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On Force, Effectiveness, and Law in Kelsen[*]

JULIETA A. RABANOS

I. INTRODUCTION

The relationship between law and coercion is perhaps one of the most controversial topics in legal philosophy – a topic that has made quite a comeback in legal discussion in recent decades after a period of apparent abandonment.[1] On the basis of various analytical criteria, a broad, complex spectrum of positions on this relationship can be reconstructed. For example, if one analyses the necessary or essential conditions of concepts, positions on the question of whether 'coercion' is an essential or necessary element of 'law' range from a strong affirmative[2] to a strong negative[3], including positions that question the way the question is posed.[4] Furthermore, if one analyses the nature or type of element, the positions range from coercion as an instrumental element (function or use)[5] to coercion as a substantive element (content or object)[6] of law. Finally, leaving aside the analysis in terms of essential or necessary conditions, the positions include law as a type of coercion, coercion as the distinctive feature of law *qua* social

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[1] For recent books, see v.gr. F Schauer, *The Force of Law* (Cambridge, MA and London, Harvard University Press, 2015), K Himma, *Coercion and the Nature of Law* (New York, Oxford University Press, 2020), T Gkouvas, *The Place of Coercion in Law* (Cambridge, Cambridge University Press, 2023). For recent papers, see v.gr. E Yankah, 'The Force of Law: The Role of Coercion in Legal Norms' (2008) 42, 5 *University of Richmond Law Review* 1195, K Woodbury-Smith, 'The nature of law and potential coercion' (2020) 33, 2 *Ratio Juris* 223, L Miotto, 'Law and Coercion: Some Clarification' (2021) 34, 1 *Ratio Juris* 74.

[2] See v.gr. J Bentham, *Of the Limits of the Penal Branch of Jurisprudence* (Oxford, Oxford University Press, 2010), J Austin, *The Province of Jurisprudence Determined* (Cambridge, Cambridge University Press, 1995), H Kelsen, *General Theory of Law and State* (Cambridge, Harvard University Press, 1949) [*GTLS*], H Kelsen, 'The Law as a Specific Social Technique' (1941) 9, 1 *University of Chicago Law Review* 75 – now reprinted in H Kelsen, *What is Justice?* (Berkeley, University of California Press) 231-256 [*LSST*], K Olivecrona, *Law as Fact*, 1st ed (Copenhagen, E. Munksgaard, 1939) [*LAF1*], K Olivecrona, *Law as Fact*, 2nd ed (London, Stevens, 1971) [*LAF2*], R Dworkin, *Law's Empire* (Cambridge, Mass., Belknap Press, 1986), Himma (n 1).

[3] See v.gr. H L A Hart, *The Concept of Law* (Oxford, Clarendon, 1961), J Raz, *Practical Reason and Norms* (Oxford: Oxford University Press, 1999), J Finnis, *Natural Law and Natural Rights* (Oxford, Oxford University Press, 2011).

[4] See v.gr Schauer (n 1).

[5] See v.gr. Hart (n 3), Raz (n 3), Himma (n 3).

[6] See v.gr. Kelsen, *GTLS* (n 3), Dworkin (n 3), N Bobbio, *Studi per una teoria generale del diritto* (Turin, Giappichelli, 2012).

normative order, coercion as the most prominent or salient feature of law *qua* social normative order,[7] and coercion as one of the central or paradigmatic features of law.[8]

The complexity and number of these positions grows exponentially when one also considers the significant differences in what is understood by 'coercion'. They range from strict or narrow views of coercion (v.gr. equating coercion generally with force, especially physical force[9]) to broad or wide views of coercion (also equating coercion with arbitrariness[10] or with non-consented interference with the will[11]), and from the association of coercion with only negative legal consequences to the association of coercion with both negative and positive legal consequences. Moreover, coercion can be used to answer all or some of the four main theoretical questions related to law: Identity (how can a 'legal' order or norm be identified?), Efficacy or Effectiveness (what is the criterion or condition for the existence of a legal order or norm?), Efficiency (how can law fulfil its function?), and Normativity (how can law guide human behaviour?).

Within this picture, Kelsen's position on the relationship between law and coercion – famously conceiving law as a coercive order – occupies a very important place at the theoretical, methodological, and chronological intersection of several strands of analysis. On the one hand, his position is based on both a strong critique of fact-based theories of law – which mainly regard coercion as an essential property or distinguishing feature of law – and natural law theories – which mainly regard coercion as a non-essential property of law. On the other hand, his position can be taken both as considering coercion to be an essential element of law in terms of function (coercion as a tool of law to achieve its goals) and/or in terms of content (coercion as a characteristic content or object of 'legal' norms). As we shall see, finally, his position was also ambivalent, both considering and rejecting the analysis of coercion as motivation[12] and both considering and rejecting the effectiveness or efficacy[13] of legal systems as the most important fact

[7] See v.gr. Bentham (n 2), Austin (n 2).
[8] See v.gr. Schauer (n 1).
[9] See v.gr. Hart (n 3), Raz (n 3), Bentham (n 2).
[10] See v.gr. V Rodríguez-Blanco, 'What Makes a Transnational Rule of Law?: Understanding the Logos and Values of Human Action in Transnational Law' in K Himma, B Spaić, and M Jovanović (eds), *Unpacking Normativity: Conceptual, Normative, and Descriptive Issues* (Oxford, Hart-Bloomsbury Publishing, 2018) 209-226.
[11] See v.gr. J Núñez, 'The Forces in Law: Sanctions and Coercions' (2017) 42 *Australian Journal of Legal Philosophy* 1, 145.
[12] This rejection stems primarily from his desire to preserve the 'purity' of legal theory and his zealous rejection of psychologism, as well as his rejection of fact-based legal theories.
[13] From now on, and from present purposes, I will use the terms 'efficacy' and 'effectiveness' as interchangeable synonyms, as the English translations of Kelsen's works contain both terms to designate the same concept. This is particularly clear in Kelsen, *GTLS* (n 2), where 'efficacy' is used (see v.gr. 29-30 ff) and H Kelsen, *General Theory of Norms* (New York, Oxford University Press, 1991) [*GTN*], where 'effectiveness' is used instead (see v.gr. 22 ff, 138 ff).

in the analysis of their existence and validity (and thus the existence and validity of legal norms).

The aim of this chapter is therefore to critically analyse Kelsen's position on the relationship between law and coercion. Here I will show that the connection between law and coercion in Kelsen's legal theory goes deeper than the first definition of 'law as a coercive order' suggests: the connection has to do not only with the specific content of legal norms, but also with the existence of the legal order itself.

