# The Force of Law:

## Law and Coercion, Validity and Effectiveness, and Synergy[1]

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**Abstract** This paper considers the two claims Schauer introduces in *The Force of Law*. Firstly, the paper seeks to establish that coercion is (a) *generally* part of the law; and (b) *occasionally* may not be. Secondly, I intend to demonstrate that despite the fact that the relationship between rules and facts within a normative system could be necessary, sufficient or desirable, in all cases is a synergetic one: they work better when they work together. Hence, the last section of this paper shows that coercion has philosophical interest in explaining the nature of law and that the question whether it is a necessary or sufficient element can be set aside.

**Keywords** Law, Coercion, Validity, Effectiveness, Synergy, Power

## I. Law and Coercion

It is arguably a dogmatic view in post-Hartian legal philosophy that coercion is not a central element when defining and describing the nature and characteristics of law. To the surprise of many, *The Force of Law* reopens the question long ago considered to be settled. In his latest book Schauer has two claims that are interlinked: a) a challenge to the current way in which we study jurisprudence; and b) that law is commonly and valuably coercive (Schauer 2015, x).

Schauer claims that legal philosophy or legal theory currently limits its inquiry to essential features, elements, or components of the concept of law and its nature

[1] A very early version of this paper "нормативные системы как право в синергии: ДЕЙСТВИТЕЛЬНОСТЬ И ДЕЙСТВЕННОСТЬ" (in English, "Normative Systems as Law in Synergy: Validity and Effectiveness"), Philosophy of Law and State Responsibility, St. Petersburg State University, 2012.

(Schauer 2015, 4) and disagrees with this approach. In tune with this, as legal philosophers—i.e. at least the Anglo-American tradition—follow H.L.A. Hart's *The Concept of Law*, they make a postulate that law cannot be identified with force—i.e. coercion is not a necessary condition for law to *be*, to exist.

Schauer agrees that "noncoercive law both can and does exist." (Schauer 2015, 3) That is not the issue he intends to unravel in *The Force of Law*. However, because we currently understand in legal philosophy that coercion is not a necessary condition for law to *be*—i.e. exist, and legal philosophy seems to be interested only in those features in law that are considered essential, "coercion loses its philosophical or theoretical interest in explaining the nature of law." (Schauer 2015, 3)

Indeed, there is a vast literature on the nature and the constituent elements of law. Within this literature, and in particular the literature following Hart's *The Concept of Law*, coercion is not central. To be more precise, coercion is only briefly noted as a potential, additional and apparently optional element in this literature, rather than being subject to detailed analysis—or at times, any analysis at all.

This paper therefore considers the two claims Schauer introduces. Overall, it recommends that coercion should be generally considered when defining and describing the nature and characteristics of law; but may occasionally be omitted. The first part of this paper seeks to establish that coercion is (a) *generally* part of the concept of law and its nature; and (b) *occasionally* may not be. Thereafter, I focus the attention on legal philosophy as a whole and what we should consider as relevant when defining and characterising the law as it is and its nature. Consequently, the last section of this paper will show that coercion has philosophical or theoretical interest in explaining the nature of law since the question whether it is a necessary or a sufficient element is irrelevant.

## II. Coercion is *generally* or *by default* part of the law

In this section, I will focus on coercion as an element that is *generally* present when referring to the concept of law and the nature of law. I will argue that coercion is *generally* part of the law—i.e. part of the law *by default*—by evaluating erroneous interpretations. In order to assess these misunderstandings, I will centre the attention on coercion as: a) a sanction—i.e. what I call a 'thick' or broad account of coercion or

coercion *by default*; and b) a *sensu stricto* view—i.e. what I call a 'thin' account of coercion.

There are many theories in legal philosophy, legal theory, or jurisprudence that have included coercion when defining and describing the nature and characteristics of law—i.e. Bentham, Austin, Kelsen, to name a few. They all maintain—at least broadly—that law will need some form of coercion to be, and that seems intuitively plausible too. An obvious example is Criminal law. Although Hart does not include the notion directly, he conceded that legal rules impose behaviours and therefore individuals are not free to do what they want. (Hart 1997, 87)

More substantively, to *generally* include coercion in the analysis of what law is can be a corollary of all rules having a sanction—or at least, all legal rules having a sanction. That is, if we hold that all rules have a sanction, and that that coercion is one of the many forms a sanction may adopt, then coercion may again be an object of analysis. The problem starts with a widespread misunderstanding of the meaning of the term "sanction."

