The Forces in Law: Sanctions and Coercions

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I. Concepts and Conceptions

Two concepts that remain solidly as objects of debate amongst scholars specialised in legal theory, legal philosophy, and jurisprudence are *sanction* and *coercion.* I argue that the extension for so long now of this particular hermeneutical debate has to do mainly with two ways of interpreting what seems to be the same objects of study, that is the concepts of sanction and coercion. Therein, what in principle may seem to be disagreement about the concepts, I argue, is a disagreement about different conceptions of these concepts. Ergo, the debate is really one between a certain strand of post-Hartian legal theory on the one side and several other approaches, pragmatists and Kelsenians, on the other. The Hartian tradition misunderstands the role of coercion in law and a closer look at Kelsen can help us understand in what ways Hartian orthodoxy on the matter falls short.

The substantive argument of the paper concerns whether law is essentially coercive, and if so, in what sense. A previous article considered the two claims introduced by Schauer. [1] This paper will revise some of the previous arguments, taking cognisance of Yankah's views, and considering, in particular, and in more detail, the reason coercion is *generally* part of the concept of law (and of its nature), and, *occasionally* absent from such concept (and its nature). In advancing our analysis, it is important to distinguish what legal philosophers mean when they refer to coercion as a condition for a legal system, that is, whether coercion is necessary, sufficient, or contingent (maybe desirable) in order to define law. In doing so, it is also of pivotal importance to distinguish whether legal philosophers, in discussing the terms necessity, sufficiency and contingency/desirability, are using such terms in the conceptual or natural sense or, indeed, in both senses. It is intended to introduce familiar yet controversial examples that have been used to illuminate not

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A very early version of this paper was published as J E NU:fiez, 'HopMaTIIBHhie CIICTeMhi KaK rrpaBo B CIIHepriiii:)J,EHCTBIITEJibHOCTb 11)J,EHCTBEHHOCTb' (in English, 'Nonnative Systems as Law in Synergy: Validity and Effectiveness') in *Philosophy of Law and State Responsibility* (2012). For a subsequent, more elaborated version, see Jorge Emilio Nufiez, 'The Force of Law: Law and Coercion, Validity and Effectiveness, and Synergy' in Christoph Bezemek and Nicoletta Ladavac (eds), *The Force of Law Reaffirmed: Frederick Schauer Meets the Critics* (2016) 107. My gratitude to the anonymous referees for their comments, arguments, objections and suggestions. The original has benefitted enormously from these thoughtful and thought-provoking points.

See Nufiez, 'The Force ofLaw', above n t.

only the concept of law (and its nature) but also — particularly -the theory of coerciOn.

II. Coercion Is *Generally* or *by Default* Part of the Law

Coercion is *generally* part of the law — ie part of the law *by default*. In order to assess hermeneutical different understandings, attention will be centred on coercion as: a) a sanction — ie a broad interpretation of coercion or coercion arising *by default;* and b) a view *sensu stricto* — ie a narrow account of coercion.[2] In this regard, this section will characterise and differentiate sanction and coercion. In the next section, different modes of coercion will be assessed. The problem arises, it is argued, from a different understanding of the meaning of the term *sanction.* Thus, coercion is usually discarded, at least by the Hartian tradition, because it is inter-defined with terms such as *force* or *threat.*

Once upon a time, there were many theories in legal philosophy, legal theory, or jurisprudence that included coercion when defining and describing the nature and characteristics of law-eg Bentham's, Austin's, Kelsen's, to name a few classical examples. They all maintain — at least broadly — that law needs some form of coercion; such a view is, indeed, intuitively plausible. An obvious example is criminal law. Although Hart does not include the notion of coercion directly, he concedes that rules circumscribe behaviours and therefore individuals are not free to do what they want.[3]

But dissent came. Currently, it is a truism in legal philosophy that law cannot be defined as commands backed by force. Indeed, Bentham, Austin, Kelsen, and many others before them were intellectually blind to the reality that law included other norms too (eg power conferring norms); the views of such authors were so utterly misconceived that Hart had to enlighten us all. Therein, it is arguably a dogmatic view in post-Hartian legal philosophy that coercion is not integral to the nature and characteristics of law.

To the surprise of many, Schauer's *The Force of Law* reopens the question long ago considered to be settled. In his book Schauer makes two interlinked claims: a) it is necessary to challenge the current way in which we study jurisprudence; and b) the law is commonly and valuably coercive.[4] However,

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Ibid. Nufiez, 'The Force of Law', above n t, uses the expressions *thick* and *thin* when referring to different accounts of coercion. For the sake of simplicity, and to avoid confusion with the use of the vocabulary in different languages mainly due to literal translations that may not reflect what I mean to say, I will refrain from using these terms. Specifically, the thin/thick distinction about coercion may be somewhat confusing, given that calling *thin* the use of force may be counterintuitive for the English language.

H L A Hart, *The Concept of Law* (2nd ed, 1997) 87.

Frederick Schauer, *The Force of Law* (2015).

surprisingly, Schauer is not alone in adopting such a view. Taking the argument even further, Yankah tells us that law is inherently coercive.[5]

Schauer claims that legal philosophy currently limits its inquiry to essential features ofthe concept and nature oflaw[6] and disputes the settled approach. Yankah also argues that currently, for legal philosophers, coercion is deemed peripheral to law.[7] In tune with this, legal philosophers — their thinking conditioned by H L A Hart's *The Concept of Law* — postulate that law cannot be identified with force — ie coercion is not a necessary precondition for law to *be*.[8]

Schauer concurs that 'noncoercive law both can and does exist'.[9] This is not, however, an issue he addresses in *The Force of Law.* But, because contemporary legal philosophy is predicated on the notion that coercion is not a necessary precondition for law — and legal philosophy seems to be interested only in expounding the essential features of law — 'coercion loses its philosophical or theoretical interest in explaining the nature oflaw'.[10]

Yankah advances a more extreme view. According to him, Hart and his followers could not see that coercion was a distinguishing element between law and threats, causing such jurists to discard previous models.[11] Arguably, from a Hartian perspective, coercion was a mere natural necessity not entailing the conceptual necessity of taking cognisance of coercion in defining the law.[12] Yankah dissents. Coercion, in his view, is not only important, but, also necessary- both naturally and conceptually-in defining legal norms.[13]

In order to disentangle these apparent differences we need to consider what questions we ask and what assumptions we raise when we characterise the law and when we discuss whether coercion is a precondition for law. More specifically, what assumptions the Hartian tradition has and whether these assumptions fall short. These questions are: What is law? Is coercion necessary for law? Is coercion a natural necessity for law? Is coercion a conceptual necessity for law? What is coercion?

