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Abstract
The Author examine Schauer's last book "the Force of Law" and explain that the American philosopher is certainly not a fully-fledged normativist but he thinks that coercion is an element of the legal order and of law. The Author, however, suggest to leave aside the role of coercion in the law, and points out that Schauer's book gives rise to various interesting reflections on law in general. In order to understand the need to use force within the law, it is useful to refer to Schauer's analyses of the psychological attitudes of individuals and the extent to which these impinge upon their behavior with regard to the legal demands made by a society. In any case, the reasons of the Society must prevail over individual ones.

Key words: the force of law, coercion, legal positivism

Riassunto
L'Autore esamina ultimo libro di Schauer " La Forza della Legge " e spiega come il filosofo americano non possa essere considerato un normativista a pieno titolo ma questi certamente ritiene che la coercizione sia un elemento dell'ordinamento giuridico e del diritto. L'Autore, tuttavia, suggerisce di non enfatizzare il ruolo di coercizione nella Legge, e sottolinea il libro di Schauer che dà luogo a varie riflessioni interessanti sul Diritto in generale. Al fine di comprendere la necessità di usare la forza nel rispetto della legge, è utile fare riferimento alle analisi di Schauer degli atteggiamenti psicologici degli individui e la misura in cui ciò influisca sul il loro comportamento rispetto alle richieste aderenza alle norme da parte della società. In ogni caso le ragioni della società debbono prevalere su quelle individuali.

Parole chiave: la forza del diritto, coercizione, positivismo giuridico

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1. Introduction

In his latest book "The Force of Law" Frederick Schauer presents detailed reflections on the nature of law, asking in particular what its defining characteristic is which distinguishes it from other types of rule that regulate the life and conduct of individuals and society as a whole, because since time immemorial there have been debates over whether people should obey the law simply because it is the law. Despite the common understanding of law as coercive a number of important legal theorists, including H. L. H. Hart and Joseph Raz, have considered that law is not inherently coercive. This position stems from the rejection of earlier jurisprudential models, forwarded by Austin and Bentham, which described law as little more than coercion sponsored by the state. In noting what was wrong in the older models, that law is importantly normative and authoritative, Schauer reintroduces what other theorists have dismissed what was right, that law is inherently coercive. Consequently, Schauer identifies force as the key element which characterises the law, a force which is not external to the law but rather inherent within and correlated to it. Contrary to many legal theorists who argue that the efficacy of the law results from the influence of external forces and factors, including in particular the fact that the law and rules are internalised by human beings on the basis of a complex social process, and that this internalisation occurs without any constraint or coercion, Frederick Schauer reassesses the role of the force that is inherent within the law. He ends up supporting the opposite view, thereby seeking to demonstrate that coercion, namely the constraint inherent within the law, establishes a profound distinction between the function played by the law and the role played by internalised rules, thereby seeking to demonstrate that the force inherent within the law is greater than the influence of social rules that impinge upon the thoughts and actions of human beings. Carrying out a detailed empirical and philosophical analysis, Schauer presents a social reality which conforms to the law on the basis of the sanction and respect for legal obligation, thereby demonstrating that the efficacy of the law is fundamentally dependent upon its coercive force, claiming that the law provides individuals with an indication of how they must behave by threatening to subject them to negative consequences and sanctions in the event that the behaviour demanded is not complied with. For Schauer, coercion thus performs an essential function within society, even though human beings in general comply with the law more out of respect for authority than a fear of sanctions, thus demonstrating that its force is more pervasive than the efforts of the state to control a minority of disobedient citizens. Schauer thus asks whether what the law commands differs from what people think is the right thing to do, i.e. should they follow the law just because it is the law. There is also an important empirical question as to whether people actually obey the law simply because it is law. While much behaviour undoubtedly complies with the law, it is important to distinguish between engaging in behaviour because of the law and engaging in behaviour because of what the law may do to us if we do not comply. Thus, the important point is what people think in relation to the behaviour that is required, i.e. whether or not it is right to obey the law. The only thing than counts is the legal system from which the law derives its force. In his concluding arguments, Schauer argues that when human beings believe

that the action they should take differs from that required by the law, compliance with the law is less widespread than might be assumed. Coercion, along with force, thus becomes a necessary element of the law and the dismissal of the importance of coercion in much of modern jurisprudence is a mistake which needs to be corrected.

However, before talking about actual coercion it is necessary to differentiate between the various types of rule to which coercion attaches. For our present purposes this means the rules of the legal system, which are rightly defined as legal rules in that they are able to determine the general legal order, i.e. objective law, on a generally stable basis. The aim of a legal norm is to establish common conduct according to values that are shared throughout society. The goal is to regulate the behaviour of individual members of the group in order to ensure its survival and to pursue the purposes considered by it to be pre-eminent. In general, legal norms are considered to be equivalent to rules of behaviour, i.e. to a command requiring a certain course of action from an individual. The coercive nature of the legal norm is thus indispensable. This central element of the legal norm is decisive in differentiating it from other types of norm, such as moral or religious rules, which belong to a non-coercive sphere in the sense that they are not commands associated with a requirement of compliance. The fundamental characteristics of a legal norm are: its general nature, in that it does not relate to an individual person but to a class of persons; its abstract nature, in that it does not refer to a specific individual case; its imperative (or coercive) nature, in that the norm laying down a substantive requirement is associated with a rule imposing a sanction; its coercive nature, in that it must mandatorily be complied with and failure to comply with it will be punished by the imposition of a sanction on the transgressor; its positive nature, in that it is posited by the state or another public authority; and its bilateral nature, in that it recognises a right as being vested in one party whilst imposing a duty or obligation on another. The legal norm must not under any circumstances be confused with the law. The legal norm is a general and abstract prescription which identifies and asserts the interests associated with a social group and defines the procedures governing their protection and specific satisfaction, compliance with which must therefore be guaranteed. Legal norms are such because they emanate from legal authority as they are issued by the competent state authority and properly promulgated. They have a strict normative significance. As regards their normativity they regulate the conduct of individuals, and as regards their generality they are binding on an indefinite number of people and in an indefinite number of cases, and may be enforced by the power of the state. State laws rely on enduring effectiveness; therefore legal norms are based on effectiveness. Today the meaning of the legal norm has thus expanded, precisely thanks to the abandonment of the understanding of the normative as prescriptive (mandatory, imperative). In fact, the term norm is no longer used within legal language solely to refer to prescriptive propositions, but also to permissive and empowering rules. Permissive rules, which negate the effects of previous imperative rules, give permission to do something which would otherwise be prevented by another norm: permissive norms thus grant a power, whilst prescriptive rules deprive power. It must be noted also as regards the meaning of norm as a prescription that prescriptive force is not implemented with equal

intensity by all legal norms. There are in fact unconditional norms as the obligation to which the addressee is subject is not conditional upon whether or not a condition obtains, as well as conditional norms in which the obligation is by contrast subject to a condition.

Aside from legal norms which prescribe conduct that is binding as a matter of law, there are also ethical, social, moral or religious norms which only bind the *internal forum* of our conscience. Social norms are perhaps the most widespread and the sociological analysis of social norms by sociologists and sociologists of law has taken on particular significance over the last few decades. Sociologists describe norms as informal understandings that regulate the behaviour of individuals[1] (social psychology has however adopted a more general definition, recognising smaller social units that may endorse norms separate or in addition to societal expectations). Such norms are considered to exist as collective representations of acceptable group conduct as well as individual conduct.[2] Within social psychology, the role of norms is emphasised by guiding behaviour as a mental representation of appropriate behaviour[3] through the promotion of pro-social behaviour. According to a psychological definition of the behavioural component of social norms, there are two dimensions to norms: the extent to which certain behaviour is displayed, and the extent to which the group approves that behaviour.[4] Both of these dimensions can be used in normative messages to alter norms and subsequently alter behaviour.