On the one hand, since Hart the dogmatic view in legal theory is that "sanction" means privation, that is, a negative consequence. On the other hand, sanction may be seen as rewards—i.e. Schauer refers to carrots and sticks. Sanctions, however, may be more broadly defined as any kind of consequence that follows an act within the law whether that consequence is positive or negative.[2]

Hart—and thereafter his followers (for example very recently Green 2015, 9)—starts from a presupposition based on an oversimplification when he says that for Kelsen "[l]aw is the primary norm which stipulated the sanction." (Hart 1997, 20-25, 35; Kelsen 1949, 61) Therein, Hart somehow assumes that Kelsen identifies sanction with threat; rules therefore for this distorted account have the form of "[…] the antecedent or 'if clause' of conditional orders backed by threats or rules imposing duties." (Hart 1997, 37) The quotation is—to say the least—incomplete.

Kelsen tells us that law, like any other normative system, is an order integrated by rules. (Kelsen 1949, 1) In order to distinguish these rules from any other normative system Kelsen tells us that they are hypothetical statements. (Kelsen 1949, 38) These hypothetical statements stipulate as a consequence a coercive act, i.e. a sanction. (Kelsen 1949, 45) That is to say, for a Kelsenian account, sanction is the consequence

[2] Note that I use the term "positive consequence" and not reward since reward may be an example of "positive consequence" but not the only one.

that *ought to* follow a given antecedent. Schauer, although enlightening, does not escape the post-Hartian slippery slope since he too defines coercion interchangeably with sanction, the latter associated mainly with negative consequences. (Schauer 2015, 5) But sanctions do not only imply *per se* negative consequences. In fact, they may also include positive ones; even if we agree that sanctions in the form of negative consequences have a more visible role in a social orders such as law (Kelsen 1949, 17).

There is coercion—or more specifically, coercive sanction—when the consequence happens independently of the subject's will (Kelsen 1949, 18)—i.e. I prefer to use "independently" rather than "against" since the subject may be willing to align his volition with the consequence. So coercion means—thick account—that somehow the choice of an antecedent conduct is limited to the subject. That is, he either a) follows the antecedent and therefore the consequence ought to follow—e.g. he murders and ought to be sentenced to a penalty; he signs a contract and ought to have consequently rights and obligations; or b) he does not follow the antecedent and the consequence does not follow—e.g. he does not murder hence he ought not to be sent to prison; he does not sign the contract and ought not to have consequent rights and obligations.

For a 'thin' or narrow account, however, coercion may be identified with the potential use of force in particular cases. But, force does not need to be present in order to have coercion since it is a factual question whether power is actually used. (Green 2015, 8; Kelsen 1949, 29 *in fine* and 30 *supra* ) So, to use the classical examples of rules of contract or wills in order to show that because they do not prescribe coercive sanctions they are not included in Kelsen's view when defining and describing the nature and characteristics of law (Green 2015, 9) is misleading because of its incompleteness. It is correct to say that if we do not comply with the rules of contract, *force* will not be used—i.e. thin account of coercion. However, to state that not complying with the formation rules of contract will not have legal consequences is something different. That is because, even in cases like the ones sub-examine, the subject has his conduct coerced—i.e. his conduct is not completely free, autonomous—since if he does not comply with the rules of contract, there will be no contract at all and therefore, no consequent rights and obligations—i.e. thick account of coercion. To that extent, coercion is *generally* or *by default* part of the law.

## III. Coercion may *occasionally* not be part of the law: coercion *sensu stricto*

There are several means in which human behaviour may be motivated and coercion is but one of them. Indeed, there are situations in which our conduct may be somehow limited with regards what we ought to do or not to do—antecedent—in order for something else to happen—consequence. It is in these situations in which our behaviour is coerced. More specifically, coercion may refer to the use of force but it does not need to. Indeed, I will argue that there are other means to motivate subjects and I will reject the use of coercion in some cases. I intend to show that *occasionally* law may do without coercion.