Ekow N Yankah, 'The Force of Law: The Role of Coercion in Legal Norms' (2008) 42 *University of Richmond Law Review* 1195.

Schauer, *The Force of Law,* above n 4, 4.

Yankah, above n 5, 1197.

It is appropriate to make clear that this view — ie coercion is not central, not necessary for law — has been maintained and questioned in legal philosophy. However, it must be noted that outside legal philosophy, coercion is still seen as a necessary condition for law. See Sandra Raponi, 'Is Coercion Necessary for Law? The Role of Coercion in International and Domestic Law' (2015) 8 *Washington University Jurisprudence Review* 35, 37, especially 37 n 7 and the reference to political philosophy.

Schauer, *The Force of Law,* above n 4, 3.

10 Ibid.

11 Yankah, above n 5, 1195.

12 Ibid 3. Hart, above n 3, 193-200.

13 Yankah, above n 5, 1197.

Although the above questions are interlinked, they do not necessarily refer to the same phenomena. Thus, when they do, such questions do not refer to the same phenomena in the same manner. Let us be more precise. Firstly, when we ask *what the law is* it will be assumed in this paper, for the sake of simplicity, that we are referring to necessary or essential elements only.[14] Indeed, as Schauer notes, in order to define and characterise the law, reference may be had to sufficient, contingent or desirable conditions. However, Schauer's claim against legal philosophers with regard to their enquiry is both unfair and incorrect. Legal philosophers do refer to and undertake thorough analysis of non-essential elements that characterise the law. Green, in his analysis, makes this very point.[15] This particular apparent disagreement will be deferred to the future for more detailed discussion.[16]

Secondly, the paper will discuss whether coercion has a relationship of conceptual necessity with *what the law is.* Even Hart accepted that coercion has a natural central role in law.[17] The question as to whether coercion is a *naturally* necessary condition of the law is irrelevant here. In this regard, both sides of the jurisprudential debate or both legal philosophical traditions seem to agree on this point.

Having clarified that the paper will discuss only whether coercion is a *conceptually* necessary condition of *what the law is,* a further question remains unanswered, namely, *what is coercion?* Having regard to the different answers given by legal theorists, it is suggested that the key to deciding whether or not coercion is a necessary conceptual condition of law is to recognise that the differences are attributable more to the different ways of understanding what *coercion* means rather than to actual differences with regard to whether coercion is conceptually necessary or not. In other words, some may maintain that coercion is conceptually necessary to define *what the law is* (classically, but not only, Austin, Bentham, Kelsen's view); some may maintain that coercion is not conceptually necessary to define *what the law is* (Hart and his followers).[18] It is argued that both sides of the jurisprudential divide disagree on the answer, not because of differences

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14 The author uses 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': Robert Alexy, 'On the Concept and the Nature of Law' (2008) 21 *Ratio Juris* 281.

15 Leslie Green, 'The Forces of Law: Duty, Coercion, and Power' (2016) 29 *Ratio Juris* 164.

16 The author has previously ventured the discussion: Nufiez, 'The Force of Law', above n t.

17 Hart, above n 3, 198; Green, above n 15, 165.

18 For a list of authors that argue coercion is not necessary, see Schauer, *The Force of Law,* above n 4, 2, 171 n 3.

on the perceived conceptual necessities pertaining to *what the law is,* but because of their different views about the term *coercion.*[19]

In order to make clear what *coercion* means, we have to be precise in relation to the other familiar and broadly used, yet differently interpreted term, *sanction.* On the one hand, since Hart it has become the prevailing view in legal theory that *sanction* means privation, that is, a negative consequence. Even Yankah identifies sanctions with breach of norms and, therefore, with a negative consequence.[20] On the other hand, sanction may be seen as rewards — ie Schauer refers to carrots and sticks.[21] Sanctions, however, may be more broadly defined as any type of consequence that follows an act within the law whether that consequence is positive or negative.[22] There is an ambiguity in the claim that law is essentially coercive that needs to be untangled?[3] Let us consider how this is evident when we compare Hart and Kelsen with the following two theses:

> A. According to Kelsen all legal norms have a sanction. Legal norms that seem not to include or make reference to a sanction are simply incomplete and therefore are part of other sanction-imposing norms. From here, Hart somehow assumes Kelsen's and Austin's views to be alike; that is to say, law is a group of legal norms or commands created by the sovereign backed by threat.
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> B. A milder version of thesis A may accept that some of the legal norms have a sanction. In other words, all legal systems include sanction-imposing norms although not all legal norms have a sanction.

The author defends a version ofthesis A. If we could demonstrate thesis A, thesis B would become irrelevant. To do so, the notion of *coercion* or *coercive sanction* in this paper includes any legal consequence that is to be applied irrespective of the will of the subject of the law. However, the issue is that since Hart most legal philosophers assume thesis A has been refuted. More precisely, in light of some passages of Kelsen's works randomly presented by Hart, some may have doubts that this is a Kelsenian move. Contrary to this, the following paragraphs show that Hart was wrong in the way he interpreted Kelsen's view.

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19 For a reference to the meaning of *coercion* from Austin to Schauer, see Andrew Stumpff Morrison, 'Law Is the Connnand of the Sovereign: H L A Hart Reconsidered' (2016) 29 *Ratio Juris* 364, 367 n 6.

20 Yankah, above n 5, 1216-ff.

21 Schauer, *The Force of Law,* above n 4, ch 8.

22 Note that the author uses the term *positive consequence* and not reward since reward may be an example of *positive consequence* but not the only one. Some may even consider threats as offers. Indeed, the difficulty to distinguish threats and offers in cases of coercion was noted by Robert Nozick, 'Coercion' (1969) in Robert Nozick, *Socratic Puzzles* (1997) 15. Nonetheless, these cases are the exception. Legal sanctions include incentives to comply with legal norms. My gratitude to the anonymous referees for their comments on this issue.