In Section II, I will show that for Kelsen coercion is an essential element of law as the criterion that allows to distinguish law *qua* normative and social order from other kinds of social and normative orders (such as religion and morality), *i.e.*, coercion of a certain kind. In Section III I will further develop the argument and show that coercion is also the criterion that allows to distinguish legal norms from other norms (like moral norms), *i.e.*, coercion as a specific object of norms which are hypothetical formulations with sanction as consequence. In Section IV I will show that, in Kelsen's framework, coercion is also to be regarded as an essential element for the effectiveness of a legal order, thus for its very existence. I will further argue that in this view the most important effect of coercion is not the direct one – the effective application of sanctions or the effective exercise of force – but the indirect one – the psychological pressure that the mere existence of organised violence and sanctions exerts on the individual. Finally, in Section V I will offer a brief concluding remark.

II. Law and Coercion – Coercion between Content and Function of Law *Qua* Social Order

It is well known that Kelsen understands law as a normative (social) coercive order. It is a normative order in the sense that it is a system of valid norms whose unity is given by the fact that they all have the same source of validity (a basic norm). [14] It is a social order in the sense that it is a normative order that regulates human behaviour when that human behaviour is in a mediated or direct relationship with other human beings.[15] Finally, it is a coercive order in the sense that it establishes coercive acts, *i.e.* acts in which an evil is to be inflicted on a subject

[14] See v.gr. H Kelsen, *Pure Theory of Law*, 2nd ed (Berkeley: University of California Press, 1967) [*PTL2*] 4 ('The legal order which is the object of this cognition is a normative order of human behavior—a system of norms regulating human behavior'), and 31 ('An "order" is a system of norms whose unity is constituted by the fact that they all have the same reason for their validity; and the reason for the validity of a normative order is a basic norm—as we shall see—from which the validity of all norms of the order are derived').

[15] See v.gr. ibid 24 ('A normative order that regulates human behavior in its direct or indirect relations to other human beings, is a social order. Morals and law are such social orders').

against their will, resorting to physical force in the case of resistance.[16] The essential role of coercion in defining law *qua* social order becomes clear when it comes to distinguishing between different social orders.

According to Kelsen, every social order aims to regulate human behaviour through rules: they encourage certain behaviours and discourage others, especially to ensure that members of a society refrain from actions that are considered detrimental to society.[17] There are several ways to achieve this result, using different motivational techniques. Direct motivation implies that a behaviour is required by the system, but there is no consequence associated with its performance or omission. In this sense, there is no retribution associated with the behaviour and the effectiveness of the order is based on voluntary obedience.[18] Indirect motivation implies that a behaviour is required by the system by establishing some consequences for its performance or omission. On the one hand, a behaviour may be required, and the system may link its execution or omission to a positive (execution) or a negative (omission) consequence. On the other hand, the system can link a negative consequence to the omission of a certain behaviour, thus transforming this behaviour into one required by the system. In these latter cases, there is a retribution associated with the performance or non-performance of the behaviour.[19]

Kelsen defines 'sanction' as the act that ought to be performed as a consequence of the verification of the conditions established by a social order.[20] For this consequence to be considered a sanction, at least one of these conditions must be a certain human behaviour. For the sanction to be considered as a coercive act, it must be imposed against the will of the subject and physical force must be available in case of resistance.[21] This means that not all sanctions are coercive acts, and not all coercive acts are sanctions. Regarding the former, it can be said that Kelsen understands the term 'sanction' both in a broad sense ('sanction' including all coercive acts) and in a narrow sense ('sanction' including only punitive coercive acts, *i.e.* acts that bring an

[16] See v.gr. ibid 26 ('A normative order, which prescribes coercive acts as sanctions (that is, as reactions against a certain human behavior), is a coercive order') and 33 ('The first characteristic, then, common to all social orders designated by the word "law" is that they are orders of human behavior. A second characteristic is that they are coercive orders').
[17] Kelsen, *GTLS* (n 2) 15. From a psychological-sociological point of view, this 'motivation function' is fulfilled by the representation of the norms that oblige, forbid, and allow certain behaviours. I will analyse the way this 'representation' is interwoven to Kelsen's concepts of effectiveness and validity of legal orders in Section IV.
[18] Kelsen, *LSST* (n 2) 235.
[19] 'A social order that seeks to bring about the desired behaviour of individuals by coercion is called "coercive order"' (Kelsen, *LSST* (n 2) 235).
[20] See v.gr. Kelsen, *PTL2* (n 14) 41.
[21] See v.gr. ibid 26.

evil upon a subject). [22] Hence, in a broad sense all sanctions are coercive acts, while in a narrow sense only some sanctions are coercive acts. As for the latter, there are some coercive acts that cannot be considered sanctions because their conditions of application do not involve at least one human behaviour that is legally ascertained and established, and that could be considered socially undesirable. Some examples of such coercive acts are pre-trial detention (where there is no legally ascertained behaviour), compulsory confinement of dangerous mentally ill persons or compulsory confinement of contagiously ill persons (where there is not a actual behaviour involved, but only a factual condition or characteristic of a subject), and expropriation in the public interest (where there is no a socially undesirable behaviour involved).

Returning to the idea of retribution, Kelsen argues that there is no social order in which some kind of retributive principle does not apply, not even in religion and morality.[23] Thus, coercion in the form of sanctions is an essential element of any social order. The relevant difference between social orders, according to Kelsen, lies in the type of coercion they establish. In this sense, Kelsen distinguishes between two main types of sanctions: transcendent and socially immanent.[24] The former are sanctions whose source is a supernatural authority, so they are generated outside society; the latter, in turn, are sanctions whose source is a human authority, so they are generated within society. There are two subtypes of socially immanent sanctions: non-organised sanctions, which are based on mere approval or disapproval by a non-organised source, and socially organised sanctions, which are specific acts performed by specific subjects as established by the system.

Here, then, lies the main criterion for distinguishing law from other social orders such as religion and morality. Religion is a normative order that imposes transcendental sanctions: there are consequences for actions or omissions that go against the will of the subject, but they come from outside society and are imposed by a supernatural authority (such as God). Morality is a normative order that imposes socially immanent, non-organised sanctions (if any): they come from society and are imposed by human beings, but the system does not designate particular

[22] Kelsen, *PTL2* (n 14) 39, 41; L Duarte D'Almeida, 'Wrongs and Sanctions in the Pure Theory of Law' (2022) 35, 3 *Ratio Juris* 249. D'Almeida also purposes to recognise a third 'intermediate' sense of sanction, which encompasses coercive acts that are linked to a condition where the commission of the human behaviour is yet to be established and/or where there is no actual human behaviour but just a possibility of it. However, in my opinion this is not really another sense of sanction, at least not in the sense D'Almeida is proposing to differentiate between a broad and a narrow sense of sanction based on the generality or specificity in the consequent of the norm. What D'Almeida proposes as an 'intermediate' sense of sanction seems to refer not to the consequent, but to the antecedent of the norm. It has to do with the conditions the norm established for the sanction, where a 'strong' sense of it asks for at least one human behaviour, legally ascertained, and established and that could be considered as socially undesirable. This 'weak' sense allows the absence of the second condition.

