

BACK TO (LAW AS) FACT

Some Remarks on Olivecrona, Scandinavian Legal Realism, and Legal Notions as Hollow Words

by Julieta Rabanos

The aim of this paper is to critically reconsider some of the main tenets underlying Karl Olivecrona's works. The first two sections are devoted to a brief reconstruction of his position on methodology for the study of legal phenomena, including the endorsement of philosophical realism and the enterprise of demystifying legal language through linguistic therapy (§ 2), as well as his particular conception of legal notions as hollow words (§ 3). I will then provide a brief analysis of a central legal concept – that of “authority” – to show how Olivecrona's methodological framework can be applied (§ 4). The last two sections are devoted to the analysis and evaluation of three possible criticisms of Olivecrona's claims as a legal realist (§ 5) and some brief concluding remarks on the usefulness of Olivecrona's approach for contemporary legal philosophy (§ 6).

Keywords: Karl Olivecrona, Scandinavian Legal Realism, demystification of legal language, hollow words, legal methodology

1. *Introduction*

Karl Olivecrona's works are part of an ambitious effort to lay the foundations for scientific knowledge in legal theory and to demystify legal language as it is commonly (ordinarily) used. Following in the footsteps of A. Hägerström, Olivecrona rejects philosophical idealism and endorses the so-called “reality thesis”, according to which the only things that exist are those that belong to the empirically accessible world: the spatio-temporal world. As a consequence, something that does not belong to this world can neither exist nor be object of scientific knowledge.

These endorsements have a profound effect in Olivecrona's works. On the one hand, he adheres to a non-cognitivist position in metaethics, thus denying the existence of values or objective mor-

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al facts. On the other hand, he advocates a realist methodology and claims that the object of legal philosophy¹ is – and cannot be anything but – law as fact(s). From these starting points, he develops a very complex and sophisticated approach to the study of legal phenomena, which, among other things, emphasises the necessity and usefulness of distinguishing between the notions used by participants and theorists, advances a theory of legal notions as hollow words, and provides criteria for identifying the relevant facts for any adequate descriptive theoretical enterprise.

The aim of this paper is to critically reconsider some of the main tenets underlying Olivecrona's works. The first two sections are devoted to a brief reconstruction of his position on methodology for the study of legal phenomena, including the endorsement of philosophical realism and the enterprise of demystifying legal language through linguistic therapy (§ 2), as well as his particular conception of legal notions as hollow words (§ 3). I will then provide a brief analysis of a central legal concept – that of “authority” – to show how Olivecrona's methodological framework can be applied (§4). The last two sections are devoted to the analysis and evaluation of three possible criticisms of Olivecrona's claims as a legal realist (§5) and some brief concluding remarks on the usefulness of Olivecrona's approach for contemporary legal philosophy (§6).

2. *Olivecrona and the Scandinavian Legal Realism² School: realism, language demystification, and linguistic therapy*

As we have already surmised, Olivecrona's work is part of a general effort by the Scandinavian school of legal theory to demystify the legal phenomenon and its language. The main aim of this demystification was to remove all metaphysical elements and remnants from legal language. Only in this way, according to the Scandinavians, can the legal phenomenon be recognised for what it really is: a set of facts and objects about which empirical knowledge can be gained. Hence the idea of “law as fact”.

This proposal for demystification began with A. Hägerström, who criticised philosophical idealism and advocated philosophical

¹ Here I will use “legal philosophy”, “legal theory”, and “legal science” as seemly synonyms, as Olivecrona does in his works.

² I am in debt here with one anonymous referee for their precious suggestion of using “Scandinavian Legal Realism” instead of the wider “Scandinavian Realism”, as this paper refers mainly to the thought of one specific author belonging to one specific school (the so-called *Uppsala School*), and not to the wider Scandinavian/Nordic legal-philosophical Realism.

realism instead³. His central idea was that, contrary to the ideas of idealism, there is no other possible world than the spatio-temporal world. Everything that is not in this world is not a real entity, but in any case a supernatural entity whose existence cannot be empirically confirmed. Only the objects that are in this spatio-temporal dimension can be the subject of empirical and objective knowledge (“reality thesis”). Consequently, legal science can only consider facts and objects located in this dimension as its subject of inquiry⁴.

Following E. Pattaro, this line of thought can be deemed as neo-empirical. It advocates realism against idealism in terms of what is real, and objectivism against subjectivism in terms of the status of knowledge. It also includes the idea that the main task of philosophy is the analysis of concepts, and a non-cognitivist position with regard to value judgements or propositions. Regarding the former, the idea is that philosophy must carry out “linguistic therapy” precisely in order to carry out the process of demystification and “purification” of metaphysical elements. Regarding the latter, the idea is that there is no point in studying the truth content of value judgements because: 1) they are neither true nor false since they provide no information (non-cognitivism); and 2) the value itself has no meaning (emotivism)⁵.

Concerning specifically legal philosophy, Olivecrona points out that

³ See, v.gr., A. Hägerström, *Das Prinzip der Wissenschaft*, Uppsala, Almqvist & Wiksells, 1908, and *Inquiries Into the Nature of Law and Morals*, Uppsala, Almqvist & Wiksells, 1953. For a brief summary of his theoretical framework, see C. Faralli, *Law as Fact*, in «Revus», 24, pp. 57-67. For a full analysis of his life and work, see P. Mindus, *A Real Mind: The Life and Work of Axel Hägerström*, Dordrecht, Springer, 2009 (especially, pp. 48 ss).

⁴ Pattaro conducts a very interesting analysis in which he compares the Scandinavian school with the neopositivist school of Vienna and concludes that they diverge in what is the origin of their respective rejections of metaphysics. Pattaro points out that the Scandinavian rejection, especially in Hägerström, has its origin in the principle of non-contradiction (which is seen as the very principle of reality). In contrast, the neopositivist rejection has its origins in the theory of verifiability of propositions. Pattaro concludes that the difference between the two schools, which apart from this point strongly agree in their empiricist and realist theses, «would be the same that separates rationalism from empiricism» (E. Pattaro, *Il realismo giuridico come alternativa al positivismo giuridico*, in K. Olivecrona, *La struttura dell'ordinamento giuridico*, Milano, Etas Kompass, 1972, p. 31).

⁵ *Ibidem*, pp. 26-28, 35. Although, as we shall see later in the particular case of Olivecrona, it is not entirely clear whether he adheres to an emotivist conception or some kind of error theory. The difference would be that in the first case the propositions or value judgements would have no objective meaning (as they are expressions of feelings), whereas in the second case they could have an objective meaning but they are always false because the object to which they refer does not exist (objective values). See T. Spaak, *A Critical Appraisal of Karl Olivecrona's Legal Philosophy*, Cham, Springer, 2014.

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. Its subject-matter is not of a different nature from that of social science in general. 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 aspects⁶.

On the other hand, idealism

is founded on the tenet that law signifies something more than merely a set of social facts. Law is held to include an *ought*. But no ought can be discovered by an investigation of facts; they always remain cold facts, and no ought appears. The ought is necessarily based on some *value*. Legal philosophy, therefore, becomes valuating if it starts from the assumption of the ought. Its chief concern will be to give adequate grounds for the legal ought or the binding force of the law. This inevitably leads to a search for the true or ideal law which is supposed to lie at the basis of positive law [...] Thus, legal philosophy purports to judge and guide legal policy. Factual material must naturally be adduced since valuation does not proceed in a vacuum. But the essential philosophical task will be evaluation itself and the exposition of principles derived from it. So it comes that legal philosophy differs in kind from those sciences which are concerned merely with social facts⁷.