23 My gratitude to the anonymous referees for their suggestions on this section.

Hart — and thereafter his followers (for example very recently Green)[24] — starts from a presupposition based on an oversimplification when he says that for Kelsen[25] '[l]aw is the primary norm which stipulated the sanction'. [26] In this regard, Hart somehow assumes that Kelsen identifies sanction with threat; rules therefore, according to this distorted view, have the form of 'the antecedent or "if clause" of conditional orders backed by threats or rules imposing duties'. [27] Hart's understanding of Kelsen's theory, as manifested in this quotation is -to say the least — incomplete. His logic is flawed and his assessment plainly unfair. Let us see what Kelsen really said.

Kelsen tells us that law, similar to any other normative system, is a social order that regulates human behaviour.[28] In order to distinguish the legal norms-ie rules for Hart — from any other normative system, Kelsen tells us that they are hypothetical statements.[29] These hypothetical statements — *ought statements* linking antecedent and consequent-prescribe a coercive act, ie a sanction. [30] Thus, from a Kelsenian perspective, sanction is the consequence that *ought to* follow a given antecedent (understanding the antecedent as a given human conduct). In simple terms, if there is no human conduct there cannot be a sanction (technically speaking). If there is human conduct and the law prescribes a consequence that ought to follow that human conduct, then a sanction arises regardless of the consequence being positive or negative.

As with any other normative system — ie group of norms that regulate human social behaviou?[1] -law's function is to coordinate human conduct in inter-subjective interference?[2] Depending on how these behaviours are dealt with, we may distinguish various normative systems, law being amongst them. Law, as any other normative system, utilises different means to motivate human conduct that

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24 Green, above n 15, 9.

25 The author will refer only to Kelsen's view on sanction, coercion, and force. The bibliography that refers to Bentham and Austin in relation to this point, at least with what has to do with the Anglo-American jurisprudential tradition, is already very rich. See John Austin, *The Province of Jurisprudence Determined* (1832) 9-ff; Jeremy Bentham, *Of Laws in General* (first published 1789, 1970 ed) 54; Hart, above n 3, 82-4.

26 Hart, above n 3, 20-5. Hans Kelsen, *General Theory of Law and State* (first published 1945, 2009 ed) 61.

27 Hart, above n 3, 37.

28 Hans Kelsen, *Pure Theory of Law* (first published 1934, 2009 ed) 24.

29 Kelsen, *General Theory of Law and State,* above n 26, 38.

30 Ibid 45.

31 Carlos E Alchourr6n and Eugenio Bulygin, *Normative Systems* (1971); Kelsen, *Pure Theory of Law,* above n 28, 15, 24; Kelsen, *General Theory of Law and State,* above n26, 15.

32 Carlos Cossio, *La Teorfa Egol6gica del Derecho y el Concepto Jurfdico de Libertad* (first published 1944, 1964 ed).

may be broadly classified into direct and indirect.[33] In any case, for the purpose of this paper, whether a norm of given human conduct brings about advantages or disadvantages, such are going to be seen as sanctions. In other words, sanction means the consequence in any norm to a result of given human conduct regardless of that consequence being positive or negative.

On this point, Schauer, although enlightening, does not escape the post-Hartian slippery slope as he too defines coercion interchangeably with sanction, associating the latter mainly with negative consequences.[34] It is argued, at least for the purpose of this paper, that sanctions *per se* do not imply only 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 social orders such as the legal order.[35]

As a consequence, we may maintain that any normative system will count amongst its elements a *sanction* so defined. Moral, religious and legal systems regulate human behaviour in different manners. Despite their differences, all of them attach to human behaviour a sanction — ie a consequence — whether that consequence is positive or negative. For example:

If you tell the truth, you will go to heaven.

If you tell the truth, you will be an honourable man.

If you tell the truth, you will not be prosecuted.

Although all these norms have a certain sanction, there are still subtle differences amongst them. Whilst moral and religious norms have to do with the conduct or behaviour of one subject or individual, legal norms have to do with various subjects or individuals. Moral and religious norms of the kind *do not lie* or *do not kill* are limited to the behaviour or conduct of the subject or individual destined to. By contrast, legal norms are bilateral in the sense they refer to the behaviour or conduct of at least two subjects or individuals, and in a sense, these behaviours or conducts somehow interfere with each other.

III. Where the Confusion Starts: What Is Coercion?

The confusion starts when coercion and sanction are inter-defined.[36] Are all sanctions coercive? It is maintained they are not. Are all coercive acts sanctions? It is maintained they are not. In this regard, sanction and coercion cannot define each other. Or, more specifically, sanctions and coercions are neither mutually exclusive nor collectively exhaustive. In other words, we may have sanctions without

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33 Kelsen, *Pure Theory of Law,* above n 28, 24; Kelsen, *General Theory of Law and State,* above n 26, 15. The author will further clarify the point referred to as motivation and law in the next section of this paper.

34 Schauer, *The Force of Law,* above n 4, 5.

35 Kelsen, *General Theory of Law and State,* above n 26, 17.

36 See Schauer, *The Force of Law,* above n 4, ch 9, especially 127-ff.

coercion and coercion without sanctions. Furthermore, we may have sanctions that are also coercive. Law, as we will see, is the normative system that has the *exclusivity* of having sanctions that are coercive in a particular manner.

Examples of coercive acts that are not sanctions are certain administrative acts. They may happen independently of (even against) our will but they are not conditioned by human behaviour. Let us think of a natural catastrophe such as an earthquake. If people are being removed by local authorities from their properties (even against their will) because of the danger of building collapse, we can maintain that they are being *coerced* — but not sanctioned — by the local authority. More clearly, the consequence (coercive removal) does not follow from human behaviour (sanction) but rather from non-human or natural facts.[37] We must remind ourselves that, at least for the purpose of this paper, a sanction is the consequence that ought to follow an antecedent, such antecedent being a given human conduct.