[23] Kelsen, *LSST* (n 2) 231.

[24] See v.gr. ibid 232 ff , Kelsen, *PTL2* (n 14) 28 ff.

subjects or particular actions outside of approval or disapproval.[25] Finally, law is a normative order that imposes socially immanent, organised sanctions: they come from society and are imposed by human subjects, and the system explicitly specifies who, when, what and how. If sanctions in religion can be attributed to this supernatural entity and sanctions in morality to no one in particular, sanctions in law can be attributed to the whole community.

We can put this graphically in this way:

	COERCIVE ORDERS	**NON-COERCIVE ORDERS**	
Type of Motivation	Indirect motivation	Indirect motivation	Direct motivation
	Punishment	Reward	
Types of sanction	Transcendental/ Socially immanent	Transcendental/ Socially immanent	No (necessary) sanction
Types of coercion	Psychic coercion	Psychic coercion	Psychic coercion
	Physical coercion		
Efficacy	Resting on sanction-coercion	Resting on sanction-voluntary obedience	Resting on voluntary obedience

And, comparing the three main social orders Kelsen has in mind:

	LAW	**MORALITY**	**RELIGION**
Type of Motivation	Indirect motivation[26]	Direct or indirect motivation[27]	Direct or indirect motivation
	Punishment		Reward/Punishment
Efficacy	Rests on sanction-coercion	Rests (mainly) on voluntary obedience	Rests on sanction-voluntary obedience
Types of sanction	Socially immanent	Socially immanent	Transcendental
	Organised	Non-organised	
Types of coercion	Psychic coercion	Psychic coercion	Psychic coercion
	Physical coercion		

It is important to point out that the fact that law is a coercive order does not mean for Kelsen that law has a coercive character – if by this is meant that law *enforces* behaviour. For contrary to what approaches as Austin's aim at,[28] law does not aim at forcing subjects to carry out the

[25] Kelsen also claims that '[c]oercive orders are based on measures of coercion as sanctions and orders that have no coercive character (moral and religious orders) rest on voluntary obedience'. See Kelsen, *LSST* (n 2) 325.
[26] For a *caveat* regarding this point, see the table at the end of Section III.
[27] See note 40.
[28] Austin characterises law as 'compulsive', or as a 'reinforced rule' by a certain authority. The specific method to 'compel' the subjects is the threatened evil in case of disobedience. For him, coercion is therefore 'psychic coercion': obedience (and performance of the desired behaviour) is achieved on the basis of the subject's fear to the sanction. See Austin (n 2) 89 ff. However, Kelsen criticises this approach for three reasons: because it is not possible to know if 'licit' behaviour is truly product of that fear; because psychic coercion is not a distinctive element of law, especially in relation to other social orders; and because the motives of 'licit' behaviour, in any case, are a subject-matter for sociology of law – and not for legal theory. See H Kelsen, 'The Pure Theory of Law and Analytical Jurisprudence' (1941) 55, 1 *Harvard Law Review* 44, 54 ff. We will return to this point in Section IV.

desired behaviour and thus at forcing legal behaviour: it merely attaches negative consequences to the performance of the undesirable behaviour. In other words, the terms are reversed: law does not (directly) require the performance of a desired behaviour and attaches an evil to its omission, but instead attaches an evil to the performance of an undesired behaviour and thus the desired behaviour is (indirectly) required by the system.[29] In this way, Kelsen can account for the fact that the desired behaviour may be performed for reasons other than the fact that the law prescribes it, and claim that this kind of 'psychic coercion'[30] is in any case not a peculiarity of law, but a common feature of any social order.[31] Thus, when Kelsen says that law is a (distinctive) coercive order, he means that law is a social order that uniquely imposes coercive acts as a consequence of conditions determined by that same order.

Moreover, this unique capacity for determination means that law regulates *all* use of force within a given society. Law not only separates between authorised and forbidden use of force, but also establishes a communal monopoly of it[32]. However, this monopoly is only about the *regulation* of the use of force: it can be both centralised (when coercive acts are performed by authorised specialised bodies) or decentralised (when coercive acts are performed by authorised non-specialised bodies). This gives rise to the principle that the use of force is forbidden and that the only exceptions of authorised use of force are those expressly set out in the law under explicit conditions: then, '[t]he use of force of man against man is either a delict or a sanction'.[33] Moreover, all possible human behaviours would be regulated either in a positive sense (when a coercive act is associated with their performance) or in a negative sense (when no coercive act is associated with their performance). To this extend, according to Kelsen, the legal order makes use of its monopoly on the use of force and employs it to pacify the community,[34] to protect subjects from other subjects and to guarantee a minimum of freedom for all. Peace, or at least collective security, is then achieved.

For Kelsen, law is a specific social technique for 'bringing about the desired social conduct through threat of coercion for contrary conduct': that is, law is a means to an end – not an end

[29] Kelsen, *PTL2* (n 14) 35.
[30] ibid.
[31] However, Kelsen does not deny that sanctions can be regarded as reasons for engaging in desired behaviour (see ibid).
[32] 'Monopoly of force' here means 'monopoly of force over the legal community': that is, that the legal order determines the conditions under which physical force may be employed by the individual so authorised by the legal community. See Kelsen, *PTL2* (n 14) 36; see also H Kelsen, *Peace through Law* (Chapel Hill, University of North Carolina Press, 1944) 3.
[33] Kelsen, *PTL2* (n 14) 42.
[34] ibid 21.

in itself.[35] It is a specific social technique characterised by the regulation of coercion through norms and the establishment of socially immanent, organised sanctions (which include the exercise of physical coercion and the general monopoly of force over the community); its effectiveness is mainly based on coercion as an indirect kind of motivational technique. Coercion is thus an essential element of law in several respects: it is the criterion for distinguishing law *qua* normative social order from other normative social orders, it is the particular subject-matter of any norm considered 'legal', and it is the main element on which the efficacy – and consequently the existence – of a legal order is based.

I will come back to this last part about existence in Section IV. Now, in Section III, let us look in detail at the idea of coercion as the specific subject-matter of 'legal' rules.