### *Motivation*

In what is specific to the social, legal, political and moral spheres, an individual or subject offers four different levels of analysis: a) in their individuality (I); b) in their relationship with their peers (you and I); c) in their relationships as part of a community or society (us, from an internal aspect); d) as a member of a community or society that has relations with other communities or societies (us, from an external aspect). A conflict of interest between subjects can only happen when more than one agent is involved. That is because, any community or population consists of subjects who are different in many senses—pluralism, as Rawls says[3]—is a permanent feature that cannot be ignored. Therefore, as in the case of civil societies in Rawls' *Theory of Justice*, I assume that subjects in their relations recognise some "rules of conduct" and act upon them (Rawls 1999, 4). But, as in any circumstances in which we have agents of different kinds, there will also be identity and conflict of interests (Rawls 1999, 4).[4] As a result, some criteria are needed for regulating their intersubjective interference.

Social orders such as religion, morality, and law are there in order to let subjects or individuals and social aggregations (Nozick 1974, Part I, Chapter 2) have their conducts interfered with in a frame of concord with others. As Kelsen says "to make them refrain from certain acts which, for some reason, are deemed detrimental to society, and to

[3] Referred to Rawls's idea of pluralism as a "permanent feature of a democratic society." See Rawls 2003, in partic. 84.

[4] In what matters here Rawls says that "[t]here is an identity of interests since social cooperation makes possible a better life for all than any would have if each were to live solely by his own efforts. There is conflict of interests since persons are not indifferent as to how the greater benefits produced by their collaboration are distributed, for in order to pursue their ends they each prefer a larger to a lesser share […]"

make them perform others which, for some reason, are considered useful to society." (Kelsen 1949, 15) Therein, law as any other social order, may motivate subjects to act or refrain from acting directly or indirectly.

Law, as any social order, "may attach certain advantages to its observance and certain disadvantages to its non-observance." (Kelsen 1949, 15) Indeed, even though he grants that the former "plays a far more important role" (Kelsen 1949, 17) in social reality, sanctions do not only imply negative consequences but may also include positive ones. In tune with this, Schauer attempts to include both advantages and disadvantages in his account when maintaining that "there can be rewards as well as punishments, and law's coercive […] power often includes its ability to create positive as well as negatives incentives." (Schauer 2015, 7) Unfortunately, Schauer falls victim to oversimplification too since he defines advantages or positive consequences in terms of rewards only (Schauer 2015, Chapter 8). Kelsen goes further and makes clear that social orders may even do without advantages or disadvantages and still "require conduct that appeals directly to the individuals." (Kelsen 1949, 15) Therefore, legal rules may be—according to a Kelsenian view—about duties but also may confer powers—i.e. all three fundamental deontic concepts, such as obligation, prohibition, and permission are included. (Navarro and Rodriguez 2014, 18)

In brief, normative orders are there for subjects to be able to interfere with each other within social aggregations in order to live in concord since otherwise conflicts of interest may happen. These social orders—law being one of them—are the set of rules that help in achieving that intersubjective interference within a frame of tolerance. And they may do so by motivating subjects directly or indirectly. Furthermore, whether this motivation is direct or direct, it may be in the form of negative but also positive consequences.

***Coercion and force***

Evidently, coercion is an example of a direct means to motivate behaviour—i.e. you ought to act or not to act in such a form in order for this or that consequence to happen. But coercion does not imply *per se* the use of force. This is another Hartian misinterpretation of the Kelsenian account that is still present amongst us. Kelsen clearly states that "[t]his does not mean that in carrying out the sanction physical force must be applied." (Kelsen 1949, 18) In tune with this, Schauer's account of the

inclusion of force as a way to see coercion is rather rushed. He maintains that "law's brute force […] is the principal identifying feature of legality has in the past been conventional wisdom. […] But precisely the opposite—that force is not the characteristic or identifying feature of law—is now conventional wisdom […]." (Schauer 2015, 10) This is not true; or at least, it is not an accurate description of a Kelsenian account.