Examples of sanctions that do not imply coercive acts come from normative systems other than law. Different from other normative systems, all legal norms, as we will see, are coercive norms in one way or another. As Kelsen rightly points out, coercion does not refer here to the internal reasons why an individual may or may not act (or omit to act) in a certain manner. This may be assessed by morality or religion. It is a distinctive feature of legal norms that, by contrast with other normative systems, they may be coercively enforced?[8] It follows from this that, in the case of an immoral act or one contrary to a religious norm, a process in the mind of the individual may follow, such as guilt or–at a supra-empirical level-divine retribution. Alternatively, a social process may be unleashed such as rejection of the actor by other members of the society. Yet, in none of these cases will coercion have been deployed. Ergo, an immoral act or one against a religious norm will have a consequence (sanction) but will not necessarily bring about coercion (at least not coercion in the sense of positive law).

Let us consider murder through the lens of law, morality, and religion. The law provides both sanction and coercion-ie a coercive sanction. For instance, if a person commits murder, another person empowered by another legal norm will apply a certain coercive sanction-eg prison. Morality however 'limits itself to the requirement: though shalt not kill' ?[9] The moral norm here is non-coercive and depends for its efficacy only on voluntary obedience. It may be said, however, that this moral norm has a sanction. If the murderer is ostracised morally by his community it may be said that the moral consequence — ie sanction — has

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37 For a more detailed account of coercive acts that are not sanctions see Kelsen, *General Theory of Law and State,* above n 26, 278-9. For a discussion on whether there are social orders without sanctions see Kelsen, *Pure Theory of Law,* above n 28, 27. For a view on and criticism of Kelsen's account of sanctions and coercion see Joseph Raz, *The Concept of a Legal System: An Introduction to the Theory of Legal System* (2nd ed, 1980) 77-85, 185-6.

38 Note that the author refers to the fact that legal norms *may* be coercively enforced. This point is dealt with in more detail in the following section of this paper.

39 Kelsen, *General Theory of Law and State,* above n 26, 20.

followed albeit not by virtue of the moral order. Furthermore, we may even argue that all moral norms have a similar sanction — ie consequence — that is, the question of the preservation or loss of honour. In any of these cases, coercion is not part of the picture.

And now the crucial question, what is coercion?[40] Part of the confusion has to do with including non-legal elements when assessing this question. In this way, by adding extraneous elements we obscure the picture rather than offer a more pristine view of what the law is. With reference to coercion, Kelsen made clear the distinction between the inner and outer considerations, as the previous section has just introduced. He also made clear that only the outer, objective side of coercion is relevant to the law. In his words '[t]he element of coercion is relevant only as part of the contents of the legal norm, only as an act stipulated by this norm, not as a process in the mind ofthe individual subject to the norm'.[41] The author follows this path too. For the purpose of this paper, coercion — or more specifically, coercive sanction — arises when the consequence that follows given human conduct ought to be independent of (even against) the subject's will — ie the word *independent* is used rather than *against* as the subject may, as we will see, be willing to align his volition with the consequence.[42] In other words, the legal norm (in large, the legal system) provides specific acts as consequences that ought to follow specific antecedents in specific cases regardless of whether we want them or not.[43]

Therefore, in this paper, coercion means — a broad account of coercion labelled here as coercion *by default* — that somehow the choice of antecedent conduct is limited to the subject as only such antecedent will bring about the consequence prescribed by the legal norm and the consequence that ought to happen. The circumstance that the consequence that follows the antecedent is positive or negative does not alter the fact that the given human conduct is limited and ought to happen even against the subject's will. Therefore, in relation to a coercive sanction that is negative in nature, if the antecedent happens, the consequence ought to follow independently of (even against) the process in the mind of the individual subject to the norm. On the contrary, in relation to a coercive sanction that is positive in nature, the consequence ought to follow independently of the process in the mind of the individual subject to the norm if, and only if, the subject complies with the antecedent prescribed by the legal norm. For instance, the subject either a) follows the antecedent and therefore the consequence ought to follow — eg he murders and ought to be sentenced to a penalty or he signs a contract and ought to have consequent rights and obligations; or b) he does not

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40 For other views see Morrison, above n 19, 367 n 6. For an extensive analysis see William A Edmundson, 'Is Law Coercive?' (1995) 1 *Legal Theory* 81. However, Edmundson recognises, taking Wertheimer's two-prong analysis, a moralised account of coercion.

41 Kelsen, *General Theory of Law and State,* above n 26, 30.

42 Indeed, as Kelsen rightly points out, the subject may act or omit to act because of motives other than the reward or punishment. See Kelsen, *Pure Theory of Law,* above n28, 26.

43 Kelsen, *General Theory of Law and State,* above n 26, 29-30.

follow the antecedent and the prescribed consequence does not follow — eg he does not murder hence he ought not to be sent to prison or he does not sign the contract and hence ought not to have consequent rights and obligations.

In a well-known move in legal philosophy, Hart argues that there is more to law than 'orders backed by threat'.[44] Indeed, this is a correct statement. However, in light of the above considerations, it can be seen that coercion does not mean only *threat* — at least according to a Kelsenian account of coercion. Therefore, Hart's criticism — at least with regard to Kelsen — is plainly unfair. The point may be developed further. Paraphrasing Hart the law may say *do X regardless of whether you wish or not to do it* but may also say *if you wish to do X, this is how you do it.* The classical distinction between duty-imposing and power-conferring norms applies here. Hart made clear that the former group may be characterised as coercive but the latter cannot. That is because — according to him — for all his predecessors (including Kelsen), coercion implies threat. This observation, the author submits, is an oversimplification.

