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,

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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.

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