

Torben Spaak

A Critical Appraisal of Karl Olivecrona's Legal Philosophy

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Torben Spaak
Department of Law
Stockholm University
Stockholm
Sweden

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Preface

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

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

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

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

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

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

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

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

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

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

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Chapter 1

Introduction

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

1.1 The Problem of the Nature of Law

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

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

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

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

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

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

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

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

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

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

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

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

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

An analysis of our concept of law can clearly be universal in the sense that it can establish necessary truths about this concept, and as a result it can show that our concept of law is or is not in use in other parts of the world. That is to say, from our standpoint, they may or may not have law (in our sense) in other parts of the world. Of course, this will not stop thinkers in other parts of the world from maintaining that we (say, in the Western world) do not have law (in their sense). We see that, on this analysis, the question of whose concept of law is the “real” or “true” concept of law is of little or no importance—which is not to say that it may not be the subject of heated political debates.

1.2 Natural Law Theory and Legal Positivism

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

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

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

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

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

1.3 Scandinavian Realism

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1.4 Main Claims

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1.5 Plan of the Book

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

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Part I

Background