Following Hägerström, Olivecrona explicitly claims that a “true realism” is the only possible approach in legal philosophy. On the one hand, he rejects idealism as inconsistent: «every form of idealism appears to lack consistency. If we follow up such theories to their ultimate propositions, we sooner or later arrive to a point where confusion between fact and ought occurs»⁸. On the other hand, he rejects false or inconsistent⁹ realisms that continue to postulate the “ought-character” as an essential element of law. To endorse this view, Olivecrona says, means having to give an account of an ultimate basis for that obligation, and «we are inevitably driven to the assumption of a natural law providing the basis of positive law», because «[i]t is obvious that no principles of natural law can be scientifically established for the simple reason that no ought can be derived from facts»¹⁰.

⁶ K. Olivecrona, *Realism and Idealism: Some Reflections on the Cardinal Point in Legal Philosophy*, in «New York University Law Review», 26, 1951, p. 120.

⁷ *Ibidem*, p. 121.

⁸ *Ibidem*, p. 129.

⁹ For example, Olivecrona considers both classical legal positivism (which claims to be realist) and the Kelsenian pure theory (which would be between realism and idealism) to be false or inconsistent realisms.

¹⁰ *Ibidem*, p. 129.

Hence, the only possibility would be a realism that conceives law without ought. This is quite possible, as Olivecrona points out, if a careful distinction between cognition and evaluation is made and both are allowed their respective spheres. The “ought” belongs to the second sphere – that of evaluation – even if the so-called value judgements take the verbal form of propositions about reality, and therefore appear to be cognitive. Olivecrona, however, says that these value judgements are only expressions of our emotional attitude. Values (and duties) have no objective existence in reality except as the content of our ideas and feelings about them. The only things that have an objective existence are our ideas about values and duties, the formulations or sentences expressing them, and the emotions connected to them. The fact that values and duties seem to have an objective existence and can therefore be object of knowledge – and that these judgements seem to be cognitive – is only a product of our own emotions and the way society is structured¹¹.

Thus, if one carefully separates the spheres of cognition and evaluation, the problem of the so-called “objective duty” would be resolved – even if, in Olivecrona’s opinion, it is nothing but a myth. Although legal norms refer to what *ought* to be and not to what *is*, Olivecrona says, this does not necessarily make them part of a mystical world of ought. On the one hand, the sentences that represent legal norms are clearly factual, as are the ideas they express. On the other hand, the supposed relations engendered by these statements and ideas are nothing more than relations of cause and effect. All a legislator – or any other competent subject – can do by creating legal norms is to make officials behave in a certain way and try to impress certain patterns of behaviour on the public. *This* is what belongs in the realm of legal philosophy. Everything that has to do with ideas, value judgements and emotions about “duty”, on the other hand, belongs in the realm of legal ideology (which in turn is «a highly important subject of inquiry» for legal philosophy)¹².

We can then ask: What kind of legal notion is one such as “duty”? Is there any interest in studying such a notion when it seems not to refer to anything real, even if it is widely used by people? And how does such a notion articulate all these ideas, value

¹¹ *Ibidem*, pp. 129-131. Even if they have no reference, Olivecrona argues, they are important because they play an indispensable role in society, even to the point of enabling its very existence. As for the latter, he claims that: «As social beings, we all of us have a complex of ideas on what we, and other people ought, and ought not to do. Without such ideas, we simply could not live in a community. They are essential to our character as human beings; and we reckon them as part of our innermost personality» (*Ibidem*, p. 130).

¹² *Ibidem*, p. 131.

judgements, and emotions in order for its usage to cause human behaviour?

3. *Olivecrona and legal notions: hollow words, social function, theoretical importance*

3.1. *Legal notions as expressions without semantic reference*

To introduce us to the topic of legal notions, let us first briefly consider some of the arguments Olivecrona uses to deny the existence of rights and duties and, consequently, to claim that expressions such as “right” or “duty” are actually “hollow words”.

Olivecrona departs from Hägerström’s ideas on the topic. Endorsing an anti-metaphysical methodology and postulating the “reality thesis”, Hägerström argued that a noun such as “right” does not refer to any real entity or fact accessible by empirical observation and can therefore refer – if at all – only to fictions or metaphysical ideas. According to Hägerström, however, these metaphysical ideas are psychological facts that actually exist and are of interest to scientific thought.

Hägerström attempted two explanations for these ideas. The first referred to their *content*: he «came to the conclusion that this is the idea of a supernatural power with regard to things and persons. He searched for a psychological explanation of the idea and found it in the feeling of strength and power associated with the conviction of possessing a right»¹³. The second referred to their *origin*, which led him to an investigation of the historical roots of the idea of “right”, especially in Ancient Greek and Roman law. His conclusion, according to Olivecrona, was that these ideas derive from the fact that «*ius civile* was a system of rules for acquiring and exercising supernatural powers, all the ancient legal acts (...) being magical acts»¹⁴.

Olivecrona uses these Hägerströmean ideas to analyse the usage of such notions in natural law and positivist theories. He concludes that notions like “right” (and “duty”) do not fit into any scientific framework because they mean nothing. In other words: They lack any semantic reference, not only because they do not refer to any real entity, but also because they do not even refer to something

¹³ K. Olivecrona, *Law as Fact*, London, Stevens, 1971², p. 175.

¹⁴ K. Olivecrona, *Legal language and reality*, Indianapolis, N.Y., Bobbs-Merrill Company, 1962, p. 166.

that exists only in the imagination¹⁵. Although it does seem to refer to some kind of relationship between people or between people and things, this relationship is not in fact a *real* situation. It does not belong to the empirical world in which we find ourselves. It is therefore impossible to identify a “right” with any factual situation¹⁶.

Olivecrona explains the content of this idea as follows:

The mental content behind our talk of rights seems to be as follows: We have a *presentation of the object of a right* – usually a physical object or the action of a person. To this we have a right, as we say. The word “right” stands for nothing, it designates nothing. But the word itself is *visually or auditively passed on to the mind*. These two presentations – the word and the object – make up the idea of a right¹⁷.

Why then do we have the illusion that “right” means power over an object or person when, in reality, it is a power we could never possibly grasp or have? Olivecrona believes that this illusion arises from an emotional background. In this sense, the idea of having a right creates a feeling of strength, especially if the right is thought to be an independent power greater than the real power situation in which individuals find themselves. The conviction of having a right creates a sense of objective power in those who are convinced of it¹⁸. Therefore, the word “right” seems to refer to a power that cannot be taken away, Olivecrona points out, even when there are no feelings involved¹⁹.

3.2. *Legal notions as hollow words: social function and importance*

Subjective ideas about the existence of “rights” and “duties” are facts that are part of the legal phenomenon and whose central importance lies in the way they can cause and guide the behaviour of

¹⁵ K. Olivecrona, *Law as Fact*, 1971², cit., p. 252.

¹⁶ *Ibidem*, pp. 182-184.

¹⁷ *Ibidem*, pp. 183-184.

¹⁸ This is part of Hägerström’s theoretical framework, as discussed by Olivecrona himself in K. Olivecrona, *Legal language and reality*, cit., p. 165.

