) that the existence of legal relations in a non-moral sense presupposes nothing more than the existence of an effective legal system. I shall argue, more specifically, that the foundation of such a system may, but does not have to, be found in a convention that constitutes and identifies the sources of law.

Olivecrona and Ross as well as Kelsen assume, as we have seen, that the existence of binding (or valid) legal norms presupposes a commitment to non-naturalism, and that therefore law, conceived as a system of binding (or valid) legal norms, must in some sense be located in a world beyond the world of time and space. Legal positivists do not and need not, however, assume that legal norms are binding in this strong sense, and this means that they do not, and need not, locate law in a non-natural world. And precisely because, on a legal positivist analysis, legal relations need not be binding in such a strong sense, a legal positivist who is also a naturalist need only provide a naturalist account of the existence-conditions of legal norms, and not of the binding force of such norms in the sense contemplated by Olivecrona.

Legal positivists such as Kelsen and Hart maintain that there is a legal system in a certain territory if, and only if, (1) the norms of the system can be derived from a

limited number of sources of law that can be handled on the basis of factual considerations (the social thesis), and (2) the system thus conceived is, on the whole, efficacious (the thesis of social efficacy). This means that legal positivists need to account for the existence of the *sources of law*. Once they have the sources of law, they can derive all and only legal norms from them and add the requirement of efficacy.

Following Hart (1961, pp. 54–57, 97–107, 1994, pp. 255–256), I suggest that we may think of the existence of the sources of law as a matter of *convention*. If we can find a conventionalist account that works, we will also have provided a naturalistically acceptable account of the ontology of law. Let us consider Eerik Lagerspetz's (1995, Chap. 1)) account of the existence of social rules, according to which a social rule, *R*, exists if the members of the relevant group of people (1a) believe that *R* exists and (1b) believe that the others in the group believe that *R* exists, and (2) act accordingly, that is, speak of *R* as existing and, if occasion arises, treat *R* as existing, at least partly because they have the beliefs (1a) and (1b).

As should be clear, the account lays down *sufficient*, but not necessary, conditions for the existence of conventional facts. The reason, Lagerspetz (1995, p. 19) explains, is that there may be some rules (or other conventional entities) that are not even known by large parts of the population, but which nevertheless may be said to exist in the sense that they are part of a system of rules that does satisfy the conditions laid down in the account. I agree with Lagerspetz that we should be content with an account that lays down sufficient conditions for the existence of conventional facts, and I think that the example he gives is good. But my primary reason for resting content with an account in terms of sufficient conditions, and for not insisting on an *analysis* in terms of both sufficient and necessary conditions, is that I am concerned with the sources of law, not with each and every legal norm, and still less with conventional facts in general, and that I believe that, on a legal positivist analysis, the sources of law may, *but need not*, have a conventionalist foundation. I see no good reason to insist that an alleged legal system would not qualify as a legal system just because the sources of law of the system did not have a conventionalist foundation. One can easily imagine a legal system in which judges and other legal officials recognize the sources of law because they fear the sovereign, not because other judges and legal officials recognize them. In other words, I do not hold that a belief in legal positivism implies a belief in a conventionalist foundation of law (on this, see Dahlman 2011).

In any case, as Lagerspetz (1995, pp. 6–8) points out, the account is meant to apply to conventional facts and related entities. Whereas most writers speak of *institutional* facts—such as the fact that a person owns a piece of land, or that he is a Swedish citizen—and maintain that such facts depend for their existence on one or more *rules* (see, e.g., Searle 1969, pp. 51–52; MacCormick and Weinberger 1986, Chap. 2), Lagerspetz operates with a broader category of *conventional* facts, which includes the fact that the rules themselves exist. The basic idea, he explains (1995, p. 6. Emphasis in the original.), is the following: "*There are things which exist and facts which hold only if the relevant individuals believe that they exist or hold and act according to these beliefs*."

We might apply Lagerspetz's account either (1) to a fundamental norm that constitutes and identifies the sources of law, such as the rule of recognition, or (2) immediately to the sources of law without the idea of a fundamental rule functioning as an intermediary. I shall focus on alternative (2), because I take this to be the less complicated alternative. I do not, however, think much depends on the choice between (1) and (2). In any case, I hold that a norm is a legal norm if, and only if, it can be traced back to a source of law, and this means that I see no need to apply the account to every single legal norm—it is enough that it applies to the sources of law.[7] Focusing on sources of law instead of legal norms, then, I shall say that a source of law, *SL*, exists if the members of the relevant group of people (1a) believe that *SL* exists and (1b) believe that the others in the group believe that *SL* exists, and (2) act accordingly, that is, speak of *SL* as existing and, if occasion arises, treat *SL* as existing, at least partly because they have the beliefs (1a) and (1b).

One may, however, wonder how we are to understand the *belief* in the account that *SL* exists. As far as I can see, the belief will have to concern either (1) a source of law that depends on (is a result of) the account or (2) a source of law that is independent of the account. Both alternatives are problematic, however. In the first case, it seems that the account will be viciously *circular*, in that it will presuppose precisely what it is meant to account for, namely the existence of the source of law in question.[8] In the second case, it seems that whereas the theorist aims to account for the existence of one source of law, SL_1, he is in fact basing this account on the existence of another source of law, SL_2. This cannot be right.

Lagerspetz chooses the first horn of the dilemma. As one might expect, he does not agree that the account is viciously circular (1995, p. 6. Emphasis added): "Descriptions of these things and facts are implicitly circular or self-referential, but the circle in question is not a vicious one. In the descriptions, institutional terms reappear only in the scopes of propositional operators describing the *attitudes* of the relevant individuals." But does it really matter that the "descriptions" do not include a reference immediately to the entity in question, but only to an attitude (a belief) about the entity? Could one not object to Lagerspetz's proposed solution that even if the account is not explicitly circular, it is indirectly circular in the sense that it presupposes a *true* belief about the existence of the entity, a belief that clearly *implies* the existence of the entity? Lagerspetz does not think so. As I understand it, his position is that we need to distinguish between (1) cases in which a conventional fact is emerging and (2) cases in which it is already in existence. In case (1), some beliefs about the conventional fact will have to be false. But in case (2), the beliefs will all be true, if the account is adequate. Let us consider his line of argument.

[7] One might perhaps argue that the products of custom, as distinguished from legislative products and court decisions, must conform to the analysis in order to qualify as customary norms, as distinguished from mere habits. The idea would be that whereas the normative aspect of legislative products and court decisions is clear enough, this is not so in the case of custom. I shall, however, leave this an open question here.

[8] This problem has been noted by den Hartogh (1993, pp. 239–241).

Lagerspetz (1995, pp. 16–17) notes that the emergence of a conventional fact presupposes a certain incidence of false beliefs about the (alleged) conventional fact. He considers the example of a meeting place in a community called S-ville and observes that the meeting place cannot emerge gradually, unless at least some of the inhabitants of S-ville mistakenly believe that the place in question is already their meeting place. But, he points out, since people in the real world are not epistemically transparent, in the sense that they have direct access to each other's minds, they can proceed to believe that a certain rule or meeting place exists, perhaps mistakenly assuming that other people also believe this:

> A and B have no direct access to each other's minds. Instead, they accept beliefs when there are reasonable grounds for acceptance. They are considering the question of whether a certain place actually is their meeting-place or not. If they share an interest in having a meeting-place, if the place they are considering satisfies that interest and if there is no obvious alternative to that place, A and B may have reasonable grounds for accepting the belief that the place in question is their meeting-place, and for behaving accordingly. Then, it becomes their meeting-place. (Lagerspetz 1995, pp. 16–17)

I accept Lagerspetz's account of case (1). The interesting question is whether we should accept the proposed account in regard to cases in which a conventional fact is already in existence. Let us imagine a situation in which the judges in a legal system, *S*, (1) believe that a source of law, *SL,* exists in *S*, and that the other judges in *S* believe that *SL* exists in *S*, and (2) act accordingly, at least partly because they believe (1). I have said that this account is indirectly circular, if the relevant beliefs are true. But Lagerspetz's position is that in this case the beliefs can actually be true in a straightforward way, and I have to agree. I take it Lagerspetz reasons as follows. If we allow that the emergence of a conventional fact, *C*, will have to involve some false beliefs on the part of the members of the community, then *C* may come to exist in the community; and if *C* exists in the community, the beliefs on the part of the members of the community that *C* exists will of course be true.

There is, however, also another, perhaps easier, way of avoiding a vicious circle, namely to focus the account not on the rule or the source of law, but on the relevant *human behavior*.[9] Consider in this light Hart's analysis (1961, p. 56), according to which there is a social rule in a community if (and only if) the members of the community (1) behave in a certain way in a certain type of situation, and (2) consider this *behavior* to be appropriate. The relevant difference between the two accounts in this context is that whereas Lagerspetz takes the belief to be a belief about the entity in question (in this case, the rule), Hart takes the attitude to be an attitude not to the entity, but to the *behavior* that together with the attitude constitutes the entity. For example, on Hart's analysis there is in a given community a rule that requires adults to shake hands when they meet if, and only if, adults do shake hands when they meet and also display a pro-attitude to this kind of behavior. Since, on Hart's account, there is no reference in the *analysans* either to the rule or to an attitude to the rule on the part of the adults of the community, but only to the relevant behavior, there is no problem of circularity.

[9] This has been suggested by den Harthog (1993, pp. 239–240).

John Finnis (1980, pp. 238–245) discusses a related problem that has arisen in the analysis of the doctrine of *opinio juris* in the field of international law. He observes that international lawyers maintain that there is a customary norm of international law that provides that one ought to do *X*, if, and only if, there is a habit of doing *X* and a belief that doing *X* is required by international law, and that this amounts to the paradoxical situation that such a customary norm can come into existence *only* if the actors in international law mistakenly believe that this norm is already part of international law. He therefore proposes a solution that seizes on a distinction between practical and empirical judgments, arguing that what is required in addition to the existence of a habit of doing *X* is not the empirical judgment that international law requires that one do *X*, but the *practical* judgment that it would be good or beneficial to have a norm of international law requiring one to do *X*.[10] That is to say, in this case, too, the solution to the circularity problem lies in substituting one object of the relevant belief (or attitude) for another.

We might thus say that a source of law, *SL*, exists if the members of the relevant group of people (1) identify legal norms in a certain way (by consulting *SL*) and believe that one ought to identify legal norms in this way, and (2) believe that the others in the group believe (a) that the members of the community identify legal norms in this way and (b) that they ought to identify legal norms in this way, and (3) act accordingly, that is, speak of *SL* as existing and, if occasion arises, treat *SL* as existing, at least partly because they have the beliefs (1) and (2). As far as I can see, the reference to the relevant behavior in the revised account instead of reference immediately to *SL* means that the problem of circularity does not arise.

There is, however, a problem with this type of account when applied to the legal sphere, namely how to determine the membership of the relevant group of people. If we assume that the persons in question must be *legally* qualified in some way, we will encounter a problem of circularity. If the account is meant to explain the foundation of law, that is, the sources of law, how can it without circularity refer to legal properties? If, on the other hand, we do not assume that they have to be legally qualified, we will run the risk of making the existence of the sources of law dependent on the views of people—the general public—whom we do not want to include in this connection. As Hart (1961, p. 113) makes clear, the existence of the rule of recognition does not depend on the behavior of the citizens, but only on the behavior of legal officials—the behavior of the citizens is relevant only to the question of social efficacy.

7.7 Self-Refutation?

Svein Eng (2007, pp. 312–314) maintains that Olivecrona's analysis assumes that all meaningful statements are either empirical or analytical, and goes on to argue that since this assumption itself is neither empirical nor analytical, it cannot be meaningful.

[10] Finnis thus appears to espouse a version of what Christian Dahlman (2012) calls the acceptance interpretation, as distinguished from the belief interpretation, of the concept of opinio juris.

Eng describes the ontological, epistemological, and semantic stance of the Scandinavian realists, including Olivecrona, as follows (Eng 2007, p. 312): "Scandinavian legal realism in a philosophical sense maintains that all we can know are facts of experience, facts in time and space, and that all meaningful language is about such facts. This school only considers real what we can experience as objects in time and space, and it only considers language *meaningful* that corresponds to something in this reality."[11] He then points out that this means that the Scandinavians recognize only two types of meaningful statements, viz. empirical and analytical statements (Eng 2007, pp. 312–313), applies this methodological principle to itself, and arrives at the conclusion that it is self-refuting:

> But what kind of status do *these* statements about the existence of criteria of meaningfulness have? Their meaningfulness can obviously not be determined by conformity/nonconformity with sense experience. And they can just as obviously not be determined by truth/falsity based on presupposed definitions. They can according to their meaning content be *neither* empirically true/false *nor* analytically true/false. Therefore they can according to themselves not be subjected to a rational discussion. The statements about what is real, what is meaningful, and what can be discussed, which have been put forward by Scandinavian realism in a philosophical sense, are thus in themselves… "meaningless", "metaphysical", "unscientific", or the like—which is what representatives of the school have not seldom said about the statements of others when they used their theory on them. (Eng 2007, p. 313)[12]

I believe that Eng overshoots the mark, however. The reason is that I have not been able to find in Olivecrona's writings any claim to the effect that claims (or theories) that are neither analytical nor empirical are meaningless in the relevant sense of the term. And Eng does not cite any such passages in his criticism of Olivecrona. Let me explain what Olivecrona does say.

First, as we have seen, Olivecrona is an ontological naturalist and a non-cognitivist (or, at times, an error theorist), and he erects his legal philosophy on a foundation of such naturalism and non-cognitivism. That is to say, he maintains that there are only natural entities or properties, and that a person who makes a moral judgment is merely expressing his attitudes or preferences. He maintains, in keeping with this, that moral, or more generally, normative, claims are meaningless in the special sense that key normative or evaluative terms in them lack cognitive meaning

[11] The Norwegian original reads as follows: "Den skandinaviske rettsrealismen i filosofisk forstand hevder at alt vi kan erkjenne, er erfaringsfakta, fakta i rom og tid, og at alt meningsfylt språk är om slike fakta. Retningen vil bare regne som virkelig det vi kan erfare som gjenstander i rom og tid, og den vil bare regne som meningsfylt det språk som svarer til noe i denne virkelighet."

[12] The Norwegian original reads as follows: "Men hva slags status har så disse utsagnene om eksistensen av holdbarhetskriterier? Deres holdbarhet kan åpenbart ikke avgjøres gjennom u/overensstemmelse med sanseerfaring. Og de kan like åpenbart heller ikke avgjøres gjennom u/sannhet på bakgrunn av forutsatte definisjoner. De kan etter sitt meningsinnhold hverken vare empiriskt u/sanne eller analytisk u/sanne. Dermed kan de ifölge seg selv ikke undergis en förmuftsmessig diskusjon. De utsagn om vad som er virkelig, hva som er meningsfylt, og hva som kan diskuteres, som settes fram av den skandinaviske rettsrealismen i filosofisk forstand, er altså ifølge seg selv… "meningsløse", "metafysiske", "ovitenskaplige", e.l. – som representanter for retningen ikke sjelden sa om andres utsagn når de anvendte sin teori på dem."

and do not refer (non-cognitivism), or else that such claims are always false because the relevant terms refer to non-natural entities and properties that do not exist in the natural world (error theory). That Olivecrona does not reject normative claims as meaningless in the sense of being in some sense pointless should be clear, *inter alia*, from his view (to be discussed in Chap. 9) that although the term 'right' lacks cognitive meaning and does not refer, it can nevertheless fulfill a directive function in legal thinking.

The question of self-refutation arises neither in regard to Olivecrona's naturalism nor in regard to the non-cognitivism espoused by Olivecrona. Even though Olivecrona does not offer any serious argument in support of his naturalism or his non-cognitivism, others, including Hägerström, have done so. The reason why a person endorses ontological or methodological naturalism may be found in a belief that reality simply is physical reality, or that the natural sciences have been very successful in attaining knowledge about physical reality (Wagner and Warner 1993, p. 12); and the reason a person endorses non-cognitivism may be that he believes that a value judgment, but not a factual judgment, presupposes the existence of a feeling (Hägerström 1964, pp. 88–89). This means that Olivecrona does not need to fall back on the problematic claim that all statements that are neither empirical nor analytical are meaningless *simpliciter*, in order to defend his naturalism and his non-cognitivism. I might add here that I have not been able to find any objection to naturalism similar to Eng's in the articles included in two recent collections of writings on naturalism (Wagner and Warner 1993; De Caro and MacArthur 2004). While this does not prove that claims of self-refutation aimed at naturalism must fail, it does suggest that such claims will not be successful.

I conclude that Eng's objection would be better conceived as an objection to the so-called verification principle endorsed by logical positivists, such as A. J. Ayer, according to which all meaningful statements are either empirical or analytical. For the received opinion is that *this* principle is indeed self-refuting, in the sense that it cannot pass the test for meaningfulness that it itself lays down (on the verification principle, see Ayer 1947, pp. 5–16; Miller 2007, Chap. 4.). But, as I have indicated, Olivecrona does *not* endorse this principle, though Alf Ross (1959, pp. 39–40) did so, and this means that one cannot refute Olivecrona's legal philosophy by showing that the principle is self-refuting.

References

Dahlman, Christian. 2011. When conventionalism goes too far. *Ratio Juris* 24:335–346.

Dahlman, Christian. 2012. The function of Opinio Juris in customary international law. *Nordic Journal of International Law* 81:327–339.

den Hartogh, Govert. 1993. Rehabilitating legal conventionalism [Review of Eerik Lagerspetz, *a conventionalist theory of institutions*]. *Law and Philosophy* 12:233–247.

Fuller, Lon L. 1958. Positivism and fidelity to law—a reply to Professor Hart. *Harvard Law Review* 71:630–672.

Hägerström, Axel. 1953. Kelsen's theory of law and the state. In *Inquiries into the Nature of Law and Morals,* ed. Karl Olivecrona. Trans. C. D. Broad, 257–298. Uppsala: Kungliga humanistiska vetenskapssamfundet i Uppsala.

Hägerström, Axel. 1964. On the truth of moral propositions. In *Philosophy and Religion,* ed. Axel Hägerström, 77–96. (Originally published under the title "Om moraliska föreställningars sanning" in Axel Hägerström, *Socialfilosofiska uppsatser*. Ed. Martin Fries, 35–65. Stockholm: Bonniers.)

Olivecrona, Karl. 1951. Realism and idealism: Some reflections on the cardinal point in legal philosophy. *New York University Law Review* 26:120–131.

Books

Ayer, A. J. 1947. *Language, truth, and logic*. 2nd ed. London: Victor Gollancz.

Bindreiter, Uta U. 2000. *Why grundnorm? A treatise on the implications of Kelsen's doctrine*. Lund: Department of Law, Lund University.

De Caro, Mario, and David MacArthur, eds. 2004. *Naturalism in question*. Cambridge: Harvard University Press.

Eng, Svein. 2007. *Rettsfilosofi [Philosophy of law]*. Oslo: Universitetsforlaget.

Finnis, John. 1980. *Natural law and natural rights*. Oxford: Clarendon Press.

Hart, H. L. A. 1961. *The concept of law*. Oxford: Clarendon Press.

Hart, H. L. A. 1994. *The concept of law. 2nd. ed. With a postscript edited by Penelope A. Bulloch and Joseph Raz*. Oxford: Oxford University Press.

Kelsen, Hans. 1984. *Hauptprobleme der Staatsrechtslehre. Aalen: Scientia Verlag. (Originally published 1923 by J. C. B*. 2nd ed. Tübingen: Mohr.

Kelsen, Hans. 1960. *Reine Rechtslehre [The pure theory of law]*. 2nd ed. Vienna: Österreichische Staatsdruckerei.

Kelsen, Hans. 1992. *Introduction to the problems of legal theory*. Trans. Bonnie Litschewski Paulson and Stanley L. Paulson. Oxford: Oxford University Press. (Originally published 1934 in German under the title *Reine Rechtslehre* by Österreichishe Staatsdruckeri, Vienna).

Kelsen, Hans. 1999. *General theory of law and state*. Trans. Anders Wedberg. Union. New Jersey: The Lawbook Exchange. (Originally published 1945 by the Harvard University Press, Cambridge).

Lagerspetz, Eerik. 1995. *The opposite mirrors*. Dordrecht: Kluwer.

MacCormick, Neil, and Ota Weinberger. 1986. *An institutional theory of law*. Dordrecht: Reidel.

Miller, Alexander. 2007. *Philosophy of language*. 2nd ed. London: Routledge.

Moore, G. E. 1993. *Principia ethica*. Revised edition. Edited and with an introduction by Thomas Baldwin. Cambridge: Cambridge University Press. (Originally published 1903 by Cambridge University Press, Cambridge).

Olivecrona, Karl. 1939. *Law as fact*. Copenhagen: Einar Munksgaard, London: Humphrey Milford.

Olivecrona, Karl. 1940. *Om lagen och staten* [*On law and the state*]. Copenhagen: Einar Munksgard, Lund: Gleerup.

Olivecrona, Karl. 1971. *Law as fact*. 2nd ed. London: Stevens & Sons.

Ross, Alf. 1959. *On law and justice*. Berkeley: University of California Press.

Searle, John R. 1969. *Speech acts*. Cambridge: Cambridge University Press.

Wagner, Steven J., and Richard Warner, eds. 1993. *Naturalism: A critical appraisal*. Notre Dame: University of Notre Dame Press.

Chapter 8
Legal Rules as Independent Imperatives

Abstract Olivecrona maintains that legal rules are a species of imperatives, viz. independent imperatives, and that while thus conceived legal rules cannot establish legal relations, they can influence people and therefore cause human behavior. He assumes here that the citizens respect the constitution and that they are therefore disposed to obey any rule that can be traced back to the constitution. He repeats this analysis in the Second Edition of *Law as Fact*, where he also introduces the concept of a performative imperative, in order to account for those legal rules that concern rights and duties rather than human behavior. He also maintains that law conceived as a set of rules exists as ideas in the imperative form about human behavior, ideas that are again and again revived in human minds, and that this means that law does not and cannot have permanent existence. I find Olivecrona's analysis fascinating but quite problematic. First, the claim that legal rules influence human beings seems to be either trivial or false, depending on how one understands it. Secondly, it is quite difficult to conceive of permissive rules and power-conferring rules as (independent) imperatives. Thirdly, the introduction of the concept of a performatory imperative brings with it new difficulties, namely to understand how an imperative can concern something other than human actions. Fourthly, the concept of an independent imperative cannot easily be distinguished from the more familiar concept of a norm, and this suggests, though it does not prove, that it is superfluous.

8.1 Introduction

Having rejected the view that law has binding force in the moral sense and the implication that there are legal relations in the moral sense, Olivecrona turns to consider the nature of legal rules (1939, chap. 2). Pointing out that the purpose of legal rules is to influence human beings, he maintains that legal rules are a species of imperatives, viz. independent imperatives, and that while thus conceived legal rules cannot establish legal relations, they can influence people and therefore cause human behavior. He repeats this analysis in the Second Edition of *Law as Fact* (1971, chaps. 5 and 8), where he also introduces the concept of a performative imperative, in order to account for those legal rules that concern rights and duties rather than human behavior.

T. Spaak, *A Critical Appraisal of Karl Olivecrona's Legal Philosophy,*
Law and Philosophy Library 108, DOI 10.1007/978-3-319-06167-2_8,

I find Olivecrona's analysis fascinating, but I cannot accept it. First, the claim that legal rules influence human beings seems to be either trivial or false, depending on how one understands it. Secondly, it is quite difficult to conceive of permissive rules and power-conferring rules as (independent) imperatives. Thirdly, the introduction of the concept of a performatory imperative brings with it new difficulties, namely to understand how an imperative can concern something other than human actions. Fourthly, the concept of an independent imperative cannot easily be distinguished from the more familiar concept of a norm.

I begin by laying out Olivecrona's account of the concept of a legal rule as it appears in the First Edition of *Law as Fact*, in the companion volume *Lagens imperativ* (1942a), and in the Second Edition of *Law as Fact* (Sec. 2). Having done that, I turn to consider the difficulties mentioned above, namely the problem about the function of legal rules (Sect. 8.3), the question whether the existence of certain types of legal rule, such as permissive rules and power-conferring rules, would mean that Olivecrona's analysis must be rejected (Sect. 8.4), and the question whether independent imperatives can concern something other than human actions (Sect. 8.5). I then consider the question of whether the concept of an independent imperative is really distinct from the concept of a norm (Sect. 8.6). The chapter concludes with a brief consideration of Olivecrona's thoughts on the ontology of legal rules (Sect 8.7).

8.2 The Concept of a Legal Rule

Olivecrona makes a distinction between the form and the content of a legal rule.[1] The *content* of a legal rule, he explains, is an idea of an action by a person in an imaginary situation (1939, pp. 28–29). He points out, however, that the legislative technique obscures the real purport of legal rules, because on the face of it many legal rules do not concern human behavior at all, but rather the existence of rights and duties. But, he insists, ultimately all legal rules concern human conduct (Olivecrona 1939, 30): "Their sole function is to contribute to the picture of the *situations* in which the actions desired should be undertaken and to the pictures of these *actions*."

The *form* of legal rules, he continues, is *imperative*, because the lawmakers aim to impress a certain behavior on us (Olivecrona 1939, 31): "Their aim is not to tell us which are the ideas in their minds but to impress a certain behaviour on people. To this end the imaginary actions are put before the eyes of the people in such a way as to call up the idea that this line of action must, unconditionally, be followed. Therefore the *imperative* form is used."

Olivecrona is, however, careful to point out that he does not have the *grammatical* imperative form in mind. Statutory provisions are often phrased in the indicative or the subjunctive mood, but they always express an imperative (1942a, 9). On his

[1] As Pattaro (1980, 1523) points out, this distinction anticipates Richard Hare's distinction between the phrastic and the neustic component of a sentence. See Hare (1952, 17–20)

analysis, what is important is that an utterance (or a gesture) *functions* as an imperative, and while he is not explicit about it, he appears to believe that an utterance functions as an imperative if it is *intended* to be an imperative. But, he continues, to determine whether a particular utterance is intended to be an imperative, one needs to consider the whole situation in which the utterance takes place (Olivecrona 1942a, pp. 16–17).

Pointing out that the *command* is the prototype of the imperative, he explains that a command *works directly on the will* of the recipient of the command, and that this means that it must have a *suggestive character*:

> A command is an act through which one person seeks to influence the will of another. This may be done through words or signs or perhaps by a determined look only. It is characteristic of the command that the influence on the will is not attained through any appeal to things that constitute values for the receiver of the command. The command may be supported and strengthened by a threat or by a promise. But this is something secondary. The command as such does not contain any reference to values. It works directly on the will. In order to do this the act must have a suggestive character. Whether words or other means are used, the purpose is obviously suggestion. (1939, pp. 33–34)

He maintains, more specifically, that if a command takes effect there arises in the addressee's mind a *value-neutral intention* to perform the commanded action, that is, an intention that is not motivated by the addressee's own wishes, and he adds that in some cases a command may actually trigger an action without the addressee's having had any intervening value-neutral intention (1942a, pp. 7, 10–11). Note that this claim is in keeping with Charles Stevenson's thoughts on the so-called emotive meaning of moral terms. Stevenson, who thinks of moral terms as a means by which we may influence the attitudes of other people, explains that the emotive meaning of a word "is a tendency of [the] word, arising through the history of its usage, to produce (result from) *affective* responses in people." (1937, pp. 23)

Olivecrona proceeds to explain that legal rules are *not* commands (1939, pp. 35–40). Pointing out that the imperative theory, or, as I would say, the command theory, presupposes that there is a commander, he objects that there simply is no one person or group of persons who could be the commander. He notes that it is often suggested that the *state*, or someone representing the state, is the commander, but points out that this could not be so. For one thing, there is simply no one who commands anything in the process of law making. For, on closer inspection, we see that neither the members of the parliament or of the government, nor the head of state commands anything: What they do is push certain buttons (when voting) or sign certain documents (when promulgating a law).[2] Moreover, the lawmakers have their position *as* lawmakers on the basis of certain rules, and it would amount to circular reasoning to maintain that those rules are commands issued by the lawmakers themselves. Olivecrona concludes that the imperative theory of law could work only if there were some kind of superhuman entity who functioned as commander, but points out that there can be no such entity.

[2] Clearly, this factual claim does nothing to establish the modal claim that the state, or someone representing the state, *could* not be the commander.

But if legal rules are not commands, although they have imperative form, what are they? Olivecrona explains that in addition to commands, there is a class of imperatives that we may refer to as *independent imperatives*. And he maintains that legal rules are precisely such independent imperatives (Olivecrona 1939, pp. 42–49).

On Olivecrona's analysis, there are three important differences between commands and independent imperatives. First, whereas a command is always *issued* by a certain person, an independent imperative is not issued by anyone in particular:

> A command in the proper sense implies a personal relationship. The command is given by one person to another by words or gestures meant to influence the will. Now the same kind of words is also used in many connexions where no personal relations whatever exist between the person who commands and the receiver of the command. The words can nevertheless have a similar, if not identical, effect. They function independently of any person who commands. We may in this case speak of *"independent imperatives",* in order to get a convenient term. (Olivecrona 1939, p. 43)

Second, whereas a command is always *addressed* to a certain person or persons and concerns a particular action or actions, an independent imperative, although it concerns a *kind* of action, is not addressed to anyone in particular:

> A command in the proper sense is addressed to a *person* and is calculated to produce an action by that person, e. g. "Forward march!" But an independent imperative may so to say be directed into the air. It does not say to an individual: *you* shall do this or that, but abstractly: *this action* shall be performed, e. g. a murderer shall be condemned to death. A "shall" is here connected with an idea of an action, not directly addressed to a person./…/ Or the meaning of a rule may be that a "legal relation" *shall* be established under such and such circumstances, e. g. the bond of marriage shall exist when the wedding has taken place. Here the imperative expression is connected with the idea of the entering into existence of a certain relation, qualified as marriage, not directed to a person. In a similar way the "shall" of a rule may be connected with the establishment of a right or a duty. The right of ownership, e. g., shall be acquired in such or such a way. (Olivecrona 1939, pp. 44–45)

Olivecrona's idea, then, is that an independent imperative concerns a class of persons (the norm-subjects) and a class of actions (the action-theme), not particular persons and actions. This is, of course, the usual way of characterizing rules, including legal rules (or norms) (see, e. g., Frändberg 1984, pp. 33–42; Hart 1961, pp. 21–23).

Third, whereas a command is in no way equivalent to a judgment, an independent imperative *can sometimes be replaced by a sentence that expresses a judgment* (1939, pp. 45–46): "In the Decalogue we have e. g. the imperative statement: 'Thou shalt not steal!' It does not in the least appear to us as intellectually absurd to replace this expression by saying: 'It is really so that you shall not steal', or 'It is your duty not to steal'. Formally, these sentences give expression to judgments. And we believe that real judgments lie behind them."

Olivecrona objects, however, that there are no real judgments behind the sentences that (appear to) express such judgments, but only a *psychological connection*, viz. a connection in a person's mind between the imperative expression and the idea of an action:

> We do not impart knowledge by such utterances, we create suggestion in order to influence the mentality and the actions of other people. There is no real judgment behind the

> sentences. The objective nature of an action is not determined by saying that it should, or should not, be undertaken. What lies behind the sentences is something other than a judgment. It is that, in our mind, an imperative expression is coupled to the idea of an action. This is a *psychological* connexion only, though of the utmost importance in social life. But for certain reasons the connexion appears to us as existing objectively. Thus we get an illusion of a reality outside the natural world, a reality expressed by this "shall". That is the sole basis of the binding force of the law. (Olivecrona 1939, pp. 46)

Olivecrona's central claim about legal rules, then, is that they can influence human beings because they have a suggestive character, and that this in turn means that they can cause human behavior. This claim is, of course, very important to Olivecrona's analysis – if legal rules were not psychologically effective in this way, the analysis would be incomplete, since on Olivecrona's analysis, as we have seen, there are no legal relations the knowledge of which could motivate the citizens to act accordingly.

Olivecrona points out, however, that the way the individual mind works is a matter for the science of psychology, and that for the purposes of his investigation into the nature of law, he need only point to the general conditions that must be satisfied for legal rules to be effective in society (Olivecrona 1939, pp. 52). Taking the example of *legislation*, he explains that its efficacy depends on an attitude of *reverence for the constitution* on the part of the citizens:

> We find an attitude of this kind at least in every civilized country of the Western type…. Everywhere there exists a set of ideas concerning the government of the country, ideas which are conceived as "binding" and implicitly obeyed. According to them certain persons are appointed to wield supreme power as kings, ministers, or members of parliament etc. From this their actual power obtains. The general attitude towards the constitution places them in key-positions, enabling them to put pressure on their fellow-citizens and generally to direct their actions in some respects. (Olivecrona 1939, pp. 52–53)

This attitude is not self-supporting, however, he explains, but must be sustained by means of an incessant psychological pressure on the citizens (Olivecrona 1939, pp. 53–54). Hence a second condition for the efficacy of legislation in society must be satisfied, viz. that there be an *organization*—the state organization—that handles the application and enforcement of the law:

> There must be a body of persons, ready to apply the laws, if necessary with force, since it would be clearly impossible to govern a community only by directly influencing the minds of the great masses through law-giving./…/ The organization that wields force, the state organization, is largely composed of persons who are trained automatically to execute the laws which are promulgated in the constitutional form, irrespective of their own opinion of their advisability. The organization is therefore like a vast machinery, so regularly and certainly does it function. The law-givers sit in the centre of the machinery as before a switchboard, from where they direct the different wheels. (Olivecrona 1939, pp. 55–56)

Olivecrona concludes that the real significance of the act of legislating is to be found in the *formalities* that are attached to it, because these formalities confer on the legal rules a special nimbus that make people take them as a pattern of conduct (Olivecrona 1939, 56. See also Olivecrona 1939, 60): "The draft is not lifted into another sphere of reality but is simply made the object of some formalities which have a peculiar effect of a psychological nature. The formalities are the essential thing. The legislative act consists in nothing but these."

I am not convinced that the citizens revere the constitution, however, and Olivecrona offers no evidence to support the claim that they do. But even if one were to accept this doubtful claim, and the implication that the citizens are disposed to obey the law, one must surely wonder whether it is illuminating to describe this state of affairs in terms of a suggestive character of the independent imperatives. One might as well assert that snakes have a peculiar "recoil property" just because most people recoil when they see a snake. As I see it, Olivecrona should have adopted instead the line of reasoning employed by Stevenson in his (Stevenson's) analysis of the emotive meaning of moral words, mentioned above (Stevenson 1937). Just as Stevenson finds the emotive meaning of moral words *in* the affective responses in people, so that there will be no emotive meaning over and above those responses, Olivecrona might have found the suggestive character of imperatives *in* the disposition of people to obey imperatives, so that there would be no suggestive character over and above that disposition. On this analysis, the interesting empirical question would have been whether people are in fact disposed to obey the imperatives.

Moreover, there seems to be a problem of circularity in Olivecrona's argumentation. As we have seen, Olivecrona maintains that the suggestive character of legal rules depends on an attitude of reverence for the constitution on the part of the citizens, and that this attitude in turn depends on the consistent application and enforcement of the relevant legal rules by the members of an organization whose task it is to apply and enforce those legal rules. One may, however, wonder how this organization, *A*, can become fully functional and give rise to the suggestive character of the rules in question, given that the rules that influence the officials in *A* could not have the requisite suggestive character, unless there was another organization, *B*, whose officials applied and enforced those rules. And, of course, the rules that influence the officials in *B* could not have the requisite suggestive character, unless there was another organization, *C*, whose officials applied and enforced those rules. And so on, and so forth. But Olivecrona might perhaps with some justification reply that the members of the organization are likely to be properly motivated simply by virtue of having been hired to do this particular job.

Olivecrona's view of the concept of a legal rule is essentially the same in the Second Edition of *Law as Fact* as it was in the First Edition, except that here he introduces the concept of a performatory imperative, in order to account for those legal rules that do not concern human behavior (1971, chaps 5 and 8. But see also 1940a, pp. 39–41). The introduction of this concept is of interest, *inter alia*, because it amounts to a connection with (then) contemporary philosophy of language. As J. L. Austin (1975, pp. 4–7) explains, a performative utterance, such as "I promise to lend you $100" or "I hereby invite you to dinner on Saturday night", has its main verb in the first person present, indicative, active (singular or plural), or is equivalent to such an utterance. It differs from an ordinary statement of fact in that he who utters it (i) does not describe or report anything, which means that it cannot be true or false, and (ii) is usually thought to *do* something rather than to (merely) say something. Olivecrona (1971, pp. 133–134) explains, in keeping with this, that a performatory imperative is an imperative whose meaning is that something shall be the case or come to pass, and that the assumption among lawyers, judges, and

legal scholars is that legal effects are brought about through such imperatives.[3] He offers the example (drawn from Roman law) of a young man who has been sold three times by his father, and who therefore, according to the law of the twelve tables, "shall be free from the father." This, he explains (Olivecrona 1971, p. 220), is clearly an imperative, though it is addressed neither to the father nor to the son or to anyone else, but "is directed toward a change in the status of the son."

Olivecrona's emphasis on the importance of performative utterances in law reflects his view that language, including legal language, has many functions, and that it is a mistake to think that the main function of language is to state or report facts. He puts it as follows in his essay on legal language and reality:

> Our language is shaped to suit our purposes. In modern philosophy it has repeatedly been pointed out that the purposes are manifold. Words are used not only to describe reality or report facts; they are also used to express emotions, and to influence behavior. To some extent the same functions are filled by looks and gestures. As regards language, it is particularly important to note that there is no reason why *nouns* should be employed solely to denote realities. We are easily led to believe that this would be the case, since denotation of realities is indubitably the primary function of nouns. But why should not nouns also be used as stimuli to action or forbearance or for the expression of emotions and inducement to emotions? (1962a, pp. 169).

Olivecrona points out in conclusion that belief in performative imperatives is connected with a belief in *magic* – the idea in ancient Rome being that the effect in question could be commanded into being—and that we can gain a better understanding of the workings of performatory imperatives if we keep this connection in mind (1971, pp. 230–231). He adds that he is not suggesting that contemporary judges and lawyers believe in magic in the same way that people did in ancient Rome, only that there are important similarities (Olivecrona 1971, pp. 230–231). The main difference between then and now, he explains, is that whereas the Romans imagined that *words* alone could bring about the relevant effects, we now believe that it is the acting person's *will* that brings about the effects (Olivecrona 1971, pp. 230–231).

8.3 The Function of Legal Rules

Olivecrona's rejection of the view that law has binding force and can establish legal relations means that he cannot accept the common-sense view that the function of legal rules is to provide reasons for action by establishing legal relations. Instead, as we have seen, his view is that the function of legal rules is to influence human beings and thus cause human behavior. As he puts it in the First Edition of *Law as Fact*,

[3] As Åqvist (2008, 276) points out, Olivecrona is here introducing the well-known distinction between ought-to-do (*tunsollen*) and ought-to-be (*seinsollen*), though he is not making use of this particular terminology.

> [t]heir [the legal rules'] sole function is to work on the minds of people, directing them to do this or that or to refrain from something else—not to communicate knowledge about the state of things. By means of such expressions the lawgivers are able to influence the conduct of state officials and the public in general. The laws are therefore links in the chain of cause and effect. (1939, pp. 21–22. See also 1951, p. 131)

He offers as an example the relation between a crime and its punishment, a relation that he considers to be eminently causal:

> Why is the murderer brought to trial if not because he is suspected of having killed another person? Why is he suspected? Is it not in most cases the fact that he has actually committed the crime he is accused of? When this fact has been proven in the way required by the law of procedure, the judge metes out his sentence. Obviously this sentence is caused by the deed on the one hand and the contents of the law on the other hand, since the judge is influenced by these facts in giving the judgment. I range the contents of the law expressly among the facts. The words printed in the law-books are certainly facts and so are the ideas evoked in the mind of the reader by these words. They are among the principal causes of the action of the judge in giving sentence. If the laws did not have this effect, people might as well give up legislating as an unnecessary waste of time. (1939, pp. 19–20)

As should be clear, the claim about the function of legal rules is part of Olivecrona's attempt to naturalize legal science, including jurisprudence, in the sense of eliminating all metaphysical elements and turning legal science into an empirical science that focuses on social facts, especially human behavior. Specifically, this attempt is in keeping with methodological naturalism of the type that requires "methods continuity" with the sciences, since it sees legal rules as psychologically effective, as parts of the chain of cause and effect, in a way that could—in principle—be empirically tested. But, as we have seen (in Chap. 5), Olivecrona's rejection of the predictive analysis of the concepts of right and duty, defended by Justice Holmes and others, on the grounds that it cannot account for the import of these concepts as traditionally understood (1962a, pp. 158), suggests rather that Olivecrona does *not* accept methodological naturalism of this type.

In any case, the claim that legal rules actually influence human beings is problematic. Since it is clear enough that valid legal rules influence the citizens, in the sense that in most cases they take the rules into account and act accordingly—indeed, on Olivecrona's own analysis, if the legal rules didn't influence the citizens, the legal system wouldn't be effective, and if it weren't effective, the legal rules couldn't be valid—Olivecrona must have something more than this in mind. But if he gives the claim a stronger interpretation, he will have to explain away the many acts of law-breaking that occur every day. For if legal rules influence us, how can it be that we sometimes break the law? To be sure, the influence from the legal rules may in some cases be countered by other factors, such as a wish to save time (in the case of speeding) or a wish to acquire a certain object (in the case of theft). But it is clear that the weaker the influence, the less interesting the claim that the function of legal rules is to influence humans becomes. Olivecrona would thus have to specify his claim about the function of legal rules in such a way that it be neither trivial nor false. I do not think he could do that.

8.4 Power-Conferring Rules and Permissive Rules

Legal scholars who conceive of law as a set or a system of rules (or norms) often divide these rules into different types of rule. For example, Alf Ross (1959, pp. 38–51), H. L. A. Hart (1961, chap. 3), and Joseph Raz (1980, chap. 6) divide legal rules into duty-imposing rules and power-conferring rules, on the grounds that these different types of rule fulfill different functions. And several Scandinavian authors, such as Strömberg (1988, chap. 3), Sundby (1974), and Strömholm (1996, chap. 11), make a distinction between duty-imposing rules, rules of qualification, power-conferring rules, and permissive rules. Whereas a duty-imposing rule imposes on a person (strictly speaking, on a class of persons) a duty to perform (or not perform) a type of action, a permissive rule permits a person to perform (or not perform) a certain type of action. A power-conferring rule, on the other hand, gives a person the possibility, by performing a certain kind of action, to change legal positions, and a rule of qualification confers on a person, an object, a relation, a state of affairs, etc. a certain legal property, such as, e.g., that of being a custodian or a Swedish citizen. The main difference between power-conferring rules and rules of qualification, then, is that the central operative fact in a power-conferring rule is a human act, specifically, a sort of symbolic act, whereas this is not so in the case of a rule of qualification (on this, see Spaak 1994, chap. 5).