Although they are not considered to be formal laws, social norms still promote a great deal of social control. Social norms can be enforced formally, that is through sanctions, or informally through language and non-verbal communication. Because individuals often derive physical and psychological resources from group membership, groups are said to control and stimulate individuals. Social norms also allow an individual to assess what behaviour the group regards as important for its existence in that they represent a codification of belief. Norms create conformity that allows people to become socialised within the culture in which they live. Social norms are learned through social interaction. Groups may adopt norms in a variety of ways. Norms can arise formally where groups explicitly set out and implement behavioural expectations. However, social norms are much more likely to develop informally, emerging gradually to control behaviour. Informal norms represent generally accepted and widely sanctioned routines that people follow in everyday life.[5] These informal norms, if broken, may not provide for formal legal punishment or sanctions, but do encourage reprimands and warnings. Deviance from social norms is defined as non-conformity to a set of norms that are accepted by a significant number of people in a community

[1] Marshall, G. (1998), Oxford Dictionary of Sociology, Oxford, Oxford University Press.

[2] Lapinski, M. K., & Rimal, R, N. (2005). *An explication of Social Norms*. Communication Theory, 15 (2), 127-147.

[3] Aarts, H. & Dijksterhuis, A. (2003). *The Silence of the Library: Environment, situational norm, and social behavior*. Journal of Personality and Social Psychology, 84 (1), 18-28.

[4] Jackson, J. (1965). *Structural Characteristics of Norms*. In I. D. Steiner & M. Fischbein (Eds.), Current Studies in Social Psychology, 301-309.

[5] Gerber, L. & Macionis, J. (2011), *Sociology*, 7th Canadian Edition, Toronto, Pearson Canada, p. 65.

or society,[6] that is if group members do not follow a norm, they become labeled as deviant (labeling theory). In sociological terms they are considered outcasts of society. Group tolerance for deviation varies across membership; not all groups receive the same treatment in the event of norm violations.

* According to the theory of normative conduct, social norms may be divided into descriptive norms and injunctive norms. Descriptive norms depict what happens, while injunctive norms describe what should happen. A descriptive norm defines people's perceptions of what is commonly done, and signifies what most people do without assigning judgment. An injunctive norm, on the other hand, transmits group approval concerning a particular pattern of behaviour, that is, it dictates how an individual should behave.[7] Unwritten rules that are understood and followed by society are prescriptive norms that indicate what we should do. Proscriptive norms, by contrast, are similarly society's unwritten rules about what one should not do.[8]

2. The role of coercion within continental legal systems. Norberto Bobbio and Hans Kelsen

2.1 The definition of coercion

First and foremost, what is coercion? Derived from the Latin *coercio*, it means a pressure, a constraint that is exerted on a person in order to bring about a particular form of behaviour which would not otherwise be engaged in, or a change in that person's intention. Coercion is thus associated with repression, constraint or inhibition. It involves various types of forceful actions that violate the free will of an individual in order to bring about the desired response. In general, it is based on the threat of physical or other violence with the aim of conditioning a person's behaviour. These actions can include, but are not limited to, extortion, blackmail, torture, and threats. Such actions are used as leverage to force the person to act in a manner contrary to her own interest. Coercion may involve the infliction of physical pain or psychological harm in order to enhance the threat. The threat may secure cooperation by or the obedience of the person being coerced. The purpose of coercion is to substitute one's own aims for those of the person being coerced. Various forms of coercion may be distinguished, depending upon the type of injury threatened, its aims and scope and its effects, each of which will have different legal, social, and ethical implications.

[6] Applebaum, R. P., Carr, D., Duneir, M., & Giddens, A. (2009). Conformity, Deviance, and Crime. Introduction to Sociology, New York, N. Y.: W. W. Norton & Company, Inc., p. 173.

[7] Schultz, Nolan, Cialdini, Goldstein, Griskevicius. (2007) The Constructive, Destructive, and Reconstructive Power of Social Norms. psychological Science, 18 (5), 429-434.

[8] Wilson, K. L., Lizzio, A. J., Zauner, S. & Gallois, C. Social Rules for managing attempted interpersonal domination in the workplace. Influence of status and gender. Sex Roles, 44. 129-154.

It is said that legislation is based on coercion and that the threat of sanctions aims to ensure that people do not commit unlawful acts out of fear for the negative consequences imposed by law. Legal coercion is a typical element of the rule of law and involves the imposition of sanctions which are applied in the event that individuals violate certain norms imposing limitations on behaviour. In other words, in order for a norm to be considered as legal, it must be supported by a coercive power which provides for the use of force against any breaches.

In order to explain and justify the necessary function of coercion within law, Schauer draws above all on the Anglophone legal tradition (common law) and the ideas of Jeremy Bentham and John Austin, including in particular their conceptions of sanctions and coercion as effective means of fulfilling the goals of the law. In an important article from 2010,[9] Schauer sketches out the problems which he would go on to consider in greater detail shortly afterwards in *The Force of Law*. Analysing Austin's theory of sanctions and coercion along with Hart's criticism of that theory, Schauer reassesses Austin's ideas concerning the role of the sanction and coercion within law, proposing a synthesis between Austin's position and the criticism brought by Hart and other philosophers of law writing in the Hartian tradition. Thus, the two opposing positions appear to be reconciled.

Schauer stresses first and foremost that part of the misunderstanding between the two theories results from a misinterpretation of the linguistic distinction between being obliged and being under an obligation. The claim of law and one of the central tasks of jurisprudence - as Schauer rightly claims - is to create obligations, or most specifically legal obligations, which must not however be confused with other types of obligation such as moral obligations.[10] In fact, commands without sanctions - as Austin argues - lack coercive force and would deprive the law of its power to impose itself as law, and consequently of its status as a source of legal obligations. Schauer points out that it is the threat of sanctions, therefore, that gives the law its normative force and authority, and which consequently creates the idea of legal obligation.[11] In fact, the law is binding because of its capacity to punish in the event that its dictates are disobeyed. However, according to Schauer, if the law is reduced to an instrument for creating only duty-imposing and not power-conferring rules, the account of law as law will provide only a partial description of its function, offering a highly restricted perspective on the law. Schauer thus criticises Hart and modern analytical jurisprudence for having limited and underestimated the role played by sanctions within the law, reducing their task to a mere contingent function, as had by contrast been correctly established in the past by Austin. Schauer explains that this is due to the following misunderstanding, namely the notion that most human beings obey the law out of commitment to the law and not in order to avoid sanctions, as Hart and most of modern legal theory seeks to