Sanctions are coercive measures in the sense that consequences happen *independently*—not necessarily against—subject's will. So far, a thick, broad account of coercion or coercion *by default* as per the previous sections in this paper. More specifically, for a thin account of coercion or coercion *sensu stricto*, some coercive sanctions may *if and only if necessary* be applied by the employment of physical force. (Kelsen 1949, 19) Indeed, the use of force is the exclusive prerogative of law as a social order. Thus, the use of force is exclusive to law but does not define it. In other words, force is instrumental to law as a form of coercion. But that does not mean: a) that coercion is defined as force; b) that force is the only form of coercion law has. It only means that force as a form of coercion is exclusive to law. And that is an accurate reading of what Kelsen proposes too. (Kelsen 1949, 18, 21)

Law may be defined as a set of rules or norms. These rules are statements characterised as being hypothetical—i.e. in the hypothetical case a certain antecedent happens ought to be the respective consequence. And that consequence may be either positive or negative. In the case of law as a social order, whether the consequence is positive or negative, in all cases it is independent from subject's will. Coercion *sensu stricto* may be used in the event "resistance is encountered in applying the sanction." (Kelsen 1949, 18) In that sense—and that sense only—coercion is an element that has to be considered in the quest to define what the law is. Kelsen himself made it clear: "[i]f 'coercion' in the sense here defined is an essential element of law, the norms which form a legal order must be norms stipulating a coercive act, i.e. a sanction. In particular, the general norms must be norms in which a certain sanction is made upon certain conditions […]." (Kelsen 1949, 45) But that does not mean that actual force—i.e. thin account of coercion—will be used. Therein, law may *occasionally* do without coercion *sensu stricto*.

## IV. It is a matter of synergy; not of counting

Schauer challenges a prevalent mode of jurisprudential inquiry (Schauer 2015, x). I am in agreement with Schauer that "noncoercive law both can and does exist." (Schauer 2015, 3) According to him, legal philosophers understand that coercion is not a necessary condition for law to exist, and because legal philosophy seems to be interested only in those features in law that are considered essential, "coercion loses its philosophical or theoretical interest in explaining the nature of law." (Schauer 2015, 3) He disagrees: legal philosophy or legal theory should not limit its inquiries to essential features, elements, or components. (Schauer 2015, 4) I am sympathetic with this view. In order to demonstrate that regardless of being necessary or sufficient, jurisprudential inquiry should study these features, I will argue that, when we consider the mainproperties of a legal order (i.e. broadly, validity and effectiveness), discussions of whether each property is necessary, sufficient, or even desirable are irrelevant and can be set aside. That is because, should we want to have a complete picture of what law is and its nature, we cannot overlook certain features solely on the basis that we understand they are not essential.[5]As a direct consequence, because coercion has to do to an extent with both the validity and the effectiveness of the law, coercion has philosophical interest in order to define its object and in examining its nature.

Alchourrón and Bulygin clearly state that in legal science there are empirical as well as logical issues. (Alchourrón and Bulygin 1971, 53) Two key concepts that characterise law from the empirical and logical standpoints are effectiveness and validity, respectively. I maintain that in any case, the relationship that exists between validity and effectiveness within a normative system is based on synergy. In the present section of the paper I intend to conceptualise or clarify the notions of these two fundamental terms in legal theory—i.e. validity and effectiveness—showing how they work together in a synergetic form. Although it may be understood that one belongs to the logical side of law and the other one, to the factual or empirical one, both can *be*—i.e. exist—independently in their spheres. But it is only when they are part of a synergetic relationship that they have full actual functionality.

[5] I use the terms "essential" and "necessary" interchangeably here. Following Alexy "[e]ssential or necessary properties of law are those properties without which law would not be law." (Alexy 2008)

Synergy implies a particular relationship amongst the components or members of the given whole; the individual members or objects can work better when working together. In other words, the individual components of the whole can exist on their own, autonomously and independently; however, working together in a synergetic manner improves their performance. And that is exactly the situation as between validity and effectiveness: they may exist independently since their existence has to do with different realms, that is to say the logical and the factual ones. Hence, whether their relationship is that of necessity, sufficiency, or desirability for law to be is irrelevant since, in any case, in theory they can be studied as separate parts.

### *Validity or logical existence*

As any term, "validity" is potentially vague. And that has to do with the "open texture" of law. (Hart 1997, 124) Bulygin is clear in that there is no consensus among scholars about the exact meaning of this rather elusive word. (Bulygin 1990) Any legal order is constituted by valid "sentences" or norms. Kelsen begins with this matter arguing that the validity "of a norm is to express first of all simply the specific existence of the norm." (Kelsen 1992, 12) In principle, by defining *existence* we would eliminate every hesitation about what *validity* means. Nevertheless, it is true, as Bulygin maintains, that "Kelsen says repeatedly that validity is the specific existence of norms. But […] the term 'existence' is in his use at least as ambiguous as 'validity'." (Bulygin 1990) Bulygin finds four different conceptions of existence (Bulygin 1990): a) factual existence; b) membership; c) existence as validity; d) formal existence. So, it seems that validity has different meanings; that Kelsen defined validity in terms of existence; and that existence itself has several other meanings too. If determining the meaning of validity was complex, now the enterprise becomes cumbersome.