The problem with Olivecrona's analysis is that while one may well conceive of duty-imposing rules and, perhaps, rules of qualification as independent imperatives, it seems rather far-fetched to conceive of power-conferring rules, and impossible to conceive of permissive rules, as imperatives (see Frändberg 2005c, p. 366). For power-conferring rules, conceived of as a distinctive type of legal rule, do not impose any duty on the competent person to exercise the relevant power; and permissive rules obviously do not require a person to do (or not do) anything. Hence in neither case does it seem reasonable to say that anyone has been commanded or required to do (or not do) anything.

The underlying question is whether we should think of power-conferring rules and permissive rules as complete and independent rules, or as fragments of duty-imposing rules. The objection to Olivecrona's analysis assumes, of course, that power-conferring rules and permissive rules are independent rules—if they were not, Olivecrona could easily avoid the objection by saying that his analysis doesn't have to account for fragments of legal rules, but only for complete and independent legal rules. The problem about the individuation of rules is difficult, to be sure, but I have argued elsewhere that power-conferring rules and permissive rules should be thought of as rule fragments, that is, as parts of duty-imposing rules addressed to judges and other legal officials, because they do not give complete reasons for action (Spaak 2003a). If I am right about this, we cannot reject Olivecrona's analysis on the grounds that it cannot account for power-conferring rules and permissive rules. Of course, Olivecrona would likely say that power-conferring rules and permissive rules do not and cannot have an independent existence, since they (like other legal rules) lack binding force. But we have also seen that this particular argument is not convincing.

8.5 Performatory Imperatives and Human Behavior

The problem with the idea of a performatory imperative is that it is rather difficult to conceive of an imperative whose function is not to influence human behavior, but to declare that a certain (legal) state of affairs shall be the case.

Olivecrona's view of the relation between performatory imperatives and human behavior appears to have changed during the period between the publication of the First and the publication of the Second Edition of *Law as Fact*. He explains in the First Edition, as we have seen, that while on the face of it many legal rules do not seem to concern human behavior, but rather the existence of rights and duties, in the final analysis all legal rules do concern human behavior, in the sense that they contribute to the situations in which a person is required to act in a certain way and to the picture of that action (1939, 30). But in the Second Edition he adopts the opposite view. Having raised the question whether all imperatives concern human behavior, he explained that this is not so: "… our actual language does not conform to this preconceived idea. If I hand over my watch to my son saying (Olivecrona 1939, pp. 133–134): 'This shall be your property', I am using an imperative form of speech. But I am not commanding him to do anything. The imperative is directed towards his acquiring ownership of the watch." He does not elaborate on this view, however, but is content to maintain that there really are legal imperatives that do not concern human behavior. He does, however, offer several examples of such imperatives.

I find it natural to look upon performatory imperatives as imperatives directed to one or more persons and requiring them to view things in a certain way and to act accordingly. I have argued elsewhere (1994, pp. 168–169) that *rules (or norms) of qualification* are better thought of as duty-imposing rules that require a person to think in a certain way and to act accordingly. And since performatory imperatives and rules of qualification are more or less the same thing, we can analyze the concept of a performatory imperative in the same way. But if this is so, there is no difference in principle between independent imperatives and performatory imperatives, and there is no compelling theoretical reason, though there *might* be good practical reasons, to make a distinction between independent imperatives and performatory imperatives.

We should note here that Olivecrona's claim about the *function* of legal rules depends on the assumption that legal rules are *imperatives*, specifically independent imperatives, because Olivecrona tacitly assumes that imperatives, and only imperatives, have a suggestive character, which, as we have seen, is what makes them capable of influencing human beings and thus of causing human behavior. Since this is so, Olivecrona would likely have to give up the claim about the function of legal rules, if it turned out that he could not reasonably conceive of all legal rules as (independent) imperatives, and this in turn means that he would have to give up his attempt to naturalize jurisprudence. Hence the question about the imperative nature of legal rules, including the question of performatory imperatives, is not a minor question in Olivecrona's legal philosophy.

8.6 Legal Rules—Imperatives or Norms?

In this section, I argue that legal rules are better understood as norms than as independent imperatives. The difference between imperatives and norms, as I see it, is that the concept of a norm, but not the concept of an imperative, necessarily expresses "an ought" (MacCormick (1973, pp. 100–130). Although Olivecrona (1939, pp. 21–22) appears to believe that a command entails "an ought" (see also Kelsen 1960, p. 4; von Wright 1963a, pp. 7–8), I do not share this view. Consider in this regard an example in which *A*, who is *B*'s superior, commands *B* to close the door and be quiet. Does it follow that *B ought* to close the door and be quiet? No, of course not, unless there already is a norm providing that *B* ought to do what he has been commanded (by *A*) to do. Moreover, Olivecrona's claim (considered above in Sect. 8.2) that an independent imperative, but not a command proper, can sometimes be replaced by a sentence that expresses a judgment, supports the view that independent imperatives are norms, not imperatives. So while I believe Olivecrona is right to maintain that on some interpretations, an independent imperative such as "Thou shalt not steal" is equivalent to a statement such as "It is the case that you must not steal," I also believe that the reason why this is so is that independent imperatives are really norms.

Åke Frändberg (2005b, 366), too, has argued that legal rules are better conceived of as norms than as independent imperatives. He points out (i) that with respect to their formal structure, legal rules are more similar to norms than to (independent) imperatives, in that they are more adequately expressed by deontic sentences—that is, sentences formulated in terms of 'may,' 'ought,' and 'must'—than in the imperative mood. He also points out (ii) that the imperative mood is indistinct (unclear) from the point of view of its formal structure, because an utterance (a sentence) in the indicative mood, say, can sometimes fulfill an imperative function.

Frändberg's objections to Olivecrona's analysis are not persuasive, however, because they are premised on the mistaken assumption that Olivecrona has in mind imperatives in the *grammatical* sense when he speaks of imperatives, including independent imperatives. But, as we have seen in Sect. 8.3, Olivecrona recognizes that statutory provisions are often phrased in the indicative or the subjunctive mood, that what is important is that an utterance (or a gesture) functions as an imperative, and that its function is determined by the intention of the utterer. Since Olivecrona operates with a *functional*, not a grammatical, concept of an (independent) imperative, one cannot reasonably object to this analysis that it does not comport with, or is unclear from the point of view of, the grammar of imperatives.

One could, however, argue that since Olivecrona is clearly concerned with imperatives in a functional, not in a grammatical, sense, his concept of an independent imperative is not too different from the concept of a norm, as that concept is usually understood. That this is so is also suggested by Alf Ross's comment (1959, 8 footnote 2) that Ross can accept Olivecrona's analysis of the concept of a legal rule, even though he himself prefers to speak of *directives*, not norms, rules, or imperatives, when he has in mind the category of "intention-borne, emotive-volitional

expressions" (Olivecrona 1959, p. 7). But, as I said in sect. 8.5, Olivecrona has reason to insist that legal rules are imperatives, because (he believes that) imperatives, and only imperatives, have a suggestive character. One could, however, argue that if independent imperatives have a suggestive character at all, and if independent imperatives are not too different from norms, then norms, too, may have such a suggestive character. If this is right, then Olivecrona would not have to insist that legal rules are independent imperatives.

8.7 The Ontology of Legal Rules

Olivecrona maintains that it follows from his naturalist, anti-metaphysical analysis of the concepts of law and legal rule that our understanding of the existence of law must undergo a radical change once we accept this analysis. He maintains, more specifically, that law conceived of as a set of rules exists as *ideas* in the imperative form about human behavior, ideas that are again and again revived in human minds, and that this means that the law does not and cannot have permanent existence:

> We are dimly conscious of a permanent existence of the rules of law. We talk of them as if they were always there as real entities. But this is not exact. It is impossible to ascribe a permanent existence to a rule of law or to any other rule. A rule exists only as the content of a notion in a human being. No notion of this kind is permanently present in the mind of anyone. The imperative appears in the mind only intermittently. Of course the position is not changed by the fact that the imperative words are put down in writing. The written text—in itself only figures on paper—has the function of calling up certain notions in the mind of the reader. That is all. (1939, pp. 47–48)

Having thus argued that legal rules do not have permanent existence, Olivecrona proceeds in *Om lagen och staten* (1940aa, pp. 48–49) to criticize the view held by some American realists that law consists of *court decisions*, not rules (e.g., Frank 1970, chap. 6). He points out that there are indeed legal rules in a non-metaphysical sense, and that the reason why some American legal scholars have come to embrace the mistaken view that there are no legal rules, but only court decisions, is to be found in the circumstance that the practice of judicial review in the United States proceeds, on the whole, in the absence of determinate legal rules. Although he does not develop this idea further, I suspect he means that the U.S. Constitution contains some fairly indeterminate rules, or fragments of rules, such as the Equal Protection Clause (in the Fourteenth Amendment) and the Due Process Clause (in the Fifth and the Fourteenth Amendments), and that the existence of these indeterminate rules, or fragments of rules, encourages legal scholars to underplay the role played by legal rules in legal thinking. I leave it an open question whether there really is such a causal connection at work here.

I cannot accept Olivecrona's claim about the lack of permanence of law, however. As I have said (in Sect. 8.7.6), I believe we can account for the existence of law using the *conventionalist* account put forward by Eerik Lagerspetz (1995, chap. 1). As we remember, Lagerspetz holds that a social rule, *R*, exists if the members of the relevant group of people (1a) believe that *R* exists and (1b) believe that the others in

the group believe that *R* exists, and (2) act accordingly, that is, speak of *R* as existing and, if occasion arises, treat *R* as existing, at least partly because they have the beliefs (1a) and (1b). If we apply this analysis to the sources of law, we may say that a rule is a legal rule if it can be traced back to a source of law, such as legislation, precedent, or custom, that the existence of a source of law is in this sense a matter of convention, and that therefore legal rules, too, are conventional entities.

This type of analysis does not require that each and every member in the group always has the relevant attitude or belief uppermost in his or her mind. Generally speaking, convention-based phenomena, such as human languages or social rules, do not depend for their existence on the attitudes or beliefs of human beings in the strong the sense that Olivecrona contemplates. If they did, the Swedish language would cease to exist (at least temporarily) if all Swedes were asleep at the same time, and few people would accept this conclusion.

References

Articles

Åqvist, Lennart. 2008. Some logico-semantical themes in Karl Olivecrona's philosophy of law: A non-exegetical approach. *Theoria* 74:271–294.

Frändberg, Åke. 2005b. An essay on the systematics of legal concepts. In Frändberg, *Rättsordningens idé*, 63–96.

Frändberg, Åke. 2005c. Rules, rights and judgements in Karl Olivecrona's theory of law. In Frändberg, *Rättsordningens idé*, 365–374.

MacCormick, D. N. 1973. Legal obligation and the imperative fallacy. In A. W. B. Simpson, ed. *Oxford essays in jurisprudence,* 2nd series, 100–130. Oxford: Clarendon Press.

Olivecrona, Karl. 1951. Realism and idealism: Some reflections on the cardinal point in legal philosophy. *New York University Law Review* 26:120–131.

Olivecrona, Karl. 1962a. Legal language and reality. In Ralph A. Newman, ed. In *Essays in honor of Roscoe Pound,* 151–191. Indianapolis: The American Society for Legal History.

Pattaro, Enrico. 1980. In ricordo di Karl Olivecrona [In Memory of Karl Olivecrona]. *Rivista Trimestrale di Diritto e Procedura Civile [Quarterly Review of Private Law and Civil Procedural Law]* 4:1520–1538.

Spaak, Torben. 2003a. Norms that confer competence. *Ratio Juris* 16:89–104.

Stevenson, Charles Leslie. 1937. The emotive meaning of ethical terms. *Mind, New Series* 46:14–31.

Books

Austin, J. L. 1975. *How to do things with words,* 2nd ed. Eds J. O. Urmson & Marina Sbisà. Cambridge: Harvard University Press.

Frändberg, Åke. 1984. *Rättsregel och rättsval [Legal rule and choice of law]*. Stockholm: Norstedts.

Frank, Jerome. 1970. *Law and the modern mind*. 6th printing. Gloucester: Peter Smith. (Originally published 1930 by Brentano's Inc.)

Hare, R. M. 1952. *The language of morals*. Oxford: Oxford Univ. Press.

Hart, H. L. A. 1961. *The concept of law*. Oxford: Clarendon Press.
Kelsen, Hans. 1960. *Reine Rechtslehre [The pure theory of law]*. 2nd ed. Vienna: Österreichische Staatsdruckerei.
Lagerspetz, Eerik. 1995. *The opposite mirrors*. Dordrecht: Kluwer.
Olivecrona, Karl. 1939. *Law as fact*. Copenhagen: Einar Munksgaard (London: Humphrey Milford).
Olivecrona, Karl. 1940a. *Om lagen och staten [On law and the state]*. Copenhagen: Einar Munksgard & Lund: Gleerup.
Olivecrona, Karl. 1942a. *Lagens imperativ [The imperative of the law]*. Lund: Gleerup.
Olivecrona, Karl. 1971. *Law as fact*. 2nd ed. London: Stevens & Sons.
Raz, Joseph. 1980. *The concept of a legal system*. 2nd ed. Oxford: Clarendon Press.
Ross, Alf. 1959. *On law and justice*. Berkeley: Univ. of California Press.
Spaak, Torben. 1994. *The concept of legal competence*. Dartmouth: Dartmouth Publishers.
Strömberg, Tore. 1988. *Rättsordningens byggstenar [The elements of the legal order]*. Lund: Studentlitteratur.
Strömholm, Stig. 1996. *Rätt, rättskällor och rättstillämpning [Law, Sources of Law, and the Application of Law]*. 5th ed. Stockholm: Norstedts.
Sundby, Nils Kristian. 1974. *Om normer [On norms]*. Oslo: Universitetsforlaget.
von Wright, Georg Henrik. 1963a. *Norm and action*. London: Routledge and Kegan Paul.

Chapter 9
The Concept of a Right

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

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

9.1 Introduction

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

T. Spaak, *A Critical Appraisal of Karl Olivecrona's Legal Philosophy,*
Law and Philosophy Library 108, DOI 10.1007/978-3-319-06167-2_9,

declaration theory of court judgments is mistaken, and (iv) that there is a close connection between a belief in rights (and other non-natural entities) and a belief in magic.

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

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

9.2 The Concept of a Right

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I agree that the situation of constraint is real enough, but I do not understand why one would want to ensure that the debtor does pay the creditor, if one also believes that the promise "can never be fulfilled in a literal sense." If there are no dollars, no pounds, etc., why should the creditor want to be paid in the first place?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

9.3 Internal and External Rights Statements

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

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

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

9.4 The Choice Theory of Rights

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

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

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

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

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

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

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

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

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

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

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

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

9.5 Rights and Magic

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

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

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

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

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

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

References

Articles

Ekelöf, P. O. 1945. Juridisk slutledning och terminologi [Legal Inference and Terminology]. *Tidsskrift for rettsvitenskap* 211–270.

Hart, H. L. A. 1973. Bentham on legal rights. In A.W. B. Simpson, ed. *Oxford essays in jurisprudence* (second series), 171–201. Oxford: Oxford University Press.

MacCormick, Neil. 1976. Children's rights: A test-case for theories of right. *Archiv für Rechts- und Sozialphilosophie* 62:305–316.

MacCormick, Neil. 1977. Rights in legislation. In P. M. S. Hacker & J. Raz, eds. *Law*, *morality and society. Essays in honour of H. L. A. Hart,* 189–209. Oxford: Clarendon Press.

Olivecrona, Karl. 1962a. Legal language and reality. In Ralph A. Newman, ed. *Essays in honor of Roscoe Pound,* 151–191. Indianapolis: The American society for legal history.

Ross, Alf. 1957. Tû-tû. *Harvard Law Review* 70:812–825. (Originally published in Danish in O. A. Borum & Knud Illum, eds. 1951. *Festskrift till Henry Ussing,* 468–484. Copenhagen: Arnold Busck).

Wedberg, Anders. 1951. Some problems in the logical analysis of legal science, *Theoria* 17:246–275.

Books

Austin, J. L. 1975. *How to do things with words*. 2nd ed. Eds J. O. Urmson & Marina Sbisà. Cambridge, Massachusetts: Harvard University Press.

Hohfeld, Wesley Newcomb. 2001. *Fundamental legal conceptions as applied in judicial reasoning*. David Campbell & Philip Thomas. Eds. Dartmouth: Ashgate. (Originally published in two parts in the *Yale Law Journal*: 1913 and 1917).

Olivecrona, Karl. 1939. *Law as fact*. Copenhagen: Einar Munksgaard & London: Humphrey Milford.

Olivecrona, Karl. 1957. *The problem of the monetary unit*. Stockholm: Almqvist & Wiksell.

Olivecrona, Karl. 1971. *Law as fact*. 2nd ed. London: Stevens & Sons.

Ross, Alf. 1959. *On law and justice*. Berkeley: University of California Press.

Searle, John R. 1969. *Speech acts*. Cambridge: Cambridge University Press.

Simmonds, N. E. 2002. *Central issues in jurisprudence*. 2nd ed. London: Sweet & Maxwell.

Spaak, Torben. 1994. *The concept of legal competence*. Dartmouth: Dartmouth Publishers.

Chapter 10
Law, Force, and Social Morality

Abstract Olivecrona maintains that law is essentially a matter of organized force. He maintains, more specifically, (i) that (organized) force is necessary to the existence of law; (ii) that law consists chiefly of rules about the use of force; (iii) that the force of law exerts its influence on social life chiefly indirectly; (iv) that the force of law causes the citizens to internalize the moral values and standards that make up the content of the legal rules; and (v) that abolishing the force of law would, as time passes, likely result in important—and dangerous—changes in the moral values and standards we accept. He also maintains (vi) that organized force can serve the citizens only if there is an organization, namely the state, that has the monopoly on power in the relevant territory, (vii) that the Marxist theory of the state, according to which law and state will ultimately wither away, is mistaken; and (viii) that a belief in international law and the rights and duties involved is apt to lead to increased use of violence. In his later writings, Olivecrona reiterates claims (i), (ii), and (vi), but does not have much to say about claims (iii)–(v), (vii), and (viii). He does, however, maintain (ix) that the coercive power of the state presupposes that the state also has psychological power, and vice versa, and (x) that only judicial independence and sound judicial ethics can guarantee legal certainty.

I argue that claims (i), (iii)–(vii), (ix), and (x) are true, and that claims (ii) and (viii) are false, and that claim (i) ought to be understood as a claim about *conceptual* necessity, if it is to concern the problem about the nature of law, even though this means that Olivecrona's argument in support of the claim becomes problematic. I also argue that Olivecrona's analysis of the role of force in law is an important counterweight to the large number of contemporary theories of law that give little or no consideration to this topic and an important reason why Olivecrona's legal philosophy is so interesting.

T. Spaak, *A Critical Appraisal of Karl Olivecrona's Legal Philosophy,*
Law and Philosophy Library 108, DOI 10.1007/978-3-319-06167-2_10,

10.1 Introduction

In the fourth and final chapter of the First Edition of *Law as Fact*, Olivecrona sets out to clarify the role of force in law (1939, p. 126). He observes that the reader will now have arrived at the conclusion that, on his (Olivecrona's) analysis, law is essentially organized force. For, he points out, the reader will have realized that if law is not binding in the traditional sense, if there are no rights and duties, if it is only a question of the psychological effects of some independent imperatives, then law must be essentially organized force (Olivecrona 1939, p. 123). And, he adds, the reader is right.

Olivecrona, who takes the term 'force' to cover not only "actual violence," but also "the influence exercised by the concentration of superior strength" (Olivecrona 1939, p. 126), maintains, more specifically, (i) that (organized) force is necessary to the existence of law; (ii) that law consists chiefly of rules about the use of force; (iii) that the force of law exerts its influence on social life chiefly indirectly; (iv) that the force of law causes the citizens to internalize the moral values and standards that make up the content of the legal rules; and (v) that abolishing the force of law would likely result in important—and dangerous—changes in the moral values and standards we accept. He also maintains (vi) that organized force can serve the citizens only if there is a organization, namely the state, that has the monopoly on power in the relevant territory,[1] (vii) that the Marxist theory of the state, according to which law and state will ultimately wither away, is mistaken; and (viii) that a belief in international law and the rights and duties involved is apt to lead to increased use of violence. In his later writings, Olivecrona reiterates claims (i), (ii), and (vi), but does not have much to say about claims (iii)–(v), (vii), and (viii). He does, however, maintain (ix) that the coercive power of the state presupposes that the state also has psychological power, and vice versa, and (x) that only judicial independence and a sound judicial ethics can guarantee legal certainty.

I argue that claims (i), (iii)–(vii), (ix), and (x) are true, and that claims (ii) and (viii) are false, and that claim (i) ought to be understood as a claim about *conceptual* necessity, if it is to concern the problem about the nature of law, even though this means that Olivecrona's argument in support of the claim becomes problematic. I also argue that Olivecrona's analysis of the role of force in law is an important counterweight to the large number of contemporary theories of law that give little or no consideration to this topic, and an important reason why Olivecrona's legal philosophy is so interesting.

I deal with Olivecrona's claims in turn (Sects. 10.2–10.11) and add a few words about Olivecrona's thoughts on World War II (Sect. 10.12). The chapter concludes with an assessment of the jurisprudential significance of Olivecrona's thoughts on law, force, and social morality (Sect. 10.13).

[1] As we shall see in Sect. 10.7, this claim is put forward by Olivecrona in *Om lagen och staten* (1940a).

10.2 Organized Force and the Existence of Law

The first of Olivecrona's claims about law and organized force, then, is that organized force is necessary to the existence of law, in the sense that law depends necessarily on the use of force by state organs, *inter alia*, in the case of police measures against disturbances, the infliction of punishment, and the execution of civil judgments (Olivecrona 1939, pp. 124–125). The idea appears to be that law could not fulfill its function—to secure peaceful coexistence among human beings—if it did not make use of force.

Olivecrona observes that we tend to believe that force is alien to law, because the actual use of force is very much kept in the background in the day-to-day workings of the legal machinery. But, he points out, the reason why the use of force can be reduced so much in the modern state as to lead us to believe that force is alien to law, is that organized force of overwhelming strength is at every moment available, and that therefore resistance would be futile (Olivecrona 1939, p. 126).

The reason why Olivecrona believes that organized force is necessary to the existence of law is that he believes that human beings tend to behave in such a way that disaster and ruin would follow if they were left free to behave as they pleased:

> This organized force is actually the backbone of our community as it stands. It is absolutely necessary for this purpose. We cannot conceive a community—at least not under modern conditions—which is not based on organized force. Without [it] there could be no real security, not even with regard to life and limb. The *hidden reserves of hate, of lust for revenge, and of boundless egoism* would break through in a destructive way if not held in check by the presence of force, immeasurably superior to that of any single individual or any private combination. Men need taming in order to live peacefully together. But taming on such a great scale as is required here presupposes unconquerable force. (Olivecrona 1939, p. 136. Emphasis added)

In a later publication, Olivecrona maintains, in keeping with this, that the existence of a world morality, that is, a set of moral rules and principles aiming to guide and constrain human actions on a global level, presupposes the existence of world law, which in turn presupposes the existence of a world organization that can enforce the world law—if these two conditions are not satisfied, he explains, it is futile to expect moral action on the global level (1945, p. 60). He adds that it is an open question whether we will ever arrive at a world morality (Olivecrona 1945, p. 61).

Although Olivecrona does not elaborate on his thoughts on this topic, it is clear that his view of human nature, or at least the tendency of humans to resort to violence, etc. echoes that of Thomas Hobbes, who said that life in the state of nature would be "solitary, poore, nasty, brutish, and short." (1991 [1651], Chap. 13, § 9, p. 89) We might say that Olivecrona's legal philosophy can in this limited sense be seen as an attempt to apply a Hobbesian approach to law and politics to the field of jurisprudence.[2]

[2] The similarity between Olivecrona's and Hobbes's philosophies has been noted in Nordin (1983, pp. 123–126). For a defense of a more robustly Hobbesian conception of law, see Ladenson (1980).

Olivecrona thus rejects (what he calls) the traditional view, according to which law and force are two distinct and, indeed, antithetical, entities. This view, he explains, is based on the metaphysical view of law, according to which law is a set or a system of rules that have binding force and can impose duties and confer rights on persons (1939, p. 127). But, he points out, as soon as we see through the metaphysical view of law, the whole distinction between law and force crumbles. He offers the following characterization of what he takes to be the true state of affairs:

> Law includes force, or rather, there is in every state an organization of overwhelming force, working according to the rules called law. By means of this organization other forms of force are kept in check. The organized legal force is, of course, regarded in another light than force of an illegal character. It is generally supported by public opinion and surrounded by a traditional reverence since it is a necessary element in the organisation upon which our well-being and even our existence is based. But this does not alter its essential objective nature. (Olivecrona 1939, p. 127)

He emphasizes that the traditional view has it not only that law and force are two distinct entities, but that the law is *guaranteed* by force, or, perhaps, that rights are guaranteed by force. He objects, however, that the only thing that can be guaranteed by force is an actual state of affairs in the community, such as peace and order:

> This actual state of things is a consequence of the use of force according to the law. Without a continued exercise of such force it cannot be maintained. In this sense it is guaranteed by force. But the law is not identical with the actual state of things. It is a body of rules which (according to current opinion) determines what *ought* to be the actual state of things. This body of rules is regarded as being endowed with a vague and undefined power—the power residing in their "binding force", the power to create rights and duties. What is really meant by saying that law is guaranteed by force is that this power is backed by actual force. (Olivecrona 1939, p. 129)

Olivecrona proceeds to consider a distinction between two types of legal rule that is familiar in the Scandinavian countries, namely the distinction between primary rules, which lay down rights and duties for the citizens, and secondary rules, which concern the sanctions that are to be imposed if a primary rule has been violated (Olivecrona 1939, pp. 130–134). He maintains, however, that this distinction lacks a basis in reality. The real situation, he explains, is that the rules of private law appear as primary rules, and that judges (and legal scholars) *assume* the existence of secondary rules that correspond to the primary rules, whereas the rules of criminal law appear as secondary rules, and judges (and legal scholars) *assume* the existence of primary rules that correspond to the secondary rules. He points out, as we have seen in Sect. 8.4, that we believe that primary rules have an independent existence, because we assume that they have binding force and create rights and duties that exist in an ideal world independently of the use of force. But, as we have seen in Chap. 7, he believes that the binding force is illusory:

> The sole effect of the rules is their effect on the minds of people—the citizens and the officials concerned, causing them to act in a certain way. The ideas of rights and duties are used as a means to describe the actions desired and also to work on people's feelings. Only these ideas are realities—the imagined powers and bonds called rights and duties have no objective existence. It is therefore impossible to base a scientific distinction on the assumption that some rules, in contrast to others, really give rise to such powers and bonds. (Olivecrona 1939, pp. 133–134)

I find Olivecrona's claim about law and organized force problematic. First, it is not clear what Olivecrona means by 'law' when he maintains that organized force is necessary to the existence of law, that is, when he maintains that there can be no law without organized force.[3] For he cannot reasonably mean (ia) law in the sense of rules that are actually backed by organized force, or (ib) law in the sense of rules that *aim* to regulate the use of force, because claim (ia) would be trivially true and therefore without interest (if 'law' is defined as rules that are actually backed by force, then law obviously presupposes such force), and claim (ib) would be false (if 'law' is defined as rules that *aim* to regulate the use of force, then law obviously does *not* presuppose such force). And he cannot reasonably mean (ii) law in (what he himself calls) the metaphysical sense, because he maintains that there is no law in the metaphysical sense. What, then, does he mean? Well, he might of course mean (iii) law as a set or a system of non-binding (in Olivecrona's sense) rules (or norms) that aims to regulate human behavior, much like Kelsen, Hart, and many others do, although his objections to the traditional understanding of law—essentially that this amounts to law in the metaphysical sense (see 1939, Chap. 1)—makes one wonder if he could consider this to be a viable alternative. If, however, he were to reject this alternative, his claim about law and organized force would seem to be incoherent. For there seems to be no plausible meaning of 'law' left.

Secondly, Olivecrona's claim does not seem to be a claim about the nature of law, as that topic is understood by contemporary legal philosophers. For Olivecrona's claim is plausible only if we take it to concern natural necessity or, perhaps, contingent facts, whereas the problem about the nature of law concerns logical, or conceptual, necessity. As Hans Oberdiek (1976) and Joseph Raz (1990, pp. 157–161) point out, it seems to be logically or conceptually possible for there to be a legal system that does not make use of force. Thus Raz suggests that we can imagine rational beings other than humans who are subject to a system of norms, and who have reason to obey these norms, whether or not there are any sanctions (Raz 1990, p. 159). And while this thought-experiment seems rather far-fetched, I agree with Raz that a legal system that does not make use of force is a logical, or conceptual, though not a "natural," possibility.

The relevance of the distinction between logical and natural necessity in this context is that it makes Olivecrona's line of reasoning problematic. For a claim about *conceptual* necessity simply cannot be based on a claim about *natural* necessity, still less on a claim about contingent facts.[4] That this is so should be clear upon reflection. Just as a factual claim cannot entail a normative claim or a value judgment, it cannot entail a claim about any kind of necessity. Factual truth and necessary truth (of whatever kind) are simply different, and whereas a necessary truth entails the corresponding factual truth, the reverse does *not* hold.[5] Similarly, a claim about natural necessity cannot entail a claim about conceptual necessity.

[3] I would like to thank Lars Lindahl for drawing my attention to this difficulty in Olivecrona's analysis.

[4] I would like to thank Folke Tersman for emphasizing this point in conversation.

[5] This claim needs some modification, however. In any system of modal logic, such as *T*, *S4* and *S5*, the theorem $p \supset Mp$ holds, and in the system *S5* the theorem $Mp \supset LMp$ holds. Thus in *S5* the

The difference between conceptual and natural necessity is nicely illustrated by H. L. A. Hart's (1958, pp. 621–624) brief discussion of the precise meaning of the claim that certain provisions are necessary in a legal system. Hart points out that rules prohibiting the free use of violence and rules constituting the minimum form of property are necessary in any legal system, *given* human nature and our wish to survive. Nevertheless, the article in which this discussion can be found is devoted to a defense of the separation thesis of legal positivism, which asserts that there is no *conceptual* connection between law and morality. That is to say, Hart reasons that since rules of the above-mentioned type are "naturally," but not conceptually, necessary, he may without contradiction defend the separation thesis.

Consider also Joseph Raz's defense of exclusive legal positivism (1985, pp. 300–305). Raz's starting point is that it is a matter of conceptual necessity that the function of law is to *claim* (legitimate) authority and to settle disputes in an authoritative manner, and that therefore it must be capable of *having* authority, even if in fact it doesn't have it. Raz then points out that the law could not fulfill its function, if it weren't possible for the parties to identify the directive (or decision) "without relying on reasons or considerations on which the directive [or decision] purports to adjudicate." (Raz 1985, p. 303) For, he reasons, if they had to reconsider the reasons or considerations that the directive was meant to replace, in order to identify the directive in the first place, the directive would be of no use to them; and if the directive would not be of any use to them, the law could not fulfill its function.[6]

The relevant difference between Raz's and Olivecrona's lines of argumentation is that Raz bases his claim about the nature of law—that exclusive legal positivism is the true theory of law—on a claim about conceptual necessity, viz. that the function of law is to claim (legitimate) authority and to settle disputes in an authoritative manner, whereas Olivecrona bases his claims about the nature of law on nothing more than claims about natural necessity or contingent, factual claims, namely the claim that human beings behave in such a way as to need taming in order to be able to live peacefully together.

10.3 Legal Rules as Rules About the Use of Force

Olivecrona's second claim is that law consists chiefly of rules about the use of force (1939, p. 134): "The real situation is that law—the body of rules summed up as law—consists chiefly of rules about force, rules which contain patterns of conduct for the exercise of force." He explains (Olivecrona 1939, p. 135) that even though legal rules, such as the rules of private law, are commonly thought to contain patterns of conduct for ordinary citizens, they are *also* rules about the use of force; and the second aspect carries more weight than the first, because "everything turns upon the regular use of force." He adds that the rules of administrative law, too, are

following holds: $p \supset LMp$. On this, see Hughes and Cresswell (1968, pp. 43–46).

[6] For critique of Raz's argumentation, see Coleman (2001a, pp. 126–127).

essentially rules about force, in the sense that they presuppose that there is organized force behind them (Olivecrona 1939, p. 135).

Olivecrona's analysis is not satisfactory, however. For it is clear that, as Olivecrona uses it, the expression 'rule about the use of force' does not have the same meaning in the fields of criminal and private law as it does in the field of administrative law—in the former fields it means something like 'rule that contains a pattern of conduct for the exercise of force,' whereas in the latter field it means something like 'rule that presupposes that there is organized force behind it.' But only the former sense of the expression is of any interest. In the latter sense, the claim does not add anything of interest to the first claim (considered in Sect. 10.2 above): that organized force is necessary to the existence of law.

But even if Olivecrona were to clarify the meaning of the expression 'rule about the use of force' accordingly, he would also have to consider the problem about the *individuation* of rules: What is *one* legal rule, as distinguished from a rule fragment? (on this, see Raz 1980, pp. 140–147; Spaak 1994, pp. 161–166). Olivecrona needs an answer to this question, because one might reasonably object to his analysis, that on closer inspection an entity that contains a pattern of conduct for persons other than officials—a "primary rule," in the terminology introduced in Sect. 10.2—may turn out to be a complete and independent rule that does *not* also contain a pattern of conduct for the use of force, and that therefore not all legal rules are rules about the use of force. As we have seen in Sect. 8.4, jurisprudents have debated the question whether permissive rules and so-called power-conferring rules are complete and independent rules, or just a part of complete and independent duty-imposing rules addressed to judges. For example, H. L. A. Hart (1961, Chap. 3) argued that we have good reason to conceive of power-conferring rules as complete and independent legal rules (on this, see Spaak 2003a). If Hart is right, Olivecrona must be mistaken. But, as I said in Sect. 8.4, I do not think Hart is right: Competence rules and permissive rules are best conceived as fragments of duty-imposing rules.[7] But it does not follow from this that all legal rules are rules about the use of force. For in order for this to be so, such duty-imposing rules would have to be addressed to judges and other legal officials (see, e.g., Kelsen 1999, p. 29); and I can see no good reason to believe that this is the case.

10.4 The Indirect Influence of the Force of Law

Olivecrona's third claim is that the force of law exerts its influence on social life chiefly *indirectly*. The truth of the matter, he explains, is that organized force consistently applied by the state organs is much more important to the influence of the law on social life than the immediate effects, say, of punishing some criminals or

[7] Olivecrona's view, as we have just seen, is that such rules cannot have an independent existence since they lack binding force (in the moral sense). But, as we have also seen, this response is not convincing.

transferring property from debtors to creditors in a few cases (1939, pp. 141–142): "The sufferings of some thousands of criminals, the transfer of property in a number of cases from debtors to creditors, is a small matter in comparison with the fact that people in general abstain from the actions labeled as crimes, pay their debts, etc."

I am not, however, convinced that the influence of the force of law on people is *indirect* as opposed to immediate. The problem is that the very distinction between (a) organized force consistently applied and (b) the immediate effects, say, of punishing some criminals or transferring property from debtors to creditors in a few cases, seems difficult to uphold. Thus it seems that on Olivecrona's analysis, the crucial fact is that the vast majority of the citizens obey the law, not that organized force is consistently applied, though on this analysis the former depends on the latter. But assuming that the former does depend on the latter, while the legal system could certainly strike out in a capricious manner and punish a criminal here and there, or transfer property from some debtors to some creditors, it does not seem possible for the legal system to apply organized force consistently *without* punishing some criminals and transferring property from debtors to creditors in a few cases.

In any case, Olivecrona maintains that we tend to overlook the indirect influence of the force of law, because we do not like to acknowledge that *fear of sanctions* is what motivates us to obey the law. But, he explains, the introspection on which we base our denial of the role played by fear does not go deep enough. As a matter of fact, the knowledge that sanctions are regularly inflicted on law-breakers has a most profound effect on our attitude toward the legal rules, and this effect is not necessarily limited to inspiring fear in us (Olivecrona 1939, p. 146): "It would be astonishing if this were not the case. How could we escape from the influence of the relentless machinery of force, which was functioning when we were born and surrounds us during our whole life? Surely, it must leave deep impressions on our mind."

Olivecrona is, however, quick to point out that this does not mean that we live under an ever-present fear of being subjected to the force of law. Since it is intolerable to live in constant fear, we adapt to the circumstances and do not even consider the possibility of committing a crime:

> This is a very important fact. If we let the mind play with tempting acts (e.g. of enrichment or revenge), involving breaches of the law, fear is also evoked, since the idea of a sanction, executed with irresistible force, is connected with the idea of law-breaking. Fear raises itself as a barrier against law-breaking. But we cannot go on harbouring ideas of law-breaking and at the same time combating them with fear. This would have a disruptive influence on the personality. We simply cannot do so in the long run without endangering our mental health. The internal cleavage would prove too much. Therefore the dangerous wishes must be excluded from our mind. If we do not entirely succeed in doing this, they are at least relegated to the sphere of day-dreams, more or less completely cut off from our every-day activities. (Olivecrona 1939, pp. 147–148)

I believe the claim about the fear of sanctions as the basis of social morality is plausible, if somewhat exaggerated. For while I believe that the pressure generated by an effective legal system does influence us, I can see no sign that the criminals adapt to the circumstances, as Olivecrona suggests we all do. And I assume that Olivecrona would not wish to explain the existence of more than just a few criminals, such as

organized crime in the United States and elsewhere, by reference to the breakdown of the legal system. Hence Olivecrona's claim about the role of fear cannot be accepted as it stands, but must be qualified in some way. But the more we qualify it, the less interesting it becomes.

10.5 The Influence of the Force of Law on Our Moral Values and Standards

Olivecrona's fourth claim is that the law causes us to internalize the moral values and standards that make up the content of the legal rules. And, as Olivecrona sees it, we can say that the law is firmly established only when the main independent imperatives have been thus internalized. He states the following:

> The rules of law are independent imperatives. In that form they are communicated to young and old. You shall not steal!—of this type are the rules concerning our behaviour. Now these imperatives are (so to speak) absorbed by the mind. We take them up and make them an integral part of our mental equipment. A firm psychological connexion is established between the idea of certain actions and certain imperative expressions, forbidding the actions or ordering them to be done. The idea of committing e.g. theft is coupled with the idea of an imperative: you shall not! Then we have a moral command with "binding force". We speak of a moral command when an independent imperative has been completely objectivated and therefore regarded as binding without reference to an authority in the outer world. The chief imperatives of the law are generally transformed in that way. Only when this is the case is the law really firmly established. (Olivecrona 1939, pp. 154–155)

The main reason why we internalize the independent imperatives so readily, he explains, is that the *suggestive character* of imperatives is enormous, especially when the power of the state, surrounded by august ceremonies, is behind the imperatives (Olivecrona 1939, p. 155): "All this combines to make a profound impression on the mind, causing us to take the fundamental 'command' of the law to heart as objectively binding. We do it all the more readily since we understand, at least instinctively, the necessity of these rules for the maintenance of peace and security."

We see that Olivecrona's claim that the law causes us to internalize the moral values and standards that make up the content of the legal rules is distinct from, but depends on, the above-mentioned claim, discussed more in depth in Chap. 8, that independent imperatives have a suggestive character, which can be traced back to our reverence for the constitution. Olivecrona's idea, as the reader will remember, is that imperatives work directly on the will of the recipient of the imperative, and that if a command takes effect, there arises in the addressee's mind a value-neutral intention to perform the commanded action, that is, an intention that is not motivated by the addressee's own wishes.

Although I find Olivecrona's thoughts on the influence on the citizens of the organized force of the law congenial to my own way of thinking, I also find the analysis problematic. If, as Olivecrona believes, we internalize the moral values and standards that make up the content of the legal rules, how could anyone endorse a political agenda at odds with the agenda set by the dominating party, if there is

one? One may, for example, wonder how there could be any political opposition in Olivecrona's own country, Sweden, where one political party dominated the political scene for a long time, including Olivecrona's years as an adult. One may also wonder how Olivecrona can square his claim (in Sect. 10.8 below) that Marxists view law as an instrument of oppression and exploitation with the claim that the force of law influences our moral values and standards. Does it not influence Marxists?

Olivecrona might, however, respond that even though the citizens will internalize the values and standards that make up the content of the legal rules, this does not mean that these values and standards will always trump, in case of a conflict, other values and standards that the citizens may also have internalized. Whether they will in fact trump such other values and standards is a contingent matter about which we can say very little on a general level. I can accept this. We should, however, note that to the extent that this is true, the claim that the law causes human beings to internalize the values and standards that make up the content of the legal rules also becomes less interesting.

10.6 The Dependence of Our Moral Values and Standards on the Force of Law

Olivecrona's fifth claim is that abolishing the force of law would likely result in important—and dangerous—changes in the moral values and standards that we accept:

> Take away those sanctions, abolish the machinery of force, and his morals will undergo a pro-found change. They will be adapted to the new state of things, where the individual cannot rely on an organized force to protect him. His morals will tend to fortify him in the struggle for existence which now takes place under conditions entirely different from those under which his old morals were suitable. Many acts, which in the quietude of a lawful society he despised or abhorred, will now appear as the necessary and permissible and virtuous means of maintaining himself and his family. To deny this is an expression of narrow-minded, blinded self-righteousness. Every major catastrophe, such as a war or a revolution, furnishes abundant proof. (Olivecrona 1939, pp. 160–161)

My guess is that Olivecrona is right about this. While I can offer no empirical evidence to support my view, I believe that, on the whole, humans are not strong-willed enough to follow the rules when this is not likely to benefit them in the short run; and that, therefore, if some people are able to break the rules with impunity, others are likely to follow. A person who follows the rules in such a situation is likely to strike many as being plain dumb, or at least as being a loser.

One may wonder whether the truth of claim (v) presupposes the truth of claim (iii), that the force of law exerts its influence on social life chiefly indirectly, or the truth of claim (iv), that the law causes us to internalize the moral values and standards that make up the content of the legal rules. I do not think so. As far as I can see, the truth of claim (iii) or claim (iv) is neither a necessary nor a sufficient condition for the truth of claim (v). The reason is that claim (iii) does not concern our moral values and standards, but rather prudential matters, and that claim (iv) concerns the *internalization*, but not necessarily the maintenance, of the relevant

moral values and standards. I should, however, add that I am not sure that my preferred interpretation of claims (iii) and (iv) corresponds to Olivecrona's intentions. For all I know, Olivecrona might say that claim (iii) does concern moral matters and that claim (iv) concerns not only the internalization, but also the maintenance, of the relevant moral values and standards. And if this were so, it seems that the truth of one or the other, or both, of claims (iii) and (iv) could be a necessary or a sufficient condition, or both, for the truth of claim (v).