[9] Schauer F., *Was Austin Right after All?: On the Role of Sanctions in a Theory of Law* , Ratio Juris, Vol. 22, 2009;
[10] ib 3
[11] ib 4

argue, which is however a distortion of reality.[12] Schauer thus poses a question which is more than legitimate, asking what legal theory is designed to accomplish, and thus what criteria distinguishes a satisfactory account of law from a limited one. Thus, the task of the jurist is to decide on the essential features of law, and not simply to provide a descriptive account of law on the basis of its factual externalisation; in other words, the law must be described how it is and appears, and not how it should be. This means that it is necessary to establish the relationship between legal obligations and sanctions. Schauer is very clear about the fact that, in order to understand the relationship between legal obligations and sanctions it must first and foremost be reiterated that when referring to an obligation in relation to the law, we are not referring to an obligation *sic et simpliciter*, but rather a legal obligation. It is precisely the fact that the obligation is a legal obligation and not a simple obligation which sets apart legal obligations from all other obligations that do not form part of the legal system, whether they be moral or any other kind, and which thus makes the sanction an essential feature of the legal obligation itself. More specifically, the legal obligation is a statement of what conduct is mandated if we presuppose some rule or system of rules. Schauer specifies that sanctions are not essential components of duties *simpliciter*, although if law is different from other rule systems, then it is legitimate sanctions that serve to distinguish the law because a sanction-free account of law is an account that does not fit the facts of the law as we see them.[13] "And thus the question would not be one about the prevalence of sanctions in real legal systems, but about the admittedly important question whether law could exist in a world without sanctions".[14] However, to assert that sanctions and coercion are central to the concept of law means to define the law as normative, i.e. to assert that the law externalises itself as legal normativity. The reason why normativity is an important aspect of the law, i.e. law's obligation-creating capacity, lies for Schauer in the fact that that it is crucial to distinguish between the identification of distinctive features of law and of important features of law. And if the purpose of legal philosophy is to determine what makes law different from other systems, then coercion and sanctions must have a dominant place in law.[15] Jurisprudence should not just provide a descriptive empirical account of what law actually is, but should seek a deeper and less practical understanding of it. Two centuries later, in the 20th Century, the sanctions theory of law - typical of Bentham and Austin - was revisited and elaborated with greater theoretical vigour by continental lawyers. Two of the greatest and most authoritative jurists from the continental tradition, the Austrian Hans Kelsen (1881-1973) and the Italian Norberto Bobbio (1909-2004), both stressed the central role in legal systems of coercion and sanctions within their legal theory writings. This aspect of the continental legal tradition, which is by no means distant or different from the Benthamite and Austinian Anglophone tradition, is undoubtedly significant and useful in achieving a full understanding of the argument presented by Schauer in *The Force of Law*. Although Schauer does not

[12] ib 9.
[13] ib 16.
[14] ib 9.
[15] ib 17.

expressly refer to the coercion and sanctions models from the continental tradition (civil law), the similarities between his conception of the need for coercion within law and the continental conception are evident, and also important.

Every legal order, whether part of the common law or civilian traditions (although the common law lacks a genuine theoretical conceptualisation of its legal order,[16] as has by contrast been provided within the civil law tradition), is rooted in a particular conception of the legal order, i.e. the body of legal norms that regulate the life of a community, the organisation of the state and legal relations between the state and the members of society. There is thus a close connection between the legal order and a social group. One of the main characteristics of the legal order is its mandatory status. It represents the overall body of legal imperatives that are binding for a particular collectivity. The legal order lays down the general body of institutions on which civil life is based and its purpose is to set rules of conduct to discipline the collective life of individuals. Every legal system is thus an organisation of rules and behaviour. It draws on institutions and a coercive apparatus (parliament, courts, etc.) in order to guarantee its own existence and that of the community. The theory of the legal order has a particular importance within the civil law tradition. There are essentially three different conceptions of the legal order: the normative, the institutional and the relational. The normative theory (Kelsen, Bobbio) to which we refer here defines the legal order as a complex or system of general positive legal rules (formal laws) or individual rules (administrative acts or court rulings), ordered according to a basic norm, and stresses above all the objective aspect of the legal order, that is the foundation of the law in the state. Its main characteristic is the division between branches of state and control over the acts and laws of the state.

In the search for parallels with Schauer's ideas concerning the role of coercion in law, it is now important to set out the view of Kelsen and Bobbio on the role of force and coercion within law, with particular reference to Kelsen's, which has turned into something of a benchmark in Europe and also served as an inspiration for Bobbio, along with many others. Both before and after Kelsen, eminent philosophers described the legal order as a coercive system based on sanctions,[17] and Kelsen himself elaborated a genuine "*Zwangstheorie*" (theory of coercion). First of all, Kelsen explains that "Law is a specific social technique which consists in bringing about the desired social conduct of men through the threat of a measure of coercion which is to be applied in case of contrary conduct".[18] Coercive orders – according to Kelsen – are a reaction with a coercive act to certain events which are considered to be undesirable as they are

[16] Legal order: The whole system of rights and duties relating to law and jurisprudence and to the administration of justice.

[17] I. Kant, Metaphysik der Sitten, Erster Teil, Rechtslehre, Einleitung, §D, 1797; R. von Jhering, Der Zweck im Recht, vol. I, 1877, p. 318 et seq; J. Bentham, Of Laws in General, 1782; J. Austin, Lectures on Jurisprudence, 4th edn., 1879; K.F. Röhl / Ch. Röhl, Allgemeine Rechtslehre, 3rd edn., 2008, p. 190 et seq; A. Thon, Rechtsnorm und subjektives Recht, 1878, p. 8.; C. Schmitt, Über die drei Arten des rechtswissenschaftlichen Denkens, 1934, p. 18.; K. Binding, Handbuch des Strafrechts, vol. 1, 1885; E. R. Bierling. Zur Kritik der juristischen Grundbegriffe, part I, 1877, p. 139 et seq ; W. Windelband, Normen und Naturgesetze, in: Präludien, Freiburg i. B., 1884, p. 211 et seq.

[18] GTLS 19

negative for society. They command a certain human behaviour by attaching a coercive act to the opposite behaviour.[19] Above all, in describing the legal order as a coercive order, Kelsen insisted at root on the coercive act, explaining the characteristics of *Zwang* as early as 1911 in his first fundamental work, *Hauptprobleme*,[20] which he also developed further in his later major publications. In an important essay[21] he asserts that the specific content of norms is *Zwang*. "The law - according to Kelsen – is a norm *that prescribes the use of force*",[22] by which he means that it is comprised of prescriptive norms, or ought propositions ("Soll-Sätze", or normative propositions) expressing a command requiring obedience (*Gehorsam*). The law must be followed because "the law is in fact a coercive order, i.e. a norm prescribing the use of force".[23]

After arriving in the United States in 1940, Kelsen revisited and elaborated that idea further in various wrings, analysing above all the concepts of coercion, coercive order and sanction in his two fundamental works *General Theory of Law and State* from 1945 and 1960 and in the second edition of *Reine Rechtslehre*.[24] In an important article[25] published in 1941 we writes that "A social order that seeks to bring about the desired behaviour of individuals by coercion is called 'coercive order'" and this type of order is opposed by "all other social orders that provide reward rather than punishment as sanctions. Those that enact no sanctions at all rely on the technique of direct motivation and their efficacy rests not on coercion but on voluntary obedience".[26] Moreover, "coercive orders are based on measures of coercion as sanctions and orders that have no coercive character (moral and religious orders) rest on voluntary obedience",[27] the law being a specific social technique and not an end consisting in the establishment of a coercive order by means of which a community can apply measures of coercion established by the order itself. Coercive orders command a certain human behaviour by attaching a coercive act to the opposite behaviour, that is, they react against certain situations that are regarded as undesirable insofar as detrimental to society.[28] Alternatively, to be more precise, coercion amounts to action taken by the legal community against a socially detrimental fact,[29] because it is a function of every social order to bring about certain reciprocal behaviour amongst human beings and to ensure that they refrain from certain acts deemed detrimental to

[19] PTL (RR II) 33

[20] H. Kelsen, Hauptprobleme, p. XII, 22, 45, 128, 131, 205 et seq, 212 et seq, 341.

[21] Kelsen, Eugen Hubers, Lehre vom Wesen des Rechts, Schweizerische Zeitschrift für Strafrecht, 34. Jahrgang, vol. 4, 1921, p. 226.

[22] ib 226

[23] ib. 235.

[24] GTLS 1945, RR II English edition

[25] Kelsen, Law as a Specific Social Technique, in : What is Justice? Justice, Law, and Politics in the Mirror of Science. Collected Essays. Berkeley and Los Angeles, University of California Press, 1957, p. 231-256.

