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THE ILLUSIONS OF THE LAW'S BINDING FORCE IN KARL OLIVECRONA'S LEGAL THEORY

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Abstract
The law's binding or coercive force is the legal authority or power that laws, rules and regulations have over the individual, groups, institutions or societies within a specific jurisdiction. However, for Olivecrona, this law's binding force is an illusion only existing in people's minds. It is not based on any objective ethical or moral values, but solely on the will of the people in power. The problem that warrants this research is to ascertain whether coercion is a necessary part of law. The study's objective is to analyse Olivecrona's illusions of the law's binding force. Significantly, this study will be of great help to all and sundry, since everybody lives in a community; and there is no community without its rules and regulations. For legal philosophers, psychologists, lawyers, law enforcement agents, and so on, it will help them to do a better job in their respective fields. Finally, this study submits that a legal system should be in line with good reason to be justified. However, philosophical discussions on any issue are not fait-accompli, there are always opportunities for further discussions on the same issue. Therefore, the need to strike a fair balance between the wrath of the law and the good reasons behind non-compliance to what the law demands in specific circumstances.
Keywords: Binding Force; Command; Coercion; Duty; Independent Imperative; Legal Right.

Introduction

The law's binding force together with its commanding nature gives the confidence and assurance of the enforceability of laws, rules and regulations; and penalties or consequences for non-compliance. All these, notwithstanding, Olivecrona reasons to the contrary. For him, law is not a command and is never made to be so, for while command is at personal relationship of one and another; the commands of the State are impersonal and independent (Olivecrona, 1971, 43-44; Dimgba, 165-166). According to him, citizens respect and habitually obey the law without reflection. The law makes imprint in their minds and they feel duty-bound or compelled to obey it without questions (Dimgba, 166-167). In order to achieve the objective of this study, this paper is divided into ten sections. The first section is the introduction. The second, third and fourth sections are devoted to Olivecrona's concepts of the law's binding force; legal rules as independent imperatives; and law as a matter of organised force, respectively. The fifth, sixth, seventh and eighth sections examine some legal philosophers' approaches to the law's binding nature. The ninth section revisits the illusions of the law's binding force in Olivecrona. The tenth chapter is the conclusion and recommendation.

Olivecrona's Concept of the Law's Binding Force

In *Law as Fact,* Karl Olivecrona completely turns down the idea that the law has binding force, that is, the law on its own, does not obligate on the subjects. For him, the "binding force" of law is an illusion without factual foundation (1971, 15). He arrives at this fairly chilling and shuddery

conclusion in his attempt to derive "law as fact." He reasons that the positivists who base law on implication must have a rule or norm as the antecedent of a sanction or consequence. The coercive or binding nature of law, Olivecrona avers, arises from the unity of law and sanction; standing alone, the law prohibiting murder is not obligatory (1971, 16). However, because the law and sanction are logically distinct concepts, they are never united and, therefore, cannot create an obligation, in Olivecrona's conceptual schemes.

The "binding force" of law, for him, is a thought, estimation or idea in human mind. There is nothing in the external world which tallies with this idea. Olivecrona states that this analysis of law lacks a factual foundation for obligation and in effect relies mainly on psychological elements. People simply have a *feeling of being bound by law*. There is no binding force or validity of law existing outside of human mind (Njoku, 2007, 159). He concludes that binding legal rules have no place in the world of time and space, but in the supernatural realm where such "bindingness" can make sense. For him, since legal rules do not and cannot have coercive force, they are incapable of conferring rights and imposing duties, or more generally, constituting or instituting legal relations (Spaak, 2014, 111).

Legal Rules as Independent Imperatives

Olivecrona, unlike Austin and Kelsen, maintains that legal rules do not establish legal relations. As such, legal rules are only psychologically effective. It is his conviction that the rules of law are expressed in imperative forms; but they are not real commands. So, he regards legal rules as *independent imperatives* (1976, 42). By rule of law being expressed imperatively Olivecrona means that "whatever words are used, the meaning of a rule is always: this action *shall* be performed under such and such circumstances; this official shall have this or that power and so on" (Njoku, 160).

Olivecrona analyses two important differences between commands and independent imperatives. First, whereas a command in a proper sense implies a personal relationship given by one to influence the will of another, that is, it is issued by a certain person, while the independent imperative of law does not. Second, whereas a command is always addressed to a certain person or persons and concerns a certain action or actions, an independent imperative concerns a kind of action, but is not addressed to anyone in particular. Olivecrona's point of view, then, is that an independent imperative has to do with a class of persons (the norm-subjects) and a class of actions (the action-theme), not particular persons and actions (1971, 43).