10.7 The State

Olivecrona does not have much to say about the state and its functions in the First Edition of *Law as Fact*, but he considers this topic in *Om lagen och staten* (1940a). Here he maintains (i) that organized force can serve the citizens only if there is an organization that has a monopoly on coercive power within the relevant territory and if the exercise of power within this organization follows a set of stable rules, (ii) that a monopoly on coercive power is a necessary condition for civilized life, and (iii) that power is a psychological relation between the power-holder and the people over whom he has power (Olivecrona 1940a, p. 162). He also explains that the organization in question is the *state*, and that it is characteristic of the state that it controls a certain territory by force of arms and that it has a monopoly on power within this territory (Olivecrona 1940a, pp. 162–164).

He proceeds to explain that power is not some sort of mysterious *ability* that some persons have and others lack, but a *psychological relation* between the power-holder and the people over whom he has the power. He writes:

> Power is not some kind of force that compels obedience. The reality that the word denotes comprises a whole situation with two parts: on the one hand the power-holder's person and position in society, in general everything that he can use to make an impression on others and get them to submit to his will; on the other hand the other person's individual characteristics and rank in relation to the former, everything that makes him disposed to obey him. (Olivecrona 1940a, p. 166)[8]

Olivecrona points out that it follows from this analysis that, strictly speaking, there is no such thing as state power (Olivecrona 1940a, p. 167). Instead, there are within the state organization various positions of power controlled by various persons. And he adds to his analysis, as we have seen in previous chapters, and as we shall see again in Sect. 15.2, that these positions of power depend on the law—if there were no law, there would be no such positions of power (Olivecrona 1940a, p. 168).

I find Olivecrona's analysis persuasive. That the state is an organization that has a power monopoly within a certain territory, that the existence of the state thus

[8] The Swedish original reads as follows. "Makten är icke någon kraft som framtvingar lydnaden. Den realitet, som ordet betecknar, innefattar en hel situation med två led: å ena sidan makthavarens person och ställning i samhället, överhuvudtaget allt som han kan använda för att göra intryck på andra och få dem att foga sig efter hans vilja, å andra sidan den andra partens personliga egenskaper och ställning i förhållande till den förre, allt som gör honom disponerad att lyda denne."

conceived is necessary to civilized life, and that power is primarily a psychological relation seems right to me. Who but an anarchist would take a different view?[9] Olivecrona does not, however, consider any other analysis of the concept of the state, which means that it is difficult to assess the novelty of his analysis.

10.8 The Marxist Theory of the State

Olivecrona concludes his analysis of the relation between law, force, and morality in the First Edition of *Law as Fact* with a few words about the Marxist theory of the state. He explains that this theory has it that organized force is necessary only when there is a conflict of interest in the community, that the state is an apparatus of organized force whose purpose is to keep the lower social class or classes in check, and that the state will wither away in a classless society because there will then be no need for an apparatus of organized force (1939, p. 182).[10] He objects, however, that the Marxist theory is incorrect, because the law and the state are necessary to peaceful coexistence among human beings.

He points out that the Marxist prediction of a future classless and non-coercive society is a pipe dream, because it is premised on the mistaken view that the use of organized force is motivated by the division of the population into different social classes when in fact it is necessary to the existence and well-being of us all; and he adds that the very idea of abolishing organized force is vain, because it would amount to leaving the community defenseless against the possible rise of warlords or strongmen of various kinds (Olivecrona 1939, p. 188) He notes that the Marxist answer to the latter objection is that there will be no such people in a communist, that is, a classless, society, but he immediately rejects this claim as baseless (Olivecrona 1939, p. 188). He concludes (Olivecrona 1939, p. 188) that "[o]rganised force, subjected to rules determined by common interests, will therefore always be necessary if only to protect the community against the formation of lawless, terroristic bands."

The reason why Marxists have been unable to see that organized force is necessary to the existence of law, he explains, is that they have failed to see that what motivates us to obey the law is ultimately the existence of organized and irresistible force, which is necessary to uphold our moral values and standards, and that this failure can be explained by reference to the (mistaken) Marxist belief that the law is necessarily an instrument of oppression. He puts it as follows:

> To them [the Marxists] the idea of force in that society has been indissolubly associated with odious oppression and exploitation. It has therefore been impossible for them to see

[9] There remains, of course, the question about the scope of state activities. For example, while Nozick (1974) argues that nothing more than a minimal state is necessary to civilization, quite a few defend a welfare state of a contemporary European type, which aims at extensive redistribution of resources. I shall not, however, go into this question here.

[10] Swedish-speaking readers may want to consult Olivecrona's fuller analysis of the Marxist theory of the state in Olivecrona (1941b).

> that our moral standards are dependent on the use of legal force. This explains how Marxists can envisage with satisfaction the disappearance of organized force, which would actually mean opening the cage where the human beast is kept in custody, making the law of the jungle once more supreme. (Olivecrona 1939, p. 189)

He concludes his reflections on the Marxist theory by pointing out that the real problem will always be how to control the use of power, so that it works in the interest of all. He points out that although the problem will not be easily solved, it is clear that it *can* be solved (Olivecrona 1939, p. 192): "Experience shows it can, for we have abundant material to prove that power—even the principal form of power, that of directing force—to a very great extent *is* actually regulated, actually 'harnessed.' The solution can only be furthered by stating the problem clearly as it really stands."

We see that Olivecrona's rejection of the Marxist theory depends on the truth of the claim that organized force is necessary to the existence of law, and that the explanation of the Marxist mistake depends on the truth of the claim that it is ultimately fear of sanctions that motivates people to obey the law. I accept both these claims. That is to say, I accept the claim that the Marxist theory of the state is mistaken, and that at bottom the mistake of the Marxists was (and is) to not appreciate that organized force is necessary to the existence of law, and that organized force plays an important role in the explanation of our willingness to obey the law.

I want to add, however, that while the Marxist idea that we could somehow work our way toward a classless society, in which there are no important conflicts of interests, is simply naïve, the idea that the way to the classless society proceeds through the so-called dictatorship of the proletariat, which Olivecrona does not discuss, is deeply disturbing from a moral point of view. My guess is that it could, and would, turn out to be a matter of "odious oppression and exploitation," as Olivecrona puts it in the quotation above.[11]

10.9 The Role of Force in International Law

Olivecrona maintains that international law cannot be law in the same sense as domestic law, because there is no organization charged with the task of applying and enforcing the rules of international law. Although states sometimes use force against one another, such force is not used in accordance with a set of rules, but is used irregularly in a way that depends on the relevant state's interests (1939, pp. 193–194). As a result, international law can only be thought of as law in the metaphysical sense (Olivecrona 1939, p. 197).

[11] To be sure, Anders Fogelklou (1978, pp. 223–226) points out that the label "the dictatorship of the proletariat" is not fully apt, because when using this label Marx was not primarily concerned to characterize the *form* of government (that is, dictatorship instead of, say, democracy), but rather a situation in which the proletariat, instead of the bourgeoisie, was in charge.

He explains that the ideas of rights and duties have a double function in international law (Olivecrona 1939, p. 200): "On the one hand they create certain inhibitions against violence. But on the other hand they positively incite to violence." He points out that one typically has in mind the restrictive function of rights when one praises international law as an instrument of peace, while overlooking the violence-inciting function, which inclines people to resort to violence in order to protect their interests. The latter function, he explains, is based on the fact that a person's belief that he has a right not only entails a belief that he may perform certain actions, but also generates feelings and ideas of strength and confidence that concern, *inter alia*, the use of force in situations where he wants to protect and vindicate his rights (Olivecrona 1939, p. 203): "These acts [of violence] are… freed from the shackles of the imperative "no!" generally associated with the idea of violence and they, too, are accompanied by feelings of strength and confidence." We see that Olivecrona is here drawing on his analysis of the function of the concept of a right to excite and to dampen feelings, discussed above (in Sect. 9.2).

Olivecrona explains that the restrictive function, although real, is primarily to be found in *domestic* law, not in international law. The reason is that the ideas of rights (and duties) are not supported in the field of international law by "uniform and unflinching pressure of a regular use of force, directed by impartial and conscientious judges." (Olivecrona 1939, p. 200) He adds (Olivecrona 1939, p. 201) that the absence of such uniform and unflinching pressure means that the ideas of rights (and duties) are not as uniform in international law as they are in domestic law, since it is "the monopoly of force [that] entails a far-reaching unification of ideas, by imposing a certain set of ideas and excluding others."

He maintains, in keeping with this, that the absence of constraints in the field of international law means that a belief in rights and duties under international law is apt to lead to increased use of violence instead of the opposite:

> The state is deemed to vindicate its right itself. It is regarded as entitled to use violence to this end, at least when it appears to be absolutely necessary (as is evident from the fact that every state keeps military forces). In other words, no prohibiting imperative is associated with the idea of violence in these cases (except by extreme pacifists, who are only a small minority when it comes to business). And feelings of strength and confidence in victory are associated with such violence, or the threat of making use of it. These feelings are even purposely excited by the leaders of states in order to augment their war-potential. Add now that the ideas about rights are under no control from outside the states, that they are chiefly determined by the interests prevailing in each state, that the different systems of ideas of rights are therefore sharply opposed to each other—and we get a notion of what the Law of Nations, and the rights of states, actually mean for the release of violence between peoples. Their effect in this respect is exactly opposed to that of an instrument of peace. As a matter of fact, the ideas of rights and justice are part and parcel of the armaments of every state. (Olivecrona 1939, pp. 204–205)

Let us note in conclusion that Vilhelm Lundstedt argued in the beginning of the 1930's that international law is based on metaphysical, even superstitious, notions, and that as a result the world is a very dangerous place. He pointed out that while it is bad enough to assume that individuals have rights and duties, this assumption is apt to lead to disaster when applied to *nations*. For, he explained, the idea

that nations have rights and duties and can be guilty of wrongdoing that must be punished leads unavoidably to aggression and, in the last instance, to war (1932, pp. 332–333). This is clearly in keeping with Olivecrona's view. My guess, then, is that Olivecrona's analysis was inspired by Lundstedt's thoughts on this topic.

10.10 Coercive and Psychological Power

In the Second Edition of *Law as Fact* (1971, pp. 270–273), Olivecrona reiterates claims (i), (ii), and (vi) but does not have much to say about claims (iii)–(v) and (vii)–(viii). His fullest treatment of these issues is instead to be found in *Rättsordningen* (1976, Chap. 7), where he concentrates on the foundation of legal certainty (*Rechtssicherheit*).

Having reiterated the claims that organized force is necessary to the existence of law, and that legal rules are essentially rules about the use of force, he points out that in modern states the coercive power of the state is normally kept in the background, and that the citizens do not think of the state as possessing coercive power, but rather as possessing an ideal power to enact binding laws (Olivecrona 1976, p. 267). He adds that if this view is widespread among the citizens, the state will as a result possess *psychological* power, and he points out that the coercive and the psychological power of the state presuppose one another:

> In reality, the coercive power and the psychological power are interwoven and condition one another reciprocally. For it is undoubtedly the case that the psychological power, besides a great deal more, presupposes an irresistible coercive power. But it is just as obvious that the coercive power cannot exist, so to speak, by itself. The possibility of using coercive power in the forms that belong to the legal system (and not in war) is dependent on the authorities' laws, regulations and judgments being on the whole loyally respected and obeyed; otherwise the coercive apparatus could simply not function. To be sure, this apparatus itself is also organized according to legal rules; its activities require that the rules in question are duly obeyed by the members of the organization, and that they are also respected in the environment. (Olivecrona 1976, pp. 267–268)[12]

I accept Olivecrona's claim that the coercive and the psychological power of the state presuppose each other. But, as I understand it, the claim that coercive power presupposes psychological power is new, in the sense that Olivecrona had not put it forward in his earlier writings (but see 1939, pp. 52–53; 1940a, pp. 64–66), whereas the claim that psychological power presupposes coercive power is not. If so, then

[12] The Swedish original reads as follows: "Reellt sett är den fysiska tvångsmakten och den psykologiska makten invävda i varandra och betingar varandra ömsesidigt. Ty det är otvivelaktigt så att den psykologiska makten, utom mycket annat, förutsätter en oemotståndlig fysisk tvångsmakt. Men det är lika klart att tvångsmakten icke kan bestå så att säga för sig själv. Möjligheten att utöva fysiskt tvång i de former som hör till rättsordningen (och icke till kriget) är beroende av att myndigheternas lagar, föreskrifter och domar på det hela blir lojalt respekterade och åtlydda; eljest skulle tvångsapparaten helt enkelt inte kunna fungera. Själva denna apparat är ju också organiserad enligt rättsregler; dess verksamhet förutsätter att reglerna i fråga direkt efterlevas av organisationens medlemmar och att de även respekteras inom miljön."

Olivecrona has added an important claim—that coercive power presupposes psychological power—to the analysis put forward in the First Edition of *Law as Fact*. The reason why this claim is plausible, as Olivecrona makes clear in the above quotation, is that the apparatus of the state lacks the resources that would be necessary to enforce the law without the cooperation of the citizens.

10.11 The Foundation of Legal Certainty

Olivecrona proceeds to point out that since the *coercive power of the state* is handled by persons—politicians and high officials—who themselves are not subject to legal sanctions, it might seem that there can be no legal certainty. But, he explains, this need not be the case, because the coercive power of the state is subject to control by the courts, even though this way of organizing things obviously presupposes that the courts are independent (1971, p. 280). He then observes that there is also the power of the legislature to *enact or revoke laws*. But, he asks, who controls the legislature? He notes that some thinkers have argued that the theory that the people are supreme and that the law emanates from the will of the people guarantees legal certainty—the people, the argument goes, could not oppress themselves. He does not, however, accept this line of reasoning, because he believes that there will always be elected representatives who govern the people, and that these representatives might deviate from the will of the people—assuming that there was a will of the people in the first place (Olivecrona 1971, p. 281). And, as one might expect, he does not accept the view that legal certainty is guaranteed by the existence of a supernatural legal system, such as natural law. The problem with this view, he explains, is that such a legal system could not influence human beings, even if—contrary to all evidence—it existed (Olivecrona 1971, pp. 281–282). I assume that he has in mind here the claim (discussed in Sect. 7.2) that there can be no connection between the world of the ought, in which the supernatural legal system must be located, and the world of time and space.

Olivecrona concludes that it is in the *respect for an established system of rules* that the authority of the state is to be found, and that only judicial independence and a sound judicial ethics can guarantee legal certainty, which is why we need to stay vigilant and tend with care the legal certainty that we do have:

> Thus both the idea of the state's divine omnipotence and the idea of a will of the people as prevailing evaporate in a sober-minded consideration of the real state of things. It is because of the respect for an established system of rules that the always relative state authority exists; and it is in the immensely complex play of strength in society that legislation changes and develops the system of rules in connection with the ideas and desires that manifest themselves in society and acquire predominant influence. But it is not a matter of course that the legal certainty in this will be lasting. It can happen that its foundations will crumble away unobserved. Legal certainty must be tended with care if it is to be preserved.

> It is very important, not least for this reason, to see clearly what is really there when we speak of a legal system. (Olivecrona 1971, p. 282) [13]

I find Olivecrona's analysis convincing, though it is worth noting that he does not explain what he means by 'legal certainty.' But assuming that he means essentially predictability, and, perhaps, legal security and uniform application of the laws,[14] he is clearly right to say that legal certainty, and more generally, the ideal of the *Rechtsstaat* (or the Rule of Law) presupposes, or involves, the existence of independent courts and sound judicial ethics.

10.12 Politics and Legal Philosophy—Again

We have seen in Chap. 2 that Olivecrona wrote two books about World War II and international politics more generally, and that critics have charged that there is a connection between Olivecrona's legal philosophy, especially the claim that law is a matter of organized force, and the views expressed in those books. More specifically, Olivecrona argued in *England eller Tyskland* (1940b) that Swedes and other Europeans ought not to fear, but to welcome, a German victory in the ongoing war, since (as he saw it) a German victory was necessary to bring about a peaceful, stable, and prosperous new order in Europe, which could replace the divided and inefficient old order dominated by England; and he argued in *Europa och Amerika* (1942b) that Europe must unite under the leadership of Germany, in order to be able to compete with the United States and certain other non-European countries, such as China and Japan.

I said in Sect. 2.5 that I can see no *logical* connection between the legal philosophy espoused by Olivecrona and Olivecrona's support for Germany. The reason, I explained, is that Olivecrona's claim that law *is* a matter of organized force entails no normative or evaluative claims at all, and, more generally, that legal positivism does not entail any normative or evaluative claim, even though some authors have

[13] The Swedish original reads as follows: "Så fördunstar vid ett nyktert betraktande av de reella förhållandena både idén om statens gudomliga allmakt och idén om en folkvilja som härskande. Det är på grund av respekten för ett bestående regelsystem som den alltid relativa statsmakten finnes; och det är under det oändligt invecklade kraftspelet i samhället som lagstiftningen ändrar och utvecklar regelsystemet i anslutning till de idéer och önskemål som gör sig gällande i samhället och vinner övervägande inflytande. Men att rättssäkerheten därunder blir bestående är icke någon självklar sak. Det kan inträffa, att dess grundvalar långsamt vittrar sönder utan att det observeras. Rättssäkerheten måste vårdas med omsorg om den skall kunna bevaras. Icke minst därför är det så viktigt att se klart, vad som verkligen föreligger där vi talar om en rättsordning."

[14] I mean by 'legal security' protection from interference in a person's private sphere by the police or by representatives of various government agencies. The relevant types of interference include searches and seizures, assaults, beatings, false imprisonment, malicious prosecution, wire tapping, and more. In American law these types of interference are often discussed under the heading "Violations of a person's right to privacy." On this, see Spaak (2008–2009, pp. 330–333). On the topic of the *Rechtsstaat* in general, see Frändberg (1994); Spaak (2008).

argued that it does (see, e.g., Radbruch 2006). It is worth noting in this context (i) that while communists and anarchists, too, believe that law is a matter of organized force, they do not support the Nazis; and (ii) that while Vilhelm Lundstedt shared much of Olivecrona's legal philosophy, including the view that there are no rights and duties independently of law, he was very far from supporting Germany in World War II.

That there is no logical connection is obvious and does not require more discussion. It is, however, worth noting that Olivecrona concludes his discussion in *Om lagen och staten* (1940a) of the state and its role as an organization that handles the exercise of force on a national level, by encouraging the people in Europe to create a similar organization on a European level (Olivecrona 1940a, pp. 197–198). His idea is that just as individuals and social classes must subordinate their personal or class interest to the interest of the state, the nations of Europe must subordinate their interests as nations to a common European good. He writes:

> A new spirit must then come to be born. Just as people have learned that individuals and classes must subordinate their interests to what is best for everyone if they are to be able to live in peace, they will come to understand that the nations must subordinate themselves to what is best for all of Europe. They must forgo their pretensions to assert their excessive egoism against each other by force of arms. Cooperation within a large organization that manages the violence must be the watchword. Whichever leadership emerges, it must in the long run come to proclaim this as its motto. A state of peace in the organization as a whole can be established only if the leadership is able to unite the many nationalities of Europe in common goals, if it can inculcate the necessity of cooperation and mutual respect, and give them security and self-esteem within the larger framework. Then perhaps one day it will come to pass that the ancient word of wisdom of the Code of Uppland—"By law shall land be maintained"—will be put into practice even in a Europe that is badly mangled by its lawlessness. (Olivecrona 1940a, p. 198)[15]

Although this claim—that the Europeans must create a peacekeeping organization on the European level—does not involve any reference to a Europe under German leadership, it is otherwise clearly in keeping both with the main political claim put forward in the first of the two books mentioned above, namely that Swedes and other Europeans ought to welcome a German victory in World War II, since a German victory would be necessary to bring about a peaceful, stable, and prosperous new order in Europe, and with the legal-philosophical claim that organized force is necessary to the existence of law. Since this is so, one might perhaps argue that Olivecrona's legal philosophy was at least part of the reason why Olivecrona came

[15] The Swedish original reads as follows: "En ny anda måste då komma att födas. Liksom man lärt sig, att individer och klasser måste underordna sina intressen under det gemensamma bästa om de skola kunna leva i fred, så kommer man att förstå, att nationerna måste underordna sig det gemensamma europeiska bästa. De måste ge avkall på sina pretentioner att med vapenmakt hävda sin måttlösa egoism gentemot varandra. Samarbete inom en större organisation, som handhar våldet, måste bli lösen. Vilken ledningen än blir, måste den i längden komma att proklamera detta som sin devis. Ett fredstillstånd inom den större organisationen kan upprättas endast om ledningen förmår samla Europas många nationaliteter till gemensamma mål, om den förmår inskärpa nödvändigheten av samarbete och ömsesidig aktning samt ge dem trygghet och självkänsla inom den större ramen. Då kan det måhända en gång i tiden inträffa, att Upplandslagens gamla visdomsord: land skall med lag byggas, vinner tillämpning även på det i sin laglöshet söndersargade Europa."

to argue that Europeans ought to welcome a German victory in World War II—if Germany did not provide the organized force necessary to maintain a legal system at the European level, there would not and could not be such a legal system; and if there were no such legal system, there could not be a peaceful, stable, and prosperous new order in Europe.

This does *not*, however, mean that Olivecrona's legal philosophy, specifically, the claim that law is a matter of organized force, *implies* the claim (call it *A*) that the Europeans ought to welcome a German victory in World War II. First, the claim under consideration (call it *B*)—that the people of Europe ought to create an organization that can handle the exercise of force on the European level—does not follow logically from the analysis put forward in the book, but is a political recommendation attached at the end of a discussion of the role of the state in the legal machinery. Secondly, even if claim (*B*) did follow from Olivecrona's legal philosophy, it does not imply claim (*A*). For one thing, (*B*), properly construed, is a *conditional* claim of the following type: If you want a peaceful Europe, you must work toward the creation of some sort of peacekeeping organization at the European level. But since claim (*B*) is conditional, you should feel free to, indeed you should, reject the *end*, should you also find that the *means* to the end is a Europe under the leadership of Adolf Hitler.

Roger Cotterrell (2013) maintains, however, as I understand him, that there is a *causal* connection between Olivecrona's legal philosophy and the political views under consideration. He explains that while he used to find attractive Olivecrona's absence of moralizing and determination to take an objective and anti-metaphysical view of law as a social phenomenon, he came to change his mind once he learned about Olivecrona's political views (Cotterrell 2013, p. 663). How, he asks (Cotterrell 2013, p. 666), could the socio-legal approach that he had found so liberating coexist with such political views? His answer is that while Olivecrona's legal philosophy, specifically the emphasis on law as organized force, does not necessitate a political position like Olivecrona's, it gives no resources to ask normative or evaluative questions about the ends of law:

> The fundamental problem of Olivecrona's distinctive Hobbesian image of the overwhelming force that guarantees peace and order is that ultimately it puts so much emphasis on the importance of that guarantee, standing alone, that it gives no resources to ask what a world in which peace and order are guaranteed *might use those pacific conditions to achieve*. (Cotterrell 2013, p. 669)

But, one wonders, what does it mean to say of a theory of law that it "gives no resources to ask" such normative or evaluative questions? As I see it, Olivecrona's legal philosophy aims to elucidate the nature of law, and if law has a nature, it is what it is whatever Olivecrona and others might have to say about it. In what sense, then, could it "give us resources to ask" this type of question? My guess is that Cotterrell simply means that Olivecrona's legal philosophy might in some circumstances be at least part of the reason why people accept (and perhaps even help bring about) obviously immoral uses of the coercive power of the law, such as in the case of Nazi Germany. For example, he might mean that persons who believe a certain theory are likely to become susceptible to certain points of view, that

those who accept Olivecrona's analysis—which sees law as a matter of organized force—are likely to become susceptible to the view that order and stability are the most important qualities of law, and that they are therefore likely to ascribe more normative weight to these features than to other features, such as respect for human rights. Thus conceived, Cotterrell's claim is a claim about a *psychological* connection, namely a claim about the likely consequences of people *believing* Olivecrona's legal philosophy.[16]

If this is what Cotterrell means, he may be right. We should, however, remember that the (logical) implications of a theory are one thing and the possible or likely (causal) consequences of people believing the theory (perhaps in a somewhat distorted shape) another, and that the proper way to assess a theory in a scientific or scholarly context is to focus on the implications of the theory, not the consequences of people believing the theory. Hence we should not reject meta-ethical theories, such as non-cognitivism, error theory or meta-ethical relativism, on the grounds that, if believed they might under certain circumstances lead to morally bad consequences in the way explained, though we should of course keep in mind the possibility or likelihood that bad consequences will follow.[17] As we shall see below (in Sect. 15.6), various legal thinkers have objected to the theory of legal positivism, on the grounds that (they believe that) people who believe this theory might come to think that they ought to obey the law come what may.

One might, in keeping with this line of argument, argue that Olivecrona did not act wisely when he chose to publish the First Edition of *Law as Fact* (and *Om lagen och staten*), in which he argued that law is essentially a matter of organized force, at a time when Hitler was on the move in Europe. That is to say, one might argue that even though the book was clearly aimed at specialists, not the general public, Olivecrona would have done well to stop and think about the likely impact of the book in such times on those who are not experts in the field, but who somehow get to hear about the claim that law is a matter of organized force.

One should, however, keep in mind that the only reasonable alternative course of action for Olivecrona would have been to postpone the publication of the book for some time; and one may well wonder if such postponement would have made any difference. One may also ask whether it is reasonable to ask of an author that he postpone the publication of a scholarly book indefinitely, given that the publication of the book is likely to be very important to him on both a personal and a professional level. My own answer to these questions is negative—I cannot believe that the publication of the book persuaded anyone to adopt a pro-Nazi stance, but I

[16] I would like to thank Christian Dahlman for suggesting this possible interpretation of Cotterrell's claim. To be sure, my interpretation of Cotterrell's claim is somewhat speculative. Cotterrell might well reject it.

[17] For example, while it does not follow from non-cognitivism that everything is permitted, people might (mistakenly) come to think that everything is permitted, if they believe that non-cognitivism is true, and this thought—that everything is permitted—might in turn lead to very bad consequences. Indeed, in the 1930's certain Swedish intellectuals objected to the non-cognitivist theory put forward by Axel Hägerström (considered above in Sects. 4.3–4.4) that it is likely to lead to "practical nihilism." On this, see Mindus (2009, pp. 104–106).

do believe that the book was very important to the author both on a personal and a professional level—and I therefore conclude that Olivecrona did not act wrongly in having the book published in 1939.

10.13 The Jurisprudential Significance of Olivecrona's Analysis

Olivecrona's thoughts on the role of force in the law are an essential part of what makes the legal philosophy put forward by Olivecrona so interesting. To be sure, Olivecrona is not the only one who has maintained that law is in some sense a matter of organized force. On John Austin's analysis (1998 [1832]), for example, there is in every society where there is law a sovereign—a person or a group of persons who are habitually obeyed by the bulk of the population and who himself or themselves obey no one—whose (tacit or explicit) commands make up the law of that society; and a command is the expression of a wish that a person should behave in a certain way coupled with readiness on the part of the person expressing that wish to visit a disobedient person with evil, that is, a sanction (Austin 1998, pp. 13–15). And Rudolf von Jhering (1921, p. 176) maintains that coercion is the second level of social order and that "coercion organized makes the State and law." Moreover, Hans Kelsen maintains that law is "that specific social technique of a coercive order which… consists in bringing about the desired social conduct of men through the threat of a measure of coercion which is to be applied in case of contrary conduct" (1999, pp. 19–20), and adds that all legal norms are coercive norms, that is, norms that stipulate a sanction (Kelsen 1999, p. 29) And, as we have seen in Chap. 5, Alf Ross (1959, p. 34) points out that in regard to its *content*, a national legal system is a system of norms "for the establishment and functioning of the State machinery of force." H. L. A. Hart (1961, p. 195), for his part, explains that the existence of sanctions in a legal system is a natural, though not a conceptual, necessity. And Joseph Raz (1980, p. 186) maintains that even though not every legal duty is backed by a sanction, coercion constitutes the ultimate foundation of the law, "in the sense of being (part of) the standard reason for obedience to some D-laws [duty-imposing laws] that are presupposed in many enormously varied ways by all the other legal norms, and, through them, by all the other laws of the system." But, with the exception of von Jhering, these thinkers do not have much of interest to say about the precise role of force in the workings of the legal system, such as the relation between the organized force of law, on the one hand, and the moral views of the citizens, on the other.

Likewise, despite occasional references to the (possible or necessary) existence of sanctions, the role of force, or coercion, in our understanding of the nature of law has not been much discussed in contemporary jurisprudence. Consider, for example, the inquiries into the nature of law proposed by prominent contemporary legal thinkers like Alexy (1994), Coleman (2001a), Dworkin (1978, 1986), Fuller (1969), Hart (1961), MacCormick and Weinberger (1986), Moore (2000), Peczenik (1995),

Raz (1979, 1990), Ross (1959), Soper (2002), and Strömholm (1996). While it is true that these writers do not in any way deny the role of force in the machinery of law, they do not offer an analysis of this role. For example, although Dworkin (1986, p. 93) maintains that the "most fundamental point of legal practice is to guide and constrain the power of government," he has nothing to say about the precise relation between law and force, such as whether organized force is necessary to the existence of law, or whether legal rules are rules about the use of force, or whether the law influences our moral values and standards.

As Nicos Stavropoulos (2009, pp. 339–340) points out, the absence of a discussion of coercion in contemporary jurisprudence reflects the view of many legal philosophers that while coercion is an important feature of legal practice, "its existence does not reflect a deep, constitutive property of law and [that] therefore [it] plays at best a very limited role in the explanation of law's nature." The underlying idea, he explains, is that it is in the nature of law to confer rights and impose obligations, and contemporary legal philosophers do not believe that coercion plays any role in the constitution of legal rights and obligations (Stavropoulos 2009, p. 340, 349).

Olivecrona would not be bothered by this claim, however, since he believes that there are no legal rights and obligations in the first place. As we have seen, he maintains, *inter alia*, that law is a set of rules in the sense of independent imperatives, which influence the subjects of law because they have a suggestive character, that there could be no law if there were no organized force, and that many legal rules are rules about the use of force. On this analysis, as we have seen, there is no room for any legal entities or properties.

One might, however, object to Olivecrona's analysis that, strictly speaking, it does not concern the problem about the nature of law, as that topic is understood by contemporary jurisprudents (see, e.g., Alexy 2008; Raz 2009, Chap. 2), because despite his intentions, the claims Olivecrona puts forward are not claims about *conceptual*, but rather about natural, necessity. Indeed, although he speaks of "the nature of the law," Olivecrona makes it clear in the very first chapter in the First Edition of *Law as Fact* that he does not aim to "formulate a definition of law," but will be content to offer "[a] description and an analysis of the facts." (1939, p. 26) And at the end of the Second edition of *Law as Fact* (1971, p. 272), he explains that: "[a] definition of the concept of law cannot be given," and that "[a]t the end of our inquiry we can only indicate some disparate but interconnected realities which are covered by the term." Of course, Olivecrona's refusal to try to offer a *definition* of (the concept of) law does not as such amount to an admission that he is not concerned with the problem about the nature of law—Hart, too, was clear that he did not aim to put forward a definition of the concept of law in his book with the same name (1961, pp. 13–17). But it does suggest that Olivecrona did not aim to put forward an analysis of the concept of law, but only a description of legal phenomena. Hence it seems that we must conclude that Olivecrona's analysis of the role of force, or coercion, in the machinery of law, although very interesting, does not really concern the nature of law, as that topic is understood by contemporary legal philosophers (but see Schauer 2013).

Nevertheless, I believe that Olivecrona's analysis is a very valuable contribution to our understanding of the role of force in law in human societies as we know them. Indeed, it seems to me that anyone with an interest in these matters ought to find Olivecrona's thoughts on this topic interesting, even fascinating.

References

Articles

Alexy, Robert. 2008. On the concept and nature of law. *Ratio Juris* 21:281–299.

Cotterrell, Roger. 2013. Northern lights: From Swedish realism to sociology of law. *Journal of Law and Society* 40:657–669.

Frändberg, Åke. 1994. Begreppet rättsstat [The concept of the *Rechtsstaat*]. In *Rättsstaten—rätt, politikoch moral* [*The Rechtsstaat—Law, politics, and morality*], ed. Fredrik Sterzel, 21–41. Uppsala: Iustus.

Hart H. L. A. 1958. Positivism and the separation of law and morals. *Harvard Law Review* 71:593–629.

Ladenson, Robert. 1980. In defense of a Hobbesian conception of law. *Philosophy and Public Affairs* 9:134–159.

Lundstedt, A. V. 1932. The responsibility of legal science for the fate of man and nations. *New York University Law Quarterly Review* 10:326–340.

Oberdiek, Hans. 1976. The role of sanctions and coercion in understanding law and legal systems. *American Journal of Jurisprudence* 21:71–94.

Olivecrona, Karl. 1941b. Marxismens lära om staten [The Marxist theory of the state]. In *Samhällsvetenskapliga problem. Sex föreläsningar utgivna av Statsvetenskapliga intresseföreningen i Lund* [*Problems of social science. Six lectures published by the Society for Political Science in Lund*], ed. Statsvetenskapliga intresseföreningen i Lund [The Society for Political Science in Lund], 9–28. Lund: Gleerup.

Olivecrona, Karl. 1945. Världsmoral förutsätter världslag och världsorganisation [World Morality Presupposes World Law and World Organization]. In *Världsmoral* [*World Morality*], ed. Johan Hansson, 59–61. Stockholm: Natur och kultur.

Radbruch, Gustav. 2006. Statutory lawlessness and supra-statutory law. *Oxford Journal of Legal Studies* 26:1–11. (Originally published 1946 in German under the title Gesetzliches Unrecht und Übergesetzliches Recht in Süddeutsche Juristenzeitung 1:105–108).

Raz, Joseph. 1985. Authority, law and morality. *The Monist* 68:295–324.

Schauer, Frederick. 2013. Necessity, importance, and the nature of law. In *Neutrality and Theory of Law*, ed. Jordi Ferrer Beltrán, José Juan Moreso, and Diego M. Papayannis, 17–32. Dordrecht: Springer.

Spaak, Torben. 2003a. Norms that confer competence. *Ratio Juris* 16:89–104.

Spaak, Torben. 2008. Moral relativism and the *Rechtsstaat*. In *Festskrift till Anders Fogelklou*, ed. Åke Frändberg, Stefan Hedlund, and Torben Spaak, 219–233. Uppsala: Iustus förlag.

Spaak, Torben. 2008–2009. The idea of a right to genetic privacy. *Juridisk tidskrift* 20:326–339.

Stavropoulos, Nicos. 2009. The relevance of coercion: Some preliminaries. *Ratio Juris* 22:339–358.

Books

Alexy, Robert. 1994. *Begriff und Geltung*. 2nd ed. Freiburg: Karl Alber.

Austin, John. 1998. *The province of jurisprudence determined and the uses of the study of jurisprudence. With an introduction by H. L. A. Hart*. Indianapolis: Hackett. (Previously published by Weidenfeld & Nicholson in 1954. Originally published in 1832).

Coleman, Jules L. 2001a. *The practice of principle*. Oxford: Oxford University Press.

Dworkin, R. M. 1978. *Taking rights seriously*. 2nd ed. London: Duckworth.

Dworkin, Ronald. 1986. *Law's empire*. Harvard: The Belknap Press.

Fogelklou, Anders. 1978. *Den orättfärdiga rätten [The Unjust Law]*. Stockholm: Norstedts.

Fuller, Lon L. 1969. *The morality of law*. 2nd revised ed. New Haven: Yale University Press. (1st ed. 1964).

Hart, H. L. A. 1961. *The concept of law*. Oxford: Clarendon Press.

Hobbes, Thomas. 1991. *Leviathan*. London: Andrew Crooke. Reprinted (Cambridge texts in the history of political thought) ed. Richard Tuck. Cambridge: Cambridge University Press. Originally published 1651.

Hughes, G. E., and M. J. Cresswell. 1968. *An introduction to modal logic*. London: Methuen.

Kelsen, Hans. 1999. *General theory of law and state. (Trans. Anders Wedberg)*. Union: The Lawbook Exchange. (Originally published 1945 by the Harvard University Press, Cambridge, Mass).

MacCormick, Neil, and Ota Weinberger. 1986. *An institutional theory of law*. Dordrecht: Reidel.

Mindus, Patricia. 2009. *A real mind. The life and work of Axel Hägerström*. Dordrecht: Springer.

Moore, Michael S. 2000. *Educating oneself in public*. Oxford: Oxford University Press.

Nordin, Svante. 1983. *Från Hägerström till Hedenius [From Hägerström to Hedenius]*. Lund: Doxa.

Nozick, Robert. 1974. *Anarchy, state, and Utopia*. New York: Basic Books.

Olivecrona, Karl. 1939. *Law as fact*. Copenhagen, London: Einar Munksgaard, Humphrey Milford.

Olivecrona, Karl. 1940a. *Om lagen och staten [On law and the state]*. Copenhagen, Lund: Einar Munksgard, Gleerup.

Olivecrona, Karl. 1940b. *England eller Tyskland? [England or Germany?]*. Lund: Gleerup.

Olivecrona, Karl. 1942b. *Europa och Amerika [Europe and America]*. Lund: Sundqvist & Emond.

Olivecrona, Karl. 1971. *Law as fact*. 2nd ed. London: Stevens & Sons.

Olivecrona, Karl. 1976. *Rättsordningen [The Legal Order]*. 2nd ed. Stockholm: Liber. (1st ed. 1966).

Peczenik, Aleksander. 1995. *Vad är rätt? [What is Law?]*. Stockholm: Norstedts.

Raz, Joseph. 1979. *The authority of law*. Oxford: Clarendon Press.

Raz, Joseph. 1980. *The concept of a legal system*. 2nd ed. Oxford: Clarendon Press.

Raz, Joseph. 1990. *Practical reason and norms*. 2nd ed. Princeton: Princeton University Press.

Raz, Joseph. 2009. *Between authority and interpretation*. Oxford: Oxford University Press.

Ross, Alf. 1959. *On law and justice*. Berkeley: University of California Press.

Soper, Philip. 2002. *The ethics of deference*. Cambridge: Cambridge University Press.

Spaak, Torben. 1994. *The concept of legal competence*. Dartmouth: Dartmouth Publishers.

Strömholm, Stig. 1996. *Rätt, rättskällor och rättstillämpning [Law, sources of law, and the application of law]*. 5th ed. Stockholm: Norstedts.

von Jhering, Rudolf. 1921. *Law as a means to an end. Trans. Isaac Husik*. New York: MacMillan. (Originally published 1877 in German under the title *Der Zweck im Recht*. This is a translation of the 4th German edition, published 1903 in Leipzig by Breitkopf & Härtel).

Chapter 11
Judicial Law-Making

Abstract Olivecrona maintains that courts necessarily create law when deciding a case. The reason, he explains, is that judges must evaluate issues of fact or law in order to decide a case, and that evaluations are not objective. Although he is not explicit about it, he appears to reason that if courts have to evaluate issues of fact or law in order to decide a case, and if evaluations are not objective, so that there is no uniquely correct way to evaluate, then the existence or content of law, or both, will depend on evaluations none of which is more correct than the other; and this means that there will be no law for the court to apply prior to the evaluation. And if courts cannot apply pre-existing law, they have to create new law. I am not convinced by Olivecrona's line of argument, however. The problem is that Olivecrona uses the term "evaluation" in a broad enough sense to cover not only evaluations, including moral evaluations, but also considerations that are not evaluations at all, and that therefore his claim that judges must evaluate issues of law or fact in order to decide a case is false. I also consider and reject the possibility that Olivecrona has in mind not evaluations, but rather conventions, and that therefore he is really saying that the existence of legal norms and legal relations is a matter of convention, as distinguished from brute facts of nature. But this interpretation of Olivecrona's reasoning is quite problematic, because the judgment that a certain operative fact is at hand is not always a conventional judgment and because conventional judgments, unlike moral judgments, are, or at least can be, objective in the sense of constructivist objectivity.

11.1 Introduction

Olivecrona does not have much to say about legal reasoning, including adjudication, in his voluminous jurisprudential writings. But he does maintain, in the Second Edition of *Law as Fact*, that courts necessarily create law when deciding a case. The reason, he explains, is that judges must evaluate issues of fact or law in order to decide a case, and that evaluations are not objective. I am not convinced by Olivecrona's analysis, however. The problem is that Olivecrona uses the term "evaluation" in a broad enough sense to cover not only evaluations, including moral evaluations, but also considerations that are not evaluations at all, and that therefore his claim that judges must evaluate issues of law or fact in order to decide a case is false.

T. Spaak, *A Critical Appraisal of Karl Olivecrona's Legal Philosophy,*
Law and Philosophy Library 108, DOI 10.1007/978-3-319-06167-2_11,

I begin with a consideration of the structure of Olivecrona's argumentation in support of the claim that courts necessarily create law when deciding a case (Sect. 11.2), adding a few words about the distinction between law application and judicial law-making (Sect. 11.3). I then consider Olivecrona's tacit assumption that the occurrence of non-objective judicial evaluations must lead to judicial law-making (Sect. 11.4), the central claim that courts must evaluate issues of fact or law in order to decide a case (Sect. 11.5), and Olivecrona's thoughts on the nature of evaluations (Sect. 11.6). Having done that, I consider and reject an alternative interpretation of Olivecrona's somewhat confusing talk about evaluations (Sect. 11.7). I state my conclusions in Sect. 11.8.

11.2 The Structure of Olivecrona's Argumentation

Olivecrona makes a distinction between *executory* judgments, which order the defendant to do something, *declaratory* judgments, which declare the existence of a legal relation, and *constitutive* judgments, which create a legal relation where there previously was none or dissolve an existing legal relation (1971, pp. 200–201). As examples of executive judgments, he mentions judgments that order a person to pay somebody else a sum of money; examples of declaratory judgments include judgments declaring that a certain person is the lawful owner of a certain object; and examples of constitutive judgments include judgments that dissolve a marriage or a company. He treats executory and declaratory judgments in turn, but has nothing to say about constitutive judgments. Having explained that an executory judgment orders the defendant to do something, and that the imperative included in the judgment is significant in two ways—by exerting pressure on the defendant and by putting the executive authorities at the disposal of the plaintiff—he argues that the imperative is the essential element in the executory judgment, whether it refers to the existence of a right or not (Olivecrona 1971, pp. 209). And he points out that although many different formulae are used in declaratory judgments, all such judgments have a directive function in that they indicate the correct behavior of the parties on the point in dispute (Olivecrona 1971, pp. 210).