Leaving aside the previous interpretations for now since they seem to only add more hermeneutic questions rather than answers, I will start again from a more basic and humble beginning. A norm is valid when it exists. But, its existence depends on a simple aspect: its creation. Indeed, in order for anything to *be*—i.e. to exist—it has first to be created. It is this creation that will guarantee its birth, its virtuality, its existence in

the legal field—more broadly, in any field. And we are no longer dealing with factual or empirical questions. We are in the presence of the logical boundaries of law.

The "validity" of a rule or norm implies that the requirements for its production, its creation, have been fulfilled: formal (competent body and procedure), and material (compatibility with the content of higher norms) determined in other norms of the order that regulate the normative production. That is why in legal theory, validity of a norm or rule usually refers to that norm or rule as belonging to a legal system from its two angles: as formal validity and as material validity.

So, if a rule or norm is created following a given procedure and by a competent authority, with its basic yet fundamental content congruent to a superior norm that is valid, with these criteria all aspects of validity are included. Whether these norms or rules must include coercion in order to be considered legally valid is a separate, additional issue. Here I follow Kelsen, Hart, Cossio and others in that there are norms in every legal system that do not imply binding force and are still valid—e.g. secondary norms, secondary rules, perinorms, etc.—as it has been shown in previous sections of this paper. So, for validity understood as the logical existence of the law, coercion may be—but does not need to—be present. To be more precise, a valid norm will imply *by default* coercion in the sense our behaviour is somehow limited—i.e. thick or broad account of coercion or coercion *by default*—but that does not mean that the same norm must refer to the use of force—i.e. thin or narrow account of coercion or coercion *sensu stricto*.

A valid norm or rule is that one that *is*—i.e. exists—in a legal order. In other words, a norm or rule is valid if and only if it has been created following the procedure, by the authority, and in tune with the content determined by a norm or rule that is superior, regardless of including coercion—or at least, coercion *sensu stricto*. At the same time, we may ascertain that by creating a new valid norm or rule part of what used to be independent, autonomous human conduct is now somehow limited by the boundaries determined by this new valid norm or rule—i.e. thick account of coercion or coercion *by default*.

***Effectiveness or factual existence***

According to Kelsen the effectiveness of law means that the norms are actually applied and obeyed. (Kelsen 1949, 39) That is to say, effectiveness results a factual, empirical question or a question of facts. The facts that concern the legal world are those of human beings with regards their behaviour or conduct. Thus, a norm or legal order will be effective provided it is complied with by the community to which it is directed to, and provided its members behave according to what is established and do not do what is prohibited.

Many legal philosophers have agreed with this notion. Aftalión, García Olano and Vilanova point out: "the word effectiveness signifies the same as what is meant in the purity of legal philosophy by saying that norms are in force: the effective existence of a conduct in compliance with that addressed by the norms." (Aftalion *et al* 1984, 184) Nino and many others identify effectiveness with force (Nino 1984, 139-140). Cossio emphasises that "effectiveness or facticity is the fact that the effective conduct agrees with its representation given by the norms; thus, the norms are effective norms." (Cossio 1964, 474)

From the above considerations and in brief, a legal norm will be effective or *in force* as long as it is followed by the population to which it is addressed to—at least in a representative number or percentage, a sufficient number of members of that population.[6] Obviously, there will be conduct that deviates from the content stipulated by the norm. But, the rule, norm, legal order will also be effective or in force if the competent authority actually applies the corresponding coercive sanction when the antecedent happens—i.e. a thick account of coercion is present whilst a thin account of coercion may be, depending upon compliance or non-compliance of the subject and actual use of force.

[6] I am not going to discuss here what expressions such as "representative number or percentage" or "sufficient number" mean since they are out of the scope of this paper. For simplicity I follow Philip Pettit—i.e. less than everyone, but likely to be nearly everyone (Pettit 1990).