For Olivecrona, the rules of law are imperative statements about imaginary actions, rights, duties and so on that cannot be defined as anybody's commands. He conceptualises the notion of the content of the rule of law as ideas of imaginary actions by people in imaginary conditions or positions in which they find themselves. The practical application of the law consists in taking these imaginary actions as role models for actual conduct when similar conditions arise in real human life (1971, 20-30; Dimgba, 2023, 165). The authoritative instructions of the law are neither made by any particular individual nor directed specifically to any particular person.

For him, law is not a command and is never so expressed. Those who drafted them or acted as formal lawgivers have not at all acted in such a way as persons who command. And to those who take cognizance of the rules, the lawgivers are for the most part entirely unknown. They have only the imperative statements as such before them, isolated from the lawgiver, who may have died many years ago (Njoku, 160). Thus, the statements function, independently of any person commanding, as guides for people's conduct. So, the only condition Olivecrona identifies for the efficacy of legislation in society is the citizens' attitude of *reverence* towards the constitution,

which cannot be well achieved without an *organization* that handles the application and enforcement of the law (1971, 45).

Law as a Matter of Organised Force

At the root of Olivecrona's analysis is the conviction that (physical) force is an essential or vital instrument in the application or administration of law whether civil or criminal (1971, 124). Even when physical force is not crudely manifested or not necessary, actual violence, Olivecrona opines, is kept very much in the background. For him, *organized force* is necessary for the existence of the law, in the sense that law depends heavily on the use of force by state organs, *inter alia*, in infliction of punishment and the execution of civil judgements (1976, 136). Without the use of force, the law, on its own, cannot fulfill its function of securing peaceful coexistence among human beings.

Although Olivecrona equally points out that some members of the society may rationalize their obedience on grounds that law is moral; reflecting a moral command which is valid because of human, not transcendental, standards (1976, 161), this does not, according to him, vitiate the fact that force is necessary to make people comply to laws. This organised force of the society is used to achieve benefits for the society and its members. These goals are attained by the laws the society passes. The reason why Olivecrona affirms and upholds organised force as necessary to the existence of law is that he strongly believes that human beings are such that disaster and ruin would follow if they were left to their own devices (1971, 132).

Other Legal Philosophers View on the Binding Nature of Law

Some philosophers of law have actually expressed their respective views concerning the binding nature of law and the role of coercion in legal norms in their legal theories. Some of their views are the subject-matter of this section.

Jeremy Bentham and the Binding Force of Law

In *Of Laws in General*, Jeremy Bentham argues that law originates from the sovereign bundled, packaged, or parceled as his wishes. These wishes of the sovereign are manifested as signs of what he declares about the conducts of his subjects. So, the law is a command directed or issued to persons, covering a certain range of acts (1970, 1). Force, according to Bentham, is the punishment and sanction which the law demands in order to ensure compliance. Olivecrona rejects this Bentham's position arguing that commands always require a face-to-face relationship between two subjects, and this relationship simply does not exist in the case of legal norms. By no stretch of imagination can the lawmaker be thought to fancy that all the norms in force are the issue of his commands: these norms were in force before the lawmaker took office and will continue to be in force even after he dies; nor does the lawmaker know the content of all norms at any time.

John Austin and Law as Command

In *The Province of Jurisprudence Determined*, John Austin argues that jurisprudence deals with rules of law issued by a human sovereign to inferiors. The demand for compliance is inherent in the definition of law; and for him, every law is, strictly speaking, a command (1995, 157). Austin's imperative theory of law consists of three inseparable elements: command, duty, and sanction. A command is a rule issued by one who has the ability to inflict an "evil" or sanction to ensure compliance. The corollary of command is duty or obligation. For him, being subject to the sanction gives rise to the obligation to obey the command (158). The sanction under his theory is the enforcement of obedience to the command. Basically, Austin's imperative theory of law derives the obligation to obey from the combination of a command and a sanction. If a command lacks a sanction, no corresponding duty arises; if a sanction is imposed, the person to whom the

law or command is addressed is under an obligation to obey it (185). The law is binding on the subject; and between the law and non-compliance, there is no middle ground. A law once made is law, its merit or demerit is another thing.