It is obvious that 'legal rules defining the ways in which valid contracts or wills or marriages are made do not require persons to act in certain ways whether they wish to or not'.[45] Kelsen also acknowledges duty-imposing rules and power-conferring ones, even permissions.[46] In all these cases, however, human conduct is subject to coercion. That is because, although law does not require persons to act in certain ways in all circumstances — eg with respect to contracts, wills, marriage — it does require persons to comply with a given antecedent if they wish a certain consequence to follow in law. In that sense, law limits human conduct-ie human conduct is being coerced — as, in order for a consequence to follow, the subject must comply with what the antecedent prescribes. The law is not simply suggesting or advising a subject that if he wishes to sell his house he may do so by signing a piece of paper called a contract. The law clearly states that if the subject aims to sell his house in such a manner that no third party may have any right whatsoever over the property, he ought to comply with certain conditions prescribed by the norms. In this way, the law is intervening in the subject's conduct by making clear what the antecedent is in order to achieve a given consequence binding in law. To that extent, the subject's conduct is also being coerced — ie the subject's choice is limited — by power-conferring norms. The consequence ought to follow (the contract will be legally binding) independently of the process in the mind of the individual subject to the norm if, and only if, the subject complies with the antecedent prescribed by the legal norm.

As an interpretive matter, it may be questioned whether Kelsen's conception of *sanction* or *coercive sanction* is as wide as the author claims, ie that it covers any normative consequence — including positive consequences like rewards — that the law may connect to a certain state of affairs.[47] Indeed, it is not difficult to find

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44 Hart, above n 3, 27.

45 Ibid.

46 Kelsen, *General Theory of Law and State,* above n 26, 75-ff.

47 My gratitude to the anonymous referees for their suggestions on this section.

passages on Kelsen's *Pure Theory of Law* that seem to be irreconcilable with such a view. Let me cite two:

> According to the Pure Theory, the consequence attached in the reconstructed legal norm to a certain condition is the coercive act of state — comprising *punishment and the civil or administrative use of coercion* -whereby only the conditioning material fact is qualified as *an unlawful act* ...[48]

> What is socially desired is brought about or pursued by attaching a consequence to human behaviour that is the opposite of what is desired – the consequence, namely, of a coercive act (the coercive deprivation of something good, such as life, liberty, or property). The legal system is obviously taking as its point of departure the assumption that the human beings whose behaviour it governs consider this coercive act an evil to be avoided.[49]

Someone may think this is rather explicit: the sanction is unambiguously described as essentially negative in the second quote, and the first quote is equally hard to square with the author's approach: behaviour that is to be rewarded will hardly qualify as an *unlawful act,* which is the condition for the application of punishment. But taking these quotations separately from the Kelsenian overall theory is again misinterpreting what Kelsen says. To be precise with a Kelsenian account we have to make clear:

> 1. 'Contrary to norm is a completely different category from logical contradiction. '[50]
>
> 2. Secondary norms for Kelsen are not power-conferring norms (a type of secondary rules for Hart). Secondary norms for Kelsen are the norms 'establishing sanction-avoiding behaviour ... '[51]

Any legal norm (primary norm for Kelsen) may have a) a norm that is its opposite and/or b) a norm that is its contrary. From there, a) and b) are not the same if we understand Kelsen correctly. Let us consider: the following conditional (1) *if P performs A, then Sought to follow.* In simple terms, *if A ought to be S* where *A* is the illicit act and *S* the sanction. For example, *if a murder ought to follow prison.* From there, a logical contradiction (the opposite norm) to *A* would be *-A*. In the example, for murder (or to kill) would be not to kill. This is a logical contradiction. However, hidden implicitly under the surface of this primary norm (Kelsenian terminology) rests the secondary norm that includes the legal obligation or duty;

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48 Hans Kelsen, *Introduction to the Problems of Legal Theory* (1992) 26.

49 Ibid 28-9.

50 Ibid 30, especially 30 n 26. Expressions such as illegal, unconstitutional and others are different from logical contradiction. Technically, for this paper, opposite is the reverse of something (for *A* would be *-A)* and contrary means an opposing nature or character.

51 Ibid.

that is, the conduct that the law intends to support — ie the secondary norm. In this case, *to respect others' life* (contrary in nature or character to *A)*.

For Hart secondary rules are other rules that refer to primary ones, whether they are rules of change, adjudication, or recognition. When Kelsen refers to secondary norms, he refers to something different. Kelsen still refers to human conduct, the one that is the legal obligation or legal duty hidden implicitly in the primary norm. This way of thinking can be applied to duty conferring and power conferring rules.

Consider the aforementioned conditional (1) *if P performs A, then S ought to follow.* This may be the logical form of, for example, criminal prohibitions and (ignoring the offer/threat issue) laws conferring tax bonuses or bounties on production. But power conferring rules seem to have the structure (2) *if* C *is to follow, then P must perform A.* While (some, many, even all?) instances of (2) may be bi-conditionals, that does not seem to be the case for (1). Hence these seem to be different structures.

What seems to be going on in the neighborhood — some may claim — is that if *P* invokes a power conferring norm, some other duty imposing norm might be triggered-ie (3) *If P performs A, then if Q peiforms B the Sought to follow* where for example the conditional in the consequent corresponds to the fact that any *B* who trespasses on the land I have purchased will be ejected. Indeed, this seems to be Hart's point and so it would affirm rather than collapse the distinction between the two categories.[52] Again, this may be Hart's way of thinking but not Kelsen's.

According to Kelsen the legal norms prescribe mainly legal duties, and by implication, prerogatives. Therein, a legal norm of the form *If A ought to be S* (primary norm for Kelsen) takes into account two facts only, that of the antecedent act and that of the consequent coercive sanction. Additionally, this primary norm states the duty to sanction by the authority in charge of its application. Indeed, a legal norm is a conceptual construction: a concept whose object is free human conduct. Therein, that same conceptual construction points out amongst many possibilities which ones ought to be followed should we want to avoid a result (duty imposing norms) or aim to obtain a certain outcome (power conferring norms).

In tum, the legal duty of the rest of the subjects or individuals, the duty to behave licitly is not expressly mentioned by the primary norm (for a Kelsenian account) but understood by inference — ie it is implicit in the meaning of the primary norm. This is for a Kelsenian account the secondary norm-ie the conduct or behaviour, the legal duty the legislator aims to support. In the simple example *If a murder, ought to be prison* this is the primary norm; from there, the behaviour contrary to that norm is *not to kill others* and the legal duty is *to respect others' lives*.