III. LAW AND COERCION – THE CONTENT OF LEGAL NORMS

Following the methodological considerations and principles of his *Pure Theory of Law*, Kelsen famously conceives norms as 'the specific meaning of acts of will directed at a definite human behaviour. This meaning is: that men *ought* to behave in a certain way'. [36] In this sense, norms function as normative conceptual schemes for understanding or qualifying reality. One of the main tasks of the Pure Theory of Law, as a theory that is supposed to offer the conditions for the possibility of legal knowledge, is thus to offer an ideal linguistic form of the legal norm.[37]

If coercion is the main criterion for distinguishing law from other social orders, as we have seen in Section II, it is also the main criterion for distinguishing between legal norms and other types of norms, in particular moral norms. The main differences lie in their structure, their (main) addressees, and the way they are supposed to guide behaviour. Let us take a closer look.

For Kelsen, a moral norm such as '*Thou shalt not steal*' is an imperative: it is mainly categorical, with the desired behaviour as its main object, and is addressed directly to the subject whose behaviour is to be guided.[38] Other kinds of moral norms, especially those involving a sanction, are considered secondary or dependent on this primary kind.[39] Even if moral orders can be considered psychically coercive, the content of these sanctions does not consist of coercive acts,

[35] Kelsen, *LSST* (n 2) 236.
[36] H Kelsen, 'On the Pure Theory of Law' (1966) 1, 1 *Israel Law Review* 1.
[37] See S Paulson, 'The Weak Reading of Authority in Hans Kelsen's Pure Theory of Law' (2000) 19, 2 *Law and Philosophy* 149.
[38] See Kelsen, *PTL2* (n 14) 100-1. See also Kelsen, *GTN* (n 13) 52 ff.
[39] See Kelsen, *GTN* (n 13) 143.

nor do these secondary moral norms individualise a subject entitled to their imposition.[40] Conversely, a legal norm such as '*Whoever steals shall be punished with imprisonment*' is not an imperative, but a hypothetical formulation with a (specific type of) sanction in its consequent.[41] On the one hand, its main object is not the socially desired behaviour, but the sanction to be imposed. On the other hand, it is not directed at the subject whose behaviour is to be guided, but at the subject who will be authorised to impose the sanction.[42] Finally, the content of these sanctions is a coercive act. Other types of legal norms, especially those that can be understood as imperatives, are subordinate to this primary type.[43]

Furthermore, whereas the notion of duty is the primary notion in moral norms, in legal norms the notion sanction is the primary one. On this basis, Kelsen first proposed a distinction between primary and secondary (legal) norms.[44] Primary norms are those that set out the conditions under which a sanction 'ought'[45] to be carried out, while secondary norms are those that prescribe the opposite behaviour to that which appears as a condition in a primary norm. Primary norms thus deal with delicts and sanctions, while secondary norms deal with legal duties. In this sense, secondary norms are in fact a mere reflex or correlate of primary norms: for every posited primary norm, a secondary norm of this kind could be devised – if only to better understand the phenomena.[46] In a second moment, Kelsen proposed to distinguish between independent and non-independent norms.[47] The former are norms that establish a sanction as a consequence of an unlawful act; the latter are norms that do not establish any sanction, but merely prescribe a certain behaviour. Here, the non-independent norms are not to be considered as 'correlates' of the independent norms, even if they do not have functional autonomy and depend

[40] See ibid 143. See also Kelsen, *PTL2* Kelsen, *PTL2* (n 14) 62. This can be seen as contradicting the distinctions Kelsen made between law, religion and morality as social orders, as can be seen in Section II. As far as moral orders are concerned, Kelsen indeed seems to oscillate between considering them as direct motivational systems (based on purely voluntary obedience) and indirect motivational systems (based on voluntary obedience and socially immanent, non-organised sanctions). In both cases, psychic coercion would be involved, but in the latter some kind of sanction (retribution) associated with refraining from the desired behaviour would also be involved. In my view, this fluctuation can be attributed both to a development of Kelsen's thought (from *LTTS* to *PTL2* to *GTN*) and to a difference in the direct object of his main interest in analysing the subject (v.gr. social orders in Kelsen, *LTTS* and *PTL2*, norms in Kelsen, *GTN*).
[41] See v.gr. Kelsen, *GTN* (n 13) 140-1.
[42] See Kelsen, *GTN* (n 13) 52 ff.
[43] See v.gr. ibid 142.
[44] See H Kelsen, *Introduction to the Problems of Legal Theory* (Oxford, Clarendon Press, 1992) [*PTL1*], 30.
[45] Paulson claims that Kelsen has oscillated between the meaning of this 'ought' – between 'ought' in the sense of duty and 'ought' as a placeholder for something akin to 'empowerment'. See Paulson (n 46) 147.
[46] See v.gr. Kelsen, *PTL1* (n 44) 29-30.
[47] See v.gr. Kelsen, *PTL2* (n 14) 56/57 and 257.

on the latter for their function.[48] Finally, in his last work, he seemly went back to the first distinction of primary and secondary norms,[49] highlighting the independent character of the former and the superfluous and implicit character of the latter.[50]

It is interesting to note that Kelsen initially considered norms as having, as Paulson puts it, a 'double possibility of effect'.[51] In this sense, norms can be both complied with and applied. From the point of view of those who comply with them, *i.e.*, ordinary subjects, norms can be conceived as commands: they directly command them to behave in a certain way (norm *qua* command). From the point of view of those who apply them, *i.e.*, officials, norms can be conceived as hypothetically formulated sanction norms: they empower them to apply a certain sanction if certain conditions obtain (norm *qua* hypothetical formulae). However, what Kelsen last called the 'complete legal norm' – the ideal linguistic form of the legal norm – focuses only on the latter. In this sense, the complete legal norm is a hypothetically formulated norm that both empowers officials to impose sanctions under certain conditions and to participate in law-making.[52]

Does the idea of coercion as an essential subject-matter of legal norms still hold when considering this complete legal norm? It seems so. Coercion still seems to be the central element, especially when the norms are considered from a nomostatic point of view. The idea of nomostatics and nomodynamics accounts for the fact that, for Kelsen, law is a coercive order that regulates its own creation. From a static or *ex-post* perspective, law is seen in terms of coercion (empowerment to sanction); from a dynamic or *ex-post* perspective, it is seen in terms of empowerment (empowerment to issue norms). [53] However, the basic structure of the norm is still the same: a hypothetical formulation that links a certain sanction to the occurrence of certain conditions. Both empowerment considerations are inextricably linked to the sanction: either to its application or to the issuing of the authorisation for its application. Moreover, since all non-sanctioning norms are considered dependent on sanction-empowering norms, they are also to be considered as directly or indirectly referring to the content or validity of the latter.