Coercion—thin account—seems to have a more central role on the factual side of the law. That is to say, if the members of the population do not comply with the norm in a sufficient number or the consequences that ought to follow the antecedent in any valid norm do not happen in a representative number or percentage, that rule or norm is ineffective. So if the coercive side of the norm or rule does not manifest when the antecedent happens, therein the valid norm or rule loses its *force* since it is not effective. For example, if someone kills someone else, and the law says "whoever kills ought to be sent to prison," the killer ought to be sent to prison for that norm or rule to be effective—i.e. the coercive element of the rule or norm has to manifest. If the killer did not go to prison, and therein the coercive element of that norm or rule did not manifest, we would be in the presence of a non-effective norm. Similarly, in the case of a contract in which the parties ought to sign in order for the document to be binding. For example, if we have a valid norm or rule stating that "for a purchase to be satisfied the seller and buyer ought to sign." Let us consider the case in which someone sells his house for a price but when reviewing the actual document that was meant to "transfer the property" to the buyer, one of the signatures is missing—either, that of the seller or that of the buyer. This norm or rule is in principle coercive in the sense the conducts of both the buyer and the seller are limited since they ought to sign the contract for the purchase to *legally* happen—i.e. to *be*, to exist. Now, if any of these two parties did not sign the contract, there would not be a contract at all. However, if the parties behaved as if there was a purchase even though the contract had not been signed, therein that norm or rule would be non-effective. That is because in addition to the norm or rule being coercive in the sense it limits the behaviour of contractual parties by including requirements, the parties ought to comply with these requirements in order for that norm or rule to be actually effective.

### *Validity and effectiveness: synergy*

It is time now to evaluate how these two concepts, validity and effectiveness, may work together and whether they have a relationship of necessity or sufficiency. But before evaluating that relationship, we must make clear what we do not talk about when we refer to them. Law may be seen from a static and dynamic point of view. In both cases, these views refer to the validity of the law. The static point of view refers to law as it is,

a system of valid norms with certain features—e.g. unity, hierarchy, coherence. The dynamic point of view refers to the creation and application of the law—i.e. law in "motion." Although there are facts involved in the creation and application of law, effectiveness has nothing to do with the dynamic side. Both static and dynamic points of view are related to validity only. We are in the presence here of a different kind of facts, those of the competent authorities that create and apply law. Whether the law is followed or not—effectiveness—refers to a different angle that is purely factual. From the previous sub-sections we have learnt that a norm or rule may not be coercive but may still be valid. But for a norm or rule to be effective, it seems that coercion plays a more central role.

Having made clear what I will not dwell with, it is time to centre the attention on the kind of relationship validity and effectiveness may have. Bulygin mentions three different ways in which facts and norms may have a particular relationship: a) in the case of issuing a norm; b) in the case of derogating a norm; and c) "[a]nother necessary condition for the validity […] of a norm is according to Kelsen the efficacy of the legal order to which this norm belongs […]." (Bulygin 1990) According to Kelsen there is a very important relationship between validity and effectiveness. That is because a norm will be valid only if the system it belongs to is as a whole effective. It is a dogmatic view in legal philosophy that effectiveness is the condition of its validity. (Kelsen 1949, 42) So if effectiveness is the condition of the validity of a norm or rule, and if for a norm to be effective means that somehow our behaviour is coerced, therein it seems plausible to maintain that the validity of these norms or rules may ultimately depend on their coercive character.

It is at this point I include synergy to relate validity and effectiveness. I maintain that these two concepts that characterise law can work independently or jointly. Similarly, they can be studied in their individuality or together. However, it is only when a valid norm is effective that it becomes actually meaningful. I will be more precise. The traditional scholarly interpretation understands that, on the one hand, for the case of the specific analysis of a legal norm or a group of them, the question is not transcendent. That is to say, the non-effectiveness of a given norm or a group of them within the community does not affect its validity at all, or that of the rest of the legal order or system. Those norms or rules may lose *force*, effectiveness, but they will still be part of

the legal order in question. On the other hand, it has become dogma in legal theory that the situation seems to be different if we analyse the same scenario from a different standpoint, that is the whole—i.e. reviewing the influence of the lack of force or effectiveness of the validly created complete legal order. In this case, the community does not comply with, follow, respect or obey the whole—or at least, most parts—of the legal system and the coercive sanctions that must be applied consequently, are not. That system is ineffective, it is not in force; hence, it is not valid either—i.e. the effectiveness of the system as a condition for its validity.