Olivecrona proceeds to argue that in deciding a case the court is *creating law* for the particular case, because there will always be a margin to decide between two alternative interpretations of the pertinent legal rule:

> The actual role of the courts is that of being a lawgiver for particular cases. The legal rules, whether laid down through acts of legislation or evolved in some other way, cannot supply exact patterns of behaviour for every contingency. There is always a more or less wide margin for deciding which of two or more alternatives are to be deemed lawful. The margin is so small as to be (in general) negligible when you put your name on the back of a bill of exchange. If you have been involved in an accident when driving your car, the margin may be very wide. All of us have to apply the rules of civil law in our relations with our fellow-citizens. In a great many simple cases, for instance when we pay a tradesman's bill, we know what we have to do without asking anybody for advice. When difficulties arise, we have to consult a legal expert. But the experts may disagree. There must be some ultimate authority capable of giving a definite answer to the question of lawful behaviour in the situ-

> ation. This task is entrusted to the courts. *They supplement abstract rules of law by laying down particular rules for individual cases*. (Olivecrona 1971, pp. 211. Emphasis added)

The reason why there will always be a margin, or, if you prefer, why the judge will always have *discretion*, he explains, is that the judge must *evaluate* the purported operative facts or legal texts in order to decide the case, and that evaluations are not objective (Olivecrona 1971, pp. 212–215). He does not, however, discuss the status of evaluations in this context, but simply assumes that they are not objective; and this is of course in keeping with his non-cognitivism and perhaps also with the error theory.[1]

To illustrate the way in which the judge must evaluate a purported *operative fact*, Olivecrona considers a hypothetical case in which *P* requires payment from *D* for goods delivered in accordance with a contract of sale (Olivecrona 1971, pp. 212–213). *P* maintains that *P* and *D* were involved in talks that resulted in a contract being concluded, whereas *D*, although he agrees that the talks took place roughly as described by *P*, objects that no deal was ever concluded. What should the court do? Having pointed out that the law on sale of goods presupposes that there is a contract of sale to begin with, Olivecrona explains (i) that the court cannot simply compare the facts as described by the parties with a description in the law of how a contract is concluded, because there is no such description in the law. Moreover, he continues, (ii) although the law reports may include a number of cases that concern the question whether a contract has been concluded, the case at bar will always be different in some respects from the cases in the law reports. He adds (iii) that the textbooks will not contain sufficient information on this question. He concludes that for these reasons, the court itself will have to decide whether a contract has been concluded or not. And, he insists, such a decision necessarily presupposes an *evaluation* of the purported operative facts:

> The real reason for the decision to apply the rules of sale and purchase is the evaluation resulting in finding that these rules ought to be applied. Nothing substantial is added by the declaration that a contract for sale and purchase has been concluded. But this declaration is of psychological importance. Since the law refers to the apparent fact that a contract for sale and purchase has been concluded, it seems necessary that the court, before applying the law of sale and purchase to the case, declares that such a contract has really been concluded. It is not generally realized that such a declaration is made on the basis of an evaluation; the declaration is taken to be the ascertainment that a fact has taken place. The real situation is that the law, in referring to the circumstance that a contract has been concluded, presupposes a general notion of a contract, which it is, however, *impossible to define exhaustively in factual terms*. Therefore, it is of necessity left to the courts to *evaluate* in each case an alleged transaction as being, or not being, of such a character that the rules of sale and purchase *ought* to be applied. (Olivecrona 1971, pp. 213. Emphasis added)

More generally, Olivecrona maintains that there is necessarily an element of evaluation involved when a court classifies an action or an event as an operative fact, or a text as a statute or a precedent:

> There are no *operative facts* in nature but only in legal language. Since the law refers to "operative" facts under such names as contract, promise, payment, marriage, etc., alleged

[1] According to the error theory, all (positive) moral judgments are objectively false.

> facts have to be classified by the courts under such headings. This is a step in the application of the law. It requires something more than ascertaining some facts: these facts have also to be *evaluated*, with the result that the court either declares them to constitute a contract, a promise, a payment, a marriage, etc., or rejects the proposed classification.
>
> Likewise, evaluations are made with regard to the *law*. A text is evaluated as belonging to the law in force; a previous decision is evaluated as being a precedent with bearing on the case now before the court; an utterance of a judge is evaluated as being an *obiter dictum* etc. Law and precedents are not "pure facts". Texts and pronouncements are evaluated when they are classified as laws and precedents. (Olivecrona 1971, pp. 214. Emphasis added)

Olivecrona observes in conclusion that although judges often agree in their evaluations, because they have absorbed a "common stock" of evaluations, there will nevertheless be debatable cases in which they have to "strike out" on their own. He adds that the evaluations are never rigidly fixed, but are always undergoing changes (Olivecrona 1971, pp. 215).

We see that Olivecrona's argumentation in support of the claim that courts are lawmakers in the particular case has the structure of a *modus ponens* inference: (P&Q⊃R) & P&Q ∴ R. Here are the premises and the conclusion spelled out:

(P1) If courts have to evaluate operative facts or legal texts in order to decide a case (P), and if evaluations are not objective (Q), then courts necessarily create law when deciding a case (R).
(P2) Courts have to evaluate operative facts or legal texts in order to decide a case (P).
(P3) Evaluations are not objective (Q).

(C) Courts necessarily create law when deciding a case (R).

We now need to take a closer look at the premises (P1)–(P3). But before we do, we should briefly consider the distinction between law application and judicial law-making.

11.3 Law Application and Judicial Law-Making

The reason why the topic of judicial law-making is so interesting is, of course, that judicial law-making is incompatible with the separation of powers doctrine, according to which each branch of the government—the executive, the legislative, and the judicial—may operate within the sphere allotted to that particular branch, and only within that sphere.[2] If Olivecrona is right, courts always and necessarily create law, and thus never apply pre-existing law, when deciding cases. Hence they consistently violate the separation of powers doctrine.[3]

[2] I discuss judicial law-making in light of the separation of powers doctrine elsewhere. See Spaak (2007, pp. 270–4).

[3] Olivecrona's stance in this regard is both similar to and different from that of Kelsen (1960, p. 347), who holds that every act of judicial decision-making is both an act of law application and an act of judicial law-making.

Although important, the underlying distinction between law application and judicial law-making is rather difficult to pin down. The question is: In what circumstances are we justified in saying that courts create new law rather than apply pre-existing law? But in order not to be distracted by the doctrine of *stare decisis*, which is accepted in some jurisdictions but not in others, we should ask instead: In what circumstances are we justified in saying that courts create new law in the *particular case* rather than apply pre-existing law?

Generally speaking, I believe there are clear cases of law application and clear cases of judicial law-making, and quite a few cases that are unclear in this regard. For example, most legal scholars would hold that a decision made in accordance with a textual interpretation of the relevant statutory provision is a clear case of law application, and that a decision outside or contrary to the plain meaning of a provision unsupported by any recognized interpretive argument(s) is a clear case of judicial law-making. But what about a decision outside or contrary to the plain meaning of the provision based on, say, good intentionalist or teleological arguments?[4] Would this be a case of judicial law-making? I think not—to answer this question in the affirmative would amount to saying that there is a good deal of judicial law-making going on in courts around the world, and I am not prepared to say that (but see Hartley 1996).

One might, of course, argue that the reason why the topic of judicial law-making is interesting is not primarily that judicial law-making is incompatible with the separation of powers doctrine, but that judges, unlike legislators, are not (normally) elected. On this analysis, judicial law-making is not primarily a separation of powers problem, but a democracy problem.[5] I believe, however, that the "democracy argument" is best understood not as an independent argument in support of a prohibition of judicial law-making, but rather as an argument in support of the separation of powers doctrine: we accept the separation of powers doctrine, at least partly because we believe that whereas unelected officials may apply pre-existing law created by democratically elected representatives, they should not create new law.

11.4 Evaluations and Judicial Law-Making

As we have seen, Olivecrona maintains (P1) that if courts have to evaluate operative facts or legal texts in order to decide a case, and if evaluations are not objective, then courts necessarily create law when deciding cases. He does not, however, explain *why* the occurrence of non-objective judicial evaluations would have to lead to judicial law-making. Nevertheless, I accept his claim. For it seems to me that if courts have to evaluate issues of fact or law in order to decide a case, and if evalu-

[4] For example, the well-known (and controversial) American case United Steelworkers v. Weber, 443 U.S. 193 (1979) is interesting in this regard. See especially the dissenting opinion by (then) Chief Justice Burger at 216–9. I discuss this case in Spaak (2007, pp. 195–200).

[5] Dworkin (1978, pp. 84–5) appears to prefer this analysis.

ations are not objective, so that there is no uniquely correct way to evaluate, then the existence or content of law, or both, will depend on evaluations none of which is more correct than the other; and this means that there will be no law for the court to apply prior to the evaluation. And if courts cannot be applying pre-existing law, they have to be creating new law.

We might see the place of evaluations in judicial decision-making a bit clearer if we adopt a mode of analysis suggested by Frändberg (1973, pp. 83–88). Frändberg, who conceives of judicial decision-making as involving the application of a legal norm to the facts at hand, distinguishes the following components of the legal syllogism:

Premise 1: The base norm (the general legal norm as it appears in the relevant piece of legislation or case law).
Premise 2: The subsumption norm (the more specific norm that is a result of an interpretation of the base norm and more precisely fits the facts of the case at bar).
Premise 3: The evidence claim (which states the facts).

Conclusion: The individual norm (which is formulated in terms of the claims of the parties and the facts of the case at bar, such as "Smith shall pay Jones $ 500 no later than 1 September 2013").

Frändberg points out that, on this analysis, the act of deciding a case by applying the law to the facts necessarily involves an act of *qualification*, which takes the judge from the base norm to the subsumption norm. Now if Olivecrona is right, this is also where judicial evaluations enter the picture. We might say that, on Olivecrona's analysis, the act of qualification is necessarily an act of *evaluation*. To be sure, whereas Frändberg's act of qualification seems to concern the base norm, not the facts of the case, Olivecrona's act of evaluation clearly concerns the facts of the case, not the base norm. The difference may not be as big as it seems, however, because the judge will interpret the base norm in light of the facts of the case, and he will view the facts in light of the base norm. If this is so, then Frändberg's act of qualification will to some extent concern the facts of the case, and Olivecrona's act of evaluation will to some extent concern the base norm.

One might, however, object to my reconstruction of Olivecrona's line of reasoning that subjectivity (non-objectivity) does not imply *arbitrariness*. That is to say, one might object that even if evaluations are not objective in the strong, realist sense presupposed above, which assumes the existence of mind-independent values and standards, we have reason to reckon with a weaker, constructivist type of evaluative objectivity, which only assumes the existence of values and standards that are, in some sense, constructed by the people concerned, such as the members of the legal community.[6] If this constructivist type of evaluative objectivity could be defended, we might say that courts evaluating issues of fact or law are indeed applying pre-existing law and thus not creating new law.

[6] The relativist analysis of moral judgments defended by Harman (1975, 1996), mentioned above (in Sect. 11.6.2), would be a case in point.

The main problem with this line of reasoning is that the condition that must be satisfied for it to apply—that the relevant group of people are in such agreement about values that we would be entitled to say that these values somehow exist by virtue of this consensus—will rarely be satisfied in the real world. Nevertheless, one may well wonder why Olivecrona did not consider the possibility of such a constructivist evaluative objectivity, given his belief in a "common stock" of evaluations on the part of judges.[7]

11.5 Evaluations in Judicial Decision-Making

Olivecrona also maintains, as we have seen, (P2) that courts have to evaluate purported operative facts or legal texts in order to decide a case. I cannot, however, accept this claim. As I see it, Olivecrona misconceives the nature of evaluations, and, as a result, exaggerates their incidence. Whereas he appears to believe that judicial evaluations are necessarily moral evaluations, I argue that they are not evaluations at all, at least not moral evaluations. I shall explain what I mean with the help of a few examples.

Let us begin with Olivecrona's thoughts on *operative facts*. Consider Olivecrona's claim that there is no definition of the concept of a contract for sale in the (Swedish) Sale of Goods Act, and that there will be nothing in the law reports or in the legal literature that could help the judge determine whether a purported contract is a legally valid contract. These are *empirical* claims, which may or may not be true in the particular case. Since this is so, they could not support a claim of *necessity*—that courts *have to* evaluate purported operative facts in order to decide a case—even if they were true. Moreover, they seem to be either false or irrelevant. For example, while there is no definition of the concept of a contract for sale in the (Swedish) Sale of Goods Act, Articles 1–9 in the (Swedish) Contracts Act—which was part of Swedish law at the time Olivecrona wrote the book—make it clear that a contract is made up of an offer and an acceptance, and that offers as well as acceptances are binding. And this (implicit) definition of the concept of a contract is clearly applicable to Olivecrona's case.

Consider also Olivecrona's analysis of the concept of a sale, as Olivecrona presents it in a letter to Professor Torstein Eckhoff at the University of Oslo. Here Olivecrona maintains that it is impossible to describe operative facts without making use of evaluative language:

> For one cannot describe, e.g., a sale as consisting in two persons uttering certain words to each other. The words could of course be spoken at the theater or for the sake of practice. There is always an added element of evaluation. *One judges that the transaction should be designated "sale", which involves one's thinking it fulfills the demands that the law can be considered to make for a transaction to be worthy of having legal sanctions attached.*

[7] See Sect. 11.2 above and the quotation from Olivecrona's letter to Torstein Eckhoff in Sect. 11.5 below.

> *A subjective element is thus added.* We all make such evaluations constantly without any difficulty at all. Only in those few cases when a question of the transaction's "validity" is brought up in a trial, does there arise any difficulty for the judges to make the evaluation. It is necessarily subjective, even though the judges have certain relatively uniform grounds for their evaluations.[8]

I am not persuaded by Olivecrona's analysis, however. He asserts without explanation that a judge who finds that a purported transaction should be labeled a sale necessarily evaluates the transaction, in the sense that he holds that it satisfies the conditions laid down in the law for something to be worthy of being labeled a sale. I cannot, however, see that in doing so the judge necessarily *evaluates* the transaction, except in a trivial and derivative sense. For such an "evaluation" depends completely on a prior determination of the facts.

Consider in this regard the case of a school teacher who is correcting a multiple choice-exam, and in doing this finds that one of his students has managed to answer correctly each and every question on the exam. On the basis of this result, the teacher awards the student the highest grade there is. Does the teacher's awarding the student the highest grade mean that the teacher *must* have evaluated the student's answers? No, of course not! If, as in this case, the teacher can determine, on the basis of factual considerations, whether the student has answered the questions correctly, then the circumstance that (pursuant to the relevant university rules and regulations) the teacher *also* must award the student a certain grade is completely irrelevant to the question whether his awarding the student a certain grade necessarily involves an evaluation of the answers. Although one may well say that the teacher evaluates the exam that he grades, such an evaluation is trivial and derivative in that it depends completely on his prior determination of the facts, that is, the answers to the questions posed. And it seems to me that the judge's determination of the purported operative facts in a legal rule proceeds in the same way, even though this determination may sometimes be difficult to make.

If, then, Olivecrona really believes that the judge must *evaluate* the purported operative facts or, perhaps, the whole situation, in order to determine, say, whether *A* and *B* have entered into a legally valid contract, he must be using the term "evaluation" in a broad enough sense to cover not only evaluations, including moral evaluations, but also considerations that are not evaluations at all. That is to say, Olivecrona's claim that judges have to evaluate the purported operative facts in order to decide a case depends on a confused view about the nature of evaluations, including moral evaluations.

One might, however, object to my line of reasoning that although he did not say so, Olivecrona might have reasoned that since the legal consequence in a legal norm is normative, and since Hume's Law has it that a normative (or an evaluative) conclusion cannot be derived from a set of purely factual premises, the operative fact(s)

[8] Karl Olivecrona's letter of 18 June 1969 to Professor Torstein Eckhoff (emphasis added), translated into English by Robert Carroll. I would like to thank Thomas Mautner for kindly providing me with a transcription of this letter.

must also be normative (Hume 1969 [1739], p. 521).[9] I cannot accept this line of reasoning, however, because the relation between operative facts and legal consequences in a legal norm is not one of (material or strict) implication, but rather one of *imputation* (*Zurechnung*), as Kelsen (1992, pp. 23–25) suggested. On Kelsen's analysis, it is the concept of *ought* that connects the operative facts and the legal consequence in a legal norm, and in doing so it distinguishes the relation of imputation from the relation of cause and effect. Although Kelsen did not specifically consider the difference between imputation and (material or strict) implication, he clearly considered imputation to be something entirely different from (material or strict) implication. And I share his view.

Consider also Olivecrona's claim that judges must evaluate a purported *legal text*, such as a statute or a precedent, in order to determine whether it is really a *legal* text. I cannot accept this claim either. Whereas one might argue that in some cases the court cannot avoid evaluative, specifically moral, considerations in the *interpretation* of a statute or a precedent, it is simply false to maintain that the court has to evaluate a purported statute or precedent in order to determine whether it is legally valid (on this, see Spaak 2004). That is to say, I take it for granted that legal positivists are right to insist that the determination of the law is a purely factual matter, if and to the extent we are concerned with matters of existence or validity, as distinguished from matters of interpretation and application (on this, see Raz 1979, 1986, p. 115; Waluchow 1994).

To be sure, the legal positivist view that judges determine the existence or validity of law using (exclusively or essentially) factual criteria is not universally accepted. Ronald Dworkin, for example, argues that the judge cannot determine what the law is, except by engaging in moral and political reasoning (1978, Chap. 4; 1986, Chap. 7). But first of all, Dworkin's theory aims at moral justification of the "settled law" (1986, pp. 65–68),[10] and this must reasonably mean that he believes that the "settled law" is a fairly uncontroversial matter, that is, a matter of empirical fact. Second, whereas Dworkin adduces a complex and intriguing theory in support of his claim, Olivecrona does not offer much in the way of argumentation in support of his claim; and he certainly would not (and could not) accept Dworkin's theory or anything resembling it.

11.6 Olivecrona on the Nature of Evaluations

I have argued that Olivecrona's claim about operative facts depends on a confused view about the nature of evaluations, and that the claim about statutes and precedents is just plain false. Let us, however, assume, for the sake of argument, that Olivecrona's claim about operative facts is true. The question, then, is whether

[9] I would like to thank Jan Österberg for suggesting this way of understanding Olivecrona's line of argument.

[10] Here Dworkin speaks of the "preinterpretive stage."

Olivecrona is right to maintain (P3) that evaluations are not objective. This question is worth considering separately, even though we already have found reason to reject (P2), and with it the conclusion of Olivecrona's line of argumentation: that courts necessarily create law when deciding a case. For having done that, we will have gained a better understanding of the strengths and weaknesses of Olivecrona's argumentation taken as a whole.

As we have seen (in Chap 6), Olivecrona's precise view of moral evaluations or moral judgments is not easy to determine. I have argued, however, that in his early writings Olivecrona vacillated between an error theory and a non-cognitivist theory in regard to rights statements and judgments about duty, while accepting non-cognitivism in regard to value judgments proper, and that in his later writings he embraced a non-cognitivist theory across the board. What is of interest in this context, however, are not the details of Olivecrona's meta-ethical view, but whether the more general claim put forward by Olivecrona in this context, namely that moral judgments are non-objective, can be defended. And while the status of moral judgments is a hotly debated issue, I feel I can accept Olivecrona's basic stance, namely that moral judgments are non-objective.

But, as we have seen (in Chap. 6), Olivecrona does not make a sharp distinction between moral and non-moral values, rights, or obligations. Hence it is reasonable to assume that he believes that his analysis applies to both types. I take a different view, however. Whereas I agree with Olivecrona that moral evaluations are non-objective in the sense indicated, I am inclined to believe that other types of evaluation (except aesthetic evaluations) are, or at least can be, objective. I believe, more specifically, that moral evaluations are non-instrumental, whereas other types of evaluation are *instrumental*, in the sense that they can be reduced to judgments about the existence (or non-existence) of factual criteria (on this, see von Wright 1963, Chap. 2, especially pp. 24–29. See also Hart 1983, p. 350). For example, Kuhn (1977, pp. 321–325) and many others maintain that a scientific theory is adequate if (and only if) it is (i) empirically accurate, (ii) internally consistent and consistent with other established theories in the field, (iii) has a broad scope of application, and is (iv) simple and (v) fruitful; and these conditions appear to be essentially factual and therefore objective, although their precise interpretation and relative weight seem to be non-objective. Similarly, if—contrary to what I have been arguing—we were to accept Olivecrona's view that the judge must evaluate purported operative facts, we could say that such judgments are typically judgments about the existence or non-existence of factual criteria; and as such they are objective. We should note, however, that the subjective element that seems to come into play when we are concerned with the precise interpretation or relative weight of the scientifically relevant values (i)–(v), although perhaps present in the case of the multiple-choice exam, appear to be absent in the case of the judge's determination of the operative facts.

11.7 Convention, Not Evaluation

If I am right, Olivecrona uses the term "evaluation" in a broad enough sense to cover not only evaluations, including moral evaluations, but also considerations that are not evaluations at all. But, one may wonder, why does he do that? Why does he speak of evaluations in such a loose manner? One possibility is that he has in mind not evaluations in the sense explained above, but *conventions*, as distinguished from brute facts of nature.[11] More specifically, he might mean that the existence of legal norms and legal relations is a matter of convention, not a matter of brute fact, and that therefore a judgment that a certain operative fact is at hand, or that a certain text is a legal text, is a conventional, as distinguished from an empirical, judgment.

On this interpretation, premise (1) in Olivecrona's argumentation—if courts have to evaluate operative facts or legal texts in order to decide a case, and if evaluations are not objective, then courts necessarily create law when deciding cases—is transformed into premise (1*): If courts have to make conventional judgments about operative facts or legal texts in order to decide a case, and if conventional judgments are not objective, then courts necessarily create law when deciding cases; premise (2)—courts have to evaluate operative facts or legal texts in order to decide a case—is transformed into premise (2*): Courts have to make conventional judgments about operative facts or legal texts in order to decide a case; and premise (3)—evaluations are subjective—is transformed into premise (3*): Conventional judgments are subjective.

This interpretation gains support from Olivecrona's introduction of a distinction between the truth and the correctness of legal statements (1971, pp. 259–267), which we shall consider more closely in Chap 13. Having argued that legal statements—statements concerning legal rights or duties—fulfill an informative as well as a directive function in legal discourse, Olivecrona explains that in regard to its informative aspect, a legal statement may be correct or incorrect, but not true or false. On Olivecrona's analysis, the *correctness* of a legal statement consists in the conformity of the statement to an effective system of rules, whereas the *truth* of such a statement would consist in the conformity of the statement to brute facts. And since *A*'s ownership of a house, *X*, or *B*'s being a judge, is not an empirical fact, presupposing as it does the existence of legal rules, the statement that *A* owns *X* or that *B* is a judge cannot, on Olivecrona's analysis, be true or false, but only correct or incorrect. What is interesting about this in this context is that Olivecrona sees a close relation between correctness thus conceived and *evaluations* (Olivecrona 1971, p. 261): "… the ascertainment of correctness presupposes the evaluation of a certain system of rules as valid and the adherence to some more or less common scales of value." So on the suggested interpretation, Olivecrona is saying not that the ascertainment of correctness presupposes an *evaluation* of a certain system of

[11] I would like to thank Thomas Mautner for suggesting this possibility.

rules as valid, but that it presupposes a *conventional* judgment that the system is valid.

But the suggested interpretation is problematic. The problem is that both premise (2*) and premise (3*) turn out to be false; and this means that Olivecrona will not be able to establish the conclusion he wants. The reason why premise (2*) is false is that the judgment that a certain operative fact is at hand, as distinguished from the judgment that a certain text is a legal text, will not always be a conventional judgment. For not all operative facts are conventional facts. As Kelsen (1999, pp. 3–4) explains, human behavior of any sort as well as natural events, such as earthquakes and inundations, can be operative facts. Thus while it is clear that a person's being a Swedish citizen or a high court judge is a conventional fact, it is equally clear that one person's killing another or a seller's delivering a product too late is not. The reason why premise (3*) is false is that unlike moral judgments, conventional judgments are, or at least can be, objective in the sense of constructivist objectivity considered in Sect. 11.4 above. The difference between the moral and the conventional case is that the necessary and sufficient condition for constructivist objectivity—that the members of the relevant group of people are in agreement about whatever it is that they need to agree about—will be satisfied in the case of conventional judgments, but not in many cases of moral judgments. Hence from the point of view of the *soundness* of Olivecrona's inference, we are back where we began.

11.8 Conclusion

We have seen that Olivecrona argues (P1) that if courts have to evaluate operative facts or legal texts in order to decide a case, and if evaluations are not objective, then courts necessarily create law when deciding cases, (P2) that courts have to evaluate operative facts or legal texts in order to decide a case, (P3) that evaluations are not objective, and that therefore (C) courts necessarily create law when deciding a case. I have argued that Olivecrona's argumentation does not stand up to scrutiny, because even though (P1) and (P3) may be true, (P2) is false, or, alternatively, even though (P1*) may be true, (P2*) and (P3*) are false. This means that although the inference—(P&Q⊃R) & P& Q ∴ R—is *valid*, it is not sound.

References

Articles

Harman, Gilbert. 1975. Moral relativism defended. *Philosophical Review* 85:3–22.
Harman, Gilbert. 1996. Moral relativism. In *Moral relativism and moral objectivity*, eds. Gilbert Harman and Thomson Judith Jarvis, 3–64. London: Blackwell.
Hart, H. L. A. 1983. Lon L. Fuller: The morality of law. In *Essays in jurisprudence and philosophy,* ed. Hart, 343–364. (Originally published in Harvard Law Review 1965).
Hartley, Trevor C. 1996. The European Court, judicial objectivity and the constitution of the European Union. *Law Quarterly Review* 112:95–109.
Kuhn, Thomas S. 1977. Objectivity, value judgment, and theory choice. In *The essential tension*, ed. Thomas S. Kuhn, 320–339. Chicago: The University of Chicago Press.
Raz, Joseph. 1979. Legal positivism and the sources of law. In *The authority of law*, ed. Joseph Raz, 37–52. Oxford: Clarendon Press.
Raz, Joseph. 1986. Dworkin: A new link in the chain. *California Law Review* 74:1103–1119.
Spaak, Torben. 2004. Legal positivism and the objectivity of law. In *Analisi e diritto*, eds. Paolo Commanducci and Riccardo Guastini, 253–267. Turin: Giapichelli.

Books

Dworkin, R. M. 1978. *Taking rights seriously*. 2nd ed. London: Duckworth.
Dworkin, Ronald. 1986. *Law's empire*. Harvard: The Belknap Press.
Frändberg, Åke. 1973. *Om analog användning av rättsnormer (on Analogical Application of Legal Norms)*. Stockholm: Norstedts.
Hume, David. 1969. In *A treatise on human nature* (*reprinted*), ed. Ernest C. Mossner. London: Penguin Books. (Originally published 1739).
Kelsen, Hans. 1960. *Reine Rechtslehre (the Pure Theory of Law)*. 2nd ed. Vienna: Österreichische Staatsdruckerei.
Kelsen, Hans. 1992. *Introduction to the problems of legal theory*. Trans. Bonnie Litschewski Paulson and Stanley L. Paulson. Oxford: Oxford University Press. (Originally published 1934 in German under the title *Reine Rechtslehre* by Österreichishe Staatsdruckeri, Vienna).
Kelsen, Hans. 1999. *General theory of law and state*. Trans. Anders Wedberg. Union, New Jersey: The lawbook exchange. (Originally published 1945 by the Harvard University Press, Cambridge, Mass).
Olivecrona, Karl. 1971. *Law as fact*. 2nd ed. London: Stevens & Sons.
Spaak, Torben. 2007. *Guidance and constraint: The action-guiding capacity of theories of legal reasoning*. Uppsala: Iustus förlag.
von Wright, Georg Henrik. 1963. *The varieties of goodness*. London: Routledge & Kegan Paul.
Waluchow, W. J. 1994. *Inclusive legal positivism*. Oxford: Oxford University Press.

Chapter 12
Legislation

Abstract Olivecrona's account of legislation follows a reliably realist pattern in that it is concerned not with the capacity of legislative products to establish legal relations, but with their capacity to cause human behavior. Rejecting as he does the view that legal rules have binding force and can confer rights and impose duties, Olivecrona argues instead that they are independent imperatives, which possess a suggestive character by virtue of which they influence the citizens (and the legal officials) on the psychological level. For, as we have seen, he holds that the citizens (and the officials) are disposed to obey the independent imperatives because they revere the constitution. On such a realist understanding of law, one important task for anyone who wants to understand legislation and its role in the world of law is to explain how the independent imperatives become incorporated into the legal machinery. Although such incorporation is of course mainly done nowadays through the process of legislation, Olivecrona points out that custom and judge-made law also play a role. In this chapter, I therefore present Olivecrona's account of how legal rules become incorporated into the legal machinery by means of legislation, and to some extent by means of custom and judge-made law, and add a few critical remarks on this account.

12.1 Introduction

The multidisciplinary study of legislation, or *Gesetzgebungslehre*, as the Germans call it, has yet to fully penetrate the defense wall of legal philosophers, who have so far focused mainly on the more or less finished product of legislation, namely the legal system (in their inquiries into the nature of law), or on the activities of judges and other law-appliers (in their study of legal reasoning), or, in some cases, on normative or evaluative questions, such as whether there is an obligation to obey the law. As Luc Wintgens (2006, p. 1) notes, perhaps exaggerating somewhat, "[t]he way law is created through the process of legislation does not appear on the screen of the legal theorist."

The general idea behind the study of legislation is that legal scholars should focus on the legislative process rather than the finished products of legislation (Wintgens and Hage 2007, pp. iii–iv). This can be done in a number of ways. One might view the process of legislation at least from a historical, a sociological, a philosophical,

T. Spaak, *A Critical Appraisal of Karl Olivecrona's Legal Philosophy,*
Law and Philosophy Library 108, DOI 10.1007/978-3-319-06167-2_12,

an economic, or a legal-doctrinal point of view. Adopting a philosophical perspective, then, I would say that the study of legislation may include, inter alia, studies concerning technical aspects of legislation, such as the construction of norm typologies and studies of the role certain types of norm, such as, e.g., goal norms, play in legislation (see, e.g., Westerman 2007), studies of the consequences—such as lack of intelligibility—of the ever-increasing quantity of legislation, especially in times of globalization, studies of the correlation between the intended and the actual effects of a given piece of legislation, studies of whether rational legislation is at all possible (Hayek 1973, 1976, 1979), and a number of other questions (Hellner 1990; Kaufmann 1997, p. 18).

But there is also room for the development of normative theories of legislation, that is, theories about the general aim of legislation, about the proper limits of legislation, etc. For example, in a fairly recent article on the study of legislation, or legisprudence, as he calls it, Wintgens (2006, pp. 1–2) issues a call for a "rational theory of legislation," arguing that such a theory should consist in "an elaboration of the idea of freedom as *principium*." (Wintgens 2006, p. 10) Crudely put, his idea is that legislation infringes the freedom of the citizens and that it must therefore be justified (Wintgens 2006, p. 10). To this end he proposes four guiding principles, namely (1) the principle of alternativity, (2) the principle of normative density, (3) the principle of temporality, and (4) the principle of coherence, arguing that if a proposed piece of legislation meets these requirements, we may treat it as being justified (Wintgens 2006, pp. 10–24).

Against this background, it is of some interest to note that Olivecrona touches on questions concerning legislation in his otherwise traditionally oriented writings on jurisprudence. As one might expect, his account of legislation follows a reliably realist pattern in that it is concerned not with the capacity of legislative products to establish legal relations, but with their capacity to cause people to behave in one way or another. That is to say, his account presents legislation as part of the "chain of cause and effect" (Olivecrona 1939, pp. 21–22), not as something that creates legal entities and properties. On this analysis, there are (and can be) no legal (or moral) rights or duties, but only legal (and moral) claims, including legislative claims, which function on the psychological level. And this means that his contribution to the study of legislation can hardly contribute to, but is rather designed to undermine, the development of normative theories of legislation.

As one might expect, the account of legislation proposed by Olivecrona depends on his realist account of the nature of law. He rejects, as we have seen (in Chaps. 7–8), the view that legal rules have binding force and can confer rights and impose duties, arguing instead that they are independent imperatives possessing a suggestive character by virtue of which they influence the citizens (and the legal officials) on the psychological level. As we have also seen, this suggestive character depends in turn ultimately on the reverence (or respect) for the constitution on the part of the citizens (and the legal officials): They are disposed to obey the independent imperatives because they revere the constitution. On such a realist understanding of law, one important task for anyone who wants to understand legislation and its role in the world of law is to explain how legal rules in the shape of

independent imperatives become incorporated into the legal machinery. Although such incorporation is of course mainly done nowadays through the process of legislation, Olivecrona points out that custom and judge-made law also play a role. In this chapter, I shall therefore present Olivecrona's account of how legal rules become incorporated into the legal machinery by means of legislation, and to some extent by means of custom and judge-made law, and add a few critical remarks on this account.

I begin by considering Olivecrona's view on legislation, as it was presented in the first edition of *Law as Fact* (Sect. 12.2), in a later article on realism and idealism in legal philosophy (Sect. 12.3), and, finally, in the second edition of *Law as Fact* (Sect. 12.4), adding a few words about Olivecrona's thoughts on customary law and judge-made law (Sect. 12.5). Having done that, I consider briefly Olivecrona's discussion of the problem of revolution (Sect. 12.6) and the search for an ultimate explanation of law (Sect. 12.7), and point to a couple of difficulties in the account of legislation (Sect. 12.8).

12.2 Legislation in Law as Fact I

As we shall see, Olivecrona's focus is on one part of the general topic of legislation, namely the incorporation of rules in the shape of independent imperatives into the machinery of law. While this account leaves out much that is of interest, it is nevertheless a considerable achievement. Not only is the account combined with, and dependent on, a highly original account of the nature of legal rules, it also bears a distinctive realist mark and differs in this way from much else that has been written on legislation.

Olivecrona begins his discussion by pointing out that accounting for the effects and significance of legislation will be problematic only if one (mistakenly) assumes that legal rules have binding force (Olivecrona 1939, p. 51): "From the traditional standpoint the act of legislating implies something inexplicable, though this is not always clearly realized. It is, however, inexplicable how the draft, or bill, can be lifted into another sphere of reality through being promulgated as law."[1] But on a realist understanding of law, he explains, one will see that the task of the legal scholar is to explain how rules in the shape of independent imperatives are actually incorporated into the legal machinery. And he points out that this task amounts to describing relations of cause and effect in the world of time and space (Olivecrona 1939, pp. 21–22). He means, more specifically, that the lawmakers "are able to influence the conduct of state officials and of the public in general" by means of 'ought' and other imperative expressions; and he points out (Olivecrona 1939, p. 52) that "[t]his effect of the act of law-giving is in no way of a mystical character. It is only a question here of cause and effect in the natural world, on the *psychological* level."

[1] The accounts of legislation in the first edition of *Law as Fact* (1939) and the Swedish version of this book, entitled *Om lagen och staten* (1940), are more or less identical.

Focusing on legislation, then, as distinguished from judge-made law or customary law, Olivecrona points out that the way the individual mind works is a matter for the science of psychology, and that for the purposes of his investigation into the nature of law, he need only point to the general conditions that must be satisfied for legal rules to be effective in society. He explains, as we have seen (in Sect. 12.8.2), that the efficacy of legislation depends primarily on an attitude of *reverence for the constitution* on the part of the citizens:

> Everywhere there exists a set of ideas concerning the government of the country, ideas which are conceived as "binding" and implicitly obeyed. According to them certain persons are appointed to wield supreme power as kings, ministers, or members of parliament etc. From this their actual power obtains. The general attitude towards the constitution places them in key-positions, enabling them to put pressure on their fellow-citizens and generally to direct their actions in some respects. (Olivecrona 1939, pp. 52–53)

This attitude of reverence, he continues, has a double significance (Olivecrona 1939, p. 54). First, it causes the citizens to accept as binding the rules that are issued by the legislature. Secondly, it closes off such acceptance in other directions, making it impossible for other groups than the members of the legislature to issue binding rules. Thus the attitude of reverence for the constitution makes it possible for some, and impossible for others, to legislate.

Under normal circumstances, Olivecrona explains, we take this attitude for granted, and as a result we treat the efficacy of legislation as a given, as part of the order of the universe (Olivecrona 1939, p. 55): "… we do not reflect on the simple fact that the effect of legislation is conditioned by the psychological attitude which we ourselves and the millions of other people maintain. Because of this attitude the law-givers can play on our minds as on a musical instrument."

This attitude is not self-supporting, however, he explains, but must be sustained by means of an incessant psychological pressure on the citizens (Olivecrona 1939, pp. 53–54). Hence, as we have seen (in Sect. 12.8.2), a second condition for the efficacy of legislation in society must be satisfied, namely that there be an *organization*—the state—that handles the application and enforcement of the law (Olivecrona 1939, pp. 55–56).

Olivecrona concludes that the real significance of the act of legislating is to be found in the *formalities* that are attached to it, because these formalities confer on the legal rules a special nimbus that makes people take them as a pattern of conduct (Olivecrona 1939, p. 56): "What takes place is that the formalities prescribed in the constitution when applied to the 'independent imperatives' in the draft, give to these imperatives a special social importance for social life by shrouding them in a nimbus or labeling them in a certain way, thereby making people take them as patterns of conduct."

He also points out that even though we think of the state as the lawmaker, it is always individual persons who act on behalf of the state when we say that the latter is creating law. From the standpoint of such individuals, what is important is to have access to the *mechanism* with the help of which one can create law. This mechanism, he explains,

> [i]s always ready for use for anyone who has been born into a key-position or has the courage and skill and tenacity required to make a way to one. The ways are different in a monarchy and in a republic, in a democracy and a dictatorship. But the significance of the key-positions is on principle the same everywhere. The important thing is to be able to use those formalities, which, considering the psychological situation, in the country, are required in order to give practical effect to independent imperatives. (Olivecrona 1939, p. 57)

Olivecrona is, however, careful to point out that although the constitution is a source of power for the act of legislation, it does not follow that the continued efficacy of the law is dependent upon the continued efficacy of the very constitution on the basis of which the law was created (Olivecrona 1939, pp. 48–59). He notes that we have seen many times that the law of the land remains efficacious even though the constitution under which it was created has been overthrown or has otherwise come to be ignored. As he explains (Olivecrona 1939, p. 59), "[t]he respect for the law may survive the causes that have, originally, brought it into being. Other causes come into play and maintain the respect. When a law has become a part of the structure of the community, many interests grow up around it. It cannot, therefore, be put aside without causing a disturbance."

12.3 Realism and Idealism

As I have said, Olivecrona's main discussions of legislation are to be found in the first and the second edition of *Law as Fact*. But in an article from the early 1950's on idealism and realism in legal philosophy (Olivecrona 1951), Olivecrona does touch, albeit briefly, on questions concerning legislation in his discussion of the idea of an objective 'ought,' which he considered to be embraced by traditional legal scholars, such as Hans Kelsen. He argued, more specifically, that any credible analysis of norms and value judgments has to be non-cognitivistic (Olivecrona 1951, pp. 129–130),[2] and that such an analysis makes it clear that there is no such thing as an objective 'ought' that dwells in a non-natural realm of norms and values, but only the efforts of the legislature (and other issuers of norms) in the world of time and space to influence human beings on the psychological level by means of imperatives:

> The sentences representing legal rules are obviously factual, and so are the ideas which they express. The belief in the objective ought includes the idea that the sentences are held really to *engender* the relations which they enunciate; they are held to establish, for instance between crime and punishment, a relation of a wholly different kind from that of causality. We are misled by our own feelings of being bound into believing in these metaphysical relations. What the legislator can do is merely to *cause* officials to act in a certain way and to impress, with more or less success, certain patterns of behaviour on the public. Nothing else is required for this purpose. (Olivecrona 1951, pp. 130–131)

[2] Olivecrona does not use the term 'non'cognitivism,' however.

The idea is thus the same as before, namely that imperatives—commands as wells as independent imperatives—are very well suited to bring about human behavior. The reason, as we have seen, is that they possess a suggestive character that influences the subjects of the imperatives, a suggestive character that in the case of the independent imperatives depends on the above-mentioned reverence for the constitution.

12.4 Legislation in *Law as Fact II*

Olivecrona returns to the topic of legislation in the second edition of *Law as Fact* (Olivecrona 1971).[3] His discussion takes place against roughly the same background as did his discussion in the first edition of *Law as Fact*, though he does not emphasize here his rejection of the view that legal rules have binding force as strongly as he did in the first edition.

Having discussed technical details of the procedure of legislation in Sweden, he repeats the view he put forward in the first edition of *Law as Fact* (Olivecrona 1939), that the efficacy of legislation is a psychological matter, which depends essentially on the reverence (or respect) for the constitution on the part of the citizens:

> What makes legislative acts by King and Diet effective is, in the first place, the engrained respect for the constitution. In the constitution the right of making laws is conferred on King and Diet; the formalities to be observed are described. The respect for these rules is so universal and so powerful that a text promulgated as law after due procedure is automatically accepted by everybody as being a law; and this implies the idea of duty to follow its prescriptions. (Olivecrona 1971, p. 90) [4]

Having pointed out that the adherents of the will theory of law, according to which law is the content of a sovereign will, emphasize the will of the sovereign over the formalities in the procedure of legislation, he objects that this is to turn "the realities upside down." What is important, he insists, is not the will of the lawmaker, which in any case does not exist, but the *formalities* that must be respected in the procedure of legislation (Olivecrona 1971, p. 92): "The formalities may seem trifling when they are regarded in isolation. They are nevertheless essential. They may consist of this or that according to the historical circumstances in the country; the important thing is that the forms of the existing constitution are observed."

[3] The accounts of legislation in Olivecrona (1971) and the Swedish version of this book, Olivecrona (1976), differ slightly.

[4] Olivecrona means by 'the Diet' a legislative body, such as the English Parliament or the US Congress.

12.5 Traditional Law

In addition to legislation, Olivecrona considers in both the first and the second edition of *Law as Fact* (what he calls) informal methods of establishing legal rules, namely custom and judge-made law. He points out in the first edition that on a realist understanding, customary rules are incorporated into the legal machinery in pretty much the same way as rules enacted by the legislature (Olivecrona 1939, p. 62): "In both cases what takes place is the introduction of new imperatives into a system of imperatives that is regarded as binding and has practical effect. In both cases there is nothing but a chain of cause and effect on the psychological level." He also observes that "[t]he forces which give practical effect to the judge-made rules are similar to those which support the law-giving machinery. The reverence in which the constitution is held is the dominating factor." (Olivecrona 1939, p. 63) He concludes that the important thing in both the case of legislation and the case of customary and judge-made law, is that it is a matter of making independent imperatives efficacious in a system of rules, and he notes that it is only to be expected that this can be done in different ways, such as by legislation, on the one hand, and by custom or judicial decision-making, on the other hand (Olivecrona 1939, p. 65).