[26] Ib, 235.

[27] ib. 235.

[28] Kelsen, Pure Theory of Law, Translation from the Second Revised and Enlarged German Edition by Max Knight, The Lawbook Exchange, Union, New Jersey, 2002, p. 33

[29] ib 34

society.[30] According to Kelsen: "The order may attach certain advantages to its observance and certain disadvantages to its non-observance. ... Behaviour conforming to the established order is achieved by a sanction provided in the order itself".[31] According to this meaning, sanctions are regarded as a reason for engaging in desired behaviour.[32] A coercive act considered as a sanction, acting against detrimental human behaviour, is the opposite of the lawful behaviour that is considered to have been commanded or to be legal, with the result that the behaviour mandated avoids the sanction.[33] He adds that: "In this sense, the law is a coercive order".[34] Moreover, "that the law is a coercive order does not mean that it enforces the legal behaviour. The behaviour is not enforced by the coercive act because the coercive act is to be executed against an illegal behaviour. This is the reason why a coercive act is considered as a sanction".[35] What Kelsen means is that it is the essence of a legal rule that the sanction prescribed be executed by the organ established by the legal order in situations in which an individual does not behave lawfully and violates the legal rule.[36] Furthermore, he makes an important clarification in stressing that when we speak of enforcement we do not refer to the coercive measure which the organ must execute, but to the subject's fear that the measure will be taken in the event of non-compliance; hence, this form of coercion should be termed psychic compulsion, which is coercive if it furnishes a reason for the behaviour desired by the legal order.[37]

Kelsen clarifies in the first edition of the *Reine Rechtslehre* that what makes human behaviour illegal is not an immanent quality, nor is it related to a meta-legal norm, a moral value or a value transcending positive law. What makes behaviour unlawful is its classification under the reconstructed legal norm (*Rechtssatz*) as the condition of a specific consequence and the provision that the legal system will react to the behaviour with a coercive act.[38] Kelsen argues that if coercion is an essential element of law (which is not accepted by Schauer), then the norms comprising a legal order must be norms stipulating coercive acts, i.e. sanctions.[39] Thus, Kelsen's assertion that coercion is an essential element of law does not refer to the behaviour of the individuals who are subject to the legal order, but to the legal order itself and the fact that the legal order provides for sanctions, and in addition that it is this fact that distinguishes it from other social orders; on this view, the law thus constitutes the rule according to which mankind actually behaves.[40]

[30] GTLS, 15.
[31] ib. 15
[32] PTL (RR II) 35
[33] ib
[34] ib. 19.
[35] PTL 35
[36] Ib. 23
[37] Ib. 23
[38] Paulson, S. L. (2013). Kelsen, Hans. *The International Encyclopedia of Ethics* at 26
[39] GTLS 45
[40] Ib. 25, 26

Furthermore, a rule is a legal rule not because its efficacy is backed by another rule providing for a sanction. The problem of coercion - Kelsen explains[41] - is not to secure the efficacy of rules, but the content of rules. Coercion consists in the fact that specific acts of coercion, referred to as sanctions, are provided for by the rules of the legal order and "The element of coercion is relevant only as part of the contents of the legal norm…".[42] He specifies that "This doctrine does not refer to the actual motives of the behaviour of the individuals subjected to the legal order, but to its content".[43] In particular, "A rule is a legal rule not because its efficacy is secured by another rule providing for a sanction; a rule is a legal rule because it provides for a sanction".[44] He adds that the assumption that a certain form of human behaviour entails a legal sanction because it is a delict (i.e. an illegal act) is not correct; on the contrary, "It is a delict because it entails a sanction".[45] In fact, the delict is the condition for the sanction.[46] As regards the delict-sanction relationship, Kelsen clarifies that a legal definition of delict must be based on the legal norm. The delict is the behaviour of the person against whom the sanction that is a consequence of the behaviour is directed, which provides the legal definition of delict.[47] Kelsen rigorously asserts that the concept of sanction as the monopoly of force of the community may be summarised as follows: "The use of force of man against man is either a delict or a sanction".[48] By providing for a sanction the legislator seeks to prevent behaviour that is considered to be detrimental to society. A coercive act is imposed on the person responsible for an evil act such as deprivation of life, health, freedom or property, which if necessary will be imposed even against his will by the deployment of physical force.[49] Briefly, the coercive act (*Zwangsakt*) is a measure of the legal order, a reaction by the law, a consequence of the law, and an essential function of the state. The law is "a coercive apparatus whose value depends, rather, on ends that transcend the law qua means", as Kelsen writes in the first edition of *Reine Rechtslehre*.[50] He specifies that "the *coercive apparatus* is identical with the *legal order*",[51] and "this coercive nature consists in nothing other than the *objective validity of norms*".[52]

The concept of delict is also related to the concept of legal duty. According to Kelsen,[53] "The concept of legal duty is … a counterpart to the concept of legal norm". This means that a person is legally obliged to act in the manner opposite to the condition for a sanction, and people are under a duty to comply with the legal norm.

[41] GTLS 29
[42] Ib. 30
[43] Ib. 25
[44] Ib 29
[45] Ib. 51
[46] Ib. 53
[47] Ib. 54.
[48] PTL 42
[49] PTL 33
[50] Paulson at 31
[51] Kelsen, Grundriss der allgemeinen Theorie des Staates, printed as a manuscript, Vienna 1926, 14
[52] Ib
[53] Ib. 58-59

"That the law is a coercive order means that the legal norms prescribe coercive acts which may be attributed to the legal community" and these coercive acts can be executed against the will of the individual and, if he resists, by physical force,[54] force being a distinguishing element of a coercive order. Law attaches certain conditions to the use of force, authorising the employment of force under certain circumstances.[55] A monopoly of force over the legal community means that the legal order determines the conditions under which physical force may be employed by the individual so authorised by the legal community.[56] According to Kelsen, the individual applying the coercive measure with the authority of the legal order acts as a representative of the order, i.e. as an organ of the community, and only this organ can employ force. In this sense the law makes use of a monopoly of force over the community and in so doing pacifies the community.[57] However, Kelsen clarifies that all legal orders are backed up by sanctions and the "decisive difference is not between social orders that are based on sanctions and those that are not. Every social order is based on sanctions by the reaction of the community to the conduct of its members".[58] And all orders prescribe coercive acts as sanctions.[59] Moreover, if coercive orders are different from those that have no coercive character and are based on voluntary obedience, this is possible only in the sense that the former provide for measures of coercion as sanctions whereas the others do not.[60] In addition, conduct that is legally forbidden by the law is the condition for a coercive act as a sanction.[61] Thus, the normative meaning of the legal order is nothing other than the stipulation that particular evils ought to be inflicted and executed under certain conditions, with the result that coercive acts and sanctions are threats that an evil *will be* inflicted under certain conditions.[62] This is because the law is an order which imposed duties on each member of the community, thereby specifying his or her position within the community by means of a specific technique, involving the provision for an act of coercion, namely a sanction directed against the member who does not fulfil his duty. If this distinction is not drawn it is not possible to differentiate between the legal order and other social orders.[63]

As a representative of stricter normativity and legal positivism, Kelsen could only assert that coercion is an integral part of positive law and the theory that describes coercion as an essential characteristic of law is a positivist theory concerned with positive law. Moreover, since positive law is a coercive order because it prescribes coercive acts, it must establish appropriate organs for executing those acts of coercion[64]