Oliver Wendell Holmes and the Pragmatic Concept of Law

Meanwhile, in *The Path of the Law*, Oliver W. Holmes considers law as a prediction of how courts will decide a particular case. The premise of his predictive theory is that a person will obey a given law, not because a sanction will be imposed for its breach, but because of the potential that a sanction will be applied to his action (62). People obey the law not because it is inherently right or just, but owing to the fact that the society depends heavily on it for order and constancy. For Holmes, treatises, statutes and so on are the oracles of the law; hence, in "these sibylline leaves are gathered the scattered prophesies of the past upon the cases in which the axe will fall" (*The Common Law,* 145).

Thus, he conceives a legal duty as a prediction that if someone commits or omits something, the person will be subjected to certain punishments by the judgement of the Court. In this regard, Holmes seems to be Austinian. Law is a systematised prognostication or prediction; an instrument of prophesy utilised by lawyers in going about their legal functions. Following Holmes, Olivecrona points out that law is obeyed because of the realization that the state can through its organised force apply a sanction to the action of the violator.

Axel Hagerstrom and the Ontologico-Naturalist Concept of Law

However, in *Inquiries into the Nature of Law and Morals*, Axel Hagerstrom claims that such concepts as 'right', 'duties', and 'binding quality of law' are metaphysical concepts and, therefore, they are pseudo-concepts (1953, 1). For him, these concepts have no objective significance. They are endogenous, not exogenous to the legal system (25). Hagerstrom developed his legal theory on a cornerstone consisting of ontological naturalism, which comes to manifestation in his rejection of metaphysics and non-cognitivist meta-ethics (Spaak, 2014: 46). For him, commands are *categorical* in the sense that they do not involve any reference to a value that the recipient of the command is expected to take in to consideration; therefore, threats and sanctions are extraneous to the concept of a command. (Spaak, 63). Olivecrona takes his cue from Hagerstrom to maintain that 'right' is a "hollow word" with no conceptual background; and law standing alone is not command.

Hans Kelsen and the Coercive Nature of Law

In *The Pure Theory of Law*, Hans Kelsen adheres to Austin's conception of legal obligation arising from the sanction. He admits that his normative system of law is a coercive order and law exists only when a sanction is attached to it. For him, legal obligation is a duty to refrain from conduct contrary to the norm (1967, 115). A person is obligated to act according to the norm when a sanction is imposed for performing conduct contrary to the norm. Under Kelsen's theory, legal obligation and legal norm are identical (117). In line with Austin, Kelsen sees sanction is a necessary element to make people comply with the demands of the law. However, unlike Kelsen, Olivecrona believes that the norm and the sanction are logically different concepts that do not exist together and, so, cannot oblige on any individual.

Karl Llewellyn and the Pragmatic Approach to Law

In *Jurisprudence*, Karl Llewellyn opines that a right exists as an inducement for courts to do something; hence, rules and rights are defined in terms of the activity of the courts, which is concerned with the predictability of conduct or behavior (1962, 21). Llewellyn argues for a pragmatic approach to law, considering it as an instrument with which to achieve justice and

fairness, rather than a rigid set of normative directions or prescriptions which individuals must comply with, willy-nilly. He regards law as a means to some social ends and not as an end in itself. As distinct from Llewellyn, Olivecrona maintains with Hagerstrom, that the word 'right' cannot be identified with any fact out there. According to him, by appealing to 'right,' one seeks to exercise a certain influence over the other in order that the other gives one a certain strength in one's possession.

Lon Fuller's Approach to the Impelling Power of Law

In *The Morality of Law,* Lon Fuller modifies the classical natural law approach by identifying the law's obliging nature with the morality of the law. Law is obeyed because it creates and preserves ideals recognized as goals by the society. This moral fiber in law, not force, is the factor which causes or creates legal obligation. In discussing the "internal morality" of law, he gives eight ways or conditions to succeed in making good laws. Law must be: (1) general; (2) promulgated; (3) pro-active; (4) clear; (5) non-contradictory; (6) practicable; (7) consistent; and (8) congruent (1963, 63). Recognition of these minimum fundamental principles, according to Fuller, is the "moral power" which causes individuals to obey the law.

H. L. A. Hart and the Law's Coercive Nature

Unlike Austin, Kelsen and Olivecrona, Hart conceives law as a system of rules, as he attempts to de-emphasise the concept of coercion in obligation. He believes that rules may obligate officials, for example, without imposing sanctions, and that not every rule in a legal system must, or does, have a sanction attached (Hart, 1958, 594). Law is not a command, but a system of rules which creates obligations between parties. A person is under obligation, not because of the force of sanction or threats of punishment, but because of the existence of the rule (Njoku, 184-185). A rule is obligatory because its existence is acknowledged by members of the society who not only generally act or justify their actions on the basis of the rule, but also demand and expect others to do likewise; moreover, they use violation of the rule as justification for punishing the offender (Hart, 1961, 163). So, as distinct from Austin, Kelsen and Olivecrona, Hart conceives legal obligation as inhering in the existence of the legal system.