In the second edition of *Law as Fact*, Olivecrona discusses briefly custom and judge-made law as examples of more informal ways to incorporate rules into the machinery of law. A custom, he explains (Olivecrona 1971, p. 105), is "a certain manner of acting, regularly observed within a community." But, he continues, it is not a question simply of behavior that actually takes place, but of behavior that actually takes place *because* the members of the community believe that this is what they ought to do (Olivecrona 1971, p. 106). With time, he notes, custom will become less and legislation more important when it comes to incorporating rules into the legal machinery (Olivecrona 1971, p. 106). He adds that today (Olivecrona 1971) there is no customary law that is independent of legislation and judge-made law (Olivecrona 1971, pp. 106–107). It is, however, worth noting that while this was (and is) largely true about state law, the significance of customary law seems to be increasing in step with the process of globalization. Just consider the case of so-called transnational law.[5]

12.6 The Problem of Revolution

Observing that it is difficult to understand how a revolution can give rise to a binding constitution, since the revolutionaries will necessarily be enacting laws in violation of the old constitution, Olivecrona points out that this problem—which he refers to as the problem of revolution—disappears completely, if we adopt a realist

[5] On transnational law, see, e.g., Berman and Kaufman (1978); Frischkorn (2005); Koh (2005–2006).

understanding of law and legal phenomena (Olivecrona 1939, p. 66). If we do, we see that in both cases a person or a group of persons is laying down a set of independent imperatives, claiming that they must be obeyed. The interesting difference, he explains, is to be found in the reasons why the imperatives become efficacious:

> While ordinary legislation is made effective through the general reverence for the constitution, working as a *permanent* source of power, a revolutionary constitution is pressed on the people by other means. There must be a temporary assemblance of forces strong enough to effect that change in attitude of the citizens which is implied in the acceptance of a new constitution as binding. For the ordinary law-givers no special effort is required to make their laws effective, because they have at their disposal a ready-made machinery. The revolutionaries have got to create the machinery themselves, i.e. to turn the minds of people into new channels through which psychological pressure can be brought to bear on them. (Olivecrona 1939, pp. 67–68)

Olivecrona identifies two important factors that must be present if the revolutionaries are to be able to create a revolutionary situation, namely force and propaganda (Olivecrona 1939, p. 69). Observing that the immediate obstacle to any attempt at a revolution is the loyalty of the citizens to the existing constitution, he concludes (Olivecrona 1939, pp. 70–71) that, generally speaking, "[t]he principal source of strength to the constitution is the social habits and instincts of the people. This is so *during* the reign of a constitution as well as when a new constitution is established. The revolutionaries can gain power only by utilising this force in the proper way."

He concludes his discussion of revolutionary lawmaking by pointing out that, on his analysis, no sharp line can be drawn between ordinary and revolutionary legislation (Olivecrona 1939, p. 72). Not only do the constitutional legislators often have the power to deviate from the requirements of the constitution, it is also widely known that a constitution may be interpreted in a way that does not correspond to the intentions of the framers. Constitutions, he observes (Olivecrona 1939, p. 72), "are far more exposed to varying and arbitrary interpretations than ordinary laws, because their application is not in general done by impartial judges but by politicians. The only control on these people is often public opinion, which may be manipulated by them to a considerable extent." It is, however, worth noting that Olivecrona does not mention the possibility of judicial review in this context. While there was no such provision in the Swedish constitution of 1809 (which was in force at the time Olivecrona wrote his book), there is one in the constitution of 1974 (introduced in 1979). Moreover, as Olivecrona surely knew, judicial review was (and is) an important legal institution in some jurisdictions, such as those of the USA and Germany.

This claim about revolutionary legislation, although perhaps somewhat surprising at first, is very much in keeping with Olivecrona's realism about law and legal phenomena. If we do away with the idea that law is binding and confers rights and imposes duties, this may be what we find. Olivecrona is not, of course, saying that the picture he paints of law and legal phenomena is attractive, only that it is realistic. Nor is he saying that one cannot subject revolutionary as well as ordinary legislation to moral criticism, though one may perhaps wonder what will be left of morality if we conceive of moral discourse as nothing more than a matter of expressing attitudes and feelings in order to *persuade*—not convince—people to behave in a

certain way. But this is a deep question about the implications of the non-cognitivist analysis that I shall not pursue here (on this, see Schafer-Landau 2003, pp. 27–30).

12.7 The Search for an Ultimate Explanation of Law

Olivecrona notes at the end of his discussions of the problem of establishing legal rules in both the first and the second editions of *Law as Fact*, that although he has discussed the problem of revolution, he has by no means provided an ultimate, or final, explanation of the law, that is, he has not explained how the legal system came into existence. The reason, he explains, is simply that it is more or less impossible to provide such an explanation, and he points out that this means that a failure to provide such an explanation cannot reasonably be an objection to his account of legislation. Here is how he puts it in the first edition:

> The historical explanation always refers to a stage in the evolution of the law starting at a point where a system of law has been practised for a long time. At most some conclusions concerning an earlier stage may be drawn from known facts. But this does not lead to a "final" explanation. It is futile to ask how the system as a whole has been established from the beginning. The objection that our exposition has not furnished an answer to that question is therefore of no weight. (Olivecrona 1939, p. 74)

What we can do, he says in the second edition, is to identify some common features in the process (Olivecrona 1971, p. 97): "Even where we find working constitutions, as for instance in the Greek states and in Rome, their origin is not known and can presumably never be known to us. It is only possible to study the facts as they appear from the sources and draw some conclusions from them." He points out in this context that there was one important element that made the establishment of a constitution possible, namely the prevalence of *religious* beliefs. As he explains (Olivecrona 1971, p. 98), "[i]n ancient times religion and law were not separated into different spheres. They formed an entity. If social rules evolved in connection with religious rites and beliefs, we can understand how they could obtain enduring respect."

12.8 Two Difficulties

We have seen that Olivecrona maintains that legal rules are independent imperatives that influence people on the psychological level because they possess a suggestive character, that this suggestive character depends ultimately on the reverence for the constitution on the part of the citizens, and that such independent imperatives are incorporated into the legal machinery mainly by means of legislation, but also by means of custom and judicial activity. But, one wonders, what does it mean to say that independent imperatives have a suggestive character? And what does it mean to say that the citizens (and the legal officials) revere the constitution?

Although Olivecrona does not have much to say about the idea of reverence for the constitution, he does consider and reject a couple of possible objections to his account, namely (1) that the general public "has very hazy notions regarding the constitution", and (2) that even if they do know something about the constitution, they "can hardly know that the text has gone through the requisite formalities." (Olivecrona 1971, p. 90) His answer to the first objection is simply that having rather hazy notions of the constitution is sufficient (Olivecrona 1971, p. 90): "[I]t is enough that people have the idea that the power of issuing laws belongs to certain authorities in the capital, known as the King and Diet." His answer to the second objection is that although it is quite true that only a few people will have direct access to the procedure of legislation, there are a number of "technical links" between the legislature and the general public that make it reasonable for the general public to trust that the legislative procedure has been carried out according to plan:

> Officials take care that the text signed by the King is the same as that which has been passed by the Diet. They then see to it that the same text is published without alteration in the official collection of the laws. The texts in this collection are read by few people outside the bureaucracy. But for the use of the public private editions are printed with commentaries, and these have to be reliable if they are to be sold at all. The press, the radio, and the TV help in spreading knowledge of new laws; organizations of different kinds distribute information to their members, and so on. This activity refers only to texts that have really gone through the constitutional formalities. (Olivecrona 1971, pp. 90–91)

As I have said (in Sect. 12.8.2), I am not convinced that the citizens revere the constitution, however, and Olivecrona does not offer any evidence to support the claim that they do. He maintains, as we have seen, that although many people have rather hazy notions regarding the constitution, they know that the legislature (together with the King) has the legal power (or competence) to make laws, and that this is enough. But can we really infer from Olivecrona's description that the citizens *revere* (or respect) the constitution? I do not think so. True, the great majority of the citizens in most democratic countries accept that a collective body called the legislature has the legal power to make laws. But this attitude on the part of the citizens can in many cases hardly be described as one of reverence or even respect for the constitution, but rather as one of acceptance, perhaps indifference, and in a few cases even as one of fear. Since Olivecrona does not discuss the attitude in question in any detail, it is difficult to say whether, and if so how, his account of legislation would be affected, if it turned out that the attitude was not one of reverence or respect, but rather one of acceptance, indifference, or fear. I am, however, inclined to think that such a finding would not be damaging to Olivecrona's account. For the account concerns the psychological efficacy of the independent imperatives only, not their normative force, and the distinction between reverence (or respect), on the one hand, and acceptance or indifference or even fear, on the other, is of little or no importance in this regard—if Olivecrona had been concerned instead to establish an *obligation* to obey the law, the situation would have been very different.

But, as I argued above (in Sect. 12.8.2), even if one were to accept the claim that the citizens revere the constitution, and the implication that the citizens are disposed to obey the law, one must surely wonder whether it is illuminating to describe this state of affairs in terms of a suggestive character possessed by the independent

imperatives. As I have said (in Sect. 12.8.2), Olivecrona should have adopted instead the line of reasoning employed by Charles Stevenson (1937) in his analysis of the emotive meaning of moral words. Just as Stevenson finds the emotive meaning of moral words *in* the affective responses in people, so that there will be no emotive meaning over and above those responses, Olivecrona might have found the suggestive character of imperatives *in* the disposition of people to obey imperatives, so that there would be no suggestive character over and above that disposition. In my view, an account along Stevensonian lines would have been more realistic than Olivecrona's account, in that it does not posit entities or properties that play no real role in the purported explanation.

References

Articles

Berman, Harold J., and Colin Kaufman. 1978. The law of international commercial transactions (Lex Mercatoria). *Harvard International Law Journal* 19:2221–2277.

Frischkorn, Michael. 2005. Definitions of the Lex Mercatoria and the effects of codifications on the Lex Mercatoria's flexibility. *European Journal of Law Reform* 7:331–351.

Koh, Harold Honghju. 2005–2006. Why transnational law matters. *24 Pennsylvania State International Law Review* 24:745–753.

Olivecrona, Karl. 1951. Realism and idealism: Some reflections on the cardinal point in legal philosophy. *New York University Law Review* 26:120–131.

Stevenson, Charles Leslie. 1937. The emotive meaning of ethical terms. *Mind, New Series* 46:14–31.

Wintgens, L. J. 2006. Legisprudence as a new theory of legislation. *Ratio Juris* 19:1–25.

Wintgens, Luc, and Jaap Hage. 2007. Editor's preface. *Legisprudence* 1:iii–iv.

Westerman, P. C. 2007. Governing by goals: Governance as a legal style. *Legisprudence* 1:51–72.

Books

Hayek, Friedrich A. 1973. *Law, legislation, and liberty. Volume 1. Rules and Order*. Chicago: The University of Chicago Press.

Hayek, Friedrich A. 1976. *Law, legislation, and liberty. Volume 2. The mirage of social justice*. Chicago: The University of Chicago Press.

Hayek, Friedrich A. 1979. *Law, legislation, and liberty. Volume 3. The political order of a free people*. Chicago: The University of Chicago Press.

Hellner, Jan. 1990. *Lagstiftning inom förmögenhetsrätten: praktik, teori och teknik. [Legislation in the field of general property law: Practice, theory and technique]*. Stockholm: Juristförlaget.

Kaufmann, Arthur. 1997. *Rechtsphilosophie*. 2nd ed. Munich: C. H. Beck.

Olivecrona, Karl. 1939. *Law as fact*. Copenhagen: Einar Munksgaard, London: Humphrey Milford.

Olivecrona, Karl. 1940. *Om lagen och staten [On law and the state]*. Copenhagen: Einar Munksgard, Lund: Gleerup.

Olivecrona, Karl. 1971. *Law as fact*. 2nd ed. London: Stevens & Sons.

Olivecrona, Karl. 1976. *Rättsordningen [The legal order]*. 2nd ed. Stockholm: Liber. (1st. ed. 1966).

Schafer-Landau, Russ. 2003. *Moral realism. A defence*. Oxford: Oxford University Press.

Chapter 13
Truth and Correctness

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

13.1 Introduction

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

T. Spaak, *A Critical Appraisal of Karl Olivecrona's Legal Philosophy,*
Law and Philosophy Library 108, DOI 10.1007/978-3-319-06167-2_13,

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

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

13.2 Truth and Correctness

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13.3 Internal or External Legal Statements?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

13.4 Two Difficulties

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

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

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

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

13.5 Conventions

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

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

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

---

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

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

References

Articles

MacCormick, Neil. 1986. Law, morality and positivism. In *An institutional theory of law*, ed. Neil MacCormick and Ota Weinberger, 127–144. Dordrecht: Reidel.

Books

Hart, H. L. A. 1961. *The concept of law*. Oxford: Clarendon Press.
Olivecrona, Karl. 1971. *Law as fact*. 2nd ed. London: Stevens & Sons.
Raz, Joseph. 1990. *Practical reason and norms*. 2nd ed. Princeton: Princeton University Press.

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

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

Part IV
The History of Legal Philosophy

Chapter 14
Topics in the History of Legal and Political Philosophy

Abstract In this chapter, I consider Olivecrona's treatment of certain topics in the history of legal and political philosophy. Olivecrona touches in these essays on questions that he had been, or would later be, concerned with when developing his own legal philosophy; and although the essays concern rather different topics, they all illustrate some aspect or aspects of his legal philosophy, such as his naturalism, his meta-ethics, his critique of will theories of law, or his analysis of the concept of a rule. Thus he considers the theory of the *universitas*, according to which a corporation is a type of composite entity that is neither fictional nor identical with its members, arguing that this theory correctly captures the Roman jurists' understanding of the nature of corporations. He also considers the Swedish medieval practice of adjudging someone a king, explaining that the act of adjudging someone a king was a magical rite, in which the court aimed to confer an ideal legal property, namely kinghood, on the person in question. Moreover, he clarifies the import of the concept of a person's *suum*, or private sphere, in the works of the natural law philosophers Hugo Grotius and Samuel Pufendorf, and points out that this concept is needed to understand the important natural law precept, that one must never harm another. Finally, he clarifies, though he does not clearly assess, John Locke's thoughts on the appropriation of property and considers and rejects Jeremy Bentham's view that law is the content of a sovereign will, arguing that the will theory cannot be squared with a thoroughgoing naturalism.

14.1 Introduction

Olivecrona wrote his first essay on a topic in the history of legal and political philosophy in 1928 and again touched on historical topics in the early 1940s. After that he did not write on such topics until the late 1960s, and then again in the 1970s. In this chapter, I want to briefly consider what Olivecrona had to say about these historical topics. As we shall see, he touches in some of these essays on questions that he had been, or would later be, concerned with when developing his own legal philosophy; and although the essays concern rather different topics, they all illustrate some aspect or aspects of his legal philosophy, such as his naturalism, his meta-ethics, his critique of will theories of law, or his analysis of the concept of a rule.

T. Spaak, *A Critical Appraisal of Karl Olivecrona's Legal Philosophy,*
Law and Philosophy Library 108, DOI 10.1007/978-3-319-06167-2_14,

I begin with Olivecrona's thoughts on the nature of corporations in Roman law (Sect. 14.2) and on king-making in early medieval Swedish law (Sect. 14.3). I then consider what Olivecrona had to say about the natural law philosophies of Hugo Grotius and Samuel Pufendorf (Sect. 14.4), the political philosophy of John Locke (Sect. 14.5), and the legal philosophy of Jeremy Bentham (Sect. 14.6). I shall devote more space to the last three topics than to the first two, because I find them especially interesting.

14.2 Roman Law: The Nature of Corporations

In his little book on Roman law (1949), Olivecrona treats (i) the nature of corporations (or juridical persons), (ii) theft, and (iii) the acquisition of possession. I shall focus here on the first of these topics, the nature of corporations, because I find the topic intriguing and because it has been of considerable interest to philosophers of law throughout the ages. As I said in Chap. 2, Olivecrona wrote his doctoral dissertation on this topic (1928); and H. L. A. Hart dealt with it in his inaugural lecture on definition and theory in jurisprudence (1954).

Olivecrona begins by noting (1949, p. 5) that "[o]ne of the outstanding contributions of the Roman jurists to legal thought is the idea that rights and duties can be ascribed to an organization as an entity distinct from its members." He observes that we can find in the literature two distinct and competing views about the nature of corporations as they were understood by the Romans, namely (i) the view that the corporation is a fictitious person, and (ii) the view that the corporation is identical with its members. He objects, however, that neither theory is satisfactory. But, he continues, there is actually a third theory on this topic, which is supported by the available evidence, namely the theory of the *universitas*, according to which a corporation is a type of composite entity that is neither fictional nor identical with its members. He then sets himself the task of showing that it is this theory that correctly captures the Roman jurists' understanding of the nature of corporations.

In order to understand the theory of the *universitas*, Olivecrona explains, we need to understand the general theory of *corpora* (or bodies); and he proceeds to explain that the latter theory is based on the idea of *species* (or *spiritus*), which is a cohesive power or spirit that inhabits each and every object that appears as a separate thing to the "natural way of looking at things" and determines the nature of that thing (Olivercrona 1949, p. 18). He writes:

> The *species* is opposed to the material, or the physical *substratum* that gets its individual determination through the *species*. The *species*, and consequently the identity of the thing, is in a way independent of the identity of the *substratum*. The material may change without altering the individuality of the thing, provided the change happens successively and does not transform the object into a thing of another kind. Thus the identity of a ship remains unaltered even if new planks are fitted; the human body remains the same though its component parts are changing, etc. (Olivercrona 1949, pp. 18–19.)

The Romans distinguished between three classes of *corpora*, Olivecrona explains, namely between (i) homogeneous bodies, such as persons, animals, and trees (Olivercrona 1949, p. 21), (ii) bodies that are made up of parts, such as buildings, ships, and tables (Olivercrona 1949, p. 23), and (iii) bodies *ex distantibus*, that is, bodies that are made up of parts that do not lose their individuality as a result of becoming part of the main body (Olivercrona 1949, p. 25), and they conceived of corporations as *corpora* of the third class, as bodies *ex distantibus*. Olivecrona describes the bodies in the third class as follows (Olivercrona 1949, p. 25): "[t]heir parts are physically independent of each other as, e.g., the sheep in a flock or the men in a legion. They are held together by some ideal or conceptual bond of unity and have a name of their own: *uni nomine subiecta sunt*."

Now a *corpus* that belongs to the second or the third class of *corpora* is a *universitas*, Olivecrona explains (Olivercrona 1949, p. 28), that is, "a thing, an entity, consisting of parts (*singulae partes*) with potential or actual individuality." He summarizes his main claim as follows:

> The individual members were not the real subjects of the corporation's rights and duties; nor was a corporation conceived of as a fictitious entity. The right and duty bearing entity was the *corpus ex distantibus* formed by the members as united by coming together (*coire*) into a college or whatever other name was used; it was this *universitas* conceived as remaining identical during changes in the membership that was the subject of the rights and duties referred to as belonging to the corporation. (Olivercrona 1949, p. 31. Footnote omitted.)

Olivecrona concludes his analysis of the concept of a corporation with a brief consideration of the question *why* the Roman jurists made use of the doctrine of *corpora*. Noting that they offer no such explanation, he hypothesizes that they made use of it because they saw a need for it, because it "… was such an excellent means of introducing those rules that are required for permanent associations of men, above all rules referring rights and duties not to the particular members but to a distinct entity represented as remaining identical during changes in the membership." (Olivercrona 1949, p. 37.)

We see that Olivecrona contemplates the existence of some sort of ideal bond that unites a number of distinct entities, namely the *species* or (*spiritus*). But, as we have seen (in Sect. 5.3), he is an ontological naturalist, who does not accept the existence of non-natural entities or properties and holds that an *analysis* of a concept, such as the concept of a corporation, in terms of non-natural entities and properties can be philosophically acceptable, if it captures the import of the concept as it is understood by those who use it, while insisting that the *concept* itself cannot be philosophically acceptable, unless there is something in the natural world that corresponds to it. One would therefore have expected him to point out that the concept of a corporation, as it was understood by the Romans, although it can be analyzed in a philosophically acceptable way, is not a philosophically acceptable concept. He does not, however, touch on these questions in his discussion of the theory of *corpora*.

While I find Olivecrona's discussion of the theory of *corpora* historically interesting, I do not find in this theory a convincing *explanation* of the nature of corporations. What we learn from Olivecrona's discussion is that the Roman jurists

conceived of corporations as a type of non-fictional, composite entity that is distinct from its members. But this is, of course, precisely how we view corporations today; and interesting as this piece of historical information is, no one who is looking for an explanation of the nature of corporations is going to be satisfied when told that our view was the view of the Roman jurists, too, and that we have indeed inherited it from them. The problem is that since, on this analysis, a corporation is neither a fiction nor identical with its members, it is unclear *what* it is. And that is precisely why jurists and philosophers since the days of the Romans have been puzzled by the nature of corporations. I conclude that the theory of *corpora* is lacking in explanatory value.

14.3 Early Medieval Swedish Law: Becoming a King

Olivecrona's second essay on legal-historical matters was his 1942 essay *Becoming a King* [*Döma till konung*] (1942). Here Olivecrona is concerned with the interpretation of some provisions in early medieval Swedish law, according to which a court could adjudge someone a king. What, Olivecrona asks, did adjudging someone a king *mean*? His answer is that the act of adjudging someone a king was a magical rite, in which the court aimed to confer an ideal legal property, namely kinghood, on the person in question.

Olivecrona begins by pointing out that according to the received opinion at the time of writing (that is, 1942) a court judgment was a *report* about a legal state of affairs. For example, a court judgment that *A* has a right to performance vis à vis *B* is a report, that under Swedish law *A* has indeed a right to performance vis à vis *B*. He objects, however, that this is a false view. For, he maintains, as we have seen in Chap. 11, that a court judgment is not a report at all, but an *imperative*. The true nature of court judgments is of interest in this context, he explains, because we must not read a false contemporary view about the nature of court judgments into our analysis of early medieval Swedish law (Olivecrona 1942, pp. 9–10).

He then explains that the essence of the ceremony in which a person was adjudged a king was that this person was placed on a rock called *Mora Rock*, which was located on a meadow a few miles out of Uppsala (Olivecrona 1942, p. 11). He proceeds to explain that the act of adjudging someone a king was a *rite* the purpose of which was to *make* the person in question king, not to choose the person who was to become king (Olivecrona 1942, p. 12):

"However it was decided in a given case who would become king—whether it depended on birth, election, combat, or perhaps in ancient times a sign of the gods—this rite was used to *make* him king. He is not a king when the act begins. But he is when it ends."[1] This rite, he continues, was *magical*. The acts clearly aimed at conferring on the person in question—the king-to-be—an ideal, that is, a

[1] The Swedish original reads as follows: "Hur det än i ett givet fall blivit bestämt vem som skulle bli konung—vare sig det berott på börd, val, vapenskifte eller kanske i forntiden ett tecken av

non-natural property, namely kinghood (Olivecrona 1942, p. 13). Having discussed the details of the rite in question, he pauses and reiterates his earlier claim that the act of adjudging someone a king was part of a very old heathen rite that included a type of verbal magic:

> By speaking in conjunction with positioning on the stone the candidate to become king is made into a king. He is adjudged a crown and a kingdom [*kununx dömi*]. This entails that he is conferred a certain power belonging to the dignity of a king. But he does not get this power to be used capriciously. By means of a continuation of the formula it is determined to what end this power shall be used, and this manner of use is confirmed by the king's oath. (Olivecrona 1942, pp. 24–25.)[2]

Olivecrona's analysis of king-making in early medieval Swedish law is clearly in keeping with the view that legal entities and properties are understood to be non-natural, and that there is a close, if implicit, connection between legal thinking and a belief in magic. Although Olivecrona does not speak of the necessity of conceiving of law and legal phenomena in terms of social facts in this context, it is obvious that he could not accept the medieval way of looking at king-making. On Olivecrona's analysis, to make someone a king does *not* mean that one somehow confers on him a non-natural property, but simply that one impresses upon people, by means of independent imperatives that possess a suggestive character, a way of looking at things and of acting accordingly. Note also that Olivecrona conceives of king-making in medieval Sweden in error-theoretical, not non-cognitivist, terms, in that he takes the concept of a king to refer to a non-natural property that does not exist and takes all (positive) claims about kings (in the metaphysical sense) to be false.

14.4 The Natural Law Philosophies of Grotius and Pufendorf: The *Suum*

Olivecrona had a strong interest in the natural law philosophies defended by the seventeenth century giants Hugo Grotius and Samuel Pufendorf (see Olivecrona 1973, 1977, 1978).[3] And while his discussion of these natural law philosophies is generally interesting and illuminating, I believe his main accomplishment was to draw our attention to the import and significance of the concept of a person's *suum*, his private sphere, in the works of these thinkers.

---

gudarna—har denna rit använts till att *göra* honom till konung. Han är icke konung när akten börjar. Men han är det när den slutar."

[2] The Swedish original reads as follows: Genom talandet i förbindelse med placerandet på stenen göres kungsämnet till konung. Därpå tilldömes han krona och "kununx dömi". I detta ligger, att han tilldelas en viss till konungavärdigheten hörande makt. Men han får icke denna makt till godtyckligt bruk. Genom den fortsatta formeln bestämmes vartill denna makt skall användas, och detta användningssätt befästes genom konungens ed.

[3] The relevant works are Grotius (2005 [1738]) and Pufendorf (2001 [1672]). Olivecrona also discusses the natural law philosophies of Grotius and Pufendorf in his essays on Locke's theory of appropriation, which we shall consider in Sect. 14.5 below.

Olivecrona begins by explaining that the theories put forward by these thinkers concerned the relation between human beings in the state of nature, where there was no state authority and all were free and equal (1977, pp. 79–81; 1978, p. 26). He then points out that Grotius and Pufendorf argued that the law of nature was grounded in the social nature of humans, which involved a striving toward peaceful coexistence on earth. On this analysis, human reason was able to discern the *means*, that is, the right way to behave, to this end, that is, peaceful co-existence on earth. The instructions, that is, the means, discerned by human reason did not, however, attain the status of *laws*, until God had commanded that they be followed. According to Grotius and Pufendorf, the law of nature thus conceived included two main precepts: (i) that one must never harm another, and (ii) that one must keep one's promises (1977, p. 81; 1978, p. 26).

But to be able to understand and apply the first precept, one must obviously become clear about the precise meaning of the phrase "harm another." Olivecrona explains (1977, p. 81; 1978, pp. 26–27) that although the law of nature had nothing to say on this topic, Grotius and Pufendorf had an explanation readily available. They maintained that harming a person meant taking something away from him that belonged to him, and that a thing belonged to a person if (and only if) it was part of his *suum*. And while they did not define the concept of *suum*, they did explain what was *included* in the *suum*, namely life, liberty, body, actions, reputation, and honor. Olivecrona writes:

> According to *Grotius,* his life, his body, his limbs, his freedom, his good reputation, his honor and his own acts belong to a person by nature… *Pufendorf* gives a similar list… he adds *pudicitia* [modesty], whereby he is thinking of sexual integrity…. In fact *Grotius* also reckons *pudicitia* to the *suum*, even though it is not found in the catalog… (1977, p. 82. See also 1973, pp. 198–9.)[4]

Olivecrona explains (1978, p. 26) that Grotius and Pufendorf based the theory of the *suum* on what they took to be a person's natural moral or spiritual ability to possess something rightly: "A *qualitas moralis ad aliquid juste habendum* had from the beginning been conferred upon humans. Based on this assumption, the two natural law teachers erected a minutely detailed theory concerning what belonged to human beings by nature, i.e. irrespective of all law and all agreements."[5] (Emphasis added.)

He also explains that on the basis of the concept of *suum*, Grotius and Pufendorf then defined right and wrong action, respectively. To act rightly is to not act wrongly, and to act wrongly is to violate the law of nature, that is, to take from another person what belongs to him or to break a promise (1973, p. 197; 1977, pp. 82–83).

---

[4] The German original reads as follows: "Nach *Grotius* gehören einem Menschen von Natur aus das Leben, der Körper, die Glieder, Die Freiheit, der gute Ruf, die Ehre und die eigenen Handlungen…. *Pufendorf* gibt ein ähnliches Verzeichnis…. Er fügt die *pudicitia* hinzu, wobei er an die sexuelle Integrität denkt…. Tatsächlich zählt auch *Grotius* die *pudicitia* zum *suum*, obgleich sie im Katalog keinen Platz gefunden hat…."

[5] The Swedish original reads as follows: "Ett qualitas moralis ad aliquid juste habendum hade från början tilldelats människorna. På detta antagande byggde de båda naturrättslärarna en noga utformad teori om vad som av naturen, d.v.s. oberoende av all lag och alla överenskommelser, tillhörde människan."

To encroach on another's *suum* was a sin, Olivecrona explains, and such an action would be punished by God (1977, 94; 1978, p. 27). But, he continues, Grotius and Pufendorf were well aware that punishment by God would not be enough, since one might have to wait a long time for such punishment to be inflicted. Accordingly, Grotius and Pufendorf maintained that if *A* encroaches on *B*'s *suum*, then *A* will as a result immediately lose the ideal protection of his own *suum*, and that therefore *B* can strike back without having to worry about encroaching on *A*'s *suum*. Interestingly, neither Grotius nor Pufendorf required that the severity of the counter-attack must be proportional to the severity of the attack. As Olivecrona explains (1978, p. 27), "[i]t was a matter here of the principle of all or nothing. Either the sanctity endured or it had disappeared. There was no third possibility. Thus even trivial offences entailed that unlimited violence was allowed to be used."[6] He offers the following example:

> A well-known and much debated case was that in which a man was exposed to an impending risk of getting a box on the ears. Was it then permissible to kill the attacker if he could not ward off the box on the ears in any other way? Both Grotius and Pufendorf answered this question in the affirmative, unlike authors of a more pacifist leaning who argued that it was better to endure wrongs, and even to allow oneself to be killed, than to inflict an injury upon another human being. (Olivecrona 1978, p. 27.)[7]

But, as Olivecrona points out, a state of affairs in which a person is permitted to strike back at an attacker without having to worry about proportionality is likely to degenerate into a war of all against all. And this, he points out, is precisely why human beings came to agree to institute society. Indeed, we may say that the purpose of entering into society was to protect each person's *suum* (Olivecrona 1978, p. 27). He adds, however, that the sovereigns—kings, emperors, etc.—never entered into any such contract with each other, and that therefore they remained in the state of nature regarding their mutual relations (Olivecrona 1978, p. 28).

Olivecrona maintains, in keeping with this, that the theory of the *suum* came to constitute the foundation of private law (Olivecrona 1978, pp. 28–29). Of course, to accomplish this one had to be able to expand the *suum* so that it could also include physical objects. And, as one might expect, Grotius and Pufendorf did argue that a person's *suum* could be expanded by human will to include other things beside the ones mentioned above, and this could be done in either of two ways, namely by acquiring (i) property rights or (ii) rights to performance (1977, p. 83). Olivecrona points out, however, that on Grotius' analysis, the existence of private property is actually founded not on the law of nature, but on human will. For, he points out, Grotius imagined that God had given the earth to the humans and that in the

[6] The Swedish original reads as follows: "[h]är gällde principen allt eller intet. Antingen bestod helgden eller hade den fallit bort. Något tredje fanns inte. Även obetydliga kränkningar medförde alltså att obegränsat våld fick användas."

[7] The Swedish original reads as follows: "Ett berömt och omdiskuterat fall var det att en man blev utsatt för en överhängande risk att få en örfil. Var det då tillåtet att slå ihjäl angriparen, om man inte på annat sätt kunde avvärja örfilen? Den frågan besvarade både Grotius och Pufendorf jakande, till skillnad från mera pacifistiskt inställda författare som hävdade att det var bättre att tåla oförrätter och t.o.m. låta sig dödas än att tillfoga en annan människa något ont."

beginning everything was common property. But, he explains (Olivecrona 1977, pp. 83–84), Grotius reasoned that the humans were granted the authority to agree to introduce the institution of private property before they entered into society.

On the analysis put forward by Grotius and Pufendorf, the act of *occupation*—that is, the act of "occupying" or seizing an unowned object—was the prototypical act-in-the-law (*Rechtsgeschäft*) (Olivecrona 1977, pp. 84–86; 1978, p. 29). The idea was that the occupier of an object exercises his will, in the sense that he wills that the object be incorporated into his *suum*. To occupy and incorporate the object with one's *suum* was possible, Olivecrona explains (1978, p. 29), because human beings possessed (as we have seen) a natural moral or spiritual power to possess objects rightly.

But, Olivecrona continues, it was also possible to transfer ownership from one person to another by means of corresponding declarations of will, that is, by entering into a contract. If the owner, *A*, of an object, *X*, wanted to transfer ownership of *X* to another person, *B*, then *A* could declare his will that *X* be separated from his *suum*, though he could not make *X* part of *B*'s *suum*. For this to happen, *B* had to declare his will that *X* become part of *B*'s *suum*. As Olivecrona explains (Olivecrona 1978, p. 30), this way of looking at things depends on the view that a person's actions are part of his *suum*.

Olivecrona points out that it is clear from the above analysis of the concept of a promise how the natural law teachers conceived of the concept of a *right*. The idea was that a right in the strict sense is a *moral power*, a *facultas moralis*, over another person, in the sense that the right-holder, *A*, has the ability to put forward a claim against the other party, *B*, that gives rise to a duty on *B*'s part to fulfill the claim (Olivecrona 1978, pp. 30–31): "Ownership also included such power, namely the power to claim one's possession back from every unauthorized holder. This power was derived from an agreement entered into in connection with the introduction of private property."[8]

We see, then, that the view ascribed by Olivecrona to judges, lawyers, and ordinary citizens, that the concept of a right is conceived of as a supernatural power over that to which it is a right (an object, an action, etc.), can be traced back to the natural law philosophies of Grotius and Pufendorf. This is at least part of what Hägerström, Lundstedt, and Olivecrona had in mind when they maintained that ordinary legal thinking is permeated by elements of natural law theory.

Given Olivecrona's very high appreciation of Axel Hägerström as a legal and moral philosopher, it is also worth noting that Olivecrona points out that in his penetrating analysis of the Swedish legal thinker Nehrman-Erhenstråle's inquiry into the basis of the binding force of a promise, Hägerström (1934) failed to take into account the very idea of a person's *suum*, an idea that Olivecrona regarded as belonging to the core of classical natural law theory. This is one of very few critical comments on Hägerström's work that can be found in Olivecrona's writings. Olivecrona puts it as follows:

[8] The Swedish original reads as follows: "Även äganderätten inneslöt en sådan makt, nämligen makten att kräva saken tillbaka från varje obehörig innehavare. Denna makt härledde sig från en överenskommelse som träffats i samband med införandet av privategendomen."

> Like so many others before him, Hägerström thought that the *suum* concept was devoid of content. It might be true that every attempt to define property leads to circularity. But Grotius and Pufendorf believed that they knew what belonged to the human being by nature. They listed what this was in their catalog, which came to form the basis of their line of argument. In the literature treating of classical natural law that I have read I have never found any account of this catalog and its importance. The *suum* doctrine, however, is a prerequisite of both the theory of wrongs and the theory of the content of legal acts. In conjunction with the idea of the sanctity of the human personality, the *suum* doctrine constitutes the core of classical natural law theory. (1978, p. 31.)[9]

Let me also repeat in conclusion what I said in Sect. 2.6, namely that Olivecrona seems to have developed with time an appreciation of the classical natural law thinkers. His discussion of the theory of the *suum* is free from critical comments on non-natural entities and properties, such as the alleged moral or spiritual ability to possess an object rightly, whose existence could not possibly be squared with Olivecrona's naturalist legal philosophy in either the First or the Second Edition of *Law as Fact*. One might perhaps guess that besides an appreciation of the intellectual qualities of Grotius and Pufendorf, Olivecrona also felt that it was important to really understand the natural law foundation on which he considered much of contemporary legal thinking to rest. The dependence of the popular understanding of the concept of a right on the teachings of Grotius and Pufendorf is, as we have seen, a case in point.

14.5 John Locke: Appropriation of Property

Olivecrona devotes three articles (1969, 1974a, 1974b) and one slim book (1971/72) to Locke's theory of appropriation of property. Since the different texts overlap considerably, I shall focus on only one of the texts, namely (1974a), though I shall cite the other texts too when they are relevant. Olivecrona's main claims in his writings on Locke are (i) that Locke's concept of property is identical with the concept of *suum* defended by Grotius and Pufendorf, and (ii) that Locke's attempt to justify private property rights does not depend on the labor theory of value, but on the concept of *suum* in conjunction with the so-called Lockean proviso. Olivecrona does not, however, express any view about the defensibility of Locke's attempt to justify private property rights.

Olivecrona's thoughts on this topic are of considerable interest, because Locke's theory is quite famous and has been put to good use by no less a figure than Robert

[9] The Swedish original reads as follows: "Liksom så många andra före honom ansåg Hägerström att suum-begreppet var innehållslöst. Det må vara riktigt att varje försök att definiera tillhörigheten leder i cirkel. Men Grotius och Pufendorf ansåg sig veta vad som av naturen tillhörde en människa. Vad detta var räknades upp i deras katalog, som kom att ligga till grund för deras resonemang. I den litteratur angående den klassiska naturrätten som jag läst har jag aldrig funnit någon framställning om denna katalog och dess betydelse. Suum-läran utgör dock en förutsättning för såväl teorin om orätten som för teorin om rättsakternas innebörd. I förbindelse med idén om den mänskliga personlighetens helgd är suum-läran själva kärnan i den klassiska naturrättsläran."

Nozick (1974, pp. 174–182)). As is well known, Nozick argues that the existence of private property rights can be justified by reference to Locke's theory in a somewhat revised form. Under Nozick's entitlement theory (Robert Nozick 1974, pp. 150–153), a person rightfully owns what he has acquired either by appropriation in Locke's sense or by just transfer of previously appropriated property; and this means that, on Nozick's analysis, the justification of private (and, of course, collective) property depends ultimately on a Lockean theory of appropriation. An additional reason why Olivecrona's thoughts on this topic are so interesting is that this appears to have been the only time Olivecrona discussed in his legal-philosophical writings proper a question that is immediately relevant to normative or evaluative questions.

Olivecrona explains that Locke followed Grotius and Pufendorf in assuming that God gave the earth to the humans collectively, while rejecting the view that the existence of private property can be justified by reference to some sort of agreement among humans (1974a, pp. 221–222): "It would have been impossible to reach an agreement between all men on earth, he thought. If the consent of all had really been a prerequisite for individual appropriation, men would have starved in the midst of plenty…." (See also Locke 1988 [1690], p. 286, 288)) Locke was therefore faced with the problem of justifying the existence of individual property rights in some other way: "How," Olivecrona asks (1974a, p. 221),[10] "could the original communism, instituted by God, have given way to private rights of property?" This, he explains, is the question to which Locke proposed to give an answer in the chapter on property in the *Second Treatise on Government*.

But when reading Locke on appropriation, Olivecrona explains (1974a, p. 222), one must distinguish between two periods of time, namely the *age of abundance*, in which there was more than enough of everything, and the *age of scarcity*, in which there is not enough of everything, and keep in mind that Locke's analysis concerns the age of abundance: "What he [Locke] sought to do was to explain how people in the age of abundance had been able to establish property-rights in things common to all without the consent of others and yet without causing injury to them." As Olivecrona points out (Olivecrona 1974a, p. 230), on Locke's analysis, the age of abundance ended because the population had increased and the concept of money had been introduced into society (see Locke 1988, p. 293). The latter circumstance, he continues, was particularly important, because it meant that a person could now appropriate much more than he could immediately consume. He also makes it clear that Locke's view was that the existence of property rights as well as the actual distribution of property in this period did not rest upon the theory of appropriation, but on agreements and laws:

> Locke assumes that in the age of scarcity communities had been formed. By common consent the different communities gave up "their Pretence to their natural common right" and settled "the Bounds of their distinct Territories". Within each community property-rights were regulated by laws… Thus contemporary distribution of property was not based on the theory of appropriation. It rested on a series of agreements to introduce money, to divide

[10] See also Olivecrona (1974b, p. 222).

> the earth, and to institute governments which issued laws concerning property-rights. The theory of appropriation only served to explain how men had been able to break loose from the original community of property. (1974a, pp. 230–231.)

To understand Locke's analysis, Olivecrona continues, one also needs to understand what Locke means when he maintains that something—an acorn, an apple, a piece of land, etc.—is one's own, that is, one's property. And, he explains (1974a, p. 222), on Locke's analysis, an object is a person's own, if, and only if, it is part of that person. Locke himself puts it as follows:

> … being given for the use of Men, there must of necessity be a means *to appropriate* them some way or other before they can be of any use, or at all beneficial to any particular Man. The Fruit, or Venison, which nourishes the wild *Indian*, who knows no Inclosure, and is still a Tenant in common, must be his, and so his, i.e. a part of him, that another can no longer have any right to it, before it can do him any good for the support of his Life. (1988, pp. 286–287.)

But, Olivecrona asks, how can an object be *part of* a person? He finds the answer to this question in the concept of *suum* introduced by Grotius and Pufendorf. As we saw in Sect. 14.4, to be able to follow the law of nature, one must know what it *means* to harm another, and this in turn assumes that one knows what is each person's own. And this, Olivecrona explains (1974a, p. 223), is where the *suum* enters the picture. But, as we also saw, the *suum* could be expanded to encompass physical objects, in addition to life, liberty, honor, and actions. On the analysis put forward by Grotius and Pufendorf, Olivecrona explains (Olivecrona 1974a, pp. 223–224), a person could make an object part of his *suum* either by "occupying" it or by entering into a contract with the owner of the object.

We see that Olivecrona shows that Locke's claim that an object is a person's own, his property, presupposes the concept of *suum* in order to be fully intelligible. This is surely a very illuminating observation by Olivecrona: Not only does it help us understand Locke's analysis, it also identifies an important connection between this analysis and the natural law philosophies of Grotius and Pufendorf.

Having pointed out that Locke reasoned that appropriation of objects and land simply *must* be possible without the consent of all others, because God had given the earth to the humans to make use of it, and because one cannot make proper use of either objects or land unless one owns them (Olivecrona 1974a, p. 225; 1974b, p. 222. See also Locke 1988, p. 286), Olivecrona then follows Locke in making a distinction between the following three questions (1974a, p. 225): (i) How is appropriation possible?, (ii) How is it done?, and (iii) How can one appropriate something without harming others? He treats these questions in turn.