[54] Ib. 34
[55] Ib. 21
[56] PTL 36
[57] Ib. 21
[58] GTLS 16
[59] Kelsen, Law, State and Justice in the Pure Theory of Law, The Yale Journal, vol. 57, no. 3, January 1948, 378
[60] ib 19
[61] ib 21
[62] PTL 44
[63] GTLS 28
[64] GTLS 392-393

since sanctions are provided by the legal order in order to achieve specific human behaviour. It is on account of the normative meaning of coercive acts, that is the objective meaning of these acts, that such acts have the character of law in the sense that they are law-stipulating, norm-creating and norm-executing acts.[65] Essentially, Kelsen is saying that the law is a coercive order because it is comprised of norms that regulate coercion, in the sense that it specifies how sanctions are to be applied. For Kelsen "The law is a *normative* order which seeks to bring about particular human behaviour by providing that, in the event of unlawful conduct to the contrary - the *delict* - a coercive act should be imposed as a consequence of the delict as a so-called sanction. In this sense, the law is a normative coercive order. Its specific existence is its *validity*".[66] Law is a coercive order. Kelsen thus gives a very strong sense of the coercive order, while Schauer limits himself to arguing in favour of coercion, rather than the coercive order. Schauer even distinguishes between coercion on the one hand and sanctions and compulsion on the other. Indeed, as was mentioned in a recent review of *The Force of Law*,[67] for Schauer law is coercive when its sanctions motivate people to act in a certain way that they would not otherwise have done had it not been required by the law.[68] For Schauer in fact, law is compulsory when it is able to make people change their behaviour in order to conform to the law. And just as for Kelsen, for Schauer too a sanction is what "law imposes in the event of noncompliance with legal mandates",[69] except that for Schauer sanctions can be coercive or non-coercive.[70]

However, Kelsen goes much further in also asking why it is necessary to obey the law, a legally and philosophically strong question which goes beyond the mere coercive nature of the legal order but which Schauer does not by contrast pose in such a direct fashion, or at any rate in the same terms and with the same radical nature. Kelsen provides the answer - which is once again the same - in practically every work (such as for example the 1957 article "Why should the Law be Obeyed?"),[71] stating that the binding force of the law, the idea that it ought to be obeyed by the people whose behaviour it regulates, is its validity. He thus poses a fundamental question over why people ought to obey the law, i.e. why the norms - i.e. prescriptions and commands - of positive law ought to be obeyed. In a normative sense the question is why norms have an objective binding meaning for people that have to comply with the dictates of a certain legal system?[72] Kelsen answers that positive law must not be obeyed because it conforms to the principles of morals constituting the ideal of justice on the grounds that the validity of law is not rooted in justice; moreover, were positive law to derive its

[65] PTL 44
[66] Kelsen, Was ist juristischer Positivismus?, Juristenzeitung, 13. August Nr. 15/16, 1965, 465
[67] Miotto L., *Evaluating the Force of Law's Force,* Australian Journal of Legal Philosophy, v. 40
[68] Schauer, 129
[69] Ib
[70] Ib
[71] Kelsen H. (1957), "Why should the Law be obeyed" in *What is justice? : justice, law, and politics in the mirror of science : collected essays,* Berkeley, University of California Press.
[72] Ib 257

validity from natural law, then positive law would have no validity in itself.[73] The reason why positive law has immanent validity is, according to Kelsen, because positive law must be supposed to be a supreme and sovereign order.[74] This order is based on a hierarchical structure (*Stufenbau*) based on the constitution. And he explains that "To the question why we ought to obey its provisions a science of positive law can only answer: the norm that we ought to obey the provisions of the historically first constitution must be presupposed as a hypothesis if the coercive order established on its basis and actually obeyed and applied by those whose behaviour it regulates is to be considered as a valid order binding upon these individuals; if the relations among these individuals are to be interpreted as legal duties, legal rights, and legal responsibilities, and not as a mere power of relations; and if it shall be possible to distinguish between what is legally right and legally wrong and especially between legitimate and illegitimate use of force. This is the basic norm of a positive legal order, the ultimate reason for its validity, seen from the point of view of a science of positive law".[75]

2.2 Bobbio

In the book *A Theory of Legal Order* the Italian jurist Norberto Bobbio (1909-2004) described one of the fundamental elements of the foundations of law, the juridical order. This is an important work in understanding the scientific way of conceptualising law in the new era of the jurisprudence of values. The book is an attempt to solve those problems that the theory of the norm had not solved or had not answered satisfactorily. Bobbio himself declared that his work could be considered as a continuation of Kelsen's work, including in particular his *General Theory of Law and State*. For Bobbio too, a normative system is a structured body of norms.[76] According to a command-based conception, he argues that norms, including legal norms, are imperatives or commands[77] which must be construed as prescriptive propositions expressing a precise content with a specific meaning.[78] Thus, for Bobbio legal orders are normative systems comprised of various types of norm, including rules of conduct and rules on sanctions which have the function of maintaining the system.[79] Consequently, for Bobbio too - as for Kelsen - the law is an organisation of force, with the difference that according to the traditional theory represented by Austin and Bentham, respect for legal norms is guaranteed by force, whilst for Bobbio force is the content of legal norms and the law is the system that regulates the use of force, although the law is not comprised solely of rules imposing sanctions. This means that the legal order is legal insofar as it represents an organised body of norms, and any system having as its purpose the organisation of force is a legal system. For Bobbio

[73] Ib 258, 259

[74] Ib 261

[75] Ib 262

[76] N. Bobbio, Teoria generale del diritto, Turin, 1993, p. VIII. The book contains two courses: Teoria dell'ordinamento giuridico (Turin, 1958) and Teoria dell'ordinamento giuridico (Turin, 1960).

[77] Bobbio, TGD, chapter III.

[78] R. Guastini, Insieme strutturati di norme. Contributi di Bobbio alla teoria dei sistemi normativi, in : Analisi e diritto, P. Comanducci and R. Guastini (eds), 2004, pp. 103-117.

[79] N. Bobbio, Studi per una teoria generale del diritto, Turin, 1970, p. 192.

therefore, although the legal system is made up of norms regulating the production of other norms and norms providing for sanctions, and since all norms belonging to that system are in any case legal, including norms relating to conduct, the pre-eminent characteristic feature of a legal system is the presence of norms providing for sanctions[80] and thus the term "law [...] indicates a type of normative system and not a type of norm".[81] Bobbio analysed the relationship between law and force in various writings,[82] including an article translated into English.[83] Bobbio's main argument is that force should rather be considered as the content of legal rules and not as a means for the realisation of law, as Kelsen asserted in 1925,[84] whereby the "law is not a body of rules guaranteed by force but a body of rules about force"[85] (the same theory was also endorsed by Alf Ross[86] and Karl Olivecrona[87]). Thus, law should not be considered in terms of coercion, as Rudolf von Jhering did,[88] although coercion should be considered as an element essential to law. According to Bobbio three objections may be brought against the traditional theory which defines law in terms of coercion: 1) that rules are generally observed spontaneously and hence the sanction is not necessary. However, irrespective of whether we consider coercion as an instrument or a means, or whether we consider it as the content of legal rules, spontaneous obedience can only be a valid argument if it is general and constant; yet in fact it is neither general nor constant;[89] 2) that every legal system contains rules not backed up by sanctions because sanctions are not necessary. But rules not backed up by sanctions are not legal rules, which thus excludes from the system a large number of the secondary rules which are the characteristic rules of a legal system, i.e. rules regulating the exercise of force, even though these are proper legal rules; 3) that the infinite regress of sanctions is impossible. Unsanctioned rules exist not only in every system but also and necessarily at its pinnacle. For Bobbio, the three arguments, the purpose of which is to remove coercion as an essential feature of the law and to define law independently of the concept of coercion, summarise the three modes of coercion: the necessity, existence and possibility of coercion. However, once coercion has been eliminated as a necessary element of the law, a question arises as to how to identify the criterion that enables a distinction to be drawn between legal rules on the one hand and moral rules and customary rules on the other. However, both the psychological theories which assert the position that rules are spontaneously accepted by individuals and do not therefore need to be backed up by coercion and the teleological rules which argue that the natural ends of law are justice, the common good or peace, which can be achieved without the use of force and coercion, do not provide a satisfactory answer because "[If] the