To be more specific, in the latter two situations may occur: a) the legal system is re-established by the application of coercive sanctions regaining enough compliance within the population; or b) the legal system does not obtain enough acceptance or compliance, and therefore it is modified, reformed or substituted by a new legal system that will have the same "proofs" or "checks" of force—in the sense of effectiveness—to succeed in remaining valid in time and space. Let remind us that effectiveness "is a condition of validity; a condition, not the reason of validity." (Kelsen 1949, 42) I maintain that although validity and effectiveness do have a certain relationship, they do not condition themselves reciprocally, at least not in all possible ways.

Let me be more precise. Whether the relationship between validity and effectiveness is necessary or sufficient, and whether this mere question is relevant will have to do with our position in legal philosophy. We may share the view that to investigate the *necessary* features of something is to investigate its *nature*. Some go to the extreme—i.e. essentialists—and maintain that a theory has to do with necessary truths only. (Raz 2009, 24) But even if we accepted this extreme view, that would not be the end of our debate. We would have to push things further and expect to differentiate amongst necessary conditions as logical, factual, and even natural necessity. I agree with Hart here in that the question whether this necessity is logical, factual or causal can safely be left as an innocent pastime for philosophers. (Hart 2001, 79) *Mutatis mutandis*, the same applies to the question of whether the relationship between validity and effectiveness is necessary or not.

Even though the complete legal order may lose effectiveness, and it may no longer be followed, it is still perfectly and fully valid for the purpose of legal theory and its study. The fact that it is not followed or effective does not alter its logical and formal

existence. In an extreme case scenario, the legal system may be modified or changed for a new one by means of evolution or revolution. Nevertheless, until that happens, the legal system remains fully valid. It is when a valid legal system interacts in synergy with effectiveness that it achieves both a real and logical dimension. However, that does not mean that one is condition for the other to exist, at least in theory.

A rule or norm—in large, a legal system—is valid, it exists, when it has been created following the procedure, by the authority, and in tune with the content determined by a superior norm or rule (logical existence); a rule or norm—a legal system—is effective when it is followed by its addresses or in the event of non-compliance, coercive consequences follow—i.e. thin account of coercion (factual existence); a norm—a legal system—is both valid and effective when these two characteristics work together in synergy.

## V. Conclusion

The force of law is, unquestionably, one of the elements legal philosophy will continue to discuss in the years to come. Whether a necessary or sufficient element, it is plainly that, an element of law and, therefore, it should be included in any analysis about the nature of law. Schauer's *The Force of Law* is a valuable addition to this study. Not necessarily because of his argument against legal philosophy and its arguably assumed essentialism, but mainly because he puts at the centre of the discussion coercion, an element most of the time included in legal theory textbooks and articles in a very brief—almost apologetic—fashion.

For simplicity, I suggest to view coercion from two different standpoints: a) a thin or narrow account of coercion; and b) a thick or broad account of coercion or coercion by default. Following a Kelsenian approach, the rules that constitute law are hypothetical statements relating antecedent with consequent. Specifically, in what matters this paper, the consequent is a sanction that may—but does not need to—incorporate the use of force. So a sanction is coercive as long as the consequence is no longer dependant on the subject's will—i.e. thick account of coercion. And we are in the presence of coercion *sensu stricto* when the use of force may be required—i.e. thin account of

coercion. That, however, does not mean it has to be used as we will see in the next section.

The last section of this paper showed that coercion has philosophical interest in explaining the nature of law since it has to do with one of its main realms, that of the effectiveness of a particular norm or rule and that of the effectiveness of the legal order as a whole. The question whether the effectiveness of the whole legal order is a necessary or sufficient element with regards its validity is irrelevant. That is because legal philosophy has to do with defining and describing the nature and characteristics of law, and therein whether the elements we study are necessary, sufficient, or desirable is an innocent pastime for philosophers. Consequently, as an element that has to do with the effectiveness of the law, coercion may have central or peripheral importance, but in any case has to do with law as it is. As any element that somehow has to do with the law as it is and its nature, coercion should be part of legal philosophy inquiry.

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