¹⁹ K. Olivecrona, *Law as Fact*, 1971², cit., p. 184. Although Olivecrona does not mention it, the same conclusion can be drawn in reverse. An individual who finds himself in a situation where, for example, his freedom or what he regards as his property is interfered with by another, and who does not have the factual power to defend himself against it, may rationalise the situation by assuming that the other individual has the right to act in such a way. In this way, the individual would not find himself in that situation because they are weak or has no power, but simply because the other person has a right.

people²⁰. For the theorist, then, it is not relevant at all that rights and duties do not exist as such. What is relevant is the fact that people have emotions associated with the idea of their existence and that they use the language accordingly.

Indeed, Olivecrona claims that «[w]ords are used not only to describe reality or report facts; they are also used to express emotions, to incite emotions, and to influence behaviour»²¹. In particular, legal language «must be primarily as a means to this end [influence men's behaviour and direct them in certain ways]. It is an instrument of social control and social intercourse. We may call it a *directive* language in contrast to a *reporting* language»²². So, words generally have at least a volitional function and an emotional function; and a certain kind of words, the so-called “hollow words”, have other important functions for the functioning of society.

A hollow word can be defined as a noun that has no semantic reference²³. If they refer to something, it is in any case to objects that do not even exist in the imagination, but only in language: «[i]t is, indeed, one of the most fruitful inventions of the human mind that the objects have been eliminated while the form of speech referring to them has been retained»²⁴. “Right” and “duty”, as we have seen, are examples of hollow words. However, Olivecrona argues, a language or statement that uses them is not nonsense. On the contrary, it is a statement with a clear social utility, which must be understood as such.

For Olivecrona, the function of hollow words is not reporting reality. They have other three functions: a directive function, an informative function, and a technical function²⁵.

The *directive function*, also called sign function, refers to the way in which they can be used to guide one's own behaviour and the behaviour of others. Olivecrona points out that hollow words – such as “right” and “duty” – function as signs to which certain ideas and consistent feelings about right or wrong behaviour are associated²⁶. For example, the statement “*Gladis has property rights to this encyclopedia*” evokes a set of consistent ideas in people. In relation to

²⁰ *Ibidem*, p. 252.

²¹ K. Olivecrona, *Legal language and reality*, cit., 1 p. 69.

²² *Ibidem*, p. 177.

²³ «But those words actually denote nothing, not even imaginary entities. They are “hollow” words. Their function in our language is primarily to serve as guides of action» (K. Olivecrona, *Law as Fact*, 1971², cit., p. 252).

²⁴ *Ibidem*, p. 173.

²⁵ *Ibidem*, pp. 170 ss., K. Olivecrona, *Law as Fact*, 1971², cit., pp. 186 ss., especially 252 ss. In this second edition of *Law as Fact*, the technical function is no longer mentioned as such.

²⁶ See also K. Olivecrona, *Law as Fact*, 1971², cit., pp. 252, 267.

Gladis, it acts as a permissive sign, evoking her ability to perform certain actions without being prevented from doing so. In relation to the rest of the people, it acts as a prohibitive sign, evoking the prohibition of performing those actions.

Whether these ideas are evoked or not, however, depends on two things. On the one hand, it depends on whether the hollow word in question is used correctly or not. This “correctness” means that the word was used in accordance with social and legal rules²⁷; in particular, for Olivecrona, «“[c]orrectness” means “according to the law”»²⁸. Therefore, any use of hollow words presupposes – for their effectiveness – the continued existence of a functioning legal system²⁹. On the other hand, at least in the case of “rights” and “duties”, this psychological effect of the triggered chain of ideas «is partly dependent on knowing that the power of the state is standing behind the possessor of a right»³⁰. It is assumed that the behaviour of agents is largely determined by these general ideas about rights and duties because of the education they receive in the social context in which they develop, where they learn how to use the words and how to respond to their use by others. However, Olivecrona points out, the knowledge that this learned practise is backed by the power of the state is also needed³¹.

The *informative function* refers to the assumptions and inferences that can be drawn from the presumed correct use of a hollow word or a sentence containing it. According to Olivecrona, this function is fulfilled by the human habit of drawing conclusions and making assumptions. For example, a number of assumptions would follow from the (assumedly) correct statement “*Marta owns this top hair salon*”: that she has actual control over that business, that she is the one who uses and profits from it, that she can sell it without anyone stopping her, that she has a legitimate title in relation to the business, and so on. These assumptions, in turn, depend on the statement being correct in the sense explained in the previous paragraph. Thus, they also presuppose the existence of a functioning legal system: outside of it, there would be no grounds for them³².

Finally, the *technical or connective function* of a hollow word concerns its usefulness as a link or connection. Hollow words can be used to connect two different sets of rules: for example, the set of

²⁷ *Ibidem*, pp. 252-253; K. Olivecrona, *Legal language and reality*, cit., p. 173.

²⁸ K. Olivecrona, *Law as Fact*, 1971², cit., p. 189.

²⁹ K. Olivecrona, *Legal language and reality*, cit., p. 188.

³⁰ K. Olivecrona, *Law as Fact*, 1971², cit., p. 191.

³¹ *Ibidem*, p. 193.

³² *Ibidem*, pp. 197, 254 ss.

rules about the acquisition of the feature and the set of rules that apply once the feature has been acquired³³. The recognition of this function is precisely what led A. Ross to originally regard hollow words (“meaningless words”, in his lexicon) as mere “tools of presentation”: immensely useful, but in the end maybe dispensable³⁴. Olivecrona, however, criticises this position claiming that Ross does not really take into account the other, more important functions that these hollow words fulfil. Had he done so, Olivecrona argues, he would have seen that hollow words are by no means dispensable³⁵.

3.3. *Legal notions as hollow words: theoretical importance and points of view*

Legal notions are thus hollow words: they lack semantic reference (§§ 3.1), but they nevertheless fulfil important social functions (§§ 3.2). They are used by people in everyday language and life, and people associate ideas and feelings with them which they express through the common language and content of the so-called “common mind”. Unlike the non-existent referents of legal notions, one can have direct empirical knowledge about this common language and this “common-mind”. Therefore, Olivecrona argues, both can serve as a factual substrate for legal science³⁶.

Olivecrona claims that the common notions and language about “right”, “compulsory force”, “duty”, etc., when taken as facts, serve as a starting point for legal science enquiries. On the one hand, this avoids the methodological problem of circularity, *i.e.*, the problem of not being able to define the object of an investigation without already knowing it. If the only knowledge the theorist has is that people talk about things like “law”, says Olivecrona, then no prior knowledge of these things is needed for research purposes³⁷. On the other hand, this allows for an investigation of a purely empirical and neutral nature, without evaluative elements and value judgements.

³³ *Ibidem*, p. 199.

³⁴ See A. Ross, *Tû-Tû*, in «Harvard Law Review», 70 (5), 1957, pp. 820-822.

³⁵ K. Olivecrona, *Law as Fact*, 1971², cit., pp. 179-182.

³⁶ *Ibidem*, 3-4. Olivecrona insists on this idea when he analyses – and supports – the possibility of a sociological theory of law: «A condition for success is, however, to avoid sliding over from fact to “ought”. The objective ought has no place in such a theory: it cannot be fitted into the context of reality; only our *ideas* of rights and duties and the emotions connected with them are real. *The distinction between ideology and objective reality is the key to the sociological explanation*» (K. Olivecrona, *Is a Sociological Explanation of Law possible?*, in «Theoria», 14 (2), p. 206 – emphasis in the original).

³⁷ K. Olivecrona, *Law as Fact*, 1971², cit., p. 1, 5.

Finally, they allow for an investigation of the role that these notions – whether or not they refer to real entities – play in the context of the society in which they are used³⁸.