[80] CDT, 236 et seq; TGD, 197; SPTG, 119 et seq.
[81] N. Bobbio, TGD, 169.
[82] Teoria dell'ordinamento giuridico, 1960, 61-67.
[83] N. Bobbio Law and Force, The Monist 49, no. 3, July 1965, 321-341.
[84] Kelsen, Allgemeine Staatslehre
[85] Bobbio, Law and Force, 322.
[86] Alf Ross, On Law and Justice, London, Stevens and Sons, 1958.
[87] Karl Olivecrona, Law as Fact, London, Oxford University Press, 1959.
[88] R. v. Jhering, Der Zweck im Recht, vol. I, 320.
[89] Bobbio Law and Force 332.

element of coercion is left out, rules of law and rules of custom are difficult to distinguish in respect to their ends. Briefly, when not disguised as coercion theories, psychological and teleological theories cannot distinguish between legal rules and moral rules, and between legal rules and the rules of custom respectively".[90] Moreover, they cannot be distinguished between on the basis of their content because, as Bobbio explains, "[S]ocial life is not the content of legal rules, but only the context in which legal rules operate. [...] what seems to distinguish them is the 'how', and not the 'what'".[91]

For Bobbio above all, Kelsen tried to solve the problem of the relationship between law and coercion by attempting to distinguish the content of legal rules (and therefore to define legal rules) not in terms of form or ends, but exclusively in terms of their object. Thus, "if law is the body of rules which regulate coercion, or the exercise of force, this means that coercion or force is the specific object of legal rules, ... and law is the rule of force".[92] This means that the law should no longer have the aim of regulating all human behaviour or social life, but exclusively of regulating behaviour in order to obtain certain results by means of force.

According to Bobbio, coercive power designates four forms of application of force: 1) the power to compel those who do not do what they should do; 2) the power to restrain those who do what they should not do; 3) the power to substitute (forced action); and 4) the power to punish those who have done what they should not have done. Classifying human acts as "actions or omissions, force is directed with regard to actions either in order to bring about or replace them, and with regard to omissions either to prevent or punish them".[93] Consequently, according to Bobbio, law has four functions in relation to coercive power, namely the *when*, the *who*, the *how*, and the *how much*: it must 1) fix the conditions governing the exercise of coercive power; 2) determine who can exercise coercive power; 3) determine the procedure and the persons who can exercise coercive power; and 4) specify how much force can be exercised.[94]. In this way, since coercion is not the means for realising the law but its object, the relationship between law and coercion has three aspects: a) coercion as an essential instrumental element; b) coercion as a non-essential element; and c) coercion as an essential material element. Thus, force is not at the service of law; rather, law is at the service of force. Accordingly, "force and law condition each other reciprocally".[95]

Bobbio points out and stresses that the rules comprising the legal system are not sanctions but rules that regulate sanctions. This means that when we speak of force as the object of regulation it is clear that this refers not to individual rules but the system as a whole, and hence that when we speak about law, we distinguish between a legal system and a system that is not legal, and not between a legal rule and a rule that is not

[90] Ib., 326.
[91] Ib., 327.
[92] Ib., 328.
[93] Ib., 330.
[94] Ib. 330-331.
[95] Ib., 334.

legal. After establishing a legal system in its entirety rather than single rule, Bobbio continues, "in order to establish whether or not a single rule is a legal rule, it is enough to demonstrate that it belongs to the system through the so-called criterion of validity", that is, the individual rules must belong to the system in order to be legal.[96] It is only by differentiating between the system and individual rules and by defining the law as an aggregation of rules (and as long as we do not attempt to define individual legal rules) that we can understand how the theory of law as a rule of force is a theory not of individual legal rules but of the legal system as a whole.

Force means coercion, and the concept of coercion is strongly tied up with the idea of force. For Bobbio, as well as for Kelsen, the legal system is a coercive order (*Zwangsordnung*) in the sense that it incorporates rules governing the exercise of force and is characterised by these. According to Bobbio, there are essentially two prerequisites for the exercise of force: 1) the power to compel or to prevent an action; and 2) the power to repair the effects of an action or of its omission after the violation has occurred, that is, the power of the legal system to impose and enforce sanctions if a legal rule from the system has been violated. Bobbio identifies two types of sanction, depending upon the behaviour's relationship with the end pursued by the person: "a) those that make it possible for compliance with a rule to be an appropriate means and transgression to be an inappropriate means of achieving the desired goal; b) those that make it possible for compliance with the rule to be an appropriate means and transgression to be an inappropriate means of avoiding the undesired goal".[97] Dealing as they do with the relations between means and ends, these two kinds of sanctions can be expressed through different technical rules. Bobbio specifies that if you want x, you must do y, where x is the end desired and y is an action regulated by the rule (deprivation of a good, privative sanction), or that if you do not want x, you must do y, where x is the end which is not wanted and y is the action regulated by the rule (infliction of a punishment / punitive sanction). In the former instance we speak of an invalid action (the action has no legal effects) if it does not conform to the legal system and the legal system's sanction of nullity (judgment of invalidity). In the latter case we speak of an unlawful action (legal negative consequences) if it does not conform to the legal rules which the legal system backs up with punishment. For the transgressor, punishment represents the harm which can be imposed on him by the force of the legal system; the privative sanction on the other hand represents the loss of the benefits of the legal system. Thus, for Bobbio "in the case of punishment, the sanction for the transgressor consists in having to submit himself to a force which diverts him or takes him away from his pre-established goal; in the case of nullification, the sanction... consists in not being able to avail himself of the force which should have helped him in achieving his established goal. Unlawfulness and invalidity are two kinds of valves which open and close ... and therefore regulate the flux of force which is at the disposal of a dominant power to make effective the rules pertaining to the system as a whole".[98]

[96] Ib., 335-336.
[97] Ib., 337-338.
[98] Ib.,340.

For Schauer too, what makes law distinctive is that, unlike other social, political, and cultural institutions, it not only tells us what to do but threatens us with unpleasant sanctions. More specifically, Schauer considers in greater depth the relationship between the role of the body imposing the rule and the person subject to the rule, specifying that a person with power to impose rules intervenes in other-regarding and harmful events, exerting control over multiple actors in breach of the rule. "And because rules are generalisations, ... the rational intervener imposes rules even where he recognises that those rules will in effect mistakenly apply on some occasions and mistakenly fail to apply on others. [...] the body imposing the rule will impose rules whenever it perceives that the harm prevented by the imposition of rules in the area in which their application is certain exceeds the harm caused by imposing rules in the area in which their application is uncertain. In imposing rules, therefore, the rational imposer considers how he or she should maximise her control over multiple miscreants, or, ... over multiple potentially misbehaving (to the detriment of third parties) agents"[99]

However, in order to understand fully Bobbio's reasoning concerning the relationship between law and force it is necessary to understand which ideas underlie his thinking in this regard. In his famous course on the *Theory of the Legal System* [*Teoria dell'ordinamento giuridico*] from 1960,[100] Bobbio asserted that original power is derived from the established political forces that created the legal system and that, if the legal system depends upon the original power,[101] then law must consequently be derived from force. To obey the original power thus means to subject oneself to the subject holding coercive power with the aim of ensuring compliance with norms, including by recourse to force. Force is thus the necessary means used by power, and the law is in turn based on coercive power. As the law is a body of effective rules, the legal system is inconceivable without the exercise of force, without a power that sustains and justifies it. Force is thus necessary in order to realise power and the legal system can only be effective if it is based on force. The legal status of a norm is not based on its content or form but on the fact that the norm is part of the legal order, and the order becomes legal when rules governing the use of force are formed. Whereas for Kelsen force is subject to legal regulation and the law is not a body of norms imposed by force but a body of norms regulating the exercise of force (a particular order or organisation or power, law is an organization of force),[102] for Bobbio the rules governing the exercise of force within a legal system do not have the purpose of implementing force but serve the purpose of organising sanctions, and thus of rendering behavioural norms and the system itself more effective. Thus, the law is not a means for organising force, but for organising society by force.