The same way of thinking, that is the Kelsenian account, can be applied to duty-imposing rules and power-conferring ones. In all cases, we have in law

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52 My gratitude to the anonymous referees for their comments on this issue.

coercive sanctions of a particular kind, as we will see. Similar to what we did with the example of murder and the *if A ought to be S* basic structure, we may do with contract law, the law of torts and any other. Let us consider the case of a loan: if a contract of loan it ought to be the devolution of the amount borrowed to the lender plus interest *(if* C *is to follow, then P must perform A* where C is the loan, *P* is the lender and *A* is the act of lending money). If the lender does not lend the money, there is no loan contract. If the lender lends the money and the borrower receives the money, there is a loan contract. If the expectation is that the borrower pays back the money plus interest then there is a loan contract (if the expectation or duty is not to pay back it may me something else, for example, a donation, but not a loan contract). In that sense, both lender and borrower have their conduct coerced since they ought to behave in a certain way in order to establish a contract of loan. They ought to follow what the law says. The law is not simply advising them or suggesting how to behave should they want to have reciprocal legal rights and duties. And all this is regardless of the fact the borrower may not pay back the money and interest owed and consequently, the lender may seek to enforce the payment legally (coercion *sensu stricto* as we will see).

IV. Even Angels Are Coerced

So far we have seen that:

Sanction	Consequence of human act (or omission) prescribed by social norm
Coercion	Act/omission follows *even* against subject's will

From the above we can infer that law is not the only social order that may use sanctions. Morality and religion as social orders exert a certain form of coercion too.[53] The difference between law and any other social order is *not* whether they prohibit, permit, or command a given act or omission. They are different *not* because of what they prohibit, permit, or command. The difference between law and any other social order relates to *how* they prohibit, permit, or command. In other words, law as a social order conditions certain antecedents to consequences that ought to follow even against our will — ie coercive sanctions.[54] Morality and religion may exert coercion too but of a different kind. We may even argue that our behaviour is limited by morality and religion, and that for a given antecedent — eg murder — a consequence ought to follow — eg rejection, hell; in this sense, morality and religion may be characterised as coercive. However, this kind of coercion is only psychic coercion.

Law may bring about psychic coercion too, but this characteristic does not define law. The motivation may be triggered by psychic impulse but it is not

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53 Kelsen, *Pure Theory of Law,* above n 28, 35.

54 Ibid 62.

necessary to law.[55] In other words, human conduct that complies with what the legal norm prescribes may happen by other motives, for instance moral and religious principles. However, this psychic coercion has nothing to do with the coercive act prescribed by the legal norm.[56] Examples of such coercion would be, say, where someone commits a criminal offence and regrets his action to the extent that he wishes to go to prison and does not further view that punishment as a threat, or someone who commits a criminal offence in order to go to prison only because he is interested in having his meal served daily.[57] Another example would be the case of a person getting married in order to be granted the same nationality as his spouse and therefore, to receive social benefits otherwise limited to nationals. All these sanctions are coercive from the perspective of the law because they ought to happen provided the respective antecedents also happen regardless of whether the subject wants them to happen or not. Whether the subjects in each situation choose to act or not to act in response to psychic coercion is a matter that goes beyond the law. Whether the subject considers the sanction a curse or a blessing has no relevance whatsoever to defining the legal norm. That the legal norm brings about coercive sanctions in the form of punishment or reward means that the legal order prescribes consequences that ought to follow certain antecedents independently of (even against) our will. Indeed, from a sociological and psychological point of view, we may argue whether psychic coercion is present — ie whether the subject acted or omitted to act due to moral, religious, or even practical reasons such as food and shelter — but that is irrelevant to the legal norm in the sense it does not define the law.

To discard the coercive character of law, ingenious theoretical devices appeared in jurisprudence. It has been pointed out that, in a society of angels,[58] coercion is not needed and that the law (at least in theory) can therefore do without it. According to this view, it follows that, if we can demonstrate that theoretically law can do without coercion, then coercion is not conceptually necessary to define the law. The author does not concur in this view. This is because, even in this society of angels, the conduct of such angels will need to be regulated by a certain ethereal law; it thus follows that our angels will have their conduct interfered with by norms and will therefore have to comply with antecedents in order to incur the prescribed consequences that ought to follow. Both Schauef [9] and Yankah[60] criticise Raz's methodology, but only on the surface. They take the view that legal philosophy should focus on law as it is in reality — as it is experienced — and not as it applies in theory. However, these criticisms do not revise Raz's approach or its application. They simply categorically discard the approach as a whole. In other words, in order to discard Raz's methodology, Schauer and Yankah do not only

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55 Kelsen, *General Theory of Law and State,* above n 26, 23.

56 Kelsen, *Pure Theory of Law,* above n 28, 35.

57 Ibid 33.

58 Joseph Raz, *Practical Reason and Norms* (1999) 157-ff.

59 Frederick Schauer, 'Was Austin Right after All? On the Role of Sanctions in a Theory ofLaw' (2010) 23 *Ratio Juris* 1, 17-18.

60 Yankah, above n 5, 1240.

change the rules but also the game. It will, nonetheless, be attempted to follow Raz and show that, even in theory, law is inherently coercive.[61] Let us consider this angelical case in more detail.

Raz introduces us to a society of angels in which its members act (or omit to act) depending on what they think is right. However ideal this society is assumed to be, conflicts can be expected amongst the angels. Law is required to deal with such conflicts. Because the members of this society are angels, we are asked to assume that they will comply with the prescriptions of the law, and that therefore coercive sanctions are not necessary. It follows, from this perspective, that a legal system without coercion is logically possible.[62] The author disagrees.