Let us note, however, before we proceed to consider Olivecrona's discussion of the three questions more closely, that Olivecrona emphasizes (1969, pp. 154–155; 1974b, p. 223) that Locke never mentions and still less makes use of the concept of a moral faculty, a *facultas moralis*, which was a central concept in the natural law philosophies of Grotius and Pufendorf. On their analysis, as we have seen, a right was a moral power on the part of the right-holder over the object he owns or the actions of others to which he has a right of performance (Olivecrona 1969, pp. 150–151). And, Olivecrona points out (Olivecrona 1969, p. 155), since Grotius

and Pufendorf had argued that the *facultas moralis* was based precisely on an agreement, the fact that Locke ignores this concept makes it easier for him to reject the view that private property rights are based on some sort of an agreement between the people of the world. In other words, since Locke does not operate with the concept of a *facultas moralis*, he has rid himself of *one* compelling reason to assume the existence of such an agreement.

Beginning with the first question mentioned above, Olivecrona considers a passage in the *Second Treatise*, where Locke maintains that a person can appropriate objects as well as land by *mixing his labor with it*, and that the reason why this is so is that each person has the *potestas in se*, that is, property in his own person. Here is Locke:

> Though the Earth, and all inferior Creatures be common to all Men, yet every Man has a *Property* in his own *Person*. This no Body has any Right to but himself. The *Labour* of his Body, and the *Work* of his hands, we may say, are properly his. Whatsoever then he removes out of the State that nature hath provided, and left it in, he hath mixed his *Labour* with, and joyned to it something that is his own, and thereby makes it his *Property*. It being by him removed from the common state Nature placed it in, it hath by his *labour* something annexed to it, that excludes the common right of other Men. For this *Labour* being the unquestionable Property of the Labourer, no Man but he can have a right to what that is once joyned to, at least where there is enough, and as good left in common for others. (Locke 1988, pp. 287–288.)

On Olivecrona's interpretation (1974a, p. 225), Locke is here saying that making an object one's own is making it part of oneself, and that this means that nobody else can have a right to it. For if this other person had a right to it, he would have a right over the right-holder, and this would be absurd. Olivecrona argues that this is the *only* possible interpretation of this text. For, he reasons, Locke could not have meant that a person becomes the owner of an object when he has *created* it, or when he has *enhanced its value by his work*, since these interpretations could not be reconciled with the examples Locke gives. As Olivecrona notes (Olivecrona 1974a, pp. 225–226), the examples include picking up an acorn or an apple or drinking the water in a river, and these simple acts of appropriation involve neither creating the object nor enhancing its value by working on it.

Turning to consider the second question, Olivecrona observes (Olivecrona 1974a, pp. 227–228) that Locke makes a distinction between appropriating objects (movables) and appropriating land, and points out that appropriation of land is more difficult to justify than appropriation of objects. For while the idea that a person can make an object his own by mixing his labor with it may seem reasonable in the case of acorns, apples and similar things, it may seem less reasonable in the case of land. But, Locke insists (1988, p. 290), the principle is the same in both cases. However, as Olivecrona explains, it is clear from what Locke says on the topic that there is in the case of land one more condition that must be satisfied, namely that the land be *delimited*. Olivecrona writes (1974a, p. 228): ""He [the occupant] by his Labour does, as it were, inclose it from the Common," Locke says in the introductory

paragraph to the exposition on the appropriation of land…. Enclosure therefore seems to be an essential feature in the appropriation of land: the effect of the labour is that the land is considered to be enclosed."

Finally, Olivecrona turns to a consideration of the third question, which concerns what Nozick (1974, pp. 178–182)) refers to as the *Lockean proviso*. The question is whether, and if so how, a person can appropriate objects or land without harming anyone else in the process. If he can do that, his appropriation seems prima facie to be justified, since it seems that no one can have a legitimate complaint unless he or somebody else has been harmed; if he cannot do that, the appropriation seems prima facie to be unjustified. Locke's solution to the problem, Olivecrona explains, was to argue that an appropriation of an object, or a piece of land, would be legitimate *only* if the person acquiring the object left *as much and as good* for other people to acquire later, or, as Locke (1988, p. 288) himself put it, "at least when there is enough, and as good left in common for others."[11] Olivecrona writes:

> The solution to the problem was that people suffered no injury if there was as much left for them to appropriate in turn… This principle applied even when land was appropriated. If somebody enclosed a piece of land, this was not to the prejudice of others provided there was "still enough, and as good left". Locke goes to the length of contending that appropriating a piece of land when enough is left for others is just like taking "a good Draught" out of a river… This theory is supplemented by the thesis that during the first ages of the world nobody could "ingross" anything to the prejudice of others… Locke presupposes that hired labour was not used before the introduction of money. But what a man was able to appropriate by his own labour could not be very much… (1974a, p. 229.)

But, Olivecrona continues (Olivecrona 1974a, pp. 229–230), on Locke's analysis, there is a *limit* to appropriation set by one's needs. One cannot legitimately appropriate more than one can consume. In the words od Locke (1988, p. 290), "[a]s much as any one can make use of to any advantage of life before it spoils; so much he may by his labour fix a Property in. Whatever is beyond this, is more than his share, and belongs to others."

At any rate, Olivecrona does not discuss the precise meaning of the phrase "enough and as good left," and one may wonder just how one is to understand it. In which circumstances has one person's appropriation left "enough and as good" for others? Consider, for example, a situation in which ten cows are grazing on a piece of land. If *A* appropriates cow *A**, if *B* appropriates cow *B**, if *C* appropriates cow *C**, and so on, then *J* cannot appropriate cow *J**, since this would leave *K* with no cow *K** to appropriate. But this also means that *I* made *J*'s situation worse, since *I*'s appropriation of *I** created a situation in which *J* could not appropriate *J**. Of course, although *J* could not appropriate *J**, he could perhaps *make use of J**, provided that this did not exclude others from making use of *J** as well. Does this, or does it not, mean that *I*'s appropriation of *I** left "enough and as good" for *J*?

Nozick (1974, p. 176) prefers the weaker condition—that "enough and as good" is left for *J* if he can make use of *J** without appropriating it—and incorporates it

[11] In my view, *Locke's* formulation of this condition suggests that he thought of it as a sufficient, but not a necessary, condition for justified appropriation.

into his entitlement theory. But Nozick's discussion of the Lockean proviso has been criticized by Cohen (1995, pp. 74–84), who objects that Nozick mistakenly assumes that the proper baseline for comparison is that the relevant objects or land remain common property (Cohen 1995, pp. 79–84). While I am not convinced by Cohen's suggestion that we should also take into account the possibility that some other person might have appropriated the relevant object or piece of land, I do believe that Cohen's lucid discussion sheds important light on the problem. But a consideration of Cohen's critique of Nozick's analysis would obviously fall outside the scope of this discussion of Olivecrona's discussion of Locke's theory of appropriation.

Olivecrona concludes his analysis with a few words about the above-mentioned labor theory of value, according to which a person adds value to an object or to a piece of land by "mixing his labor" with it (1974a, pp. 231–233; 1969, pp. 156–157). He emphasizes that it is a mistake to think that the labor theory of value is meant to *justify* the appropriation of property. Instead, his view, as we have seen, is that the justification of property appropriation turns on the incorporation of the object or the piece of land with one's *suum* and on the circumstance that the appropriator left "enough and as good" for others. Olivecrona infers from this that Locke's intention when introducing the labor theory of value must have been to justify the actual distribution of property in seventeenth-century England, where the differences between rich and poor were considerable:

> Locke probably often encountered the question how prevailing inequalities could be justified in spite of the fact that everything had been given to mankind in common… The theory of appropriation, which referred to the remote age of abundance, gave no satisfactory explanation of the contemporary situation. The supposition that glaring inequalities had been tacitly sanctioned by the agreement to introduce money was not much of an answer to the persistent murmurs about how strange it seemed that so many people have been deprived of their rightful share in God's donation.
>
> The tenor of Section B [in Locke 1988, pp. 296–298] is to belittle the ground for such complaints. It is labour that puts the greatest part of value upon land, without which it would scarcely be worth anything. "Nature and earth furnished only the almost worthless Materials, as in themselves"… Therefore what has been taken from the common is insignificant. (Locke 1988, p. 232.)

Let us note in conclusion that Olivecrona's discussion of Locke's theory of appropriation, which is thus to be distinguished from the labor theory of value, is purely analytical and descriptive, and that it is unclear whether Olivecrona believes that this theory can justify property rights. But given that Olivecrona believes (i) that Locke's attempt to justify property rights depends on the assumption that each person has a private sphere, the *suum*, (ii) that the *suum* is a non-natural entity (or property), and (iii) that there are no non-natural entities or properties, Olivecrona clearly cannot accept Locke's line of argument. One may well wonder why he did not state this conclusion clearly.

14.6 Jeremy Bentham: An Empiricist Theory of Law

Olivecrona, who devotes only one article to the legal philosophy of Jeremy Bentham, notes with satisfaction that Bentham aimed for a thoroughly empiricist theory of law (1975, p. 97): "Bentham's theory represents a great attempt to give a coherent explanation of the phenomena covered by the word "law" on the basis of sensory experience." This suggests that Olivecrona takes Bentham to be a fellow naturalist in the field of legal philosophy. For, as we saw in Sect. 5.3, Olivecrona makes it clear in the preface to the Second Edition of *Law as Fact* that his aim is precisely to "fit the complex phenomena covered by the word law into the spatio-temporal world."

Olivecrona begins his discussion of Bentham's theory by pointing out that Bentham follows in the footsteps of natural law thinkers like Grotius and Pufendorf in assuming that law is the content of a sovereign will, although he (Bentham) was careful to point out that he would disregard the moral quality of the sovereign will in his study of the law. As Olivecrona explains (1975, pp. 96–97), Grotius and Pufendorf, as well as other natural law thinkers, had assumed that law possessed binding force, *vis obligandi*, which "created an inner necessity in those subject to it," and that this binding force was based on the social contract, which in turn derived its binding force from the law of nature. But, he continues, Bentham flatly rejected natural law thinking, arguing that knowledge depends on sense impressions and that this means that there is no room for a law of nature. Olivecrona writes: (Olivecrona 1975, pp. 96–97. Footnotes omitted): "He [Bentham] firmly adhered to an empiricist philosophy… This theory of knowledge left no room for assuming the existence of a law of nature. The law of nature was a "formidable non-entity," "an obscure phantom." The chimera of an original contract had been "effectually demolished" by Hume. This fiction might once have had its use in the political work, Bentham concedes. "But the season of *Fiction* is now over," he [Bentham] adds."

According to Olivecrona, Bentham was above all concerned with the question, "What is a single law?", what Raz (1980, pp. 70–92) would later refer to as the problem of the individuation of laws. Olivecrona (1975, p. 99) considers in some detail Bentham's analyses of the concept of *a law*, according to which a law is roughly "an assemblage of signs declarative of a volition conceived or adopted by the sovereign in a state," and the concept of a *sovereign*, according to which the sovereign is the person or persons who possess actual supreme power in the community.

Having reviewed Bentham's analysis, Olivecrona identifies two problems in it, namely that it is difficult to show (i) that the common law, conceived of as a collection of rules derived from precedents, is part of the content of a sovereign will, and (ii) that the laws of previous sovereigns are part of the content of the sovereign will (Olivecrona 1975, pp. 105–107). He notes that Bentham's solution to these problems was to announce that the common law is no law at all (Olivecrona 1975, p. 105), and that the present sovereign "adopts" the laws of previous sovereigns (Olivecrona 1975, p. 107). The root of these difficulties, he continues, is to be found

in the idea that *a law is the content of a sovereign will*, which he (Olivecrona) calls an unempirical and unjustified assumption. Bentham, he complains, does not start his investigation into the nature of law with an open mind:

> As he states himself, he took his point of departure in the theory that "the body of law" is a collection of "expressions of will" by the sovereign power. He inherited his theory from natural law doctrine and never questioned its validity. His treatise may be regarded as a magnificent attempt to reconcile the will-theory to empirical facts. He thought that this could be done only if the theory were shorn of the natural law framework on which it had previously rested. If the ideas of a law of nature and of a social contract were discarded as having no foundation in experience, the body of law would appear nakedly as the sovereign's commands and prohibitions. This preconceived idea took precedence over unbiased observation of social facts. When the implications of the will-theory were at variance with existing conditions, some juridical construction was supplied to fill the gap. The sovereign's adoption of old laws is a case in point. Sometimes this attempt to harmonize theory and reality broke down altogether, as when it proved impossible to find a place in the system for the principal part of the laws of England, the common law. (Olivecrona 1975, pp. 107–108.)

Olivecrona maintains, more specifically, that Bentham's attempt to define the concept of a sovereign exclusively in non-legal terms fails, because the sovereign's power is not, and cannot be, independent of the law (Olivecrona 1975, p. 108). Hence it would amount to circular reasoning to argue that the law is the content of a sovereign will. Thus Olivecrona is here repeating the objection raised by Axel Hägerström to will theories of law, discussed in Sect. 4.5, namely the objection that law cannot be the content of a sovereign will, because the power of the sovereign is dependent on the existing law. But, as I said in Sect. 4.5, while Hägerström's *reasoning* is clearly sound, one may wonder about the truth of the *premise*, that is, the claim that the power of the sovereign is factually dependent on the existing law. Could there not be a person who has the necessary power over the people independently of the law? Having thought about it, I am, however, inclined to answer this question in the negative.

Bentham's view that the citizens are disposed to obey the sovereign is thoroughly criticized by Olivecrona, who maintains that in reality the citizens obey the law not because they respect the King or some other individual, but because they revere the constitution:

> There was certainly widespread loyalty toward the King, Lords, and Commons. But the loyalty was toward the institutions, not toward certain individuals. The persons who were members of the lawgiving body got their positions by virtue of constitutional rules about elections and succession. They exercised power by proceeding according to constitutional rules about sessions, voting, etc. The final exercise of power took place when King, Lords, and Commons were "in Parliament assembled" and the royal assent was given.
>
> It is therefore apparent that legislative power for certain individuals derived from the constitution; and the constitution was a source of power because it was the object of general veneration. Moreover, the legislative process could only take place in an ordered society, governed by rules of civil and criminal law. The constitution functioned as part of the law as a whole. The possibility of lawgiving with practical effect therefore derived from the entire legal system and its hold on the minds of the people. (Olivecrona 1975, p. 108.)

We see that Olivecrona is here invoking his own view, discussed in Chap. 8, that legal rules are not declarations of will, but independent imperatives that influence the citizens because they possess a suggestive character. On this analysis, the relevance of legislation in accordance with the relevant rules in the constitution is that the product of legislation—that is, the statute(s)—becomes psychologically effective, that is, comes to possess a suggestive character, on the grounds that the citizens revere the constitution and are therefore disposed to obey acts of legislation that they can trace back to the constitution. He writes (Olivecrona 1975, p. 109): "The psychological effect of promulgating a text as a law was therefore to invest it, in the eyes of the citizens, with a new quality: that of being a law. Thereby, automatically and without a question, it was placed within the great system of rules to which obedience was due."

Olivecrona concludes his analysis of Bentham's theory on a positive note, however, emphasizing his admiration for Bentham's groundbreaking work:

> After more than two hundred years much of Bentham's thinking is, of course, open to criticism and sometimes obsolete. Still, his work makes fascinating reading, and it remains truly a milestone in the history of legal theory. When seen in the context of his time, Bentham's approach cannot fail to arouse admiration. With his principle of investigating the facts covered by the term "law" in a strictly empirical way he introduced something radically new. For those who adopt such a principle (though not necessarily Bentham's epistemology), it is most instructive to follow his argument with a critical mind. In particular, the lucid exposition of the will-theory serves to lay bare its weaknesses. (Olivecrona 1975, p. 110.)

I share Olivecrona's concluding assessment of Bentham's legal philosophy. But I also share Olivecrona's view that Bentham's will theory is unacceptable, and I was surprised to learn that H. L. A. Hart nowhere mentions Olivecrona's interesting critique in his own masterful discussion of Bentham's legal philosophy (Hart 1982).

The main reason why I find Olivecrona's critique of Bentham's analysis to be so interesting is that it is clearly dependent on Olivecrona's own legal philosophy, specifically the belief in ontological naturalism, the critique of will theories of law, and the view that legal rules are independent imperatives that possess a suggestive character, on the grounds that the citizens revere the constitution. While it is obvious that Olivecrona appreciates Bentham's legal philosophy, he clearly believes that Bentham was not a thoroughgoing naturalist, since he deviated from the tenets of naturalism at crucial points. In this regard, his analysis of Bentham's legal philosophy differs a bit from his discussions of the nature of corporations in Roman law, the natural law philosophies of Grotius and Pufendorf, and Locke's theory of appropriation of property. While his discussions of those theories are both illuminating and interesting, they are not as clearly connected with his own legal philosophy as is his discussion of Bentham's theory, even though they do identify and discuss examples of non-naturalist, even magical, thinking that he thought was still present in contemporary legal thinking.

Let us note in conclusion that Olivecrona speaks of *empiricism*, not naturalism, in his discussion of Bentham's legal philosophy. But while empiricism, as we have seen, is naturally conceived of as an *epistemological* theory, or family of

theories, according to which we can have knowledge only of that which we can detect using our five senses, Olivecrona's naturalism is *ontological*. The empiricism that Olivecrona has in mind is, however, a natural, albeit not a necessary, epistemological companion to ontological naturalism.

References

Articles

Hägerström, Axel. 1934. Nehrman-Ehrenstråles uppfattning av grunden för ett löftes juridiskt bindande kraft, belyst genom å ena sidan romersk, å andra sidan naturrättslig åskådning [Nehrman-Erhenstråle's view of the basis of the binding force of a promise, illuminated by Roman thinking, on the one hand, and natural law thinking, on the other]. In Minnesskrift ägnad 1734 års lag, 571–630. Stockholm.

Hart, H. L. A. 1954. Definition and theory in jurisprudence. *Law Quarterly Review* 70:37–60.

Olivecrona, Karl. 1969. Begreppet "Property" hos John Locke [John Locke's concept of property]. In *Logik, rätt och moral. Filosofiska studier tillägnade Manfred Moritz på 60-årsdagen den 4 juni 1969* [*Logic, Law, and Morality*. *Philosophical Studies Dedicated to Manfred Moritz on His 6oth Birthday 4 June 1969*], eds. Sören Halldén et al., 149–163. Lund: Studentlitteratur.

Olivecrona, Karl. 1973. Das Meinige nach der Naturrechtslehre [The *meum* according to natural law theory]. *Archiv für Rechts- und Sozialphilosophie* [*Archive for Legal and Social Philosophy*] 59:197–205.

Olivecrona, Karl. 1974a. Appropriation in the state of nature: Locke on the origin of property. *Journal of the History of Ideas* 35:211–230.

Olivecrona, Karl. 1974b. Locke's theory of appropriation. *The Philosophical Quarterly* 24:220–234.

Olivecrona, Karl. 1975. The will of the sovereign: Some reflections on Bentham's concept of "a Law." *American Journal of Jurisprudence* 20:95–110.

Olivecrona, Karl. 1977. Die Zwei Schichten im naturrechtlichen Denken [The two strata in natural law thinking]. *Archiv für Rechts- und Sozialphilosophie* [*Archive for Legal and Social Philosophy*] 63:79–103.

Olivecrona, Karl. 1978. Hägerström och naturrätten [Hägerström and natural law]. In *Uppsalaskolan—och efteråt* [*The Uppsala school—and afterwards*], ed. Stig Strömholm, 25–31. Uppsala: Almqvist & Wiksell.

Books

Cohen, G. A. 1995. *Self-ownership, freedom, and equality*. Cambridge: Cambridge University Press.

Grotius, Hugo. 2005. *The rights of war and peace*. Book I. Edited and with an introduction by Richard Tuck (Natural law and enlightenment classics. General editor: Knut Haakonsen). Indianapolis: Liberty Fund. (Originally published 1738.)

Hart, H. L. A. 1982. *Essays on Bentham*. Oxford: Clarendon Press.

Locke, John. 1988. The second treatise of government. In *Two treatises of government* (*Cambridge texts in the history of political thought*), ed. Peter Laslett, Cambridge: Cambridge University Press. (Originally published 1690).

Nozick, Robert. 1974. *Anarchy, state, and utopia*. New York: Basic Books.

Olivecrona, Karl 1928. *Studier över begreppet juridisk person i romersk och modern rätt* [*Studies on the concept of a juridical person in Roman and modern law*]. Uppsala: Appelbergs.
Olivecrona, Karl. 1942. *Döma till konung* [*Becoming a King*]. Lund: Gleerup.
Olivecrona, Karl. 1949. *Three essays in Roman law*. Copenhagen: Munksgaard.
Olivecrona, Karl 1971/1972. *Äganderättens ursprung enligt John Locke* [*The origin of ownership according to John Locke*]. Uppsala: Kungliga humanistiska vetenskapssamfundet i Uppsala årsbok.
Pufendorf, Samuel. 2001. *Om de mänskliga och medborgerliga plikterna enligt naturrätten*. [*On human and civil duties according to the law of nature.*] Stockholm: City University Press. (Originally published 1672).
Raz, Joseph. 1980. *The concept of a legal system*. 2nd ed. Oxford: Clarendon Press.

Part V
Context

Chapter 15
Legal Realism and Legal Positivism

Abstract In this chapter, I argue that even though Olivecrona explicitly rejects legal positivism, conceived as the theory that law is the content of a sovereign will, he is best understood as a legal positivist as this theory is understood by contemporary jurisprudents. Having discussed Olivecrona's critique of will theories of law, which follows closely Hägerström's critique of such theories, and having pointed out that Olivecrona introduces a distinction between voluntarist and non-voluntarist theories of law and maintains that a competent theory of law must fall into the latter category, I argue that the category of non-voluntarist theories of law is too heterogeneous to play a meaningful role in the debate about the nature of law. I also discuss the main tenets of contemporary legal positivism and argue that there is to be found in Olivecrona's legal philosophy a commitment (1) to an abstract, but not to a more concrete, version of the social thesis, (2) to the separation thesis, and (3) to the thesis of social efficacy, but not to the semantic thesis. In addition, I discuss Olivecrona's illuminating distinction between English (or naturalist) legal positivism and German (or idealist) legal positivism and its relevance to certain questions raised in the well-known Hart/Fuller debate about wicked legal systems. Finally, I argue that while many contemporary legal positivists conceive of law as a system of norms or rules, and while Olivecrona does maintain that law is a matter of rules, he does not see law as a system of rules.

15.1 Introduction

We have seen that Karl Olivecrona was a (Scandinavian) legal realist, and that he rejected legal positivism, conceived as the theory that law is the content of a sovereign will. Nevertheless, I am going to argue in this chapter that a commitment to the central tenets of legal positivism, as that theory, or family of theories, is understood by contemporary jurisprudents, is implicit in Olivecrona's legal philosophy.

I begin with a few words about Olivecrona's critique of will theories of law, such as the type of legal positivism put forward by Jeremy Bentham and John Austin (Sect. 2), and the ensuing distinction between voluntarism and non-voluntarism in jurisprudence (Sect. 3). I then introduce the theory of legal positivism as it is conceived by contemporary jurisprudents, and discuss Olivecrona's position on each of the three central tenets of legal positivism, namely the social thesis, the separa-

T. Spaak, *A Critical Appraisal of Karl Olivecrona's Legal Philosophy,*
Law and Philosophy Library 108, DOI 10.1007/978-3-319-06167-2_15,

tion thesis, and the thesis of social efficacy, as well as on a fourth, optional thesis called the semantic thesis (Sect. 4). Having done that, I consider again the claim that Olivecrona is, after all, a legal positivist in light of Olivecrona's rich discussion in the Second Edition of *Law as Fact* of various types of legal positivism (Sect. 5), and comment on Gustav Radbruch's objection that legal positivism is an authoritarian theory of law and the possible application of this objection to Olivecrona's theory of law (Sect. 6). The chapter concludes with a brief discussion of Olivecrona's thoughts on the systemic character of law (Sect. 7).

15.2 A Critique of Will Theories of Law

We have seen that Olivecrona begins the First Edition of *Law as Fact* by considering and rejecting the view that law has binding force. He observes in that context that classical natural law theory explains the binding force of law by reference to an underlying social contract, according to which the members of society have agreed to obey the commands of the sovereign (1939, p. 22). He then points out that in the last 100 years or so law has been conceived as the will of the sovereign without any reference to a social contract, and that this alternative account has been put forward by its defenders as a way of accounting for the binding force of law in the world of time and space, or, if you will, within the framework of ontological naturalism (Olivecrona 1939, p. 22). The essence of the will theory, he explains, is that

> … the written laws are mere expressions or outward signs of the will of the state. The substance of the law is the *will* and nothing else. It is important to stress that this is the meaning of the theory, however absurd it may sound. The theory must not be interpreted as saying only that the laws are *established* through acts of law-giving, as e.g. voting in parliaments etc. Such a statement would be a mere platitude and, in addition, it would tell us nothing about the nature of the law. It would only indicate how the law is brought into being, not what it *is*. No, the meaning is that the law *consists* of the *will of the state*. (Olivecrona 1939, p. 23)

Having explained the content of the theory, he goes on to argue that the theory is flawed. First, there is no such thing as the will of the *state* (Olivecrona 1939, p. 24): "Only human beings have a will and each has a will of his own." Secondly, the relevant will cannot be the will of the power-holders in society, that is, the people involved in the law-making process, such as kings, presidents, or members of the parliament, because they simply do not will the content of the law. For one thing, they are typically unaware of the details of the laws (Olivecrona 1939, p. 24). Thirdly, the relevant will cannot be the will of the *people* either, because the man in the street has no view whatsoever regarding the content of the law (Olivecrona 1939, pp. 24–25).

Olivecrona returns 12 years later, in an article on realism and idealism in legal philosophy (1951), to the problems that mar the will theory. Here he puts forward a new objection to the view that the relevant will is the will of the state, namely that the analysis is circular since the state is conceptually dependent on law—if there were no law, there could be no state. He adds that the relevant will cannot be the will

of the people either, because there is no unified will of the people. Finally, he points out that the relevant will cannot be the will of the actual holders of power, because they necessarily owe their position of power at least partly to the legal system. He comments on the last point as follows:

> It is … patent that the members of the government and of the parliamentary representation of the people have got their positions according to certain rules of the constitution; their decrees are regarded as having legal force because the constitution says so; their governance would be impossible without the steadfast maintenance of private and criminal law through courts. So it is evident that their power is conditioned, first, by the constitution and the general respect it enjoys, and, secondly, by the legal organization of communal life through private and criminal law. The legal system, therefore, is not founded on their will and power. (Olivecrona 1951, pp. 123–124)

Moreover, as we have seen in Chap. 13, Olivecrona (1975) deals specifically with Bentham's will theory in his analysis of Bentham's legal philosophy. In this article, he comes back to the circularity objection, again emphasizing the factual impossibility of the assumption that the sovereign can have power over the people without recourse to the law.

I find Olivecrona's objections to will theories convincing, and do not linger on them. The dearth of will theories in contemporary jurisprudence also seems to bear Olivecrona's critique out. It is, however, worth noting that Olivecrona's objections are more or less identical with the objections put forward by Axel Hägerström in his 1917 book *Till frågan om den objektiva rättens begrepp* (1917,1953c) (see Sect. 4.4 above). I shall return to the question about the relation between Olivecrona's and Hägerström's analyses in Chap. 15.

Let us note in concluding this section that Olivecrona's critique of will theories does not include a critique of either intentionalist or subjective-teleological (or purposive) interpretation of statutes (for an account of these types of interpretation, see Spaak 2007, Chap. 3). This is perhaps a little bit surprising. One can, of course, espouse an intentionalist or a subjective-teleological interpretation even if one rejects the will theory, though one would expect a legal philosopher to comment on the connection between this theory and these types of interpretation. But, as we have seen, Olivecrona pays hardly any attention to problems of legal reasoning, including statutory interpretation, in is jurisprudential writings.

15.3 Voluntarism and Non-Voluntarism

Having rejected will theories, Olivecrona goes on in the Second Edition of *Law as Fact* to introduce a distinction between voluntarist and non-voluntarist theories of law, and to argue that a competent theory of law must fall into the latter category. He observes that for a long time jurisprudents have assumed that a theory of law must fall into either of two categories, namely that of natural law theory or that of legal positivism, and he points out that these categories are mutually exclusive and jointly exhaustive *only* if we assume that positive law is the content of a sovereign will, and that the crucial issue is whether positive law thus conceived must be based

on natural law. But, he objects, we should reject will theories altogether and embrace non-voluntarism instead. If we do, we can avoid choosing between natural law theory and legal positivism. He puts it as follows:

> The common element in legal positivism and most of such theories as are called theories of natural law is the *voluntaristic* approach. The concept of positive law remains fundamentally the same; the law is held to be the expression of the will of a supreme authority. The difference between nineteenth-century legal positivism and classical natural law doctrine was a difference of opinion within the framework of voluntarism. On the whole the same framework is common to present legal positivism and modern natural law theory. This is the reason why legal positivism and natural law doctrine still are so often held to be the alternatives open to legal theory. The assumption that there is a 'positive' law in the traditional sense seems to be self-evident; and the great problem appears to be whether this positive law needs a basis other than the will of the lawgiver. (1971, pp. 79–80)

Olivecrona does not have much to say about the nature of non-voluntarist theories of law, but is content to point out that this category includes a number of diverse theories, such as the theories put forward by Oliver Wendell Holmes (1896–1897), Ehrlich (1936), Petrazycki (1955), Hägerström (1953a, 1953b, 1953c, 1953d, 1953e, 1953f), Ross (1989, 1959), and Hart (1961). However, this is not good enough: The category of non-voluntarist theories of law is simply too heterogeneous to be able to play a meaningful role in the debate about the nature of law. I mean, what can one possibly say about the theories in this category, except that they are *not* voluntarist? Luckily, Olivecrona does not focus in the rest of the book on this newly introduced category, but is content to develop his own theory of law; and this theory is, of course, non-voluntarist.

As should be clear, I cannot accept Olivecrona's claim that once one rejects will theories, one can avoid choosing between natural law theory and legal positivism, unless one also accepts the view that both natural law theory and legal positivism involve the assumption that there is a positive law that is the content of a sovereign will. As we shall see, contemporary legal positivists do not make this assumption, nor do contemporary natural law thinkers, such as Finnis (1980) and Moore (2000); and they have good reason not to make it.

15.4 Legal Positivism[1]

If legal positivism is not the theory that law is the content of a sovereign will, what is it? As I see it, legal positivism is a theory of law (in a wide sense of the term 'theory') of the type advanced by scholars like Austin (1998), Kelsen (1934, 1999, 1960), Hart (1961, 1982), Raz (1979, 1985), and MacCormick and Weinberger (1986), Waluchow (1994), and Coleman (2001), not a theory telling the judge how he should decide hard cases or when civil disobedience is justified. What legal positivism thus conceived offers is an account of the *concept* of law, in the sense that it lays down conditions that have to be satisfied by anything that purports to be

[1] Much of the text in this section can be found, more or less verbatim, in Spaak (2003, pp. 472–475).

law. We might say that legal positivism is a meta-theory of law, in the sense that it aims to lay down requirements that any adequate theory of law must meet (see Raz 1979, p. 39).

Legal positivism appeared on the scene in Europe in the nineteenth century as a reaction to the dominance of natural law thinking, claiming that all law is positive law. *Classical legal positivism*, as I shall call the version of legal positivism advanced by Jeremy Bentham and John Austin, has it that there is in every legal system a *sovereign*—a person or a group of persons habitually obeyed by the bulk of the population without habitually obeying anyone—who is above the law and issues commands (explicitly or tacitly) to the citizens, which commands are the law. For example, having explained that a law, properly so-called, is a command that obliges a person or persons, and that a command is an expression of will uttered by a person in a position of power, Austin (1998, p. 193) writes: "Every positive law, or every law simply and strictly so called, is set by a sovereign person, or a sovereign body of persons, to a member or members of the independent political society wherein that person or body is sovereign or supreme." This is, of course, a version of the will theory of law rejected by Olivecrona in Sect. 2 above.

Normativist legal positivists, on the other hand, reject the idea of a sovereign who stands above the law, and reject, or at least play down the importance of, the concept of will in their analyses of law. Instead, they substitute the concept of a *norm* (or rule) for the concept of a command. On this analysis, law is a system of norms (or rules), which norms (or rules) can be traced back to a *foundational norm* (or rule) that lays down the criteria of validity in the system or grounds the normativity of law (Kelsen 1960; Chap. 5; Hart 1961; Chap. 6).

But despite these differences, legal positivists accept three central tenets, namely the social thesis, the separation thesis, and the thesis of social efficacy. In addition, some legal positivists accept a fourth thesis, namely the semantic thesis. Let us now consider these theses in turn, in order to see whether Olivecrona's theory of law conforms to them.

15.4.1 The Social Thesis

The backbone of legal positivism is to be found in the social thesis, which has it that *what is law and what is not is a matter of social fact*. Hart's characterization of the rule of recognition may serve as an indirect characterization of the social thesis, which thesis occurs on a meta-level in relation to the rule of recognition:

> The question whether a rule of recognition exists and what its content is, i.e., what the criteria of validity in any given legal system are, is regarded throughout this book as an empirical, though complex, question of fact. This is true even though it is also true that normally, when a lawyer operating within the system asserts that some particular rule is valid he does not *explicitly state* but *tacitly presupposes* the fact that the rule of recognition… exists as the accepted rule of recognition of the system. If challenged, what is thus presupposed but left unstated could be established by an appeal to the facts, i.e., to the actual practice of the courts and officials of the system when identifying the law which they are to apply. (1961, p. 245. See also Kelsen 1965, pp. 465–469; Raz 1979)

But legal positivists disagree about how to understand the social thesis. While some argue that, properly understood, it requires the use of *exclusively* factual criteria of legal validity, and that any reference to moral values is best understood as granting the judge discretion to create new law (Raz 1986, p. 1110), others maintain that the criteria of validity may, but need not, be of a moral nature (Coleman 2001; Chaps. 6–10; Hart 1994, pp. 247–248, 250–251; Waluchow 1994). My own view is that the strong social thesis is in keeping with the way we think of the sources of law—legislation, precedent, custom—because no one thinks that one needs to engage in moral reasoning in order to handle these sources; and that the weak social thesis is in keeping with the way we think of the interpretation and application of the legal raw-material that we get from the sources of law, because everyone knows that in case of a conflict between the interpretive arguments, the judge must rank these arguments in order to decide the case before him—and that this may, but need not, involve ranking the underlying morally relevant values, such as predictability, intelligibility, democratic legitimacy, legislative efficiency, etc. (on this, see Spaak 2004, pp. 259–263).

Although Olivecrona never addresses this question explicitly, my impression is that he accepts the social thesis.[2] For he maintains, as we have seen in Chap. 5, that law is a matter of social facts. His aim, he explains, is to *reduce* our picture of law in order to make it correspond with objective reality (1939, p. 25): "Anyone who asserts that there is something more in the law, something of another order of things than 'mere' facts, will have to take on himself the burden of proof." And, as far as I can see, this *reduction thesis*, as we might refer to it, implies, but is not implied by, the *social thesis*. For *if* law is a matter of social facts, *then* it must surely be possible to determine what the law is using factual criteria. The reverse is not true, however. As Kelsen's theory makes clear, it does not follow from the claim that it is possible to determine what the law is using factual criteria, that law is not something of another order than facts.

There is a problem, however. So far we have been discussing the social thesis at a very high level of abstraction, and we have said nothing specific about how we find the legal raw material. But one might argue that, properly understood, the social thesis has it that one can determine the law with the help of a limited number of *sources of law* that can be handled using factual considerations, such as the traditional ones: legislation, precedent, and custom. The idea behind this *concrete* version of the social thesis is that the social thesis would be too abstract to be of much use in legal thinking, if it did not imply that there are some fairly specific sources of law. It is worth noting here that while Hart's rule of recognition assumes the existence of *some* sources of law, it leaves it an open question just *which* sources of law will be the relevant ones in the jurisdiction in question (1961, pp. 92–93). Under Hart's theory, whichever sources of law are identified by the rule of recognition will be the relevant sources of law.

[2] As we have seen, he rejects one particular version of the social thesis, namely the thesis that law is the content of a sovereign will.

Although his position on the concrete version of the social thesis throughout most of his writings is not very clear, Olivecrona clearly rejects it in the concluding chapter of the Second Edition of *Law as Fact*. Let us, however, begin by taking a look at what he has to say on this topic in his early works.

First, he touches on the topic in the second chapter of the First Edition of *Law as Fact*, where he considers the question of how the independent imperatives become "incorporated in the machinery of society" (1939, p. 50). He explains that the main way of achieving this is by way of *legislation*, but points out that there are also other, more informal ways of achieving it, such as by way of *precedent* or *custom*.[3]

Secondly, Olivecrona's view that legal rules have a suggestive character that depends on the reverence for the constitution on the part of the citizens appears to *presuppose* the concrete version of the social thesis. For in order to defend this view Olivecrona must assume the legal rules can somehow be traced back to the constitution—if the citizens couldn't trace the legal rules back to the constitution, they wouldn't know which rules to revere—and this assumption amounts to a defence of the view that legal rules can be traced back to one or the other of the traditional sources of law.[4]

These two considerations suggest that Olivecrona accepts the concrete version of the social thesis. But there are also considerations that may be thought to point in the opposite direction. First, Olivecrona claims in *Om lagen och staten* (1940) that we cannot make a distinction between moral and legal rules on the basis of their nature or their pedigree. He argues, more specifically, that legal rules cannot be traced back to the state, or to the actual holders of power in society, because the state depends on the law for its existence, and the actual power-holders would not have this power if there were no legal system (Olivecrona 1940, p. 42; 1971, p. 77). But this argument, which appears to be aimed at will theories of law, does not show that not all legal rules can be traced back to certain sources of law. For the view that all legal rules can be traced back to certain sources of law does not presuppose the existence of the state or a sovereign will operating in the background. Hence Olivecrona's claim that we cannot make a distinction between moral and legal rules on the basis of their pedigree does *not* imply a rejection of the concrete version of the social thesis.

It is, however, clear from the concluding chapter in the Second Edition of *Law as Fact* that Olivecrona does reject the concrete version of the social thesis. Discussing the systemic quality of law, he puts it as follows:

> The law in the usual sense of the word includes the rules about the organization of the state and the activities of the state. But it also comprises all other rules promulgated according to the constitution. Besides these rules of enacted law there are also the rules based on precedents. This mass of rules cannot be exactly circumscribed. The system of 'legal' rules

[3] Olivecrona also considers doctrinal writings, that is, the work of legal scholars, to function as a source of law, at least in countries like Germany and Sweden (1939, p. 64). But this is not a good idea. If the courts treated such writings as a source of law on a par with legislation, precedent, and custom, they would be conferring law-making power on non-elected actors. On a related problem, see Kelsen (1960, pp. 352–354).

[4] I was inspired to think along these lines by reading Pattaro (1968, p. 31–32).

> is not a closed system which can be identified by formal criteria. It is an 'open' system without fixed boundaries. (1971, p. 272)

I am not, however, suggesting that Olivecrona's stance in the Second Edition of *Law as Fact* amounts to a change of view. Olivecrona might simply have realized that this issue was considered by contemporary jurisprudents, such as Hart (1961), to be important, and he might therefore have felt a need to make his view on this matter clear.

Let me conclude the discussion of the social thesis by pointing out that the problem that this thesis deals with appears to be considered a more important problem in common law countries, such as England and the United States, than in civil law countries. I assume the reason is that the legal systems in civil law countries, but not in common law countries, almost without exception include a written constitution, which deals more or less effectively with the problem. Thus whereas Hart, an Englishman, introduced the idea of the rule of recognition to solve the problem of distinguishing between legal and non-legal rules, and to account for the normativity of law (1961, Chap. 6), Kelsen, an Austrian, paid almost no attention to the former problem. As is well known, Kelsen (1960, pp. 200–209) introduced the idea of the basic norm solely to account for the normativity of law. On Kelsen's analysis, the former question is not much of a problem, since the question of the status of a norm as a *legal* norm can be handled by simply tracing the norm back to the constitution (and ultimately to the basic norm). Kelsen did, however, argue in an article written at the end of his long career that norms must be created by human beings in order to qualify as legal norms, pointing out that the idea of human creation covers both customary and statutory law (1965, p. 465).

15.4.2 The Separation Thesis

The separation thesis has it that there is no *conceptual* connection between law and morality. John Austin's classic formulation of this thesis reads as follows:

> The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it vary from the text, by which we regulate our approbation or disapprobation. (1998, p. 184)

But legal positivists differ on the correct understanding of this thesis, too. While some writers maintain that it denies a conceptual connection between morality and law *simpliciter* (call this the strong separation thesis),[5] most maintain that it only denies such a relation between morality and the *content* of law (call this the weak separation thesis).[6] As I see it, the weak separation thesis is to be preferred to the

[5] See, e.g., Raz (1979, pp. 37–39).

[6] According to Kelsen (1992, p. 56), "[a]ny content whatever can be law; there is no human behaviour that can be excluded simply by virtue of its substance from becoming the content of a legal norm." See also Kelsen (1999, p. 113); Hart (1958; 1961, p. 181).

strong, because the former is what leading legal positivists like Kelsen and Hart, and, I think, Austin, had in mind when they spoke of the separation of law and morality, and because the moral value of the content of law is easier to ascertain than the moral value of an effective legal system. The former consideration carries weight, because when discussing legal positivism it is important to stay as close as possible to the views of those who are recognized as leading legal positivists. And the latter consideration carries weight, because it is important to characterize legal positivism in a way that makes the theory workable. On either interpretation, it follows from the separation thesis that the question whether this or that legal system has moral authority, or whether the citizens have a moral obligation to obey the law, can be answered only after an examination of the legal system in question. From the point of view of this thesis, these questions belong to moral or political philosophy.