Thus, the ideas and emotions of people in connection with legal notions have not only a fundamental social relevance but also an unavoidable theoretical significance. A person endorses this “internal” aspect of law, according to Olivecrona, when they feel themselves as a member of the community in which they live, accept its legal system, adapt their behaviour to the prevailing ideas of rights and duties, and judge the behaviour of others by the same standard. In other words, this person has the idea that “rights” and “duties” have objective existence and evaluates behaviour on the basis of this existence³⁹.

For her part, the theorist places herself «outside the social context to get the “external” aspect» of law in the role of an observer⁴⁰. From this perspective, none of the (supposed) referents of these legal notions used by the observed people has any existence. However, in order to fruitfully understand their legal ideas, the theorist cannot limit herself to the observation of movements and regularities: she must also concern herself with the internal aspect of law. In this regard, Olivecrona says:

To understand what’s going on, [the theorist] has to interpret people’s speech and penetrate their minds. He will begin to understand their legal ideas, how they are generated, what they imply, and how they influence behaviour.

The internal aspect of law has to be integrated into the external aspect. It is a psychological phenomenon forming a part of the complex reality presented to the observer. The internal aspect of law represents a subjective view. But this subjective view is an essential part of law as fact⁴¹.

Hence, in order to analyse legal notions such as “right”, “duty” or “authority”, the theorist must start from the notion which is actually used by those who endorse the internal aspect of law and adopt the internal point of view. If she takes this as a fact, she will not only be able to describe the legal phenomenon adequately, but also to undertake a detailed and demystifying analysis of its content. This

³⁸ *Ibidem*, pp. 5-6.

³⁹ *Ibidem*, p. 215. Olivecrona mentions here that the notion of the “internal” aspect of the law was introduced by H.L.A. Hart in 1961 and that he uses it because it is a convenient expression. Hart claims, however, that the internal aspect of rules is not a matter of feelings or emotions: the crucial thing is the reflexive critical attitude of an individual, that manifests itself in criticism of deviation from the rule and demands for conformity (see H.L.A. Hart, *The Concept of Law*, Oxford, Clarendon Press, 1961¹, p. 57).

⁴⁰ K. Olivecrona, *Law as Fact*, 1971², cit., p. 216.

⁴¹ *Ibidem*.

leads to a very important methodological consequence: it is quite possible that the content of the legal notion used by the participants does not correspond to the content of the legal notion used by the theorist. The former is essential to make intelligible the psychological phenomenon underlying human behaviour. However, as we have seen, this does not at all mean that it corresponds to what happens – or what exists – in reality. Part of the task of the theorist is to point this out and to develop a demystified useful legal notion (with semantic reference).

4. *An example of application: the concept of authority in Olivecrona*

Let us now provide a brief analysis of a central legal concept – that of “authority” – to show how Olivecrona’s methodological framework can be applied.

4.1. *Two different questions about authority*

Throughout his works, Olivecrona does not use “authority” consistently, nor does he reserve it as an exclusive term for the situations in which he uses it⁴². What he does do, however, is to separate two distinct questions that he believes should be clearly distinguished and kept separate.

The first question relates to the ultimate origin of the legal system, not in historical but in conceptual and justificatory terms. This question is related, on the one hand, to questions of identification and unity of legal systems and, on the other hand and above all, to the search for the origin or justification of the (allegedly) binding force of legal norms⁴³. The second question, in turn, is about the

⁴² For example, “authority” appears when he critically analyses voluntarist theories and the concept of binding force (together with “supreme authority”) and when he analyses the norm-forming process and the complex psychological process involved (together with “power holder”, and “legislator”). He also uses “authority” as a quality when analysing the discourses of other authors and when analysing the psychological dimension of individuals (as a synonym for “right to command” or “power to command”). See v.gr. *Ibidem*, pp. 123-129, especially 127.

⁴³ Even at first glance it seems clear that these themes are not necessarily connected. It seems possible to think of a criterion that not only makes it possible to identify legal systems but also gives them unity, without necessarily postulating that this same criterion provides a justification for an alleged binding force of the system and/or the norms of which it is composed. Now, it is precisely Olivecrona who critically points out that other proposed criteria not only seem to mix the two questions, but also that the search for an answer to the (supposed) binding force has been decisive in mixing them up.

creation and elimination of norms within the framework of an existing and effective legal system. In other words, the first question refers to the extra-systemic or supreme authority: that which (allegedly) gives the legal system its origin and/or binding force and whose status as an authority is not derived from a norm of the same system. The second question, in turn, refers to the intra-systemic or competent authority: that which makes changes to the legal norms according to the procedures established by the existing legal system itself and whose status as an authority derives from a norm of the same system.

Olivecrona deals with both questions, though in a different way. As for the problem of supreme authority – regarding the search for a criterion of identification and unity of law – Olivecrona claims that this is a wrong theoretical position. It is wrong because it assumes a voluntarist position with regard to law, *i.e.*, it assumes that law is a set of commands emerging from the will of a subject (or group) who, in turn, is pre-existent and independent of law. Natural law scholars and legal positivists make the same mistake, Olivecrona argues, because they think of law in the same way. The only thing that changes between them is the identity of the supreme authority – God, for the former; the earthly ruler, for the latter⁴⁴.

According to Olivecrona, however, voluntarist theories are wrong for two reasons. The first reason is that there is no pre-existent supreme authority that is independent of law. This is because this would require either the existence of a being (God) that does not exist in the spatio-temporal world, or because any kind of earthly sovereign (holder of power, the state, the people) necessarily requires the right to configure itself as such (a right that also does not exist). The second reason is that legal norms are not commands or manifestations of someone's will. Rather, they are a different kind of imperative: the so-called independent imperatives⁴⁵.

As for the problem of supreme authority as the search for the bases or reasons for the binding force of law – understood as its capacity to create objective duties – Olivecrona claims that this is not a scientific problem⁴⁶. Rather, he says, it is a problem that has to

⁴⁴ See *Ibidem*, 79-80.

⁴⁵ See *Ibidem*, 128 ss. For a critical analysis of the notion of independent imperatives, see J. Rabanos, *La máquina del derecho y sus engranajes. Karl Olivecrona sobre derecho, autoridad y normas jurídicas como imperativos independientes*, in «Análisi e diritto», 21 (2), 2021.

⁴⁶ «From the traditional standpoint, the birth of Law from Force must remain a mystery, puzzling for ever the brains of unfortunate philosophers» (K. Olivecrona, *Law as Fact*, Copenhagen, E. Munksgaard, 1939¹, p. 67). This remark appears in the discussion of the enactment of a constitution and “the problem of the revolution”. Indeed, Olivecrona points out that:

do with metaphysics and legal ideology. This is the case for two reasons. On the one hand, the so-called binding force exists only as an idea in people's minds, since there is nothing in the spatio-temporal world that corresponds to this idea. The reason is that, as we have seen, there are no objective (moral) values or duties in reality.

On the other hand, there is no will that "breathes" binding force into the law. This is so not only for the reasons given in the previous paragraph, but also for another very simple reason. In order not to violate Hume's law, and to avoid deriving ought from is, one must assume that this supreme authority has the right to impose these duties – the so-called "right to command". This would presuppose, however, that there *are* rights and that there *are* objective values from which this supposed right can be derived – the existence of both of which, again, Olivecrona denies.