[48] See Kelsen, *PTL2* (n 14) 54-8.
[49] See v.gr. Kelsen, *GTN* (n 13) 56-57.
[50] See Kelsen, *GTN* (n 13) 142.
[51] See Paulson (n 37) 142.
[52] See ibid 151.
[53] See Kelsen, *PTL2* (n 14) 55-59; Paulson (n 37) 152. These two points of view of the legal norm can be also seen as 'norm *qua* process' and 'norm *qua* product': see S Paulson, 'A "Justified Normativity" Thesis in Hans Kelsen's Pure Theory of Law? Rejoinders to Robert Alexy and Joseph Raz' in M Klatt (ed), *Institutionalized Reason: The Jurisprudence of Robert Alexy* (Oxford, Oxford University Press, 2012) 61-111, 87.

Interestingly, this conception of the complete legal norm as a hypothetical formulation regarding empowerment to sanction allows for a further (and finer) distinction from other types of norms. It is not just that moral norms are imperatives, while legal norms are hypothetical formulations of this kind: for Kelsen, the very notion of empowerment is also a *legal* notion. This is because the notion of empowerment seems to be inextricably linked to the notion of a dynamic normative system, as well as to the notions of indirect motivational technique and socially immanent organised sanction. As far as the former is concerned, the concept of empowerment seems to have no place in a normative system that does not allow for deliberate change, *i.e.* that does not regulate its own change. Only when the idea of deliberate normative labour is introduced – in particular, deliberative normative issuance – does the idea of empowerment become both necessary and, in a sense, conceivable. As far as the latter is concerned, in turn, the concept of empowerment seems to be intrinsically linked to the need for systemic organisation whenever an indirect motivational technique is used, and especially when the attributed consequence is a certain behaviour of a certain human subject. This situation requires a systemic determination not only of when (the antecedent) and what (the act or event in the consequence), but also and especially of who and how (the determination of the occurrence of the antecedent and the execution of that consequence). [54]

Here we can briefly return to some considerations from Section II. There we saw that Kelsen distinguishes law from other social systems with direct or indirect motivation technique but transcendent sanctions (religious systems) and with direct or indirect motivation technique and socially immanent but unorganised sanctions (moral systems). To this distinction we can now add the fact that Kelsen considers religious and moral systems to be static systems, whereas legal systems are paradigmatically or distinctively dynamic systems.[55] This dynamic quality can only exist where there are subjects who are empowered by the norms of the system to deliberately change the existent norms or carry out the consequences that the existing norms determine that ought to be applied. Following Kelsen's idea of the complete legal norm, empowerment as a legal concept is thus always directly or indirectly linked to sanctions. Directly,

[54] Whether the determination of the occurrence of the antecedent is considered a different and separable question from the execution of the consequent is, for Kelsen, a question of the development of the organisation. See Kelsen, *LSST* (n 2) . What is important here is whether the determination of the event can be regarded as the issuance of a norm, in this case a particular or individual norm. In this case, both types of empowerment that Kelsen seems to consider clearly refer to the same subject. This is the sense in which Kelsen claims that all legal authorities (*i.e.*, competent subjects), though not at the top or bottom of the legal system, both create and apply laws.

[55] See v.gr. Kelsen, *PTL2* (n 14) 70-71, 195. I say 'paradigmatic' because Kelsen himself puts a caveat on this statement. He recognises that legal systems can be both nomostatic and nomodynamic, i.e. that their norms are valid both when they are derived from other norms (nomostatic) and when they are created according to other norms (nomodynamic). For Kelsen, a legal system can be purely dynamic, but it is impossible for it to be purely static. In this sense, it would not be a legal system.

because there is empowerment to create and/or eliminate general norms that establish sanctions under certain conditions, or to issue specific norms that determine that a sanction ought to be applied, or to enforce a sanction. Indirectly, because there is empowerment to create and eliminate general norms which, even if they do not directly impute sanctions, nevertheless refer to those that do so – *e.g.*, by limit or change their conditions or their validity.

We can summarise this as follows:

		LAW	MORALITY	RELIGION
Main norm	**Type**	Hypothetical formulated sanction-norm	Imperative	Imperative
	Addressee	Official	Individual	Individual
	Deontic characterisation	Ought (empowerment)	Ought (imperative)	Ought (imperative)
Other norms (if any)	**Type**	Imperative	Hypothetical formulated sanction-norm	Hypothetical formulated sanction-norm
	Addressee	Individual	Community at large	God/Supranatural entity
	Deontic characterisation	Multiple	Ought	Ought
Types of sanction		Socially immanent	Socially immanent	Transcendental
		Organised	Non-organised	
Types of empowerment		Empowerment to execute sanctions	"Empowerment" to execute sanctions	"Empowerment" to execute sanctions
		Empowerment to issue norms		
Main way to guide conduct (main norm)		Direct motivation (officials) Indirect motivation (individuals)	Direct motivation (individuals)	Direct and indirect motivation (individuals)

IV. LAW AND COERCION – THE EXISTENCE OF THE LEGAL ORDER

So far we have seen that for Kelsen coercion is an essential element of law because it is (1) the criterion that allows to distinguish law *qua* normative social order from other kinds of normative social orders (such as religion and morality) – coercion of a specific kind (Section II); and (2) the criterion that allows to distinguish legal norms from other norms (such as moral norms) – coercion as the specific subject-matter of norms (Section III).

However, for Kelsen, coercion can also be seen as an essential element of law in a third way: as an essential condition for the very existence of law. On the one hand, and drawing from the conclusions of the previous sections, the existence of coercion can be seen as an essential condition for the effectiveness of law. Although it can be well argued that both direct and indirect effects of coercion are relevant, we will see that the indirect effects are those that contribute most to the achievement of effectiveness. On the other hand, and going a little further, coercion can be seen as an essential condition for the validity of law. Two independent arguments can

be put forward in this regard. The first is that Kelsen's basic norm, following Bobbio, can ultimately be traced back to the principle of effectiveness. The second is that the content of Kelsen's basic norm – at least in some of its characterisations[56] – is nevertheless based on the notion of coercion. Let us examine both.

A. Coercion as an essential condition for the effectiveness of a legal order

What exactly does 'effectiveness' mean, especially when it comes to a legal system?[57] In his reflections on the concept of validity, Kelsen focuses primarly on the effectiveness of individual norms.[58] The effectiveness of a norm is the real fact that the norm is by and large applied (by officials) and followed (by individuals)[59] – in other words, the fact that norm-compliant behaviour occurs in reality.[60] In this sense, a norm such as '*If behaviour X occurs, then sanction Y ought to be imposed*' can be said to be effective if officials by and large actually impose sanctions-Y when behaviour-X occurs, and if individuals by and large refrain from doing-X.

This doubled-faced account of effectiveness has interesting consequences. On the one hand, this norm would be effective if no individual refrains from doing-X and officials by and large impose sanctions-Y on these individuals. In this case, the norm is effective because it is actually *applied* by the relevant addressees (officials). If, on the other hand, all individuals refrain from doing-X, then no official would actually impose sanctions-Y as a consequence of someone doing-X. In this case, the norm is effective because it is actually *observed* not only by the individuals but also by the officials. Individuals comply with the norm by not doing-X, thus achieving the socially desired behaviour; official, by not imposing sanctions because the conditions for their application are not met.