Ronald Dworkin's Account of Associative Obligation

Dworkin believes that people generally have a duty to honour their responsibilities under social practices that define groups and attach special responsibilities to membership (*Law's Empire,* 1986, 198), provided that the group's members think that their obligations are *special*, *personal*, and derived from a good faith interpretation of *equal concern* for the well-being of all its members. These conditions are not a matter of the members' actual feelings and thoughts: they are interpretive properties that people do well to impute to them (1986, 201). Dworkin calls this "associative" or "fraternal" obligation, and it arises independent of people choosing to assume them (195), like family and friendship. Certainly, obedience is not part of Dworkin's paradigm virtue of "fraternity"; rather, mutual aid and support are the normal obligation.

John Finnis and the Law's Binding Nature

For Finnis, there are moral values that should make people to obey each law. This is because the moral principles that found particular rules are derivatives of the general moral types, and are geared towards the solution of co-ordination problems and realisation of common good (Njoku, 311). In *Natural Law and Natural Rights* Finnis believes that moral principles are *presumptive* and *defeasible*, that is, giving exclusionary reasons for action (1980, 318). These exclusionary reasons justify the vast legal effort to render the law or place it over individuals' discretionary evaluation. Finnis' argument is that there is no reason why a general moral reason that is authoritative cannot serve as exclusionary reason for action for the citizens. The common good

as an ideal exemplified in particular laws demand moral obligation or force to be actualized. According to Finnis, it should not be left to individuals as optional advantage (Njoku, 312), as distinct from Olivecrona.

Joseph Raz and the Coercive Nature of Legal Norms

Raz argues that the entire law is coercive to guarantee obedience by its subjects; however, this coercion is not fundamental to its nature. Instead, the law's authority is imbedded in its capacity to guide human conduct and offer good reasons for actions. This is what he refers to as the "service conception of law's authority." Law should aid people do what they should better than they could without it. He submits that even in a community of angels who are unfailingly bound to obeying legal norms, differing conceptions of good or self-interests would necessitate institutions to authoritatively settle disagreements. (Raz, 1975, 159-160). Unlike Olivecrona, Raz stresses a refined grasp of law where coercion plays a role, but far from being the defining feature of the legal system.

Revisiting the Illusions of the Law's Binding Force in Olivecrona's Legal Theory

Olivecrona's arguments on the illusions of the law's binding force can be summed up as follows: (I) "Duty", "legitimacy", "right" are vacuous words, devoid of any significance or force; and without semantic reference. (II) The connection between right and duty that seems to exist between the "authority" and its "subjects" is non-existent and unreal; the only thing that is real is that idea which people have about its existence. (III) The only real connection between the authority and its "subjects" is an uncertain, conditional, cause-effect relationship between the authority's involvement in the making of a law and the response of the people to it. (IV) Legal norms are not commands that are binding; rather, they are impersonal imperatives that deduce their efficaciousness from a complex psychological mechanisms. (V) The questionable "duty to obey" is nothing more than a feeling of restraint that leads to performing the act. (VI) The existence of threats of sanctions and of coercion generally has a heavy influence on the formation of the above-mentioned ideas. (Rabanos, 2023, 219-220).

It is necessary to pointed out that Olivecrona's critique of the view that law has binding force; his analysis of the concept and function of a legal rule; and his idea that law is a matter of organized force; make his legal ideas a special contribution to twentieth century legal philosophy. However, his legal theory is beset by some difficulties. Olivecrona's general claim that law consists chiefly of rules about the use of force, rules which contain patterns of conduct for the exercise of force whether in criminal or civil law is enough criticism to his idea. His theory downplays on the intrinsic power dynamics within the legal system. Laws are not inevitably made through voluntary recognition by every individual. Most often, it is implemented by State authorities or other institutional bodies. So, the obliging nature of law, in many occasions, originates from the forceful measures like punishments and penalties. His theory fails to take cognizance of the importance of these external sources of authority in ascertaining the coercive nature of law.