[99] Schauer, Imposing rules, 42 San Diego Law Review 2005, 88.

[100] Bobbio, Teoria dell'ordinamento giuridico, Giappichelli, Turin 1960, passim

[101] Kelsen too provides a similar justification for power when asserting that "... and yet law only becomes law, it only becomes *positive* law at any rate due to the fact that it is imposed or posited by the 'state' power, by the power that only becomes the state by virtue of the law" (Kelsen, Eugen Huber, 242).

[102] RR II, 221, GTLS 21

2.3 Schauer

If Kelsen and Bobbio provided a strong explanation for the function of coercion and sanctions, this was possible thanks to their normativist conception of the legal order as a system of norms and, above all for Kelsen, as a formal system of law. In fact, according to their doctrine, law is law thanks to the specific nature of norms and not because norms prescribe models or ends to be pursued. The law is the legal system tout court, which is in turn based on a hierarchical system of norms kept together by a basic norm, the *Grundnorm*, which guarantees its unity in the sense that the validity of individual norms, and hence of the legal order as a whole, is guaranteed by one single norm (the basic norm for Kelsen) which confers unity and consequentiality on the variety of individual norms. On this view, the law is a self-referential system that follows an internal logic. It is within this strictly normativist conception of the legal order that the function of coercion and sanctions is construed in a strictly legal role such that they constitute essential elements of the legal norm itself, with the result that both coercion and sanctions must be understood in a strictly normativist and legal sense, are efficient and effective and form part of the legal apparatus of a state. On this view, legal norms are generally binding rules of conduct posited by the state authority, which are intended to regulate social relations. Legal norms determine the rights and duties of the parties to legal relations and compliance with legal norms is guaranteed by state coercion. Coercion is considered to be instrumental in determining a state's legitimacy and authority, that is the law's ability to prevent certain behaviour by criminalising it (a man is coerced when either force is used against him or his behaviour is being determined by the threat of force) and to prove state's power to operate in structuring society. There is no doubt that coercion has a political and social significance in that it helps to explain both the state's authority as well as its proper limits by exerting psychological pressure on subjects to act or not to act in some particular way by means of (psychologically potent) threats which alter the costs and benefits of acting, where the coercer - be it state or a single agent - communicates a conditional proposal involving a threat accompanied by some demand regarding the coercee's future actions.[103] Moreover, since coercion creates an alteration in the costs and benefits of acting, it should be useful to define whether the proposal improves or worsens an agent's prospects for action.[104]

The question that Schauer asks in order to explain and to the very end to justify coercion and sanctions is a very simple question, that is ' Do people obey the law and if they do obey law do they obey the law, or are they doing something else which merely makes them appear as if they are obeying the law?' The law is peculiar as it is different from other normative systems of ethics and right-doing. And also for Schauer, as for Kelsen and Bobbio, this is the reason that makes law distinctive and unlike other social and political and cultural institutions because it not only tells us what to do but threatens us with unpleasant sanctions. Furthermore, would you even obey it as a

[103] Scott A. Anderson, The Enforcement Approach to Coercion, Journal of Ethics and Social Philosophy, vol. 5 no. 1, October 2010, p. 3,4
[104] Ibid., 5

normative system without these sanctions and coercive means? Schauer indicates a sharp distinction between behaviour which is compliant with commands, and behaviour which is merely consistent with them. This might appear deeply problematic for those who believe and act on a law-as-law basis because it suggests that it is possible that the law merely tracks people's actions, which they would do otherwise do anyway. In that sense law loses its social status as a system different to other moral and normative systems. And for Schauer, if we are after all interested in law largely because of what it can do to us, of how it can make a difference, and if the commands merely track the law, then there is little point in being interested in the law at all. And for Schauer it seems also uncontroversial that most of the people will not commit just because it is the right thing to do. And still it remains the question of why people actually comply with the law. In his description Schauer indicates that when sanctions are non-existent, soft, or administered without much alacrity, people defer to their better judgement, that the task is to determine whether they comply with the law. And it is here where Schauer provides and introduces the necessity of coercion and sanction for the law to be effective because 'legal systems have long relied on coercion and we can understand why. A principal reason for having the law is that people's judgments are often mistaken and it should come to little surprise that many people overestimate their own decision making possibilities'. And this is why law with coercion is a fundamental system for effective social regulation in a complex world of beliefs, needs, wants and desires and the inevitable consequences that occur because of them. For Schauer the law is often saying us to go against our best judgements, and when that happens, the law needs to be something more than a voluntary system that is alongside our natural tendencies to act in a certain way. That is why once we understand that people's self-interested decisions may not be in the collective interest, and once we understand that people's non self-interested judgements may often be mistaken, we can understand the need for law and law's authority, that is the need for force, coercion and sanctions. As Leslie Green explains in his interesting comment on Schauer's book, "Schauer insists that coercion is central to a theoretical understanding of law and it is a mistake to 'denigrate' it, think it 'irrelevant', 'relegate it to the sidelines'"[105]. For Schauer coercion is central to law, it merges with social power, that is, it is capable to influence people's action and interests, and its nature has been largely underestimated, and is convinced that many laws would not be complied with without a coercive support, motivating incentives included. It compels people to do what the law wants. Schauer provides us with a broader description of coercion and sanctions which is less closely aligned with a formal and normativist schema of the law. Schauer analyses coercion and sanctions, arguing that they are necessary in order for the legal to operate, starting from an empirical observation and thus not from the legal order as a theoretical and legal philosophical construct. He concludes that coercion is widespread, or in his words “ubiquitous”, in our legal systems, by which he means to say that the law applies coercion over a very broad range of cases, varying from rules governing how to drive a car through the provision positive incentives, such as rewards

[105] Green Leslie, “The Forces of Law: Duty, Coercion and Power”. Oxford Legal Studies Research Paper No. 12/2015, p. 14

and subsidies granted in a wide variety of cases, to contractual clauses and many more. In doing so however the law takes on nuances, such as with regard to cases involving state subsidies, which may leave the reader perplexed as to whether they may really be considered as coercion. It is true that the definition of coercion provided by Schauer is at times blurred and is not rigorous. For example, he draws a distinction between coercion on the one hand and sanctions and compulsion on the other,[106] asserting that law is coercive when its sanctions motivate people to act in a way they would not have acted had it not been required by the law, whilst law is compulsory where it succeeds in forcing people to change their behaviour to conform to the law. It has been rightly stressed in a recent review of this book[107] that a sanction is that which the law imposes in the event of non-compliance with the dictates of the law, and it follows from this that sanctions may be coercive or non-coercive. In this sense continental legal philosophy provides us with clearer and conceptually less ambiguous conceptions. However, the discussion would end up being lengthy and pointless, departing from the underlying argumentation proposed by Schauer which seeks to go to the heart of the problem and which essentially appears to be correct with regard to the stated purpose, that is in seeking to demonstrate that coercion and sanctions are necessary within a legal order to ensure its proper functioning, also in the face of potential exceptions. In fact, Schauer does not always distinguish clearly between cases involving coercion and cases involving non-coercive acts. However, that lack of distinction does not undermine the core essential argument which Schauer presents throughout the book without much ambiguity, namely that coercion and sanctions are a constant fact throughout all legal systems, and hence this does not appear to us to represent a lack of clarity or theoretical limit. If nothing else, Schauer already indicates in the title *The Force of Law* that, in order to be strong and to function properly, the law needs elements that are capable of rendering it such, and certainly both coercion and sanctions fulfil this purpose, even though they do not represent its sole internal rationale.