Kelsen distinguishes between the conditions for the efficacy of sanction-decreeing norms (primary norms) and other norms. In regard to the latter, he claims that 'the effectiveness of a norm commanding a certain behaviour is dependent of the sanction-decreeing norm, the primary norm'.[61] In regard to the former, he claims that they 'do not need sanctions as reactions to their violation or observance, or need such guarantees to a much lesser degree than other norms which have to *command* behaviour because this behaviour is, or can be, contrary to the natural

[56] See Paulson (n 37).
[57] For an introductory study of efficacy and law, see v.gr. L Burazin, 'The Concept of Law and Efficacy' in M Sellers, S Kirste (eds), *Encyclopedia of the Philosophy of Law and Social Philosophy* (Dordrecht, Springer, 2019).
[58] See v.gr. Kelsen, *GTN* (n 13) 139 ff.
[59] ibid 138.
[60] Kelsen writes: 'The validity is a quality of law; the so-called efficacy is a quality of the actual behaviour of men and not, as linguistic usage seems to suggest, of law itself'. See Kelsen, *GTLS* (n 2) 40.
[61] Kelsen, *GTN* (n 13) 138.

inclinations of human beings'.[62] Kelsen seems to assume that this is so because it is ultimately easier for people to sanction socially undesirable behaviour than to engage in socially desirable behaviour.[63] Moreover, Kelsen recognises two possibilities for the effectiveness of these sanction-decreeing norms. On the one hand, these norms can be applied by and large. This includes both (1) the situation of issuance of an individual norm declaring that a coercive act ought to be performed and the performance of the act, and (2) the situation of issuance of an individual norm declaring a coercive act ought not to be performed because the conditions have not been met. On the other, these sanction-decreeing norms can be not applied at all because the specific condition for sanctions has never occurred nor suspected to occur (even though it is possible that it will do so).[64]

With regard to the legal system *qua* normative social order, Kelsen points out that the usual view is that a given legal system is effective if 'its norms which command a certain behaviour are actually observed and, if not observed, then applied'.[65] Taking the previous paragraph into account, Kelsen's view can be better understood as meaning that a legal system is effective when its norms are by and large *applied*. This is because, as we have seen, there is the possibility that norms can be considered effective even if the subjects authorised to apply them do not do so because no delict is committed. In other words: a legal system is effective when the socially undesirable behaviour present in the condition of application of its norms is by and large not committed (*effectiveness-by-absence*) or, if committed, the corresponding sanction is by and large determined and executed (*effectiveness-by-action*).

What does coercion have to do with effectiveness, especially the effectiveness of legal systems? Well, if one defines effectiveness in the way Kelsen seems to do, then the presence of coercion is a necessary condition for effectiveness, both conceptually and empirically. Conceptually, in the sense that the effectiveness of the legal system is entirely defined by reference to norms that involve coercion. Empirically, because the presence of coercion – in particular, its indirect effects – can in account for effectiveness, in particular what I have called *effectiveness-by-absence*.

[62] ibid
[63] One can conjecture that it is easier imposing an evil (to an evil) than asking for providing for a good (without a clear good in exchange).
[64] See Kelsen, *GTN* (n 13) 141.
[65] ibid 138.

As for coercion as a conceptually necessary condition, the argument seems quite straightforward: the effectiveness of a legal system is defined solely by what happens in relation to sanction-norms. In this sense, and following Kelsen's definitions, the statement '*LS1 is effective*' actually means '*the sanction-norms belonging to LS1 are by and large applied*'. And this in turn means: '*the socially undesired behaviours, content of the antecedent of sanction-norms belonging to LS1, are by and large not being committed, and thus the sanction in the consequent of those sanction-norms is not being determined and executed*' or '*the socially undesired behaviours, content of the antecedent of sanction-norms belonging to LS1, are being committed, and thus the sanction in the consequent of those sanction-norms is by and large being determined and executed'*.

As for coercion as an empirically necessary condition, Kelsen's argument does not seem as straightforward as the previous one, but it could be constructed as follows. Kelsen claims that 'by the efficacy of law is meant that the idea of law furnishes a motive for lawful conduct' and that 'the efficacy of law, understood in the last-mentioned way, consists in the fact that men are led to observe the conduct required by a norm by their idea of this norm'.[66] In this sense, it can be said that the effectiveness of the legal system – especially the *effectiveness-by-absence* – is caused or supported by the (direct and indirect) effects of coercion within the sanction-norms, which influence the ideas that people have about the norms.

According to Olivecrona,[67] the presence and by and large application of sanctions as a consequence of the occurrence of certain behaviours have direct and indirect effects on human behaviour. On the one hand, the direct effect refers to the causation of human behaviour by fear of sanctions. If sanctions are actually and consistently applied as a consequence of a certain behaviour (*effectiveness-by-action*), this motivates people not to engage in that behaviour. Thus, the more plausible the application of sanctions is, the greater the motivation not to behave in that way (*effectiveness-by-absence*).

The indirect effect, on the other hand, refers to the psychic or psychological pressure that both the existence of organised violence – *i.e.*, the existence of a system of sanction-norms – and the

[66] Kelsen, *GTLS* (n 2) 40.

[67] See v.gr. Olivecrona, *LAF1* (n 2) 140 ff, especially 141-142. I am primarily guided here by the first edition of *Law as Fact* (1939) in which Olivecrona offers an articulated exposition on the subject. In the second edition of *Law as Fact* (1971), he argued that the study of these issues should be reserved for a future work, but maintained his position that sanctions are central to the explanation of obedience to the law. In a final article, he finally returned to an in-depth analysis of coercion and law, now arguing that the legal system interweaves coercion and psychological power (1976). See also T Spaak, *A Critical Appraisal of Karl Olivecrona's Legal Philosophy* (Cham, Springer, 2014).

direct application of sanctions exert on the subjects. This psychological pressure does not manifest itself in the form of fear or discomfort, as (if at all) in the case of the direct effect, but in a sense of objective duty and other similarly moral sentiments towards not committing delicts. Olivecrona argues that this is an adaptive mechanism of humans to maintain sanity and function in society, a mechanism that has been supported and maintained over the centuries by things like education.[68] Although he concedes that coercion is not the only element that generates this sense of duty, he nevertheless claims that coercion is a necessary (though not sufficient) condition for it.[69]

The indirect effect of coercion is of particular interest here, for two reasons. The first is that it provides an interesting explanation for the particularities of psychological or psychic coercion of law *qua* social order. As we have seen, Kelsen rejected it as a distinctive feature of law, since it is a feature shared by all normative social orders. However, here it seems to be intrinsically connected with the presence of the specific type of coercion that Kelsen claims as distinctive of law: socially immanent, organised, physical coercion.