In any case, the idea of the existence of a binding force related to the law has profound psychological effects on the people who adopt the internal point of view. This idea causally motivates their behaviour, as it is linked to a range of emotions, and thus determines their respective inclinations to perform or not to perform the patterns of conduct expressed in the legal norms. It is precisely in this psychological dimension that the origin of legal and moral "duty" should be sought, says Olivecrona. Duty exists only as an idea or value judgement that motivates and explains the actions of individuals – and part of the task of the theorist is to explain the origin of these ideas and their influence on human behaviour.

4.2. *The notion of authority from different points of view*

At this point we can now ask: what is the notion of authority of the participants, *i.e.*, those who adopt an internal point of view? And what would be the relevant notion of authority for legal theorists?

Although Olivecrona does not lay down a clear, explicit definition for any of those notions, they can be reconstructed on the basis of his analysis of "binding force" and "obedience". As we have seen, for him the actual notions and language of the participants are only the starting point for theoretical investigations. Following Ol-

«Actually, the laying-down of the constitution through revolutionary acts is no more mysterious than ordinary lawgiving. In both cases what really happens is that a set of independent imperatives is laid down by some individuals with a claim to obedience in a whole country. The difference is in the causes which make the imperatives effective» (*Ibidem*, p. 67).

ivecrona's methodological approach, we will thus start from the participants' notions.

For the participants, "binding force" generally denotes the existence of an objective duty to act in accordance with (legal) norms, the justification for which is to be found in the right of a (legal) authority to issue commands or directives. Drawing from this, we could say that "authority" is a subject – or group – that has a legitimate right to command and upon the people under its jurisdiction consequently have a corresponding duty to obey. The legitimacy of this right to command justifies the existence of the duty to obey. "Obedience" means, at the very least, carrying out the content of the authority's commands; at best, it means recognising these commands as a guide for one's own behaviour and as a justification for evaluating the behaviour of others. The duty of obedience is an objective duty – independent of any individual considerations – which does not depend on the fear of possible sanctions in case of non-compliance.

This "internal notion" of authority is a normative, practical, non-relative, and relational notion. Normative, because it implies a value or norm on the basis of which value judgements are made about facts. Practical, because it is used as a premise for reasoning about what should be done. Non-relative, because it does not depend on the existence of a normative system (it does not presuppose that "X is a legitimate authority according to a normative system NS" but that "X is a legitimate authority")⁴⁷. And relational, because it presupposes the existence of a relationship between at least two parties, the authority and the individual subject to its jurisdiction ("X is a legitimate authority with respect to Y").

We can now ask about the relevant notion for legal theorists. Using this "internal notion" as a basis, Olivecrona carries out a deep linguistic therapy work to clarify each of the elements that make up the internal notion:

1) "Right", "duty", "legitimacy" are hollow words without semantic reference.

2) The relationship between right and duty that (allegedly) exists between the "authority" and its "subjects" is not real; the only thing that is real is the idea that people have about its existence⁴⁸.

⁴⁷ This may indeed depend on the existence of a normative system of a moral kind; however, not all who accept that there are objective moral values accept that morality can be organised as a system. I will not deal with this question here.

⁴⁸ Thus, "binding force" denotes no more than the sense of compulsion to act felt by those who believe in the existence of such an obligation as a consequence of an authority's

3) The only real relationship between the authority and its “subjects” is a (contingent) cause-effect relationship between the authority’s involvement in the creation of a norm and the people’s reaction to it⁴⁹.

4) Legal norms are not commands or declarations of will by a subject or group of subjects that are “binding” because they are enacted by that subject or group of subjects. Rather, they are impersonal imperatives and derive their efficacy from a complex psychological mechanism involving – among other things – ideas about legitimacy and about the existence of rights and duties⁵⁰.

5) The so-called “duty to obey” is nothing more than a feeling of constraint that leads to performing the act contained in the legal norms; and this feeling is not directed at the subject who enacted the norm, but at the constitution⁵¹; *and*

6) The presence of sanctions and of coercion in general has a very strong influence on the formation of the above-mentioned ideas, so that this should be considered as part of the definition⁵².

So, for Olivecrona’s theorist – situated in the external point of view and committed to a proper explanation of the phenomenon – the notion of authority (“external notion”) can be sketched as follows. Authority is a subject or group of subjects that is *considered* by a person or group as holding a legitimate right to command, which implies the existence of a correlative duty of obedience of that individual or group. The manifestations of this “obedience” can range from mere conformity of individual behaviour to conformity plus criticism of the non-conformity of others and the demand for conformity. The presence of sanctions and of coercion in general is relevant to the formation of that relevant consideration.

This “external notion” of authority is an empirical, theoretical, relative, and relational notion. Empirical because it does not contain any element that has to do with values or standards of evaluation.

existent right to command, a feeling that motivates them both to act in conformity with legal norms and to criticise non-conformity.

⁴⁹ See v.gr. K. Olivecrona, *Law as Fact*, 1971², cit., pp. 222-226.

⁵⁰ See also J. Rabanos, *La máquina del derecho*, cit.

⁵¹ See v.gr. K. Olivecrona, *Law as Fact*, 1939², cit., pp. 52 ss. Olivecrona calls this “respect for the constitution”. In short, this attitude would essentially consist in considering that the norms of the constitution as having binding force, that there is an objective duty to obey these rules, and that there is an objective duty to obey any norm qualified as a “law” or “legal norm” because it has been incorporated into the system according to the formalities established by the constitution. The effectiveness of the legal norms, in turn, derives precisely from this incorporation under these conditions. See. v. gr. K. Olivecrona, *Law as Fact*, 1971², cit., pp. 90-92. See also v. gr. J. Rabanos, *La máquina del derecho*, cit., §§ 2.2. ss.

⁵² See v.gr. K. Olivecrona, *Law as Fact*, 1939², cit., pp. 53-54, and K. Olivecrona, *Law as Fact*, 1971², cit., pp. 271-272.

Theoretical because it is not used as a premise for thinking about what should be done, but its *raison d'être* is to provide information about the world. Relative, because it assumes that “X is an authority” in relation to an individual or group of individuals Y (it is not assumed that “X is an authority” but that “X is an authority in relation to Y”). Relational, because it also presupposes the existence of a relationship between at least two parties (“X is an authority in relation to Y”).

Here, we can finally fully appreciate one of Olivecrona’s methodological tenets. As we have just seen, even if the participants’ notion is indispensable to the notion used by the theorist, nevertheless the latter does not fully coincide with the former, nor it assumes – or needs to assume – the existence of any objective value or moral entity.

5. *Three (possible) points of criticism*

As we have seen in the precedent sections, one of the most important points in Olivecrona’s theoretical framework is his adherence to the methodological and ontological theses that characterise Scandinavian Legal Realism: methodological realism and Hägerström’s so-called “reality thesis” (§ 1-2). Both are united in the conception Olivecrona has of the object and methods of a theory of law, or an adequate legal science: a theory whose object is only real facts, that are empirically ascertainable because they belong to the spatio-temporal world. Everything that does not belong to this world is not real, and what is not real cannot be the subject of scientific analysis and inquiry. The task of the theorist is to give a complete, descriptive account of the facts that constitute the legal phenomenon.

I will now briefly address some of the deeper criticisms that have been levelled at realist approaches (including Scandinavian Legal Realism) within legal philosophy and legal science, and critically assess if and how – and to what extent – they could be answered by Olivecrona’s approach.