Faced with the challenge of conjuring up a hypothetical celestial scenario, two main problems arise. Firstly, we need to agree upon the profile of our society of angels — who these angels are, what their characteristics are, and so on. Assuming we follow Raz, these angels are part of a society in which the members act according to what they think is right. The second problem is that these angelical beings need to decide what type of act makes their claims right; they have to agree on what is right or, in the case of disagreement, what counts as right in a particular situation. Let us assume that one of the angels discovers earth. The first question that will arise is *who is the rightful owner of earth?* Undoubtedly, a variety of answers will follow including the following: the first one setting foot on earth, the first one to have a permanent settlement by moving from heaven to earth, or its original creator. Thus, in relation to the second problem, the angels must choose the theoretical background to decide what is just: *res nullius* or *res communis* — ie the originally uninhabited territory belonging to no-one or everyone having a certain right over it. Assuming the angels agree on *res nullius* or *res communis,* one party may still claim that whoever was the first one on the territory is its rightful owner. However, the opposite party may dispute this, supporting its case with historical, legal, political, cultural and geographical evidence, and arguing either a) that it was there first, or b) that being first is not what makes acquisition just, but, rather exploitation of the earth's resources, or the establishment of a community. Indeed, angels need law. It follows from this, that for the sake of avoiding conflicts or solving them when they arise, legal rules are required. If legal rules are required, angelical conduct will be somehow interfered with. If angelical conduct is interfered with, angelical conduct is not free from limitations.[63] In other words, if an angel

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61 Kelsen, *Pure Theory of Law,* above n 28, 35.

62 Raz, *Practical Reason and Norms,* above n 58, 158.

63 Freedom or liberty can be defined — in principle — as the ability to decide upon one's actions and omissions. Negative liberty can be seen as the absence of interferences, freedom from restraints (eg constraints, barriers, etc); positive liberty is the freedom to form and make actual a rational and reasonable plan of life. For further analysis see Isaiah Berlin, *Four Essays on Liberty* (1969). For different interpretations on the topic see Matthew H Kramer, 'On the Unavoidability of Actions: Quentin Skinner, Thomas Hobbes, and the Modem Doctrine of Negative Liberty' (2001) 44 *Inquiry* 315; Philip Pettit, 'A Definition of Negative Liberty' (1989) 2 *Ratio* 153; and many others.

wants earth to be his own, he will have to follow what the law says in order to have rightful ownership. The consequence (earth's rightful ownership) ought to follow independently of the process in the mind of the angel subject to the norm if, and only if, the angel complies with the antecedent prescribed by the legal norm. Hence, even in the case of a society of angels, legal norms require coercion. That does not mean, as we will see in the next section, that actual coercive enforcement will be necessary amongst angels. This is because, as angels, we assume they will follow what they think is right. Therefore, although two angels may not agree at first who earth's rightful owner is, they both agree that they will do what is right. If the manner in which right is defined derives from the law, and the angels bring their dispute to the law, then they know that it is for the law to give them the answer on earth's ownership.

Thus far, this paper has challenged Hart's arguably dogmatic view that coercion is not an element central to law. Certain different understandings have been disentangled and we have seen that sanctions may take the form of coercion but are not necessarily required to do so. However, when they do take this form, they are inextricably intertwined with law. Whether force is deployed or not is a different aspect in this enquiry. We will see in the next section of this paper that actual *force* may be applied but this does not necessarily have to be done. For a narrow account coercion may be identified with the potential use of force in particular cases. Nevertheless, force does not need to be present in order to have coercion as it is a factual question as to whether power is actually used.[64] Therefore, it is misleading 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, for example, Kelsen's theory oflaw.[65] It is correct to say that if we do not comply with the rules of contract, *force* will not be used — this is a narrow account of coercion or coercion *sensu stricto.* However, to state that not complying with the rules for formation of contract will not have legal consequences is something different. That is because, even in cases such as the ones sub-examined, the subject has his conduct coerced, as if he does not comply with the rules of contract, there will be no contract and, therefore, no consequent rights and obligations. This is a broad account of coercion or coercion *by default.* In this regard, coercion is *generally* or *by default* part of the law.

V. Coercion May *Occasionally* Not Be Part of the Law: Coercion *Sensu Stricto*

There are several ways in which human behaviour may be motivated and coercion is just one of them. There are situations in which our conduct may be somehow limited with regard to what we ought to do or not to do — antecedent — in order for something else to happen — consequence. It is in these situations that our behaviour is coerced. More specifically, coercion may refer to the use of force but

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64 Green, above n 15, 8; Kelsen, *General Theory of Law and State,* above n 26, 29, 30.

65 Green, above n 15, 9.

need not necessarily do so. Indeed, it will be argued that there are other means to motivate subjects and the use of coercion will be rejected in certain cases. It is intended to show that *occasionally* law may do without coercion.

1. *Motivation*

In 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 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 happen only when more than one agent is involved. Any community or population consists of subjects who are different in many senses; pluralism, as Rawls ventures,[66] is a permanent feature of society that cannot be ignored. Therefore, as in the case of the civil societies in Rawls' *A Theory of Justice,* it is assumed that subjects in their relations recognise some *rules of conduct* and act upon them.[67] However, as in any circumstances in which we have agents of different types, there will also be identity and conflict of interests.[68] As a result, criteria are needed for regulating their inter-subjective interference. Even Raz's angels will need criteria too as we have seen in the previous section.

Social orders such as religion, morality, and law exist in order to let subjects and social aggregations[69] have their conduct regulated within an interactive framework of society. As Kelsen says such orders make subjects 'refrain from certain acts which, for some reason, are deemed detrimental to society, and to ... perform others which, for some reason, are considered useful to society'. [70] In this way, law, as with any other social order, may motivate subjects to act or refrain from acting directly or indirectly.[71] Law 'may attach certain advantages to its observance and certain disadvantages to its non-observance'.[72] Even though the former 'plays a far more important role'[73] in social reality, sanctions do not only

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66 Rawls refers to pluralism as a 'permanent feature of a democratic society.' See Jolm Rawls, *Justice as Fairness: A Restatement* (2001) 84.

67 Jolm Rawls, *A Theory of Justice* (revised ed, 1999) 4.

68 In this regard Rawls says that

> There 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.

Ibid.