3. Conclusion

Schauer is certainly not a fully-fledged normativist - in fact he is a typical representative of analytical jurisprudence - but he certainly does endorse a certain view of normativism,[108] accepting that coercion is an element of the legal order and of law, i.e. a means of backing law. In this sense Schauer has a normative concept of coercion. However, leaving aside the role of coercion in the law, Schauer's book gives rise to various interesting reflections on law in general. In order to understand the need to use force within the law, it is useful to refer to Schauer's analyses of the psychological attitudes of individuals and the extent to which these impinge upon their behaviour with regard to the legal demands made by a society. It would in fact be interesting to

[106] Schauer, The Force of Law, 129;

[107] Miotto at note 67;

[108] Schauer, Recapturing the Role of Coercion in Understanding Law, Conference, University of Toronto, Faculty of Law, 15 November 2013. On this occasion, Schauer asserted that coercion, i.e. the ability of law to make people do things they do not want to do, re-emerges as perhaps the most important characteristic and defining feature of law.

know whether the process of internalisation is a process of rationalisation, a conscious rationalisation (and if so to what extent) and whether there is any general awareness of internalisation,[109] along with the extent to which it is possible to demonstrate that human behaviour is independent from the law. In addition, noting that people who are motivated morally nonetheless act according to the law, it would be appropriate to consider whether this is a simple coincidence, and thus to establish a more precise relationship (in quantitative as well as qualitative terms) between the sociological, political and psychological components of legal force, and also to ask whether the use of legitimate force performs a compromise function within the general behaviour of individuals. It would also be appropriate to clarify the relationship between morality and self-interest and whether self-interest is immoral (by definition, and to what extent), along with the relationship between self-interest and interests rooted in the law, including whether they are diametrically opposed to each other or whether they can actually overlap in real life, except as regards motivation. In addition, it is also important to consider the extent to which it can be asserted that self-interest is always opposed to moral sensibility and to ask whether the aim of law is to solve practical problems or to change the moral opinions of people. If the law is supposed to perform a regulatory function and if this implies that there is a model of society that we seek to obtain by exerting moral pressure - and this is a very important moral and sociological point - it will be necessary to determine the role of individual attitudes in relation to a coercive and sanctions-based model of society. In fact, it is not possible to factor out people's moral agreement with the law and to ask whether this agreement is spontaneous because the individual approves its morality or is dependent on the fear of the consequences in the event of non-compliance with the law, along with the extent to which people comply with the law irrespective of its content, because of its content or because of its existence. "What we need to develop" - rightly says Green[110] - "is an account of the 'very idea of obeying the law *qua* law'. ... Before we can count how many ways the law has to coerce us, however, we need to know what counts as coercion". The conclusions reached by Schauer, Kelsen and Bobbio concerning the need for coercion and sanctions within the legal order are largely the same, namely that in order to function properly a legal order must be coercive and based on sanctions. It is the starting points used for their reasoning that differ. Schauer starts from an empirical analysis of the behaviour and inclinations of human beings in order to assert the need for sanctions and coercion within the law. As representatives of a classical and traditional form of legal positivism, Kelsen and Bobbio start from the assumption of the unity and coherence of the legal order, while Schauer gives greater consideration to the psychological and social aspect of human behaviour[111] - while perhaps placing too much importance on the psychological aspect of human behaviour - vis-à-vis the law, reaching the conclusion that in order to be observed the law needs to be backed

[109] A detailed study of mass psychology and the relationship between the masses and power may be found in Elias Canetti works. In this regard it is interesting to note the difference between the behaviour of the individual and that of the crowd.

[110] Green, p. 30, 32.

[111] Here it might be possible to endorse the view of Ludwig Wittgenstein when he asserts that we don't follow specific rules but mere social conventions.

up by the force of coercion and sanctions. Kelsen and Bobbio draw a distinction between legal systems and all other systems, including moral, political and religious systems. This is the typical distinction drawn by legal positivism with all other schemata for interpretation, thereby distancing the law from all other systems. The law is law insofar as it is law and any further criteria for interpreting the human sphere belong to other disciplines. The only valid question in this regard relates to what really makes law distinctive compared to other systems. Moreover, a comparison between Schauer, Kelsen and Bobbio should take as much account as possible of the vast problem concerning the separation between law and morals as analysed and debated within continental philosophy. In this regard it would be useful to consider the extent to which Schauer considers moral obligation to be influenced by law, commands, sanctions, and coercion, and it is also legitimate to ask whether he considers there to be any intrinsic morality and whether this is the result of a process of internalisation. It would also be interesting to understand whether, for Schauer, it is possible to internalise the law without reference to coercion and sanctions and how it is possible to establish the origin of moral obligation irrespective of the law, as well as to establish whether the law prevails over morality, or vice versa, and if so for what reason. We could perhaps say in this regard, according to a utopian model, that the ideal habits and behaviour of individuals should result from morals plus the law. But can law and coercion be moral? Must an account of coercion rely intrinsically on normative presuppositions (meaning that it is intrinsically moralised) or is such a theory to be developed out of purely positive premises (meaning that it is non-moralised)? It has not been proven that a moralised account of coercion is required because "an account that eschews such moral judgments is liable, it may be supposed, to misclassify cases and, in particular, to find coercion where it should not",[112] so that cases considered coercive, though moralized accounts might not, does not yet prove that a moralized account of coercion is needed. Moreover, "given that morality and other forms of normativity play a role in helping us to organise our societies and lives into various cooperative arrangements, there are… many ways in which normativity or morality can come into understanding of how one agent can exercise power over another".[113] Yet this begs the question as to "why coercion requires special justification, why coercion is thought to be an act of special moral significance".[114] However, states do not need to control all different forms of pressure, including coercion and sanctions, in order to secure peace, nor in all likelihood does their authority depend on having done so. "A state that wishes to claim legitimate authority will need to protect individuals from the coercion of others as well as to avoid unjust coercion of its own".[115] It is thus possible to explain how important it is that the state have the right to use coercion because society needs to be able to prevent and inhibit disruptive and anti-social behaviour in order to guarantee stability and safety. "While most people will be likely to respond to either moral or prudential considerations that favour peaceful coexistence, there is a

[112] Scott Anderson, Ibid. 16
[113] Ibid. 17
[114] Ibid. 26
[115] Ibid. 29

continuous temptation for some people to victimise others. When individuals or groups disregard law, … society will need to be able to halt and discourage such behaviour effectively. … It is thus crucial for a state's functioning and authority that it exercise such powers, …".[116] As Dennis Lloyd has argued, the force of law is and seems always to have been linked with rules which are capable of being enforced by coercion.[117] According to Kelsen, it is the Grundnorm that establishes the legitimacy of the laws of the state, whilst on a more modern and sociological view the legal order should be a system for satisfying legitimate expectations with the aim of realising an ideal of justice and a social equilibrium. In *The Force of Law*, Schauer seems to say that collective values and goals are more important and should be respected and realised more than individual ones. However, this presupposes a shared global ethic. Does Schauer agree?

[116] Ibid. 30

[117] Dennis Lloyd, The Idea of Law, Middlesex, England: Penguin Books, 1970, 35.