5.1. *Realism as a superficial, non-adequate methodology, and the impossibility of neutrality*

Superficiality and non-adequacy. One major criticism of legal realism can be reconstructed as follows. In its endeavour to regard law merely as fact, legal realism postulates a descriptive legal sci-

ence which would confine itself to explaining mere regularities of behaviour. However, this kind of description is insufficient because it cannot adequately capture the legal phenomenon. It cannot account for the fact that the participants consider that they are following rules and not merely performing actions. This is a dimension of meaning that cannot be reduced to facts, as realists would advocate, otherwise they engage in a strong reductionism that distorts the understanding of the phenomenon. For these reasons, this type of legal science should be abandoned⁵³.

This line of criticism seems to be particularly persuasive. However, is this the kind of approach Olivecrona suggests? It does not seem to be. As we have seen, Olivecrona not only acknowledges the existence of this dimension of meaning that participants have in relation to practise, but also considers it essential to an adequate explanation of the legal phenomenon. It is a dimension that, while psychological and consisting of feelings and ideas, manifests itself in the language and concepts that individuals use⁵⁴. Since it is possible to gain empirical knowledge about this language and its contents, legal science can deal with them. And not only that: it *must* deal with them and at least use them as a starting point for investigations⁵⁵.

This methodological perspective runs throughout Olivecrona's theoretical framework, even though he does not use Hart's "useful terminology" of internal and external aspects (and points of view) of law until the second edition of *Law as Fact*⁵⁶. However, it is possible that what leads Olivecrona to attach methodological importance to the internal aspect of the rules is not exactly the same as what leads Hart to emphasise it. In Hart's framework, this importance is related to the claim that any description of legal phenomena that does not take this aspect into account is inadequate, since it would not be a description in terms of rules, but a description in terms of mere regularities of behaviour, predictions, and signs⁵⁷. In turn, the relevance for Olivecrona seems to lie in the fact that it is impossible to grasp the influence – in the sense of cause and effect – of legal norms on people's behaviour without taking it into account.

⁵³ See v.gr. H.L.A. Hart, *Essays in Jurisprudence and Philosophy*, Oxford, Clarendon Press, 1983, pp. 12-13, 161 ss; Bix critically reconstructs it in B. Bix, *Ross and Olivecrona on Rights*, in «Australian Journal of Legal Philosophy», 34, 2009, pp. 113 ss.

⁵⁴ Olivecrona also calls them «living concepts». See K. Olivecrona, *Law as Fact*, 1971², cit., p. 136.

⁵⁵ See v.gr. *Ibidem*, pp. 3-4, 84.

⁵⁶ *Ibidem*, p. 215.

⁵⁷ H.L.A. Hart, *The Concept of Law*, 1961¹, cit., pp. 89-90.

The impossibility of neutrality. Olivecrona's idea that an investigation where the theorist has no prior knowledge of what she is observing can be carried out might be controverted in a different methodological way. Olivecrona's concern⁵⁸ is to avoid the problem of circularity, which he believes occurs when the theorist defines her object of enquiry while being already familiar with it. This familiarity would imply a number of evaluative elements and value judgments that the theorist would consciously or unconsciously bring into her investigation. The resulting research would thus be far removed from the purely empirical and neutral type of research to which Olivecrona is committed by virtue of his methodological realism.

The question that arises here is whether this type of research would really be possible and/or plausible. Since it would be impossible to answer such a crucial methodological question here, I propose to leave it open and to just briefly consider an example of a negative answer given by J. Finnis, a legal theorist who may well be in the antipodes of Olivecrona. In a very brief summary⁵⁹, Finnis argues that the theorist can never dispense with evaluative elements. Even when she wants to perform a purely descriptive task, Finnis argues, she still establishes certain criteria of relevance in terms of which facts – and which individuals – she considers relevant to “observe” the phenomenon – *i.e.*, to construct its “central case” – and how these facts are to be evaluated. This would, of course, imply something beyond Olivecrona's own discourse: it would simply mean that a realistic legal science as the one advocated by Scandinavian realists, based on methodological neutrality and objectivity, can never be achieved⁶⁰.

The inadequacy of the external point of view. Another methodological discussion that might particularly concern Olivecrona has to do with the point of view in which the legal theorist stands in or adopts. For Olivecrona, it seems clear that the theorist must position herself in the external point of view, and that from this external point of view she must take into account the internal point of the participants in order to give a complete account of the observed phenomenon. She would thus be a theorist-observer who «record[s] not only such observable regularities of behaviour and reactions but also *the fact that* members of society accept certain rules as stan-

⁵⁸ K. Olivecrona, *Law as Fact*, 1971², cit., pp. 1, 5.

⁵⁹ For a full development, see J. Finnis, *Natural law and natural rights*, Oxford, Oxford University Press, 2011, pp. 428-432.

⁶⁰ *Ibidem*, pp. 418, 428-432.

dards of behaviour»⁶¹. This way, the theorist can also report on what these accepted rules or criteria for behaviour are.

Now, if the theorist had to “understand” what it means to adopt the internal point of view⁶² in order to adequately describe the practice, this might mean that a position like Olivecrona’s is not sufficient. This rejection can be found in J. Raz, who postulates that the theorist is (or should be) in a kind of internal but non-committed point of view: a position “as if” the internal point of view were adopted, but without committing to it⁶³. This rejection is also found in C. Redondo. She argues that it is not possible for a theorist to identify legal norms without using the “constitutive pattern” whose acceptance by the participants is the origin of those legal norms. Since this use implies (at least some kind of) acceptance, then the theorist would necessarily be adopting an internal point of view even when she is describing⁶⁴.

I cannot go into this debate here, as it is completely beyond the aim of this work. However, it is worth saying that, in my opinion, the arguments in favour of a position like Olivecrona’s – and against the others – revolve around two fundamental points. The first one is that those who argue for the theorist adopting some kind of internal point of view assume that the external view does not include the possibility of capturing «the fact that members of society accept certain rules as guidelines or criteria» and persist in the idea that only «mere regularities and hostile reactions» are captured by the external view⁶⁵. As we have seen, however, there seem to be good reasons to argue that this is not the case.

The second – and, in my opinion, most important – point is that this kind of criticism seems to be based on the premise that legal

⁶¹ H.L.A. Hart, *The Concept of Law*, cit., p. 291.

⁶² H.L.A. Hart, *The Concept of Law*, Oxford, Oxford University Press, 1997², p. 95.

⁶³ See v.gr. J. Raz, *The Authority of Law*, Oxford, Oxford University Press, 1979¹, pp. 153 ss.

⁶⁴ See M.C. Redondo Natella, *La normatività istituzionale del diritto*, Madrid, Marcial Pons, 2018, *passim*. For her part, M.G. Scataglini differs from Redondo in that it is the use of this constitutive pattern that enables the observer to identify legal norms «that do not reach her on the basis of a foreign rule of recognition»: What enables her to do so «is the internal point of view of *her* legal system, acquired through her participation in a social practise or way of life in which her system’s rule of recognition functions as a normative basis» (M.G. Scataglini, *Bulygin-Redondo: desencuentros cercanos sobre enunciados hartianos del tercer tipo*, in «Critica. Revista Hispanoamericana de Filosofía», 49, 2017, p. 121). In my opinion, Olivecrona would perhaps even reject Scataglini’s proposal because he considers it a circular argument: In this sense, he would presuppose that one already has a certain familiarity with what is being observed.