The second reason is that this indirect effect may be related – both conceptually and empirically – to coercion being a necessary feature for effectiveness. The presence of sanction-norms is not only necessary to conceptualise effectiveness, as we have seen, but its indirect effects are also empirically necessary for *effectiveness-by-absence*. Indeed, the indirect effect of coercion can explain in an empirical way the conceptual link that Kelsen first proposed between primary and secondary norms, *i.e.,* between sanction-norms and duty-norms. It is not only the direct effect of coercion what causes people not to commit delicts out of fear of sanctions, as the indirect technique of behaviour-guiding would lead one to expect. It is its indirect effect what mainly causes people not to do so: not out of fear, but because they assume that there is a corresponding valid duty not to do-X associated with the sanction-norm that establishes a sanction for doing-X. In other words: where a sanction-norm exists, the indirect effect of coercion causes people to read the situation as if a duty not to commit the delict were also existent.[70]

[68] 'Fear rises itself as a barrier against law-breaking. But we cannot go on harbouring ideas of lawbreaking and at the same time combating them with fear. This would have a disruptive influence on the personality. We simply cannot do so in the long run without endangering our mental health. The internal cleavage would prove too much. Therefore the dangerous wishes must be excluded from our mind. If we do not entirely succeed in doing this, they are at least relegated to the sphere of day-dreams, more or less completely cut off from our every-day activities' (Olivecrona, *LAF1* (n 2) 147-148).
[69] Olivecrona, *LAF2* (n 2): 272.
[70] I will return to this in point *ii* below.

Furthermore, it can be argued this psychological pressure is also necessary for *effectiveness-by-action*. Indeed, this pressure would also be exerted on the very subjects who are authorised to impose the sanctions and hence generate a 'sense of duty' to apply them, even when – as Kelsen himself points out – the sanction-norms only concede an authorisation and not impose a duty to do so. More than that, as we shall see in the next point, it is possible to assume that it explains why these subjects attribute validity to these norms and to the legal order as a whole.

B. Coercion as an essential condition for the validity of a legal order

We have seen how, for Kelsen, coercion can be regarded (conceptually and empirically) as an essential condition for the effectiveness of law. As I will try to show in this section, coercion can also be seen as an essential condition for the validity of law. There are two independent paths to do so. The first is to consider how Kelsen's basic norm could ultimately be traced back to the principle of effectiveness. The second is to show that the content of (at least some of the characterisations of) Kelsen's basic norm is inherently based on the notion of coercion. Let us explore both paths.

i. The basic norm and the principle of effectiveness

The relationship between Kelsen's basic norm and the principle of effectiveness[71] can be examined without having to define the exact content of the basic norm. I will devote more attention to it in the following section. For the moment, suffice it to say that the basic norm – regardless of its precise content – is the ultimate source of what Kelsen calls the 'objective validity' of prescriptive acts undertaken in accordance with a given social coercive order.[72] In other words, the basic norm allows these acts to be interpreted as objectively normative – *i.e.*, as norms[73] – because they have been authorised by norms of the system. This basic norm is not a positive norm, but a conditional and hypothetical, presupposed one. And – this is the crux of

[71] According to the principle of effectiveness, 'a legal order must be efficacious in order to be valid'. See Kelsen, *GTLS* (n 2) 121. Kelsen understands that this principle, in international law, has the status of a positive norm: 'It is this general principle of effectiveness, a positive norm of international law, which, applied to the concrete circumstances of an individual national legal order, provides the individual basic norm of this national legal order'. At the level of individual norms, the principle of effectiveness acts as a limit for the principle of legitimacy, according to which 'a norm of a legal order is valid until its validity is terminated in a way determined by this legal order or replaced by the validity of another norm of this order'. See Kelsen, *PTL2* (n 14) 209-11. In this sense, effectiveness (both of the legal order and the individual norm in itself) are, together with the existence of an act of norm-creation, condition for the validity of a norm: 'effectiveness is the condition in the sense that a legal order a whole, and a single legal norm, can no loger be regarded as valid when they cease to be effective'. See Kelsen, *PTL2* (n 14) 212.

[72] See v.gr. Kelsen, *PTL2* (n 14) 8, 202-3, 217-8.

[73] 'The act of will (which is an Is) "has" the Meaning of an Ought. This Ought is the norm' (Kelsen, *GTN* (n 13) 26).

the matter – *it is presupposed only with regard to the most effective coercive order in a given area at a given time*.[74]

This is the famous answer Kelsen ultimately gives to the question of how to distinguish between the command of a robber and that of an authority, and by extension, between the normative order of a gang of robbers and a legal order.[75] Here, all the characteristics of both the individual prescriptions and the normative order *qua* social coercive order seem to be the same. Regarding the former, in both cases there is an act of will which means that someone ought to behave in a certain way. Regarding the latter, in both cases there is a social order that regulates its own creation, uses an indirect technique to guide behaviour, and consists of (alleged) norms that empower some subjects to determine and carry out socially immanent, organised sanctions. It is clear that the previous distinctions Kelsen traced between different types of social orders – between law, morality and religion – do not apply here. So how can we call one a legal order and the other, a different kind of social order? If these two orders exist at the same time in the same territory, how can we distinguish between a legal order and another coercive social order?

The answer is quite simple: only one of them is a *valid* order – only one of them is really composed of norms, *i.e.*, has 'objective validity'. Kelsen explicitly addresses this point and gives this answer:

> Why is the coercive order that constitutes the community of the robber gang and comprised the internal and external order not interpreted as a legal order? Why is the subjective meaning of this coercive order (that one ought to behave in conformity with it) not interpreted as its objective meaning? Because no basic norm is presupposed according to which one ought to behave in conformity with this order. But why is no such basic norm presupposed? Because this order does not have the lasting effectiveness without which no basic norm is presupposed. The robbers' coercive order does not have this effectiveness, if the norms of the legal order in whose territorial sphere of validity the gang operates are actually applied to the robbers' activity … in short, if the coercive order regarded as the legal order is more effective that the coercive order constituting the gang.[76]

[74] See, v.gr., Kelsen, *PTL2* (n 14) 49.
[75] ibid 44 ff.
[76] ibid 47-48.