I believe that Olivecrona accepts the separation thesis, in its weak version.[7] First, if you maintain that there is a conceptual connection between law and morality, you will very likely maintain that morality is objective in the sense that moral truth or validity is independent of what people may do or think about moral questions—if you do not accept some version of moral objectivism, you will have to accept the conclusion that the legal force and, in extreme cases, the existence and content of the law, varies with its moral quality; and this will likely undermine the predictability of court decisions (on this, see Spaak 2009, pp. 281–282). But, as we have seen, Olivecrona is a non-cognitivist, and at times an error theorist, and both non-cognitivism and error-theory imply that there are no moral values and standards. And this suggests that he could not in a meaningful way hold that there is a conceptual connection between law and morality.[8]

Secondly, although he conceives of law and morality as two distinct and partly overlapping sets of rules, that is, independent imperatives, that are related in important ways, Olivecrona does not even consider the possibility that there might be a *conceptual* connection between the two sets of rules. He states the following:

> The fields of law and morals thus form two circles that intersect. We find, further, already with a passing glance at the circumstances, that the legal order is rooted in morals in two ways: in that quite a few important legal rules are also considered to be moral rules, and in that there is the general moral commandment that one must obey the law. Such a basis is undoubtedly necessary if a legal order is to function. (1940, p. 42)[9]

[7] Bjarup (1978, pp. 179–180), who does not distinguish between the weak and the strong separation thesis, points out that all Scandinavian realists, including Olivecrona, accept the (weak) separation thesis. Eng (2007, p. 300), who also does not distinguish between the weak and the strong separation thesis, appears to believe that Olivecrona accepts the weak separation thesis.

[8] It is, however, worth noting that H. L. A. Hart, who accepts non-cognitivism (1982, pp. 159–160), clearly believes that he can endorse the separation thesis. See, e.g., Hart (1958).

[9] The Swedish original reads as follows: "Rättens och moralens områden bilda således tvenne cirklar som skära varandra. Vi finna vidare redan vid en ytlig blick på förhållandena, att rättsordningen på två sätt är förankrad i moralen: dels genom att en hel del centrala rättsregler tillika fattas såsom moraliska regler, dels genom att man har det allmänna moralbudet att man skall rätta sig efter lagen. En dylik förankring är utan tvivel nödvändig för att en rättsordning skall kunna fungera."

15.4.3 The Thesis of Social Efficacy[10]

The thesis of social efficacy has it that the existence of law presupposes that it is *effective* (Hart 1961, pp. 113–114; Kelsen 1960, pp. 215–221; Raz 1980; Chap. 9. See also Alexy 1994, pp. 31–34). The requirement that the law be effective is usually understood to mean that in order for a legal system to exist, the citizens must, on the whole, obey the law, and judges and other officials must apply it. As Kelsen (1960, p. 219) puts it, "[a] legal order is considered valid if its norms are by and large effective, i.e., if they are in fact obeyed and applied."[11]

Olivecrona does not have anything to say about the thesis of social efficacy, though my guess is that he accepts it. Since he believes that law is a matter of social fact, he must reasonably also believe that the law must be effective in order to exist. As we have seen in Sect. 8.7, he maintains that the law of a country exists as *ideas* in the imperative form about human behavior, ideas that are again and again revived in human minds, and that therefore law conceived of as a set of rules does not and cannot have permanent existence. He is not, however, explicit that the citizens must obey the law in order for it to exist. I assume that the reason why he never considers the question of the existence of the law is that he does not conceive of law as a system of rules (or norms) in the sense of semantic units (as Kelsen, Hart, and many others do), and that therefore the question of existence does not present itself as a pertinent one. But it seems to me that one could well accept the view that the (purported) law is a set of independent imperatives in Olivecrona's sense, and still argue that in case the citizens do not obey the law, there simply is no legal system. Since this is so, Olivecrona should have addressed this question.

Pattaro (1968, pp. 31–32) points out that whereas Kelsen (1960, pp. 215–221) and Hart (1961, pp. 100–101) hold that *efficacy* of the legal system taken as a whole is a necessary condition for the *validity* of legal norms,[12] Olivecrona seems rather to think of the validity of legal norms as a necessary condition for the efficacy of the legal system (see also Pattaro 1972, pp. 6–8). For while he is never explicit that the law must be applied or obeyed in order to exist, his view that legal rules are psychologically effective appears to presuppose that they are legally valid in the sense that they can be traced back to the constitution—if they were not legally valid in this sense, they would not be psychologically effective, and so they would not qualify as legal rules.

I am not sure that the difference between these two positions is that great, however. For one might argue that the theories of Kelsen and Hart, too, imply that the efficacy of the legal system presupposes the validity of the rules of the system—if the citizens and the law-appliers could not identify the legal rules, they could not obey

[10] I have previously (Spaak 2003) referred to this thesis as the 'existence thesis,' but I now believe that the 'thesis of social efficacy' is a more apt label.

[11] The German original reads as follows: "[e]ine Rechtsordnung wird als gültig angesehen, wenn ihre Normen *im großen und ganzen* wirksam sind, das heißt tatsächlich befolgt und angewendet werden."

[12] Strictly speaking, Hart says that it is normally *pointless* to speak about the validity of rules that belong to a system of rules that is not effective (1961, p. 101).

them, and if they did not obey them, the legal system would not be effective. But perhaps this argument exaggerates the importance of identification in the formal sense. The real question is perhaps rather whether the citizens can find the relevant rules, and this may in practice have little do to with enactment in accordance with the constitution.

15.4.4 The Semantic Thesis

In addition to the three theses discussed above, some legal positivists accept a semantic thesis, according to which central normative terms such as 'right,' 'duty,' and 'ought' have a special legal *meaning*, which differs from the meaning they have in a moral context.[13] Thus whereas the moral meaning of the term 'ought' is usually taken to be normative, the specifically legal meaning of 'ought' is sometimes taken to be descriptive in one way or the other. Oliver Wendell Holmes,[14] for example, maintains that a legal duty is mainly the *prophecy* that if a person doesn't do what he is legally required to do, he will suffer disagreeable consequences:

> Take again a notion which as popularly understood is the widest conception which the law contains;—the notion of legal duty…. We fill the word with all the content which we draw from morals. But what does it mean to a bad man? Mainly, and in the first place, a prophecy that if he does certain things he will be subjected to disagreeable consequences by way of imprisonment or compulsory payment of money. (1896–1897, p. 461)

And Kelsen, whose position on this point is not crystal clear, writes:

> Within the field of morals, the concept of duty coincides with that of "ought." The behavior which is the moral duty of somebody is simply the behavior which he ought to observe according to a moral norm. The concept of legal duty also implies an "ought." That somebody is legally obligated to certain conduct means that an organ "ought" to apply a sanction to him in case of contrary conduct. But the concept of legal duty differs from that of moral duty by the fact that the legal duty is not the behavior which the norm "demands," which "ought" to be observed. The legal duty, instead, is the behavior by the observance of which the delict is avoided, thus the opposite of the behavior which forms a condition for the sanction. Only the sanction "ought" to be executed. (1999, p. 60)

I take Kelsen to be saying that a person, p, has a legal duty to perform an action, a, if (and only if) there is an organ that ought to apply a sanction to p if p omits to perform a, and that this means that the action that a is not necessarily an action that p ought to perform. On this analysis, the action that *ought* to be performed is the sanction-applying action of the organ. Nevertheless, it is natural to assume that Kelsen means that in such a situation the action that is a legal duty ought to be performed, too—why else should the official apply a sanction to the person who omits to perform that action?

---

[13] I borrow the term 'the semantic thesis' from Raz (1979, p. 37).

[14] Holmes is usually said to be one of the American realists, or perhaps better, a source of inspiration for the American realists. This does not, however, mean that he was not also a legal positivist in the sense explained in this chapter. On the relation between legal positivism and American legal realism, see Leiter (2007, Chap. 2).

In any case, as I just indicated, not all legal positivists accept the semantic thesis. Neil MacCormick, for example, holds that normative terms like 'right,' 'duty,' and 'ought' have the *same* meaning in legal and moral contexts. Having argued (in a comment on H. L. A. Hart's legal philosophy) that legal and moral rights and obligations are conceptually distinct, he goes on to point out that it does not follow from this that these terms have different *meanings* when qualified as 'legal' and 'moral,' respectively:

> Railway tickets are not steamer tickets, but this does not make them 'tickets' in different senses of the term 'tickets'. Legal obligations are not moral obligations, but this does not make them 'obligations' in different senses of the term 'obligation.' (Contrast the two senses of 'interest' which occur in 'mortgage interest' and 'life interest'.) Thus if Hart suggests that legal obligations or duties are to do with what is legally due from or owed by us, and thus with what can be properly demanded from us, these demands being enforceable by due process, it will follow that moral duties or obligations are to do with what is morally due from or owed by us, and thus with what can properly be demanded from us—moral demands being in their nature above and beyond enforcement by institutional and coercive processes. Whatever differentiates legal obligations from moral obligations, it is not… some kind of pun on the term 'obligation'. But in my suggestion… the differentiation arises from justifying grounds of ascription of legal and of moral right and duty, the former being jurisdictionally relative while the latter are not. (1987, p. 108)

I am inclined to agree with MacCormick that it is preferable to distinguish between legal and moral rights and obligations not on the basis of the *meaning* of these terms, but on the basis of the reasons *why* a certain right or obligation is a legal, or a moral, right or obligation; and, as I see it, a right or obligation is a legal right or obligation if, and only if, it is imposed or conferred by a legal system. Of course, it does not follow from the type of analysis that MacCormick espouses that legal and moral rights and obligations have the same normative force. The normative force of the respective type of right or obligation will simply depend on the basis of this right or obligation, that is, the relevant norms or values that we conventionally refer to as 'legal' and 'moral,' respectively.

In any case, a non-cognitivist, such as Olivecrona, can hardly accept the semantic thesis, since he believes that such terms have no cognitive meaning, though he may of course hold that they have so-called emotive meaning (on this, see Stevenson 1937). To be sure, we have seen in Sect. 6.4, in particular, that in his early writings Olivecrona vacillated between a non-cognitivist and an error-theoretical analysis of (certain) normative terms. And on the error-theoretical, as distinguished from the non-cognitivist, analysis normative terms do have cognitive meaning and do refer (to non-natural entities or properties). Hence if and to the extent that Olivecrona accepts an error theory of normative and evaluative judgments, he can accept the semantic thesis.

15.5 Conclusion

We see that a commitment to (1) the abstract, but not the concrete, version of the social thesis, (2) the separation thesis, and (3) the thesis of social efficacy, though not to the semantic thesis, is implicit in Olivecrona's legal philosophy; and this means

that Olivecrona can be properly described as a legal positivist. Olivecrona's explicit rejection of legal positivism conceived of as the theory that law is the content of a sovereign will can, of course, easily be reconciled with the endorsement or acceptance of legal positivism in the sense of these three theses. What Olivecrona rejects is one particular version of the social thesis, not the social thesis itself, and still less the theory—legal positivism—whose content is rendered by these three theses.

15.6 Olivecrona on Legal Positivism

There can be no doubt that Olivecrona would have been surprised, perhaps even annoyed, had he been told that about 40 years later he would be classified as a legal positivist, despite the fact that he not only rejected legal positivism conceived as the theory that law is the content of a sovereign will, but also devoted about thirty pages in the Second Edition of *Law as Fact* (1971, pp. 25–41, pp. 51–64) to an illuminating discussion and comparison of different types of legal positivism, a discussion that he ended with the recommendation that we use the term 'legal positivism' to refer to the will theory of law discussed above and nothing else. Here is Olivecrona:

> The best solution to the terminological problem seems to be simply to use the expression 'legal positivism' in accordance with the original and traditional sense of the German *Rechtspositivismus*. No confusion need arise from this, and the authors who have from the beginning been called positivists will still be called positivists.
>
> In this usage the term 'positivism' is derived from positive law; it has no connection with philosophical positivism (which is, indeed, a term with no precise meaning). 'Legal positivism' connotes the view that all law is positive in the sense of being an expression of the will of a supreme authority. As was previously remarked, however, a restriction has to be made. The term refers to theories which professedly include the said fundamental view on the nature of law. It can easily be ascertained which they are. But it is another question whether this view is consistently maintained without immixture of foreign elements. (1971, pp. 61–62)

Nevertheless, the fact remains that the theory that Olivecrona rejects is just one particular version of legal positivism, as that theory is understood by contemporary jurisprudents. The participants in the contemporary debate about legal positivism in all its various forms all assume that the theories of law put forward by Kelsen and Hart are paradigmatic forms of legal positivism, even though Kelsen embraced the will theory only at the beginning (Kelsen 1984) and at the end (Kelsen 1979) of his long carrier and Hart never embraced it. Whether the development from a narrower to a broader understanding of legal positivism has been, on the whole, a happy development, or whether we should have listened to what Olivecrona said in 1971 will here be left an open question.[15] Suffice it to say that this is how the land lies now.

[15] Frändberg (2001, p. 146) deplores this development, arguing that the broader understanding of legal positivism (and natural law theory) adopted by contemporary jurisprudents is "more likely to blur than to clarify legal thinking on important analytical and normative issues."

15.7 Gustav Radbruch's Objection to Legal Positivism

One reason why the conclusion reached in Sect. 4—that Olivecrona is a legal positivist—is of interest is that the claim discussed above (in Sects. 2.5 and 10.12), that Olivecrona's legal philosophy supports the view that a German victory in World War II would have been in the best interest of Swedes and other Europeans, may be thought to be related to the criticism levelled by some commentators against legal positivism, that it is an authoritarian theory of law.

As we have seen (in Sect. 10.12), the idea behind the above-mentioned criticism of Olivecrona appears to be that if one believes that law is a matter of organized force (and perhaps also that there are no rights and duties independently of law), one might well in some circumstances come to accept (and perhaps even help bring about) obviously immoral uses of the coercive power of law. But this claim is a claim about *causal* connections, and it is clearly different from, though not always kept distinct from, the general claim put forward by Radbruch (2006) and others, which as I understand it concerns the *logical* implications of the theory, namely that legal positivism is an authoritarian theory that *requires* the subjects of the law, including judges and other officials, to obey the law, come what may. The idea behind Radbruch's criticism appears to be that, on any competent analysis, law is binding, and that therefore legal positivists—who accept the social thesis and therefore hold that the existence (or validity) of law is independent of the content of law—must rationally believe that one ought to obey the law, even if it turns out to be evil.

Having discussed some cases where innocent people had suffered under the evil laws of Nazi Germany, Radbruch proceeds to blame these tragic events on the commitment to legal positivism among German jurists:

> Positivism, with its principle that 'a law is a law', has in fact rendered the German legal profession defenceless against statutes that are arbitrary and criminal. Positivism is, moreover, in and of itself wholly incapable of establishing the validity of statutes. It claims to have proved the validity of a statute simply by showing that the statute has sufficient power behind it to prevail. But while power may indeed serve as a basis for the 'must' of compulsion, it never serves as a basis for the 'ought' of obligation or for legal validity. Obligation and legal validity must be based, rather, on a value inherent in the statute. (Radbruch 2006, p. 6)

That the general claim is mistaken is clear enough. To see that this is so, one simply needs to appreciate that on a legal positivist analysis, the normative force of law is too weak to have any interesting implications for action. Specifically, it follows from the separation thesis that a legal obligation (or right) is not necessarily a moral obligation (or right) (Hart 1958, pp. 615–621). Indeed, on the legal positivist analysis, having a legal duty or obligation to perform an action is fully compatible with having a moral duty or obligation *not* to perform the relevant action. Since this is so, it is a mistake to accuse legal positivism of being an authoritarian theory of law, or to accuse particular legal positivist theories, such as the theory defended by Olivecrona, of being authoritarian theories of law.

As the reader can see, my claim in the previous paragraph assumes that it follows from the separation thesis that legal rights and obligations are not necessarily

moral rights and obligations. However, it appears that at the time Radbruch wrote (1946), German judges and legal thinkers understood legal positivism in a way that differs from the way I have presented this theory in this chapter. Specifically, as Olivecrona explains in the Second Edition of *Law as Fact* (1971, pp. 25–41, 45–7, 50–62) and in *Rättsordningen* (1976, pp. 34–62), whereas English legal positivists, such as Jeremy Bentham and John Austin, did not conceive of legal rules as having binding force at all, German legal positivists, such as Karl Bergbohm and others, held that legal rules do have binding force (in the moral sense) (Olivecrona 1940, pp. 35–49, 55–64, 68–71); and the reason why the German legal positivists could coherently operate with a notion of binding force is that they also held that law flows from the general will of the people, which can somehow obligate the subjects of the law, a view that in turn depends on the murky notion of the spirit of the people (*Volksgeist*).

If Olivecrona's analysis is correct, as I think it is, we can understand why Radbruch speaks in the quotation above of legal validity as a genuinely normative property of legal norms, and why he believed that legal positivism was an authoritarian theory of law; and we see that the criticism leveled by Hart (1958, pp. 615–621) against Radbruch in his (Hart's) well-known debate with Fuller (1958) proceeded on an understanding of legal positivism that simply was not shared by German judges and legal scholars, including Radbruch. Olivecrona, who does not mention Radbruch or the Hart/Fuller debate in this context, puts the general point as follows:

> The reproach that legal positivism made the state a god could only be directed against idealistic [that is, German] positivism. Naturalistic [that is, English] positivism implies no deification of the state, since it ascribes binding force to the commands of the sovereign in the sense only that the commands are accompanied by threats. But this distinction has often been overlooked; the same kind of criticism has been leveled against legal positivism in general. (1971, p. 47)

This fact is, I believe, of some importance. Given the influence of Hart's views, especially in the English-speaking world, a contemporary jurisprudent, not to mention a student of jurisprudence, may easily be deceived into thinking that Radbruch was simply incompetent in that he failed to appreciate the import of the separation thesis. Olivecrona's discussion of English and German legal positivism is therefore an important, if limited, contribution to the jurisprudential debate, which makes it clear that Radbruch's criticism of legal positivism was based on an understanding of legal positivism that was not shared by Hart, or by contemporary jurisprudents.

15.8 The Systemic Character of Law

Prominent legal positivists such as Kelsen (1960, 1999), Hart (1961), and Raz (1980) maintain that law is a system of norms or rules or similar entities, and they have all made an effort to elucidate the nature of such a system. Thus having explained that a theory of law must first determine its study object, and that in order to do so the theorist needs to consider the common characteristics, if any, of those

phenomena that fall under the word 'law' and its equivalents in other languages, Kelsen maintains that those phenomena are indeed alike in that they have precisely a *systemic* character:

> … if we compare with one another the objects that have been called "law" throughout the ages, it turns out that they all first and foremost appear as *orders* for human behavior. An "order" is a *system of norms* whose unity is constituted by their all having the same ground for validity. And the ground for validity of a normative order is—as we shall see—a basic norm from which the validity of all the norms belonging to the order is derived. An individual norm is a legal norm provided that it belongs to a definite legal order, and it belongs to a definite legal order if its validity is grounded in the basic norm of this order. (1960, p. 32. Emphasis added)[16]

Olivecrona does not appear to accept this view, however. While he does maintain that law is a matter of rules (in the sense of independent imperatives), he does not appear to believe that law is a *system* of rules. Criticizing the will theory of law, he puts his view as follows:

> In reality there is no homogeneous source [such as a sovereign will] of the rules reckoned as legal. The origin of the core of ancient rules is lost in the mists of history; and new rules flow to the common pool through several different channels. The relative unity of the legal system results from the stability of certain ideas of rights and duties, from the durable existence of institutions (legislative, judicial, and administrative), and from the continued application of a vast body of rules connected with these institutions. There is no single driving force to the system [such as a sovereign will]; the regular application of the rules and their efficacy in governing the life of society depends on a network of psychological and material factors (ideas of rights and duties, habit, belief in authority, fear of sanctions, and so on). The will-theory substitutes an imaginary will for this infinitely complicated reality. (1971, p. 77)

Although Olivecrona has very little to say about problems of legal reasoning in his jurisprudential writings, it is worth noting that his rejection of the view that law is a system of rules seems to imply a rejection of the systemic approach to the interpretation of legal rules, according to which one should interpret a legal rule so that it coheres as well as possible with the surrounding body of law (on this, see Spaak 2007, Chap. 3)—if law were not a system, there would be little point in aiming to interpret a legal rule so that it cohered with the surrounding body of law. True, Olivecrona could probably avoid this problem by saying that law is a body of rules that can be divided into a number of little sub-systems, all of which allow systemic interpretation on a small scale, that is, within the respective sub-system. But this particular way out could not explain the occurrence of systemic interpretation of a legal rule in light of a constitutional provision, unless one also expanded each

[16] The German original reads as follows: „… wenn wir die Objekte, die bei den verschiedensten Zeiten als „Recht" bezeichnet werden, miteinander vergleichen, so ergibt sich zunächst, dass sie alle sich als *Ordnungen* menschlichen Verhalten darstellen. Eine „Ordnung" ist ein *System von Normen*, deren Einheit dadurch konstituiert wird, dass sie allen denselben Geltungsgrund haben; und der Geltungsgrund einer normativen Ordnung ist – wie wir sehen werden – eine Grundnorm, aus der sich die Geltung aller zu der Ordnung gehörigen Normen ableitet. Eine einzelne Norm ist eine Rechtsnorm, sofern sie zu einer bestimmten Rechtsordnung gehört, und sie gehört zu einer bestimmten Rechtsordnung, wenn ihre Geltung auf der Grundnorm dieser Ordnung beruht."

sub-system to include the constitution. And this would seem to be too much of a concession for somebody who rejects the systemic quality of law.

Olivecrona's rejection of the view that law is a system of rules does not imply that Olivecrona is not a legal positivist, however. For while legal positivism requires that there be unity of law in the weak sense that all legal norms can be traced back to a few fundamental sources of law, such as legislation, precedent, or custom, it does *not* require that there be unity of law in the strong sense that law should have a systemic character.

References

Articles

Frändberg, Åke. 2001. Naturalism and positivism. In *Libens Merito. Festskrift till Stig Strömholm* [*Festschrift for Stig Strömholm*], ed. O. Matsson et al., 139–146. Uppsala: Acta academiae regiae scientiarum upsaliensis.

Fuller, Lon L. 1958. Positivism and fidelity to law—a reply to Professor Hart. *Harvard Law Review* 71:630–672.

Hägerström, Axel. 1953a. General view. In *Inquiries into the nature of law and morals*, ed. Karl Olivecrona. Trans: C. D. Broad, 1–16. Uppsala: Kungliga humanistiska vetenskapssamfundet i Uppsala.

Hägerström, Axel. 1953b. Is positive law an expression of will? In *Inquiries into the nature of law and morals*, ed. Karl Olivecrona, 17–55.

Hägerström, Axel. 1953c. On the question of the notion of law. In *Inquiries into the nature of law and morals*, ed. Karl Olivecrona, 56–256.

Hägerström, Axel. 1953d. Kelsen's theory of law and the state. In *Inquiries into the nature of law and morals*, ed. Karl Olivecrona, 257–298.

Hägerström, Axel. 1953e. The conception of a declaration of intention in the sphere of private law. In *Inquiries into the nature of law and morals*, ed. Karl Olivecrona, 299–347.

Hägerström, Axel. 1953f. On fundamental problems of law. In *Inquiries into the nature of law and morals*, ed. Karl Olivecrona, 348–366.

Hart, H. L. A. 1958. Positivism and the separation of law and morals. *Harvard Law Review* 71:593–629.

Holmes, O. W. 1896–1897. The path of the law. *Harvard Law Review* 10:457–478.

Kelsen, Hans. 1965. Was ist juristischer Positivismus? [What is legal positivism?]. *Juristenzeitung* [*Journal for Jurists*] 15/16:465–469.

MacCormick, Neil. 1987. Comment. In *Issues in contemporary legal philosophy: The influence of H. L. A. Hart*, ed. Ruth Gavison, 105–113. Oxford: Clarendon.

Olivecrona, Karl. 1951. Realism and idealism: Some reflections on the cardinal point in legal philosophy. *New York University Law Review* 26:120–131.

Olivecrona, Karl. 1975. The will of the sovereign: Some reflections on Bentham's concept of "a Law." *American Journal of Jurisprudence* 20:95–110.

Pattaro, Enrico. 1968. Riflessioni su Olivecrona [Reflections on Olivecrona]. *Rivista Trimestrale di Diritto e Procedura Civile* [*Quarterly review of private law and civil procedural law*] 2:721–764.

Pattaro, Enrico. 1972. *Il realismo giuridico come alternativa al positivismo giuridico* [*Legal realism as an alternative to legal positivism*]. Introduction to Karl Olivecrona, La struttura dell'ordinamento giuridico [Law as Fact. 2nd ed.]. Trans: Enrico Pattaro, 1–55. Milano: Etas Kompass.

Radbruch, Gustav. 2006. Statutory lawlessness and supra-statutory law. *Oxford Journal of Legal Studies* 26:1–11 (originally published 1946 in German under the title Gesetzliches Unrecht und Übergesetzliches Recht“ in Süddeutsche Juristenzeitung 1:105–108).
Raz, Joseph. 1979. Legal positivism and the sources of law. In *The authority of law*, ed. Joseph Raz, 37–52. Oxford: Clarendon.
Raz, Joseph. 1985. Authority, law and morality. *The Monist* 68:295–324.
Raz, Joseph. 1986. Dworkin: A new link in the chain. *California Law Review* 74:1103–1119.
Spaak, Torben. 2003. Legal positivism, law's normativity, and the normative force of legal justification. *Ratio Juris* 16:469–485.
Spaak, Torben. 2004. Legal positivism and the objectivity of law. In *Analisi e diritto*, ed. Paolo Commanducci and Riccardo Guastini, 253–267. Turin: Giapichelli.
Spaak, Torben. 2009. Meta-ethics and legal theory: The case of Gustav Radbruch. *Law and Philosophy* 28:261–290.
Stevenson, Charles Leslie. 1937. The emotive meaning of ethical terms. *Mind, New Series* 46:14–31.

Books

Alexy, Robert. 1994. *Begriff und Geltung*. 2nd ed. Freiburg: Karl Alber.
Austin, John. 1998. *The province of jurisprudence determined and the uses of the study of jurisprudence* (with an introduction by H. L. A. Hart). Indianapolis: Hackett. (Previously published by Weidenfeld & Nicholson in 1954. Originally published in 1832).
Bjarup, Jes. 1978. *Skandinavischer Realismus* [*Scandinavian realism*]. München: Karl Alber.
Coleman, Jules L. 2001. *The practice of principle*. Oxford: Oxford University Press.
Ehrlich, Eugen. 1936. *Fundamental principles of the sociology of law*. Cambridge: Harvard University Press.
Eng, Svein. 2007. *Rettsfilosofi* [*Philosophy of law*]. Oslo: Universitetsforlaget.
Finnis, John. 1980. *Natural law and natural rights*. Oxford: Clarendon.
Hägerström, Axel. 1917. *Till frågan om den objektiva rättens begrepp* [*On the question of the notion of law*]. Uppsala: AB Akademiska bokhandeln.
Hart, H. L. A. 1961. *The concept of law*. Oxford: Clarendon.
Hart, H. L. A. 1982. *Essays on Bentham*. Oxford: Clarendon.
Hart, H. L. A. 1994. *The concept of law* (Clarendon Law Series). 2nd ed. Oxford: Oxford University Press (with a postscript edited by Penelope A. Bulloch and Joseph Raz).
Kelsen, Hans. 1934. *Reine Rechtslehre*. Wien: Österreichische Staatsdruckerei (reprinted by Scientia Verlag, 1994).
Kelsen, Hans. 1960. Reine Rechtslehre [*The pure theory of law*]. 2nd ed. Vienna: Österreichische Staatsdruckerei.
Kelsen, Hans. 1979. *Allgemeine Theorie der Normen*, ed. Kurt Ringhofer and Robert Walter. Vienna: Manzsche.
Kelsen, Hans. 1984. *Hauptprobleme der Staatsrechtslehre*. Aalen: Scientia Verlag (originally published 1923 by J. C. B. Mohr, 2nd ed. Tübingen).
Kelsen, Hans. 1992. *Introduction to the problems of legal theory*. Trans: Bonnie Litschewski Paulson and Stanley L. Paulson. Oxford: Oxford University Press (originally published 1934 in German under the title Reine Rechtslehre by Österreichishe Staatsdruckeri, Vienna).
Kelsen, Hans. 1999. *General theory of law and state*. Trans: Anders Wedberg. Union: The Lawbook Exchange (originally published 1945 by the Harvard University Press, Cambridge, Mass).
Leiter, Brian. 2007. *Naturalizing jurisprudence*. Oxford: Oxford University Press.
MacCormick, Neil and Ota Weinberger. 1986. *An institutional theory of law*. Dordrecht: Reidel.
Moore, Michael S. 2000. *Educating oneself in public*. Oxford: Oxford University Press.
Olivecrona, Karl. 1939. *Law as fact*. Copenhagen: Einar Munksgaard.

Olivecrona, Karl. 1940. *Om lagen och staten* [*On law and the state*]. Copenhagen: Einar Munksgard.
Olivecrona, Karl. 1971. *Law as fact*. 2nd ed. London: Stevens & Sons.
Olivecrona, Karl. 1976. *Rättsordningen* [*The legal order*]. 2nd ed. Stockholm: Liber (1st. ed. 1966).
Petrazycki, Leon. 1955. *Law and morality*. Transl: Hugh W. Babb (with an introduction by Nicolas S. Timasheff). Cambridge: Harvard University Press.
Raz, Joseph. 1980. *The concept of a legal system*. 2nd ed. Oxford: Clarendon.
Ross, Alf. 1959. *On law and justice*. Berkeley: University of California Press.
Ross, Alf. 1989. *Towards a realistic jurisprudence*. Trans: Annie I. Fausbøll. Aalen: Scientia Verlag. (originally published 1946 by Munksgaard, Copenhagen).
Spaak, Torben. 2007. *Guidance and constraint: The action-guiding capacity of theories of legal reasoning*. Uppsala: Lustus förlag.
Waluchow, W. J. 1994. *Inclusive legal positivism*. Oxford: Oxford University Press.

Chapter 16
Hägerström, Lundstedt, Ross, and Olivecrona

Abstract I argue in this chapter that the comparison between Olivecrona, on the one hand, and Hägerström and the other Scandinavian realists, on the other, makes it clear that Olivecrona's legal philosophy is indeed a creation that nobody but Olivecrona can claim credit for. I argue, more specifically, that while Olivecrona adopts Hägerström's ontological naturalism and non-cognitivist meta-ethics, he shows considerable independence in erecting a substantive legal philosophy on the basis of the philosophical foundation provided by Hägerström. I also argue that Olivecrona does not appear to have been much inspired by Lundstedt in his legal-philosophical work. While Olivecrona and Lundstedt shared many views, these views can be traced back to Hägerström's writings. A case in point is that Olivecrona appears to accept Lundstedt's view that the citizens tend to internalize the moral values and standards that make up the content of criminal law rules, although Olivecrona holds that the influence of the law, specifically the organized force of the law, is not limited to the field of criminal law, but is true across the board. Finally, I point out that Olivecrona and Ross agree on a number of important points, except the very basic question about the existence of legal relations. Thus they agree (i) about the analysis of the concept of a legal rule, although they make use of different terms to express this concept, and (ii) about the analysis of the concept of a legal right, and they also agree to a certain extent (iii) that law is a matter of organized force, though Olivecrona makes much more of this idea than does Ross.

16.1 Introduction

The analysis in the previous chapters indicates that Olivecrona's legal philosophy is a very interesting and coherent whole, and that it deserves a central place in twentieth-century legal philosophy. The main qualities of this legal philosophy, as we have seen, are a consistently executed naturalism and a penetrating analysis of the role of force in law. One question remains to be asked, however: How original was Olivecrona as a legal philosopher? Given Olivecrona's obvious intellectual debt to Axel Hägerström, we have good reason to pose this question. Interestingly, the Swedish philosopher Ingemar Hedenius once said in a critical comment that Olivecrona follows his masters, Axel Hägerström and Vilhelm Lundstedt, with a considerable lack of independence (1941, p. 67). The correctness of Hedenius's

T. Spaak, *A Critical Appraisal of Karl Olivecrona's Legal Philosophy,*
Law and Philosophy Library 108, DOI 10.1007/978-3-319-06167-2_16,

assessment cannot be taken for granted, however, because Hedenius's judgment may well have been somewhat clouded by an intense dislike of Olivecrona for political reasons, namely Olivecrona's idea that the Europeans ought to welcome a German victory in World War II (discussed in Chaps. 2, 10, and 15). Moreover, Hedenius's comment dates back to 1941, when Olivecrona was still a fairly young legal philosopher, though Hedenius's comment was, to be sure, included also in the second edition of Hedenius's book, which was published 1963. Notwithstanding Hedenius's criticism, I shall argue that while Olivecrona obviously adopts Hägerström's ontological naturalism and non-cognitivism/error theory, Olivecrona's substantive legal philosophy is in all essentials an independent creation that nobody but Olivecrona can claim the credit for. Indeed, I shall argue that Olivecrona deserves to be counted among the most important philosophers of law of the twentieth century.

The focus in this chapter, then, will be on the dependence, if any, of Olivecrona's substantive legal philosophy on Hägerström's substantive legal philosophy. But I shall also consider the relation between Olivecrona's legal philosophy and the legal philosophies of two other prominent Scandinavian Realists, namely Vilhelm Lundstedt and Alf Ross. Lundstedt was Olivecrona's senior colleague in Uppsala, and an important source of inspiration for Olivecrona in the early days of his career. Ross, who was 2 years younger than Olivecrona, had studied in Vienna under Hans Kelsen. However, he received his doctorate in philosophy in Uppsala, where he was supervised by Hägerström, who also inspired him very much, and he came later to be inspired by the movement of logical positivism (on Ross, see Bjarup 2008). Of these legal philosophers, Ross is undoubtedly the one who has received most recognition on the international scene. As H. L. A. Hart (1983, p. 161) said in his review of Ross's book *On Law and Justice,* "Ross is less tortuous and obscure than Hägerström, less naïve and professorial than Lundstedt; and richer in illuminating examples and concrete detail, if less urbane, than Olivecrona."

I begin with the relation between Olivecrona and Hägerström (Sect. 16.2), and proceed to consider the relation between Olivecrona and Lundstedt (Sect. 16.3) and between Olivecrona and Ross (Sect. 16.4). I state my conclusions in Sect. 16.5.

16.2 Olivecrona and Hägerström

We have seen that Olivecrona adopts Hägerström's ontological naturalism and non-cognitivism/error theory. This much is quite clear and fairly unremarkable. The interesting question concerns the relation between Olivecrona's *substantive* legal philosophy and the substantive legal philosophy of Hägerström. To what extent, if any, does the former depend on the latter? As we shall see, Olivecrona follows Hägerström in broad outline, but shows considerable independence in working out the implications of Hägerström's ideas, and in adding ideas of his own. To see that this is so, however, we need to consider in some detail the relation between Olivecrona's main legal-philosophical claims and the legal philosophy of Hägerström.

As we have seen, Olivecrona (i) rejects the view that legal rules have binding force, and (ii) maintains instead that legal rules are independent imperatives that

influence people because they possess a suggestive character. We have also seen that he maintains (iii) that while the noun 'right' does not refer to anything real, rights statements nevertheless fulfill a directive, an informative, and a technical function in legal thinking, (iv) that law is a matter of organized force in a number of ways, (v) that courts necessarily create new law when deciding a case, (vi) that the activity of legislation does not create rules that establish legal relations, but instead incorporates in the legal machinery psychologically effective rules in the shape of independent imperatives, and (vii) that (external) legal statements can be correct or incorrect, but not true or false. Finally, we have seen (viii) that Olivecrona's legal philosophy implies the main tenets of legal positivism, and (ix) that Olivecrona argues that any defensible theory of law must fall into the category of non-voluntarist theories of law. I shall treat these claims or issues in turn.

16.2.1 The Binding Force of Law

Olivecrona's most fundamental legal-philosophical claim is that legal rules lack binding force, and that therefore there are no legal relations. Can we find this claim in Hägerström's writings? Hägerström does not have much to say about the binding force of law, though we have seen that he does say in a review of Alf Ross's book *Theorie der Rechtsquellen* (1929) that once we take into account the fact that social reality is the only reality there is, the very idea of binding law for a given society evaporates into nothingness (Hägerström 1931, p. 83). Thus Olivecrona's rejection of the view that law has binding force appears to be in keeping with Hägerström's view of the matter. Nevertheless, Olivecrona's critique of the view that law has binding force is a valuable contribution to legal philosophy, because it spells out rather clearly what Olivecrona takes to be involved in the rejection of this view, namely the non-existence of legal relations.

As we have seen, the reason why Olivecrona rejects the view that law has binding force is that he believes that the binding force is such a peculiar property that legal rules with binding force must be located in a supernatural world, where this peculiar property can make sense, and that there can be no connection between our world and the supernatural world. We have also seen that Olivecrona's objection that there can be no connection between the two worlds is identical with Hägerström's objection to Kelsen's claim that law belongs in the world of the ought. Hence Olivecrona's rejection of the view that law has binding force is not original. What *is* original is perhaps Olivecrona's claim that as a result, there are no legal entities or properties, that is, no legal rights and duties, no marriages, no professors, etc. To be sure, Hägerström himself might well have shared this view, but the way in which Olivecrona teased out its precise legal implications is a highly valuable contribution to legal philosophy.

Olivecrona explains that we believe that law has binding force because we misunderstand the nature of value judgments, that is, we are moral, or more broadly, value objectivists, even though (he believes) Hägerström has convincingly shown that the correct meta-ethical theory is non-cognitivism. As I have said in Chap. 7,

I take Olivecrona to be saying that value objectivists wrongly assume that a binding rule or a true (or valid) value judgment somehow establishes a normative (or evaluative) relation, that it generates a normative (or evaluative) entity or property, whereas non-cognitivists, who maintain that rules and value judgments cannot be true or false, hold that legal rules do not and cannot generate any such entities or properties.

We have also seen that Hägerström aims to explain *why* judges, lawyers, and others mistakenly believe that law has binding force by pointing out that the state of consciousness of the recipient of a *command* is quite similar to the state of consciousness of one who is under a *duty*, and that this means that a person may easily and without realizing it glide from the one state of consciousness to the other. Olivecrona does not, however, discuss this interesting and subtle explanation. The explanation that Olivecrona does offer appears to be his own, however.

16.2.2 Legal Rules as Independent Imperatives

Olivecrona argues that legal rules are independent imperatives, which cannot establish legal relations, but can influence people, and that in this sense they are part of the chain of cause and effect. The underlying idea, as we have seen, is that imperatives—that is, commands and independent imperatives—work immediately on the mind of the recipient of the command, because they possess a suggestive character, which depends on the reverence for the constitution on the part of the citizens.

Hägerström, for his part, argues that positive law is a set of rules that is actually applied by courts and other law-applying organs, and that in this sense law is a social machine in which the citizens are the cogs. He does not argue that legal rules are independent imperatives, however, though he does argue that legal rules can be seen as *imperatives*, and that declarations of intent, too, are really imperatives. He also explains that commands work on the minds of people, and that the concepts of a sanction and an award are extraneous to the concept of a command.

We see, then, that while Olivecrona owes to Hägerström the view that legal rules can be conceived of as imperatives as well as his analysis of the concept of a command, the view that legal rules are *independent* imperatives in the sense explained by Olivecrona is his own, not Hägerström's. To be sure, Åke Frändberg (2005, pp. 377–378) maintains that Olivecrona took over the theory of independent imperatives from Hägerström without further ado, and he cites as evidence in support of this claim quotations from the writings of Hägerström and Olivecrona that make it clear that Olivecrona follows Hägerström closely as regards the existence of a suggestive character of imperatives and the consequent capacity of imperatives to influence people who are subjected to them. But while this is true enough, it does *not* support the claim that Olivecrona took over the theory of *independent imperatives* from Hägerström. For the suggestive character is not characteristic of independent imperatives in particular, but pertains to imperatives in general, that is, commands as well as independent imperatives.

But, as we have seen in Chap. 8, one may wonder whether there is really any interesting difference between independent imperatives and norms. And if there are no interesting differences, why complicate our conceptual apparatus by introducing a new term for an old concept? Of course, we have also seen that there may be one important difference between independent imperatives and norms, namely that on Olivecrona's analysis, independent imperatives, unlike norms, have a suggestive character, which is what makes it possible for them to influence people and, therefore, to become part of the chain of cause and effect. That is to say, Olivecrona's attempt to naturalize legal science in general and jurisprudence in particular depends on the truth of the view that legal rules are (independent) imperatives. And while I have expressed doubts about the existence of such a suggestive character, the underlying idea is very interesting. The idea did not originate with Olivecrona, however, but with Hägerström.

16.2.3 The Concept of a Right

Olivecrona maintains (i) that the noun 'right' does not refer to anything real, but to some sort of imaginary power, and that therefore there are no rights. He maintains, however, (ii) that the concept of a right nevertheless fulfills important functions in legal thinking, viz. a directive, an informative, and a technical function, as well as the function of exciting or dampening our feelings. He also maintains (iii) that the non-existence of rights means that the so-called declaration theory of court judgments is mistaken, and (iv) that there is a close connection between a belief in rights (and other non-natural entities) and a belief in magic. In addition, he maintains (v) that as a result of the function of the right concept to excite our feelings, international law, which confers rights on states, is actually a threat to world peace.

Hägerström, too, maintains that the noun 'right' does not refer to anything real, but to some sort of imaginary power. And he maintains, in keeping with this, that rights statements are always *false*, because they involve the ascription of a supernatural power to the right-holder, which power does not exist. That is to say, he defends an *error theory* of rights.

Whereas Olivecrona's claims (i) and (iv) can be found in the writings of Hägerström, and claim (v) is clearly inspired by Hägerström's idea (briefly mentioned in Sect. 4.11) that the concept of a right can function to excite or dampen feelings, claims (ii) and (iii) appear to have originated with Olivecrona himself, though as we have seen, he owes the idea of the technical function of the right concept not to Hägerström, but to Anders Wedberg (and Alf Ross). The claim that the declaration theory of judgments is mistaken, in particular, appears to be an original contribution to legal thinking, specifically to the field of procedural law. Although original, the claim about the different functions of the concept of a right is in my view not as interesting, because it seems that most concepts can fulfill at least an informative or a directive function, depending on the circumstances. Olivecrona's critique of international law appears to be independent of Hägerström's legal philosophy, though not, as we shall see, of Lundstedt's legal philosophy.

16.2.4 Law as a Matter of Organized Force

As we have seen (in Chap. 10), Olivecrona puts forward ten distinct claims that concern the idea that law is a matter of organized force. He maintains, more specifically, (i) that (organized) force is necessary to the existence of law; (ii) that law consists chiefly of rules about the use of force; (iii) that the force of law exerts its influence on social life chiefly indirectly; (iv) that the force of law causes the citizens to internalize the moral values and standards that make up the content of the legal rules; and (v) that abolishing the force of law would likely result, with time, in important—and dangerous—changes in the moral values and standards we accept. He also maintains (vi) that organized force can serve the citizens only if there is an organization, namely the state, that has a monopoly on power in the relevant territory, (vii) that the Marxist theory of the state, according to which law and state will ultimately wither away, is mistaken; and (viii) that a belief in international law and the rights and duties involved is apt to lead to increased use of violence. In his later writings, he reiterates the first, the second, and the sixth claim, but does not have much to say about claims (iii)—(v), (vii), and (viii). He does, however, maintain (ix) that the coercive power of the state presupposes that the state also has psychological power, and vice versa, and (x) that only judicial independence and a sound judicial ethics can guarantee legal certainty.