⁶⁵ See E. Bulygin, *¿Está (parte de) la filosofía del derecho basada en un error?*, en «Doxa. Cuadernos de Filosofía del Derecho», 2004, *passim*.

theorists must account for the so-called “normativity of law”⁶⁶. Olivecrona, for his part, rejects both that this would be a problem – if it really were a problem – that belongs to legal science or legal philosophy, and that “binding force” is a notion that has a semantic reference to account for and/or to investigate as such. The only relevant thing for Olivecrona is that there are people who claim that legal norms have binding force and/or that law is normative, and that the consequence of this attribution causes their behaviour⁶⁷.

5.2. *Realism as a reductionist discourse: reduction to facts and (disjoined) individual behaviour*

Connected to the previous point, there is another criticism which is usually directed against those who take a realist position with regard to the legal phenomenon. In their effort to present law as fact, according to this criticism, legal realists adopt a reductionist and dissolving position. On the one hand, they would try to reduce the complexity of the legal phenomenon to facts and even to a single kind of fact, such as language, psychological states, behavioural predictions, and so on. On the other hand, as a consequence of this reduction-to-facts eagerness, they would dissolve law into a myriad of individual behaviours with no possible unity. The latter would also show that such an approach cannot explain something that is considered fundamental to the legal phenomenon: its formal aspect.

Let us analyse this criticism in relation to Olivecrona’s theoretical framework. As for the first part, the “reduction to facts” criticism, Olivecrona’s – and the rest of the Scandinavian legal realists’ – answer is simple: one cannot speak of a “reduction” *to* facts, because there is nothing else in reality *but* facts. Indeed, this criticism seems to presuppose that there is something beyond the spatio-temporal world – such as a “world of ought” or a “world of meanings” – that can also be called “real”. However, this is precisely what a realist position like Olivecrona’s – following Hägerström’s – rejects. The only reality is that of the spatio-temporal world. Outside it,

⁶⁶ What does “normativity of law” mean is, without any doubt, a whole discussion in itself. I cannot go into it here. For two very good introductory studies, see v.gr. N. Muffato, *Normatividad en el derecho*, in *Enciclopedia de filosofía y teoría del derecho* (Fabra Zabra, J.L., Rodríguez-Blanco, V. eds.), vol.2, 2015 and B. Bix, *The Normativity of Law*, in *The Cambridge Companion to Legal Positivism*, Cambridge, Cambridge University Press, 2021.

⁶⁷ Not surprisingly, another author who takes the same position on the theorist-observer, Bulygin, believes that the assumption that legal philosophy must account for “normativity of law” is based on a fundamental error. See n. 65.

either nothing exists, or if it exists, it has no connection with the spatio-temporal world, nor any influence on it. Consequently, there would be nothing that could be reduced to facts because there is nothing else except, in short, facts. Anyone who wanted to dispute this, the Scandinavian legal realists would say, has the burden of proof.

Moreover, as Olivecrona might reply in any case, many of the things that do not exist as such in the spatio-temporal world indeed exist as ideas or emotions of human beings expressed and constructed through language. And these ideas, emotions, and language – like people themselves and their intersubjective relations – do have their place in the spatio-temporal world as facts. The recognition of this circumstance and its profound significance for the legal phenomenon plays an important role in Olivecrona's theoretical framework, as we have already seen. Nothing else is required for an empiricist legal science or philosophy.

The insistence that there is “something else” that cannot be grasped or explained in this way seems to be a rather anti-psychological stance, denying that any social phenomenon can be explained on the basis of what happens in people's psyches. But such a position can again be criticised for two reasons. First, because it does not provide convincing arguments for its rejection, at least not if it is meant to be a final rejection. Secondly, because it does not do justice to Occam's Razor – it insists on a multiplication of entities, even though an adequate answer can be very well given without resorting to this multiplication⁶⁸.

What could indeed be criticised would be a “reductionism” with regard to the kind of facts considered relevant to the explanation. In this sense, Olivecrona could be accused of reducing the law to a single type of fact: a purely linguistic fact (or set of facts). Olivecrona explains that, on the one hand, language and the actual notions used by people are the facts that can serve as the basis for research. On the other hand, language is the means by which, at the psychological level, the ideas that motivate behaviour emerge and by which intersubjective relations between individuals are established. In this sense, it seems indeed that the only important facts for Olivecrona's analysis are linguistic facts, although it also seems clear that the legal phenomenon is much more complex than that.

⁶⁸ Pattaro argues that this anti-psychological accusation is unjustified. See C. Pattaro, *The law and the right: A reappraisal of the reality that ought to be. (A Treatise of legal philosophy and general jurisprudence, 1.)*, Dordrecht, Springer, 2007, pp. 389 ss.

However, I agree with S. Castignone when she points out – referring not only to Olivecrona, but also to Hägerström and A. Lundstedt – that the importance attached to language does not mean that these authors reduce law to purely linguistic facts, for they clearly recognise that «behind linguistic formulations there are interests, purposes, concrete situations, relations of force; in contemporary political organisations there is a monopoly of force by the organs of the state»⁶⁹. In Olivecrona’s approach, this is evident in topics such as the analysis on the origin and maintenance of respect for the constitution, the interdependence between law and the state, the consideration of the authoritative determination of linguistic issues, the complexity of law, and the insistence on the use of legal language as a means to guide behaviour. When Olivecrona argues that law is too complex a phenomenon to be captured in a single short definition – such as that of voluntarist theories – it is even more clear⁷⁰.

As for the second part of the criticism, the alleged “dissolution” into individual behaviour and the lack of attention to the formal aspect, it is very difficult to argue that Olivecrona is guilty of this. Unlike perhaps other realists, including the other Scandinavians, Olivecrona’s approach is heavily focused on the formal aspect of law, both structural and procedural. Although he does not see law as a series of commands springing from the will of a supreme authority, this does not lead him to see it as a disjointed product of a sequence of individual behaviours.

On the contrary. Olivecrona’s approach provides, on the one hand, criteria to formally qualify the legal material in order to understand the fundamental role of legal formalities⁷¹. On the other hand, he provides an explanation of how the behaviour of individuals – both the authorities of the system and the ordinary members of society – contributes to the existence and maintenance of law. This also enables him to argue that law is not the product of the individual or collective *will* of any authority. Pattaro sums it up well when he says that:

His theory of the legal norm as an independent imperative [...] separates the norm from the conduct of the one who creates it: something becomes a norm when, having been enacted in compliance to certain formalities, it is inserted into a pre-existing system. The law, according to Olivecrona, is not the will or the power of legislators, governors, or judges [...] The law that the “legal operators” produce

⁶⁹ S. Castignone, *Diritto, linguaggio, realtà: Saggi sul realismo giuridico*, Torino, Giappichelli, 1995, p. 218.

⁷⁰ See v.gr. K. Olivecrona, *Law as Fact*, 1971², cit., pp. 77, 272. See also §§5.3.

⁷¹ E. Pattaro, *The law and the right: A reappraisal of the reality that ought to be.*, cit., p. 8.

is independent of their persons and, on the contrary, results from the modalities they have used and the positions they occupy. The law is born from the law, even if the law is a fact⁷².

Finally, I think Castignone sums up well the way in which the Scandinavian legal realists avoided falling into the earlier criticism with regard to legal language:

in placing the emphasis on the sign-directive function of legal language and the evaluative element that always constitutes its “other face”, Scandinavian realism’s approach has been able to avoid two major dangers: First, that of incurring in “naturalistic” reductionisms of the concepts of law, duty, legal obligation; second, the that of becoming silted up within the narrow confines of a sociological approach that pretends to explain a world of permissions and prohibitions, and thus of feelings of power and coercion, by simply describing the actual behaviour of individuals and legal bodies⁷³.