Furthermore, the roles of the decisions of the judiciary and legal precedents in constituting the binding nature of law are not explicated in his theory. The obvious fact that courts, as part of government, have power to interpret and build up legal principles, and their decisions can set binding precedents for future cases, is overlooked in his theory. Hence, his theory fails to recognise the law's dynamic and evolving nature. Again, his accent or stress on the subjective view of the individual can lead to a relativistic approach to law. Law only has a compelling force, according to him, if individuals acknowledge it as such. This view denigrates the importance of societal values, social norms and collective understanding in forming the legal systems. By

reducing the coercive nature of the law to individual consent, he neglects the wider social, cultural and historical contexts from which legal principles and norms emerge. In like manner, the law's binding force, when ascertained solely by individual acknowledgement, can open the floodgates for subjective interpretations; and permit "pick-and-choose" by individuals which laws they reckon obliging. By so doing, the steadfastness and consistency of the legal systems are grievously countermined.

On the other hand, it is good to point out that law cannot be determined simply by the fact of obedience to a rule, neither can it be ascertained simply by the nature of the sanction imposed for violation of the rule. A rule is not law because it is enforced by a physical force or punishment, rather than the public condemnation that might underlie a moral rule. If Olivecrona's physical force or sanction makes a rule law, then a gunman's order demanding money at gunpoint would be law, because his sanction is certainly greater, at least in terms of imminence to the victim, than the usual sanction attached to a rule. Again, he does not explain why there can be no connection between the world of the ought and the world of time and space, he just avers and insists that there cannot be such connection (Spaak, 2014, 113).

More regrettably, Olivecrona avers that, in reality, fear is never far away when dealing with the law, though he quickly points out that this does not mean that people should live under an ever-present fear of being subjected to the force of law. Olivecrona's claim about the role of fear cannot be accepted as it stands. No matter how he qualifies it; and the more he qualifies it, the less interesting it becomes. He fails to acknowledge the fact that human beings, from time immemorial, have been living in communities and abiding by certain moral laws of conscience before the actual enactment of human laws. Simply put, there are unchangeable laws of reason which all men everywhere keep for the sake of conscience, not for fear of penalisation or punishment (Dimgba, 175; Dennis, 224). Again, Olivecrona's believe that human beings behave in such a way as to need taming in order to be able to live together peacefully, for me, is not the best way Olivecrona should justify his idea of law as a matter of physical force. Human beings are not mere animals as to require taming. They are rational, and they obey good laws most often because it is good to do so.

Meanwhile, in line with his idea of the binding force of law as an illusion, Olivecrona concludes that the idea of 'right' is a 'hollow word' (Rabanos, 214). Unlike Olivecrona, John Locke postulates "inalienability of rights" as criteria for determining the validity of positive law. If positive law violates those rights, it apparently is still law, but the individual has no obligation to obey it. His duty is to rebel and resist the law. For Hart, our language of action in law is *ascriptive* not *descriptive*, so, when one says that 'A has right,' one is not making a description, but an ascription: a quasi-moral claim in our ordinary language of action approximated in legal sphere.

Conclusion and Recommendation

In conclusion, this study does not agree with Olivecrona that people obey the law because of the organised force of the State or society. It is not disputed that people do obey law for various reasons, like morals, habit, indifference, duress, fear, coercion, self-interest, or ignorance. However, the concern of this study is whether such reasons or motives, especially coercion could constitute part of the law. This does not deny the fact of general moral principles from which particular rules are derived. The fact is that, even where general moral rule is recognized, positive laws do not always profess a coherent fidelity to such standards.

Be that as it may, the duty to obey the law is not arbitrary. Scholars have argued that there are circumstances in which the duty to obey can be ruled against; for example, in the case of unjust

law. Therefore, a balance should be struck between the coercive or binding nature of the law and other moral considerations. While there can be justifiable reasons to generally obey the law, there is no arbitrary obligation to do so in all situations. Nonetheless, when the law's coercion is involuntarily brought down upon a whole community, then, the justificatory reasons to which the law must conform is limited. If coercion is built into the very nature of law, then, vindication is necessary. Laws should be justified in an unparalleled manners (Yankah, 1254-1255).

It is good to point out that a legal system by its nature should be in line with good reasons to be justified. However, this idea does not connote that coercion cannot be vindicated. Kant, Hegel and others have observed that coercion can serve as a veritable tool for ensuring justice and securing the optimum amount of mutual freedom for all (Yankah, 1255). Nevertheless, philosophical discussions on any issue are not *fait-accompli,* there are always opportunities for further discussions on the same issue. So, by bringing the coercive or binding nature of law to the threshold of jurisprudence (*Ad Limina Jurisprudentiae*), everybody is reminded of the severe power of the law and, therefore, the need to strike a fair balance between the wrath of the law and the good reasons behind non-compliance to what the law demands in specific circumstances.

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