I have been able to find only two of these claims in Hägerström's writings, namely claims (iv) and (v). As we have seen (in Sect. 4.13), Hägerström maintains in a posthumously published manuscript that the existence of an effective legal system is a necessary condition for the maintenance of positive morality, in the sense that the consistent application and enforcement of the law by the courts is a necessary condition for the acceptance on the part of the citizens of the moral values and standards that are part of the law—if the law were not thus enforced, our ideas of rights and duties would evaporate and our behavior would change accordingly. But I am also inclined to believe that claim (viii) can be traced back to Hägerström's analysis, in the sense that it builds on Hägerström's idea that the concept of a right tends to excite or dampen our feelings.

This means that the essential parts of Olivecrona's claims about law and organized force cannot be traced back to Hägerström, but must be considered to be Olivecrona's own claims. Since I have argued that Olivecrona's thoughts about law and organized force are among his most interesting and characteristic legal-philosophical claims, this is an important conclusion.

16.2.5 Judicial Law-Making

Hägerström does not have anything to say about legal reasoning, including judicial law-making, which means that Olivecrona's claim about judicial law-making cannot be traced back to Hägerström's writings. To be sure, I have argued in Chap. 11 that Olivecrona's claim about judicial law-making is mistaken, because he uses the

term ‘evaluation’ too broadly. But I nevertheless believe that Olivecrona’s thoughts on this matter are thought-provoking and a valuable contribution to legal thinking.

16.2.6 Legislation

Hägerström does not have much to say about questions of legislation, even though he does touch on the question of revolutionary law-making in his critical discussion of will theories of law (considered above in Sect. 4.5.),[1] and this means, of course, that Olivecrona’s claim about legislation cannot be traced back to Hägerström’s writings. Olivecrona’s claim is, however, very much in keeping with Hägerström’s view that rules, including legal rules, are best conceived as imperatives. If legal rules are not and cannot be binding, they cannot establish legal relations, and this means that they must function in some other way. If they are best conceived as (independent) imperatives, which have a suggestive character, then the conclusion that their function is to influence the subjects of law on the psychological level is very close at hand. And from here it is but a short step to Olivecrona’s view that the function of the act of legislation is to bring the legal rules (in the shape of independent imperatives) to the attention of the citizens, who (Olivecrona mintains) revere or respect the constitution.

16.2.7 Truth and Correctness

Hägerström does not make a distinction between the truth and the correctness of external legal statements either, which means that Olivecrona’s distinction between truth and correctness cannot be traced back to Hägerström’s writings. I have, of course, argued in Chap. 12 that the value of this distinction is debatable, because Olivecrona’s analysis of the concept of correctness appears to be self-refuting. Nevertheless, I believe the distinction deserves to be seriously considered, not least because it seems possible to understand it in more than one way.

16.2.8 Legal Positivism

As we have seen (in Sect. 15.4), Olivecrona’s legal philosophy implies the central tenets of legal positivism. I am inclined to believe that Hägerström, too, was a legal positivist, because it seems reasonable to assume that he accepted the social thesis, the separation thesis, and the thesis of social efficacy, even though he never dealt explicitly with these questions. But, like Olivecrona, Hägerström rejects legal positivism conceived as the theory that law is the content of a sovereign will. And, as

[1] On this, see Hägerström (1953, pp. 28–35).

we have seen (in Sect. 15.2), Olivecrona's critique of will theories of law in general adds nothing to Hägerström's penetrating critique of this type of theory. I conclude that Olivecrona's legal positivism, although in keeping with Hägerström's analysis, is nevertheless independent of it, while Olivecrona's critique of will theories adds nothing to Hägerström's critique of this type of theory.

16.2.9 Voluntarism and Non-Voluntarism

We have seen (in Sect. 15.3) that having rejected will theories of law, Olivecrona introduces a distinction between voluntarism and non-voluntarism as regards the question of the nature of law. But, as we have also seen, the category of non-voluntarist theories of law introduced by Olivecrona is too heterogeneous to be of much value in the debate about the nature of law. Nevertheless, Olivecrona's contribution to legal philosophy in this regard, though not substantial, appears to be independent of Hägerström's legal philosophy.

16.3 Olivecrona and Lundstedt

Like Olivecrona, Vilhelm Lundstedt was a legal scholar and an enthusiastic follower of Axel Hägerström. And like Hägerström (and Olivecrona most of the time), he maintained that value judgments assert nothing about reality and that therefore they can neither be true nor false. As we have seen in Chap. 1, he expounds his mature legal philosophy in a book entitled *Legal Thinking Revised* (1956). He objects in this book to (what he refers to as) traditional legal science, that it operates with metaphysical concepts such as 'right,' 'duty,' 'wrong-doing,' and 'guilt' (Lundstedt 1956, p. 42), arguing that legal science must be founded on experience and be a social science (Lundstedt 1956, p. 126). Like Hägerström and Olivecrona, he rejects legal positivism conceived as the theory that law is the content of a sovereign will (1929). And he mentions in the introductory chapter that he considers Olivecrona to be a legal scholar who holds views similar to his (Lundstedt 1956, p. 10).

16.3.1 The Binding Force of Law

Like Hägerström, Lundstedt conceives of law as a social machine in which human beings are the cogs (1956, pp. 8–9, 18). And like Hägerström (and Olivecrona), he objects to the view that law has binding for, that this presupposes that law be located in a supernatural world, where this peculiar property can make sense, and that there could be no connection between our world and such a supernatural world (1932). However, in Lundstedt's writings there is no closer analysis of this problem, and there is also no consideration of the question whether the absence of legal rules with

binding force implies, or is equivalent to, the absence of legal relations. I therefore conclude that Olivecrona's thoughts on these matters are independent of Lundstedt's legal philosophy.

16.3.2 Legal Rules as Independent Imperatives

Lundstedt maintains that there are no legal rules (1956, p. 16), but what he means is that even though there are no legal rules that have binding force, there may be legal rules that have no such binding force. And this, as we have seen, is Olivecrona's view, too. But, Lundstedt does not have anything to say about the nature of legal rules conceived as non-metaphysical entities. What he does say is simply that we need to speak of legal rules in order to make ourselves understood, and that in doing so we may use inverted commas as follows: There is a 'legal rule' that prohibits murder (Lundstedt 1956, p. 17). But this is, of course, futile. As Eerik Lagerspetz (1995, p. 3) notes, Lundstedt tries "to avoid the ontological commitment by a typographical trick." In any case, it is clear that Olivecrona does not owe the idea of legal rules being independent imperatives to Lundstedt.

16.3.3 The Concept of a Right

Like Hägerström, Lundstedt maintains that the term 'right' does not refer to anything real, and that the concept of right as understood by judges, legal scholars, and others is a metaphysical concept. Indeed, he argues (1956, p. 77) that "the conception of legal rights usually held within the sphere of jurisprudence is completely illogical, accordingly untrue to real life." Instead, he suggests that we should use the term 'right' to refer to a person's protected position. For example, we might say that a person's property right consists in a protected position, which in turn depends on the consistent application of the relevant legal rules by courts and other law-applying organs (Lundstedt 1956, pp. 94–98).

While Olivecrona would not, of course, reject Lundstedt's claim that as a matter of fact the owner of an object will in most cases be secure in his position of it, he would not accept Lundstedt's claim that we can analyze the concept of a right to property in these terms. As we have seen (in Sect. 5.3), Olivecrona's view is that any analysis of legal concepts in empirical terms must fail to account for the circumstance that judges and lawyers treat legal rules and rights and duties, etc. as *reasons for action*, and that therefore it will fail to capture the import of these concepts as traditionally understood.

Given that Lundstedt appears to accept an error-theoretical analysis of the concept of a right, according to which the right concept refers to non-natural entities or properties, it is surprising that he also advocates a redefinition of this concept in empirical terms. For it is obvious that in doing so he is changing the subject, as it were. The "metaphysical" understanding of the concept of a right rejected by Lundstedt

involves, as Olivecrona has made clear, the idea that rights function as reasons for action, but this idea will be lost on Lundstedt's proposed analysis of the concept.

16.3.4 Law as a Matter of Organized Force

Lundstedt argued as early as 1936 that the social function of *criminal* law is to "foster[] and maintain[] spontaneous feelings, moral instincts, as it were, against those actions encumbered with punishments, i.e. crimes, or so to speak, to stir up the general spontaneous morale against this." (1956, p. 229) And he pointed out (Lundstedt 1956, p. 229) that this presupposes that the criminal code can "impress upon the general public the idea of *absolute* inadmissibility of the punishable conduct," and that such an impression can be created *only* if punishment appears as a regular consequence of the crime, "following so to speak *with the necessity of a physical law*." For, he explained (Lundstedt 1956, p. 230), "[o]nly in this way will it [the crime] be rejected in its *common* character as a *type*, i.e. without any possibility of justifying it with all sorts of sophistry owing to the individual moral situation of the doer of the deed."

Since it is hard to believe that Olivecrona was unaware of Lundstedt's view, one may guess that Olivecrona owes the claim that the organized force of law causes us to internalize the moral values and standards that make up the content of the legal rules, at least partly, to Lundstedt.[2] It is, however, important to note that Lundstedt in his turn was influenced by Hägerström on this very count. As we saw in the previous section, Hägerström had argued that the force of law causes us to internalize the moral values and standards that make up the content of the legal rules. Hence it may be somewhat misleading to say that Olivecrona was influenced by Lundstedt in this regard; rather, both Olivecrona and Lundstedt were influenced by Hägerström.

Olivecrona also maintains, as we have seen, that international law is a threat to peace. In this case, too, he clearly follows in the footsteps of Lundstedt, who (as we saw in Sect. 10.9) had argued in 1932 that a belief in rights in the field of international law is apt to lead to very bad consequences. He had argued, more specifically, that while it is bad enough to assume that *individuals* have rights and duties, etc., this assumption is apt to lead to disaster when applied to *nations*.

16.3.5 Judicial Law-Making

Lundstedt has nothing to say about legal reasoning, including judicial law-making. Hence we may conclude that Olivecrona's view of judicial law-making is independent of Lundstedt's legal philosophy.

[2] I would like to thank Uta Bindreiter for drawing my attention to this possible relation of dependence.

16.3.6 Legislation

Lundstedt does not have anything to say about the process of legislation either, which means that we may conclude that Olivecrona's thoughts on legislation are independent of Lundstedt's legal philosophy.

16.3.7 Truth and Correctness

Lundstedt does not make a distinction between the truth and the correctness of legal statements, either. Since this is so, we may conclude that Olivecrona's view of this distinction is independent of Lundstedt's legal philosophy.

16.3.8 Legal Positivism

Like Olivecrona, Lundstedt rejects the theory that law is the content of a sovereign will, and like Olivecrona, he is a legal positivist in the sense that his legal philosophy implies the central tenets of legal positivism. However, I can see no reason why Olivecrona should have been inspired by Lundstedt on these counts. At the most, Lundstedt might have conveyed some of Hägerström's ideas to Olivecrona when Olivecrona was still a young legal philosopher.

16.3.9 Voluntarism and Non-Voluntarism

To my knowledge, Lundstedt never paid much attention to this distinction or to the category of non-voluntarist theories of law. Moreover, since Olivecrona owes the distinction between voluntarism and non-voluntarism and the category of non-voluntarist theories of law to Hägerström, if he owes them to anyone, it follows that he does not owe them to Lundstedt.

16.4 Olivecrona and Ross

Since Olivecrona and Ross were roughly the same age, we have perhaps less reason to assume that Olivecrona was influenced by Ross than that he was influenced by Lundstedt. But given that Olivecrona and Ross were the two most prominent Scandinavian realists, it may nevertheless be of interest to compare Olivecrona's legal philosophy with that of Ross.

16.4.1 The Binding Force of Law

We have seen that, on Olivecrona's analysis, law is a set of legal rules, conceived of as independent imperatives, which lack binding force and which cannot establish legal relations, but which can cause human behavior by influencing the subjects of law. We have also seen that while Ross maintains that there is no place for the property of binding force (or validity) in the world of time and space, he clearly assumes that there are legal relations—legal entities and properties—by virtue of the fact that there are valid legal rules. Thus Olivecrona's view on this topic is more radical, if also more implausible, than Ross's. At any rate, since both Olivecrona and Ross follow Hägerström in rejecting the view that law has binding force, we have no reason to believe that Olivecrona follows Ross on this count, or vice versa.

A related issue concerns the concept of legal validity. We have seen (in Sect. 5.4) that whereas Ross embraces a so-called prediction theory of the concept of valid law, Olivecrona rejects this type of theory on the ground that it does away with the *normative* aspect of law, that it cannot account for the circumstance that judges and lawyers treat legal rules and rights and duties as *reasons for action* (Sect. 5.3).

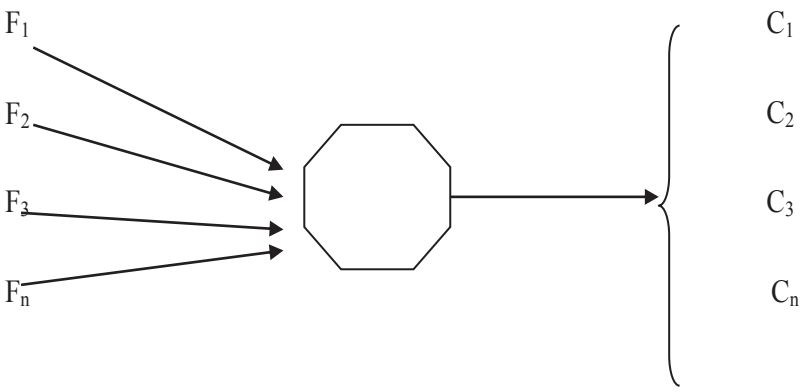
16.4.2 Legal Rules as Independent Imperatives

Olivecrona maintained as early as 1939 that legal rules are independent imperatives. Ross would later argue that legal rules are (what he refers to as) directives, that is, linguistic utterances that lack representative (cognitive) meaning and aim to influence human behavior (1959, pp. 7–8). He explains (Ross 1959, p. 7) that the influence of an utterance such as "shut the door" is direct in the sense that it is "exercised by the suggestive force or pressure contained in the utterance itself." And he points out that although he prefers the term 'directive' to 'independent imperative,' he actually agrees with Olivecrona's analysis of the concept of a legal rule (Ross (1959, p. 8, footnote 2). But, unlike Olivecrona, he does not put the idea of suggestive force (or suggestive character) to much use in his legal philosophy. For example, he does not conclude that the function of legal rules is not to establish legal relations, but to influence people and therefore to cause human behavior. Hence we have no reason to think that Olivecrona was influenced by Ross's analysis in this matter. Indeed, Olivecrona writes in a private letter of 9 March 1956 to Professor Frede Castberg at the University of Oslo that he believes that Ross's analysis of the concept of a rule builds on his (Olivecrona's) analysis as it was put forward in *Om lagen och staten* (1940).[3]

[3] I would like to thank Thomas Mautner for kindly providing me with a transcription of this letter.

16.4.3 The Concept of a Legal Right[4]

Ross's starting point is that the term 'legal right' does not refer—it lacks, as Ross puts it, semantic reference—and must therefore function in some other way (1959, pp. 172–175. See also 1957, p. 820). Against this background, Ross (1959, p. 74) claims that the concept of a legal right is a *technical tool of presentation*, or, as I prefer to say, a *connective concept*, which ties together a disjunction of operative facts and a conjunction of legal consequences in the following way (*F* stands for operative facts, *R* stands for right, and *C* stands for legal consequences):



We might say with Olivecrona (1962, p. 190) that the concept of a legal right thus conceived fulfils the same function as a *junction*: a large number of lines (the operative facts) converge into the junction (the legal right), from which a large number of lines branch out (the legal consequences). On this type of analysis, Ross explains, the term 'right' refers to the "complex situation" just mentioned (1957, p. 822). Moreover, on this analysis, to assert that a person has a legal right is to render the content of a number of legal norms in a convenient manner. What we have here, Ross explains (1959, p. 172), is "a simple example of reduction by reason to systematic order."

We have seen (in Sect. 9.2) that the *technical* function of legal rights, identified by Olivecrona, is a version of the connective analysis proposed by Ross, and before him by Anders Wedberg (1951). But it seems to me that Olivecrona's thoughts on the technical function do not add anything important to Ross's sophisticated analysis. It is, however, worth noting that Olivecrona and Ross appear to have slightly different views about which types of rule are connected with each other by the concept of a right. Whereas Ross, who focuses on the concept of

[4] The first two paragraphs in this sub-section can be found, more or less verbatim, in Spaak (2009, p. 246).

ownership, has in mind rules according to which the owner may use the object, according to which other persons may not interfere with the owner's enjoyment of the object, according to which the owner can sell or mortgage the object, and according to which other persons can do nothing to divest the owner of his ownership of the object, Olivecrona also takes into account penal rules and rules about damages. Thus Olivecrona takes into account a more expansive set of rules than does Ross. I believe the set of rules chosen by Ross is to be preferred, however, because I cannot see that penal rules and rules about damages contribute to the determination of the *concept* of a legal right.

16.4.4 Law as a Matter of Organized Force

As we have seen (in Sect. 5.4), Ross (1959, p. 34) conceives of a national legal system as a system of norms "for the establishment and functioning of the State machinery of force." And this seems to be in keeping with Olivecrona's view that law is a matter of organized force. Ross maintains that such a system is *valid* if, and only if, judges (i) apply the norms (ii) because they feel bound by them (Ross 1959, p. 35). So while Olivecrona and Ross appear to agree that law is a matter of organized force, they differ in that Olivecrona, but not Ross, maintains that there are no legal relations, and that Ross, like Kelsen, and others, is happy to maintain that there is organized force in the background, whereas Olivecrona goes much further and spells out the different ways in which law *is* a matter of organized force.

16.4.5 Judicial Law-Making

Ross devotes two chapters in *On Law and Justice* (1959) to the doctrine of the sources of law and judicial interpretation, but he never touches on the topic of judicial law-making. Hence we may safely conclude that Olivecrona's view of judicial law-making is independent of Ross's legal philosophy.

16.4.6 Legislation

Although Ross does discuss questions concerning legislation in *On Law on Justice* (1959), his main concern is to make it clear that legal politics is a value-driven activity and that therefore it cannot be considered a science (Ross 1959, Chaps. 14–17). He does not, however, touch on the question that Olivecrona is concerned with, that is, the incorporation of rules into the legal system, and this means that we may conclude that Olivecrona's thoughts on legislation are independent of Lundstedt's legal philosophy.

16.4.7 Truth and Correctness

Since Ross does not make a distinction between the truth and the correctness of legal statements, we may conclude that Olivecrona's thoughts on this subject are independent of Ross's legal philosophy.

16.4.8 Legal Positivism

Ross is clearly a legal positivist. He makes it clear in an illuminating article on validity and the conflict between legal positivism and natural law theory (1998[1961], pp. 149–150) that he embraces the social thesis, discussed in Sect. 15.4, and that he takes this thesis to be more or less identical with the separation thesis, also discussed in Sect. 15.4.[5] Since he also clearly believes that a purported legal system must be effective in order to exist (1959, pp. 34–35), he accepts the thesis of social efficacy, discussed in Sect. 15.4, too. He does not, however, appear to embrace the semantic thesis, discussed in Sect. 15.4, according to which the meaning in a legal context of normative terms, such as 'right' and 'duty,' differs from the meaning these terms have in a moral context. For one thing, his claim that 'right' *lacks* cognitive meaning and fulfills a connective function in legal thinking is difficult to square with a commitment to this thesis. In any case, Ross agrees with Olivecrona and Lundstedt that legal positivism, conceived as the theory that law is the content of a sovereign will, should be rejected (Ross 1959, p. 150). It does not, however, follow from the fact that both Olivecrona and Ross embrace legal positivism that Olivecrona was inspired by Ross, or vice versa, in this regard.

16.4.9 Voluntarism and Non-Voluntarism

To my knowledge, Ross never paid much attention to the distinction between voluntarism and non-voluntarism and the category of non-voluntarist theories of law. Moreover, since, as we have seen, Olivecrona owes the distinction between voluntarism and non-voluntarism and the category of non-voluntarist theories of law to Hägerström, if he owes them to anyone, it follows that he does not owe them to Ross.

[5] I have argued elsewhere (Spaak 2003, p. 474) that the social thesis implies the separation thesis, but not vice versa.

16.5 Conclusion

We see, then, that while Olivecrona follows Hägerström in broad outline, he goes his own way when it comes to elaborating the details of his legal philosophy. More specifically, he adopts Hägerström's ontological naturalism and non-cognitivist meta-ethics, but shows considerable independence in erecting a substantive legal philosophy on the basis of Hägerström's naturalism and meta-ethics. For example, Olivecrona's most fundamental legal-philosophical claims are that legal rules do not have binding force, that there are no legal relations, and that legal rules cause human behaviour by influencing the subjects of the law. Since these claims clearly depend on Hägerström's legal philosophy, we cannot credit Olivecrona with the very idea that there is no binding force and no legal relations. We can, however, give him credit for elaborating these claims in such an interesting way.

Olivecrona does not appear to have been much inspired by Lundstedt in his legal-philosophical work. While Olivecrona and Lundstedt shared many views, these views can be traced back to Hägerström's writings. A case in point is that Olivecrona appears to accept Lundstedt's view that the citizens tend to internalize the moral values and standards that make up the content of criminal law rules, although Olivecrona holds that the influence of the law, specifically the organized force of the law, is not limited to the field of criminal law, but is true across the board. But, as we have seen, Lundstedt had in turn gotten this view from Hägerström. I shall leave it an open question whether Olivecrona was more inspired by Lundstedt than by Hägerström on this count, or vice versa.

Finally, Olivecrona and Ross agree on a number of important points, except the very basic question about the existence of legal relations. Thus they agree (i) about the analysis of the concept of a legal rule, although they make use of different terms to express this concept, and (ii) about the analysis of the concept of a legal right, and they also agree to a certain extent (iii) that law is a matter of organized force, though Olivecrona makes much more of this idea than does Ross. They differ, *inter alia*, in that Ross has nothing to say about judicial law-making and legislation, and does not make a distinction between the truth and the correctness of legal statements. But in my view, these differences are not terribly important.

I conclude that the comparison between Olivecrona, on the one hand, and Hägerström and the other Scandinavian realists, on the other, shows that Olivecrona's legal philosophy is indeed a creation that nobody but Olivecrona can claim credit for. Hence I believe that Hedenius's claim about Olivecrona's lack of independence in relation to Hägerström and Lundstedt (considered above in Sect. 16.1) is much exaggerated and that it was indeed mainly intended to insult its target, whom Hedenius disliked for moral/political reasons. While Olivecrona's analysis sometimes comes across as somewhat dogmatic and not very subtle, there can be no doubt that Olivecrona had a very good eye for the big legal-philosophical picture, that is, for what is more and what is less important on a larger scale. As we have seen, he set out to create a realistic legal philosophy on the basis of Axel Hägerström's thought. And despite my many disagreements with him on matters of philosophical detail, I believe he was quite successful in this endeavor.

References

Articles

Bjarup, Jes. 2008. Alf Ross. In *Der Kreis um Hans Kelsen. Die Anfangsjahre der Reinen Rechtslehre [Hans Kelsen and his circle: The early years of the pure theory of law],* eds. Walter Robert et al., 409–443 Vienna: Manzsche.

Frändberg, Åke. 2005. Några drag i svensk allmän rättslära och rättsfilosofi efter Hägerström [Some features of Swedish jurisprudence and legal philosophy after Hägerström]. In *Rättsordningens idé*, ed. Frändberg, 375–393.

Hägerström, Axel. 1931. Till frågan om begreppet gällande rätt [On the question of the concept of valid law]. *Tidsskrift for rettsvitenskap,* 48–91.

Hägerström, Axel. 1953. Is positive law an expression of will? In *Inquiries into the nature of law and morals*, ed. Hägerström, 17–55.

Hart, H. L. A. 1983. Scandinavian Realism. In *Essays in jurisprudence and philosophy*, ed. H. L. A. Hart, 161–169. Oxford: Clarendon Press. (Originally published in *Cambridge Law Journal* 1959).

Lundstedt, Vilhelm. 1929. Den historiska rättspositivismen. Med särskild hänsyn till Bergbohms lära [Historical legal positivism. With special consideration given to Bergbohm's theory] In *Juridiska fakultetens minnesskrift [Memorial publication of the Faculty of Law]*, vol. 10, 1–69. Uppsala: Juridiska fakulteten vid Uppsala universitet.

Lundstedt, A. V. 1932. The responsibility of legal science for the fate of man and nations. *New York University Law Quarterly Review* 10:326–40.

Olivecrona, Karl. 1962. Legal language and reality. In *Essays in honor of Roscoe Pound*, ed. Ralph A. Newman, 151–191. Indianapolis: The American Society for Legal History.

Ross, Alf. 1957. Tû-tû. *Harvard law review* 70:812–825. (Originally published in Danish in O. A. Borum & Knud Illum, eds. 1951. *Festskrift till Henry Ussing*, 468–484. Copenhagen: Arnold Busck).

Ross, Alf. 1998. Validity and the conflict between positivism and natural law. In *Normativity and norms. Critical perspectives on Kelsenian Themes,* eds. Stanley L. Paulson and Bonnie Litschewski Paulson 147–163. Oxford: Clarendon Press. (Originally published 1961 in *Revista Jurídica de Buenos Aires* 4:46–93).

Spaak, Torben. 2003. Legal positivism, law's normativity, and the normative force of legal justification *Ratio Juris* 16:469–485.

Spaak, Torben. 2009. Naturalism in Scandinavian and American Realism. In *De Lege,* eds. Petter Asp and Mattias Dahlberg, 243–293. Uppsala: Iustus.

Wedberg, Anders. 1951. Some problems in the logical analysis of legal science, *Theoria* 17:246–275.

Books

Hedenius, Ingemar. 1941. *Om rätt och moral. [On law and morals]*. Stockholm: Tiden.

Lagerspetz, Eerik. 1995. *The opposite mirrors*. Dordrecht: Kluwer.

Lundstedt, A. V. 1956. *Legal thinking revised*. Stockholm: Almqvist & Wiksell.

Olivecrona, Karl. 1939. *Law as fact*. Copenhagen: Einar Munksgaard (London: Humphrey Milford).

Olivecrona, Karl. 1940. *Om lagen och staten [On law and the state]*. Copenhagen: Einar Munksgard (Lund: Gleerup).

Ross, Alf. 1929. Theorie der Rechtsquellen *[Theory of the sources of law]*. Leipzig: Deuticke.

Ross, Alf. 1959. *On law and justice*. Berkeley & Los Angeles: University of California Press.

Karl Olivecrona: A Selective Bibliography

What follows below is, as the title indicates, a selective bibliography. The reader who wants information about all Olivecrona's legal and legal-philosophical publications (up to 1964) may consult the bibliography in *Festschrift for Karl Olivecrona* (see the List of References), which also includes Olivecrona's work in procedural law and a number of short newspaper articles.

1925

1. Talerätt och materiell rätt. En relikt från naturrätten. Några reflektioner i anledning av professor Kallenbergs senaste arbete. [*Locus Standi* and Substantive Law. A Relic from Natural Law. Some Reflections Prompted by Professor Kallenberg's Latest Work] *Svensk juristtidning* [*Swedish Law Journal*] 10:177–182 [Review].

2. Till frågan om lagars grundlagsenlighet [On the Question of the Constitutionality of Statutes]. *Statsvetenskaplig tidskrift* [*Journal of Political Science*] 28:301–329.

1926

3. A. V. Lundstedt, *Superstition and Rationality in Action for Peace*? *Svensk juristtidning* [*Swedish Law Journal*] 11:278–283 [Review].

1927

4. Till frågan om rättsvetenskapens problemställning [On the Question of the Problem of Legal Science]. *Tidsskrift for rettsvitenskap* [*Journal for Legal Science*] 40:327–350.

1928

5. Några synpunkter på de juridiska begreppen [Some Thoughts on Legal Concepts]. In *Festskrift till Axel Hägerström* [*Festschrift for Axel Hägerström*], eds. Filosofiska och juridiska föreningarna i Uppsala, 221–228. Uppsala: Almqvist & Wiksell.

6. *Studier över begreppet juridisk person i romersk och modern rätt* [*Studies on the Concept of a Juridical Person in Roman and Modern Law*]. Uppsala: Appelbergs boktryckeri [Doctoral dissertation].

1929

7. En teori om bevisbördan [A Theory of the Burden of Proof]. In *Minnesskrift utgiven av Juridiska fakulteten i Uppsala vol. 11* [*Memorial Publication Published by the Faculty of Law in Uppsala Vol. 11*]:1–27.

T. Spaak, *A Critical Appraisal of Karl Olivecrona's Legal Philosophy,*
Law and Philosophy Library 108, DOI 10.1007/978-3-319-06167-2,

1930

8. *Bevisskyldigheten och den materiella rätten* [*Substantive Law and the Onus of Proof*]. Uppsala: Almqvist & Wiksell.

1933

9. Anders Vilhelm Lundstedt, *Die Unwissenschaftlichkeit der Rechtswissenschaft. Erster Teil*. [*The Unscientific Character of Legal Science*. *Part One*] *Svensk juristtidning* [*Swedish Law Journal*] 18:260–261 [Review].

1934

10. Om civildomens arter [On the Types of Civil Judgment]. In *Festskrift för Otto Hjalmar Granfelt* [*Festschrift for Otto Hjalmar Granfelt*], 102–111. Helsingfors: Juridiska Föreningen i Finland.

1936

11. Anders Vilhelm Lundstedt, *Die Unwissenschaftlichkeit der Rechtswissenschaft. Zweiter Teil*. [*The Unscientific Character of Legal Science*. *Part Two*] *Svensk juristtidning* [*Swedish Law Journal*] 21:436–437 [Review].

1938

12. *The Acquisition of Possession in Roman Law*. Lund: C. W. K. Gleerup & Leipzig: Otto Harrassowitz.

1939

13. Axel Hägerström †. *Svensk juristtidning* [*Swedish Law Journal*] 24:513–515.

14. *Law as Fact*. Copenhagen: Ejnar Munksgaard & Oxford: Humphrey Milford.

1940

15. *Om lagen och staten* [*On Law and the State*]. Copenhagen: Ejnar Munksgaard & Lund: C. W. K. Gleerup.

16. *Gesetz und Staat* [*Law and the State*]. Copenhagen: Ejnar Munksgaard [Translation of 15].

17. *England eller Tyskland?* [*England or Germany?*]. Lund: C. W. K. Gleerup.

1941

18. *England oder Deutschland?* [*England or Germany?*]. Lübeck: Reichskontor der Nordischen Gesellschaft [Translation of 17].

19. *Varig fred i Europa* [*Lasting Peace in Europe*]. Oslo: Blix forlag [Translation of 17].

20. *Europa och Amerika* [*Europe and America*]. Lund: Sundqvist & Emond.

21. Marxismens lära om staten [The Marxist Theory of the State]. In *Samhällsvetenskapliga problem. Sex föreläsningar utgivna av Statsvetenskapliga intresseföreningen i Lund* [*Problems of Social Science. Six Lectures Published by the Society for Political Science in Lund*], ed. Statsvetenskapliga intresseföreningen i Lund, 9–28. Lund: C. W. K. Gleerup.

22. Några ord om löften och tillit i det gamla Rom [A Few Words about Promises and Reliance in Ancient Rome]. *Svensk juristtidning* [*Swedish Law Journal*] 26:271–278.

23. Zum Begriff des subjektiven Rechts. Bemerkungen zu Konrad Marc-Wogaus Kritik in Theoria 1940s. 227 ff [On the Concept of a Right. Comments on Konrad Marc-Wogaus's Criticism in Theoria p. 227 ff]. *Theoria* 7:46–52.

1942

24. Besittningsviljans gåta [The Riddle of the Will behind Possession]. *Svensk juristtidning* [*Swedish Law Journal*] 27:333–334.

25. Axel Hägerström, *Der römische Obligationsbegriff im Lichte der allgemeinen römischen Rechtsanschauung II. Über die Verbalobligation*. *Svensk juristtidning* [*Swedish Law Journal*] 27:607–612 [Review].

26. *Döma till konung. En rättshistorisk undersökning*. [*Becoming a King. A Legal-Historical Investigation*] Lund: C. W. K. Gleerup.

27. *Lagens imperativ*. Med bilaga: *Vidräkning med docenten I. Hedenius*. [*The Imperative of the Law*. With an Appendix: *Criticism of I. Hedenius*] Lund: C. W. K. Gleerup.

28. *Der Imperativ des Gesetzes* [*The Imperative of the Law*]. Kopenhagen: Ejnar Munksgaard [Translation of 27, except the appendix].

1943

29. *Domen i tvistemål* [*Judgment in Civil Cases*]. Lund: C. W. K. Gleerup.

30. Kreationsakt och val [Creation Act and Election]. *Svensk juristtidning* [*Swedish Law Journal*] 28:809–814.

1944

31. Civildomens innebörd [The Meaning of the Civil Judgment]. *Svensk juristtidning* [*Swedish Law Journal*] 29:721–741.

32. Var går fronten? [Where is the Front?] *Lundagård* 11:223–225.

1945

33. Världsmoral förutsätter världslag och världsorganisation [World Morality Presupposes World Law and World Organization]. In *Världsmoral* [*World Morality*], ed. Johan Hansson, 59–61. Stockholm: Natur och kultur.

1946

34. *Civilprocessens allmänna del* [*Civil Procedure. General Part*] 2nd ed. Lund: Juridiska föreningen.

35. Giorgio del Vecchio, *Lezioni di filosofia del diritto*. *Svensk juristtidning* [*Swedish Law Journal*] 31:810–811 [Review].

1947

36. Domstolarnas bundenhet av HD:s prejudikat [The Binding Force of Supreme Court Precedent]. *Svensk juristtidning* [*Swedish Law Journal*] 32:289–291.

37. Law as Fact. In *Interpretations of Modern Legal Philosophies. Essays in Honour of Roscoe Pound. With an Introduction by Paul Sayre*, ed. Paul Sayre, 542–557. New York: Oxford University Press.

38. En sociologisk rättslära [A Sociological Theory of Law]. In Juridiska fakulteten, Uppsala universitet, ed., *Festskrift tillägnad Vilhelm Lundstedt* [*Festschrift Dedicated to Vilhelm Lundstedt*], 167–199. Uppsala: Lundequistska bokhandeln & Leipzig: Otto Harrassowitz.

39. *Das Werden eines Königs nach altschwedischem Recht. Der Königsritus als magischer Akt* [Becoming a King According to Old Swedish Law. The King Rite as a Magic Act]. Lund: Lunds universitets årsskrift. Första avdelningen, Teologi, juridik och humanistiska ämnen [Lund University Yearbook. First Part, Theology, Law, and the Humanities] [Translation of 26].

40. Viljan bakom rätten [The Will behind the Law]. *Statsvetenskaplig tidskrift* [*Journal of Political Science*] 50:1–32.

1948

41. *Ideologie und Realität des Geldes*. [*The Ideology and Reality of Money*] Lund: C. W. K. Gleerup.

42. Is a Sociological Explanation of Law Possible? *Theoria* 14:167–207.

1949

43. *Three Essays in Roman Law*. Copenhagen: Ejnar Munksgaard.

1951

44. Arthur Nussbaum, *Money in the Law. National and International. A Comparative Study in the Borderline of Law and Economics*. *Svensk juristtidning* [*Swedish Law Journal*] 36:281–283 [Review].

45. Realism and Idealism: Some Reflections on the Cardinal Point in Legal Philosophy. *New York University Law Review* 26:120–131.

46. Straffets vara eller icke vara [Punishment or not?]. *Svensk juristtidning* [*Swedish Law Journal*] 36:575–580.

1952

47. Penningen i civilrättens system [Money in the System of Private Law]. *Svensk juristtidning* [*Swedish Law Journal*] 37:675–684.

48. Vilhelm Lundstedt 70 år [Vilhelm Lundstedt at 70]. *Svensk juristtidning* [*Swedish Law Journal*] 37:497–504.

1953

49. Giorgio del Vecchio, *Lehrbuch der Rechtsphilosophie* & Giorgio del Vecchio, *Die Gerechtigkeit*. *Tidsskrift for rettsvitenskap* [*Journal for Legal Science*] 66:334–336 [Review].

50. *Penningenhetens problem* [*The Problem of the Monetary Unit*]. Lund: C. W. K. Gleerup.

51. Some Reflections on the Present Status of Legal Philosophy. In *Académie internationale de droit comparé. Acta actorum academiæ universalis jurisprudentiæ comparativæ*. Vol. III P. 3., 291–304. Roma: Istituto italiano di studi legislativi.

1954

52. L'imperativo della legge [The Imperative of the Law]. In *Jus, Rivista di scienze giuridiche*, *NS 5*:451–467 [Translation of 27].

1955

53. Vilhelm Lundstedt död [Vilhelm Lundstedt: Obituary]. *Svensk juristtidning* [*Swedish Law Journal*] 40:590–591.

1956

54. El derecho como hecho [Law as Fact]. In *El hecho del derecho* [The Fact of Law], 213–240. Buenos Aires: Bibl. del Inst. Argentino de filosofía jurídica y social [Translation of 14].

1957

55. Zur Frage des magischen Charakters der älteren Rechtsvorstellungen [On the Question of the Magical Nature of Older Views on Law]. In *Kungliga humanistiska vetenskapssamfundet i Lund. Årsberättelse* [*The Royal Society of Human Sciences. Annual Report*], 1–15. Lund: C. W. K. Gleerup.

56. Vilhelm Lundstedt, *Legal Thinking Revised*. *Svensk juristtidning* [*Swedish Law Journal*] 42:551–553 [Review].

57. Das moralische Problem der Strafgesetzgebung [*The Moral Problem of Penal Legislation*]. In *Zeitschrift für d. ges. Strafrechtswissenschaft* [*Yearbook for Penal Legal Science*]*, Berlin* 69:397–411.

58. *The Problem of the Monetary Unit*. Stockholm: Almqvist & Wiksell.

59. G. Ryle, *Revolutionen i filosofien*. *Svensk juristtidning* [*Swedish Law Journal*] 42:632–635 [Review].

60. Vilhelm Lundstedt (1882–1955). In *Rivista internazionale di filosofia del diritto, Mil.,* 34:473–475.

1958

61. Najnowsze kierunki w dziedzinie teorii prawa w Szecjci [The most recent tendencies in legal theory in Sweden]. In *Panstwo i prawo* [*State and Law*], Warsaw 13:254–268.

1959

62. *El derecho como hecho. En apéndice: El imperativo de la ley*. [*Law as Fact. Appendix: The Imperative of the Law*] Buenos Aires [Translation of 14 and 27].

63. The Legal Theories of Axel Hägerström and Vilhelm Lundstedt. *Scandinavian Studies in Law* 3:125–150.

1960

64. *Rätt och dom* [*Law and Judgment*]. Stockholm: Norstedts [2nd. ed. 1966].

1961

65. Inledning [Introduction]. In Axel Hägerström, *Rätten och viljan. Två uppsatser ånyo utgivna av Karl Olivecrona* [*Law and Will. Two Essays Published again by Karl Olivecrona*], 9–56. Lund: C. W. K. Gleerup.

1962

66. Margit Waller, *Axel Hägerström*. *Svensk juristtidning* [*Swedish Law Journal*] 47:655–656 [Review].

67. Election and Creation. In *Studi in onore di Emilio Betti. Volume Primo* [*Studies in Honor of Emilio Betti. Volume One*], 383–388. Milan: Giuffrè.

68. Legal Language and Reality. In Ralph A. Newman, ed. *Essays in Honor of Roscoe Pound*, 151–91. Indianapolis: The American Society for Legal History. Indianapolis.

1963

69. The Imperative Element in the Law. *Rutgers Law Review* 18:794–810.

1964

70. *Det rättsliga språket och verkligheten* [*Legal Language and Reality*]. Lund: C. W. K. Gleerup [Translation of 69].

71. *Grundtankar hos Hägerström och Lundstedt. Tre uppsatser*. [*Fundamental Ideas of Hägerström and Lundstedt. Three Essays*] 2nd. ed. Lund: Juridiska föreningen.

72. *Lenguaje jurídico y realidad* [*Legal Language and Reality*]. Córdoba [Translation of 69].

1966

73. *Rättsordningen* [*The Legal Order*]. LiberFörlag.

1969

74. Begreppet 'Property' hos John Locke [John Locke's Concept of Property]. In Sören Halldén, Göran Hermerén and Leif Stille, eds. *Logik, rätt och moral. Filosofiska studier tillägnade Manfred Moritz på 60-årsdagen den 4 juni 1969* [*Logic, Law and Morality. Philosophical Studies Dedicated to Manfred Moritz on his Sixtieth Birthday 4 June, 1969*], 149–163. Lund: Studentlitteratur.

1971

75. *Law as Fact*. 2nd ed. London: Stevens and Sons.

76. *Äganderättens ursprung enligt John Locke* [*The Origin of Ownership According to John Locke*]. Kungliga humanistiska vetenskapssamfundet i Uppsala, 1971–1972.

1973

77. Das meinige nach der Naturrechtslehre [The *meum* According to Natural Law Theory]. *Archiv für Rechts- und Sozialphilosophie* [*Archives for Legal and Social Philosophy*] 59:197–205.

1974

78. Appropriation in the State of Nature: Locke on the Origin of Property. *Journal of the History of Ideas* 25:211–230.

79. Locke's Theory of Appropriation. *The Philosophical Quarterly* 24:220–234.

1975

80. The Will of the Sovereign: Some Reflections on Bentham's Concept of 'a Law.' *American Journal of Jurisprudence* 95:95–110.

81. Om 'skandinavisk realism' [On 'Scandinavian Realism'] *Ugeskrift for retsvæsen* [Weekly Journal for Legal Affairs] 346–347.

1977

82. Die Zwei Schichten im naturrechtlichen Denken [The Two Strata of Natural Law Thinking]. *Archiv für Rechts- und Sozialphilosophie* [Archive for Legal and Social Philosophy] 63:79–103.

1978

83. Hägerström och naturrätten [Hägerström and Natural Law]. In 1978. *Uppsalaskolan—och efteråt* [*The Uppsala School—and Afterwards*], ed. Stig Strömholm, 25–31. Uppsala: Almqvist & Wiksell.

Index

T. Spaak, *A Critical Appraisal of Karl Olivecrona's Legal Philosophy,*
Law and Philosophy Library 108, DOI 10.1007/978-3-319-06167-2,