5.3. *A discourse outside legal theory: natural, not conceptual necessities*

A final question concerns the kind of theses and the kind of legal notions that Olivecrona argues for in his approach. This criticism can be formulated as follows. Olivecrona’s approach would not really deal with the nature of law – or, for that matter, with any legal concept in general – since Olivecrona does not seem to be interested in necessary properties or in establishing conceptual or logical truths⁷⁴. On the contrary, he seems only interested in analysing and describing the facts that constitute the legal phenomenon⁷⁵ and even openly denies that a set of necessary (and sufficient) properties can be found in relation to law. Olivecrona in fact concludes that «[a] definition of the concept of law cannot be given», hence «[a]t the end of our inquiry we can only indicate some disparate but interconnected realities which are covered by the term»⁷⁶.

This criticism is put forward by T. Spaak, who considers it mainly in the context of Olivecrona’s thesis that law is a matter of organised force. On the one hand, Spaak accepts that «conceptual

⁷² *Ibidem*, p. 7.

⁷³ S. Castignone, *Diritto, linguaggio, realtà: Saggi sul realismo giuridico*, cit., pp. 218-219.

⁷⁴ See v.gr. J. Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason*, Oxford, Oxford University Press, 2009, pp. 24 ss.

⁷⁵ K. Olivecrona, *Law as Fact*, 1939¹, cit., p. 26.

⁷⁶ K. Olivecrona, *Law as Fact*, 1971², cit., p. 272. In the same vein is his rejection of the definitions of “law” given by voluntarist theories, considering them “oversimplifications”, and pointing out that the complexity of the phenomenon does not allow for more than one definition that can be vague and unclear.

analysis in the classic sense aims to establish conceptual or logical truths» and that there is an extremely important difference between conceptual or logical necessity and natural (or physical) necessity⁷⁷. On the basis of these considerations, Spaak argues that the theses put forward by Olivecrona – especially those relating to force – are in fact of natural necessity and not conceptual necessity. This is because force or coercion is not a conceptually necessary property of law that reflects «a deep, constitutive property of law»⁷⁸. And this fact is something that proves to be true because one can imagine a possible world – the well-known society of angels – in which there would be a phenomenon recognisable as law that would have no trace of coercion⁷⁹.

For this reason, Spaak concludes that:

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)⁸⁰.

In my opinion, this criticism is based on a number of assumptions that Olivecrona would not endorse. The first of these is that the nature of law is to confer rights and impose duties, an assumption that seems to be common among contemporary legal philosophers⁸¹. Indeed, the example of the society of angels is based on the idea that a possible world is conceivable in which the granting of rights and the imposition of duties does not involve any use of force⁸². As N. Stavropoulos notes, contemporary philosophers of law assume that coercion plays no role in the *constitution* of rights and duties, and therefore it has little conceptual relevance⁸³.

⁷⁷ T. Spaak, *A Critical Appraisal of Karl Olivecrona's Legal Philosophy*, cit., p. 3. For a brief analysis of different types of necessity, see v.gr. A. Sardo, *La pretesa di correttezza e il concetto di necessità normativa*, in «Rivista di filosofia del diritto», 2020 (2), pp. 346-354.

⁷⁸ N. Stavropoulos, *The relevance of coercion: Some preliminaries*, in «Ratio Juris», 22, 2009, pp. 339-340, quoted in T. Spaak, *A Critical Appraisal of Karl Olivecrona's Legal Philosophy*, cit., p. 178.

⁷⁹ Spaak concedes that Olivecrona would not be interested in thinking that the nature of law is to confer rights and impose duties, as contemporary legal philosophers seem to assume (as Stavropoulos points out), precisely because he does not believe that there are legal rights and duties (*Ibidem*, p. 178).

⁸⁰ *Ibidem*, p. 178.

⁸¹ As Stavropoulos points out (N. Stavropoulos, *The relevance of coercion: Some preliminaries*, cit., pp. 340, 349, quoted in T. Spaak, *A Critical Appraisal of Karl Olivecrona's Legal Philosophy*, cit., p. 178).

⁸² For brevity reasons, I will assume here that the resolution of coordination problems also has to do – in a wide sense – with the granting of rights and imposition of duties.

⁸³ *Ibidem*.

As Spaak himself notes, however, it is clear that Olivecrona does not share this idea. Indeed, it is impossible for someone who rejects the existence of rights and duties to accept that the nature of law – if there should be one – is related to them. Olivecrona might well accept that people believe that the nature of law is to grant rights and impose duties, just as they believe in the objective existence of rights and duties themselves. However, this means no more and no less than that people believe in certain things: it does not in any way mean that they exist in the spatio-temporal world. They surely can be named with a hollow word, but their reference is not (magically, really) created by the word. For this reason, the theorist does not have to hold on to this idea about the alleged nature of law as long as she gives adequate account of it in her investigations. And this is exactly what Olivecrona does. He accounts for the (internal) notion that the participants have of legal notions and words and then, in order to adequately describe the practice, develops an (external) notion whose content is different.

The second presupposition is the assumedly acceptance of some kind of “theoretical essentialism” with regard to legal philosophy and its task. This theoretical essentialism assumes, among other things, that there is a “thing” that is “the law”, and that a theory of law is «a theory about that thing: it is, properly understood, an explanation of the nature of law, that is, of the “necessary” and “essential” properties of law, or in other words, of the properties by virtue of which one thing is law and another is not»⁸⁴.

It seems obvious that Olivecrona, with his strongly realist and empiricist assumptions, would see in this kind of approach a return to idealism, since it would postulate the existence of an entity – “the law” – which does not exist as such in the spatio-temporal world, and which could therefore only be a metaphysical entity. In any case, Olivecrona could well accept that individuals possess a notion of “law” (a living concept) which they define in terms of “necessary” and “essential” properties, and that the legal theorist must account for this fact. But this means no more and no less than that people believe certain things, and it does not mean that the legal theorist must replicate this notion in her discourse without any re-

⁸⁴ P. Chiassoni, *El discreto placer del positivismo jurídico*, (P. Moreno Cruz ed.), Bogotá, Universidad Externado de Colombia, 2013, pp. 425 ss. Chiassoni is talking here about Raz’s position on the task of legal theory, and he makes five other very illuminating points about it. I cannot go into detail here. However, it is sufficient to address the first two points raised by Chiassoni, which I think illuminate the assumptions behind the critique of Olivecrona.

finement and/or demystification while endeavouring to describe legal phenomena.

6. Back to (Law as) Fact: some concluding remarks

Understanding law as fact, as Olivecrona aims to do, has some important advantages. On the one hand, it allows for a comprehensive account of legal reality, including the ways in which participants perceive it, are affected by it, and also construct it. On the other hand, it avoids some of the disadvantages of other approaches, such as taking ordinary language and normative language at face value, trapping the theorist within the confines of common usage or linguistic assumptions; or assuming the (objective) existence of entities such as rights and duties and thus having the burden of accounting for how these entities actually exist and interact with, affect and constrain people, and/or risking moving from descriptive to prescriptive discourse.

As I have tried to show here, I think Olivecrona's theoretical framework – and the responses he gives, or could have given, to both deserved and undeserved criticism – offers some extremely valuable food for thought for anyone who wants to engage in a serious, rigorous, and attentive philosophical analysis of the legal phenomenon. Moreover it can also serve as a yardstick to measure the adequacy, usefulness and fruitfulness of past and contemporary discourses and methodological approaches in legal philosophy, especially those that attempt to offer methodological tools for an “adequate description” of legal phenomena.