69 Robert Nozick, *Anarchy, State, and Utopia* (1974) pt 1 ch 2.

70 Kelsen, *General Theory of Law and State,* above n 26, 15.

71 Ibid.

72 Ibid.

73 Ibid 17.

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 negative incentives'. [74] Unfortunately, Schauer falls victim to oversimplification too as he defines advantages or positive consequences in terms of rewards only.[75] Kelsen goes further and asserts that social orders may even function without advantages or disadvantages and still 'require conduct that appeals directly to the individuals'.[76] Therefore, legal rules may — according to a Kelsenian view — specify duties but also confer powers — therefore, all three fundamental deontic concepts, obligation, prohibition, and permission are included.[77]

In brief, normative orders exist to enable subjects to interact with each other within social aggregations in order to co-exist in harmony with each other as otherwise conflicts of interest may occur. These social orders — law being one such order-are the set of rules that help to promote inter-subjective interaction within a framework of tolerance. Such orders may do so by motivating subjects either directly or indirectly. Furthermore, whether this motivation is direct or indirect, it may be in the form of negative but also positive consequences.

2. *Coercion and force*

Evidently, coercion is an example of a direct means to motivate behaviour-ie you ought to act or not to act in such a way in order for this or that consequence to happen. However, coercion does not imply *per se* the use of force. This is another difference between the Hartian and Kelsenian accounts 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'.[78] In tune with this, Schauer and Yankah's accounts of the inclusion of force as a way to characterise coercion is rather hasty. Schauer maintains

> 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 ...[79]

In tum, Yankah tells us that 'Kelsen … conceived of law as simply proscribed norms the violation of which give rise to a corresponding sanction' understanding 'sanction [as] a penalty attached to the breach of a norm ... '[80] These

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74 Schauer, *The Force of Law,* above n 4, 7.
75 Ibid ch 8.
76 Kelsen, *General Theory of Law and State,* above n 26, 15.
77 Pablo E Navarro and Jorge Rodriguez, *Deontic Logic and Legal Systems* (2014) 18.
78 Kelsen, *General Theory of Law and State,* above n 26, 18.
79 Schauer, *The Force of Law,* above n 4, 10.
80 Yankah, above n 5, 1216-17.

accounts are not true; or at least, they are not an accurate description of the Kelsenian view.

Sanctions are coercive measures in the sense that consequences happen *independently* of-not necessarily against-the subject's will. Thus far, a broad account of coercion or coercion *by default* has been presented, as per the previous sections in this paper. Coercion-so defined-has two different facets: rational coercion, and, physical coercion.[81] Legal norms, it is argued, are coercive in one sense but not necessarily in the other. More specifically, all legal norms apply rational pressure or bring about rational coercion but not all legal norms have the ability or need to deploy physical coercion.

On the one hand, because a legal norm brings about rational coercion a given consequence ought to follow an antecedent, not as a process in the mind of the individual subject to the norm — that is for other normative systems such as morality and religion — but as an objectively prescribed consequence. This is common to all legal norms and in this sense all norms are coercive. Physical coercion, on the other hand, may follow a given antecedent but does not necessarily have to do so. After all, some coercive sanctions may, *if and only if necessary,* be applied by the employment of physical force.[82] For clarity, this last account will be named coercion *sensu stricto.*

Thus far, all normative systems follow a similar structure in that they prescribe a consequence to a given antecedent in order to regulate human conduct. When the consequence ought to follow as objectively prescribed by the norm, independently of — even against — the process in the mind of the individual subject to that norm, we have sanctions that are coercive. More specifically, these coercive sanctions are *rationally* coercive — ie the consequence ought to follow the antecedent regardless of the process in the mind of the subject. In addition to this, some coercive sanctions may be *physically* coercive too — ie in the event that the subject does not follow the consequence. Law has the exclusive prerogative in comparison with all other normative systems to *force* the subject. Let us be even more precise here.

The use of *force* — ie physical coercion — is the exclusive prerogative of law as a social order.[83] However, that does not mean that the use of force as exclusive to law defines it. In other words, force is instrumental to law as a form of coercion — ie physical coercion. However, that does not imply that coercion is defined only as force — ie force is but one of the modes coercion presents; or that force is the only form of coercion law has at its disposal. It only means that force, as a form of coercion, is exclusive to law. This is also an accurate reading of Kelsen's thesis.[84]

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81 Ibid 1226-ff.

82 Kelsen, *General Theory of Law and State,* above n 26, 19.

83 Kelsen, *Pure Theory of Law,* above n 28, 33-7.

84 Kelsen, *General Theory of Law and State,* above n 26, 18-21. For an example of post-Hartian misinterpretation of Kelsen's view see Green, above n 15, 7. Green

Law may be defined as a set of legal rules or norms. These legal rules are statements characterised as being hypothetical — ie in the hypothetical case a certain antecedent ought to have a respective consequence. That consequence may be either positive or negative. In the case of law as a social order, whether the consequence is positive or negative, is, in all cases, independent of the subject's will. Coercion *sensu stricto* may be used in the event 'resistance is encountered in applying the sanction'.[85] In that sense — and that sense only — coercion is an element that has to be considered in the quest to define what law is. Kelsen himself made it clear:

> If '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, ie a sanction. In particular, the general norms must be norms in which a certain sanction is made upon certain conditions ...[86]

However, that does not mean that actual force — ie a broad account of coercion — will be used. Therefore, law may *occasionally* function without coercion *sensu stricto.*

VI. Conclusion

The force of law is, unquestionably, one of the purported elements of the law that legal philosophy will continue to discuss in the years to come. Whether it is a necessary or sufficient element, it is plain that it is an integral element of law and, therefore, should be included in any analysis ofthe nature oflaw.

For simplicity, it is suggested that coercion in law should be viewed from two different standpoints: a) a narrow account of coercion or coercion *sensu stricto;* and b) a broad account of coercion or coercion *by default.* Following a Kelsenian approach, the rules that constitute law are hypothetical statements relating antecedent with consequent regardless of the process in the mind of the subject — ie rational coercion. Specifically, the consequent is a sanction that may-but is not necessarily required to — incorporate the use of force — ie physical coercion. Ergo, a sanction is coercive as long as the consequence that ought to follow the antecedent is no longer dependant on the subject's will-ie a broad account of coercion. We are in the presence of coercion *sensu stricto* when the use of force may be required — ie a narrow account of coercion. This, however, does not mean that force has to be actually deployed.

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groups together Bentham, Austin, and Kelsen and tells us that '[t]hey meant that law not only necessarily has such powers, but also that it necessarily uses them'.

85 Kelsen, *General Theory of Law and State,* above n 26, 18.

86 Ibid 45.