The relationship between the basic norm and effectiveness is thus twofold. On the one hand, the presupposition of the basic norm is only possible or meaningful with regard to a 'lasting effective' order. On the other hand, if two orders are simultaneously effective in the same territory, effectiveness is the ultimate criterion for the basic norm: it can only be presupposed with regard to the 'more effective' order. This seems to mean that the difference between a valid coercive order (authorised, legal coercion – 'legal order') and an invalid coercive order (unauthorised, illegal coercion – 'gang of robbers') is ultimately only the fact that the first is, by and large, more applied (*effectiveness-by-action*) and obeyed (*effectiveness-by-absence*). As a consequence, if the conclusions of the previous point hold – *i.e.* if coercion can be conceived as an essential condition for the *effectiveness* of a legal order – then ultimately coercion is also an essential condition for the *validity* of a legal order.[77]

Norberto Bobbio summarised this difficulty as follows: could the basic norm be an ingenious but ultimately completely useless expedient?[78] Bobbio says that it is understandable that, out of pure formal correctness, it is necessary to close the legal order with an ultimate norm and not with an ultimate power. Indeed, out of pure formal correctness it seems reasonable to have an ultimate norm that authorises – in some way – the first prescriptive acts at the top of the order. However, if this ultimate norm ends up referring to ultimate power – if a social order is a legal order only because it is more effective than that of a gang of robbers – then the ultimate norm seems rather superfluous for such a purpose. According to Bobbio, Kelsen offers no argument in favour of the thesis that this ultimate power derives its effectiveness from the fact that this power is authorised, and if the 'legitimacy' of this power is ultimately derived from its effectiveness, then 'the adoption of a norm that plays the role of a legitimating norm is a superfluous operation'.[79] This is so because validity is ultimately traced back entirely to the principle of effectiveness – and as a result, the foundation does not help to solve the main problem of positivist theories, namely the derivation of law from fact.[80]

[77] Whether it can be considered as a necessary and/or sufficient condition is, in my opinion, up to debate.
[78] N Bobbio, *Diritto e potere. Saggi su Kelsen* (Turin, Giappichelli, 2014), 145-147.
[79] ibid 146. The translation from Italian is mine.
[80] Bobbio famously asserts that norm and power are two sides of the same coin: the same phenomena can be analysed one way or the other, depending on the interest of the theorist and the field of study (legal theory, political theory). See v.gr. N Bobbio, 'Kelsen and Legal Power' in S Paulson and B Litschewski Paulson (eds), *Normativity and Norms: Critical Perspectives on Kelsenian Themes* (Oxford, Clarendon Press, 1999) 434-449, 435 ff. In analysing this difficulty of the basic norm, Bobbio says that Kelsen's insistence on finding a norm (rather than a power) to close the legal order may reflect a practical preference: the ideal of the Rule of Law. See N Bobbio, *Diritto e potere* (n 78), 146-147.

ii. The basic norm and coercion as its specific subject-matter

Even if one disagrees with the conclusion of the previous section, there is a second independent argument to show that coercion can be regarded as an essential condition for the validity of law: that the content of Kelsen's basic norm – at least in some of its characterisations[81] – is nevertheless inseparably based on the concept of coercion.

Kelsen was not entirely consistent with his definition of the basic norm throughout his prolific academic career. As Paulson argued,[82] several groups of characterisations can be drawn out from different definitions Kelsen offered: 'empowerment and legal validity, normativity, the unity of the legal system, definitions of the law, meaningfulness and "normative consistency", and, finally, two groups that bring together characterization of the basic norm addressing the Kantian or Neokantian dimension of Kelsen's legal philosophy'.[83] Paulson further identifies five characterisations of the basic norm that belong to the group empowerment and legal validity: basic norm [1] *qua* authorisation to enact legal norms, [2] *qua* authorisation to impose sanctions, [3] *qua* ultimate basis for legal validity (=membership), [4] *qua* ultimate basis for legal validity (=bindingness), and [5] *qua* precondition for the transition from the purely subjective meaning of an act to its objective or legal sense.[84] For the present purpose, these five characterisations will suffice.

That coercion is an essential part of the content of the basic norm in both characterisations [1] and [2] is quite clear. Characterised in this way, the basic norm greatly resembles any other norm of the legal order – therefore, the considerations and conclusions from Section III on coercion as the specific subject-matter of legal norms can very well be applied also to the basic norm. The fact that the basic norm, unlike the other norms, is only presupposed and not posited makes no difference here.

That coercion is an essential part of the content of the basic norm is also quite clear with regard to characterisations [3] and [5]. Regarding the former, as Paulson points out, [3] and [1] interlock neatly, since [3] sets up a criterion of validity as membership that recalls the empowerment of a subject to enact norms. Regarding the latter, [5] fits both [1] and [2] as [5] refers generally to prescriptive acts (both the issuance of norms and the imposition of sanctions). According to

[81] See v.gr. Paulson (n 37) and Paulson (n 53) .
[82] See Paulson (n 53) 85 ff.
[83] ibid 86.
[84] See ibid 86-97.

Paulson, [5] leads to [3], which in turn is explained in terms of [1].[85] Therefore, all these characterisations – in one way or another – are reconstructed as coercion as their specific subject-matter.

Finally, even if it might be considered as an erroneous characterisation,[86] the content of the basic norm in characterisation [4] can be also linked to coercion – albeit in a more indirect way. On the one hand, bindingness is directly related to obligations and duties, which in turn are inextricably linked to coercive acts that function as sanctions. This is clear in the version of Kelsen's theory in which he postulates the existence of primary and secondary norms, although this may be disputed in his later versions. On the other hand, although this may not be exactly what the late Kelsen intended to assert, characterisation [4] can easily be read as the basic norm of the active participants within the legal phenomenon, both officials and non-officials. In this sense, characterisation [4] seems to perfectly reflect their main 'working presupposition' (even if it is not considered by them as a presupposition but as a fact): that there is a duty of some subjects to behave or not behave in a certain way, as a counterpart to the right or power of some other subjects to issue sanction-norms and impose sanctions, a right or power conceded by the order in force because ultimately the subjects who established the first historical constitution of that order had the right or power to do so.

V. Concluding Remark

The resumption of the debate about the relationship between law and coercion may prove extremely fruitful for legal philosophy and theory for a number of reasons, including the examination of methodological and substantive tenets that have been considered consolidated knowledge and truths in recent decades. Kelsen's particular position is particularly interesting as it considers coercion both as a means employed by the legal order and as the specific content of legal norms. This chapter showed that coercion can be understood as an essential element of law in Kelsen's framework because it is (1) the criterion that distinguishes law qua normative social order from other kinds of normative social orders, (2) the criterion that distinguishes legal norms from other norms, (3) an essential condition for the effectiveness of law, and (4) an

[85] ibid 90.
[86] See ibid 91-92.

essential condition for the validity of law. For these reasons, an in-depth study and consideration of Kelsen's approach – within the framework of his fully developed theory of law and legal methodology – may be of great value and interest for the continuation of the debate.