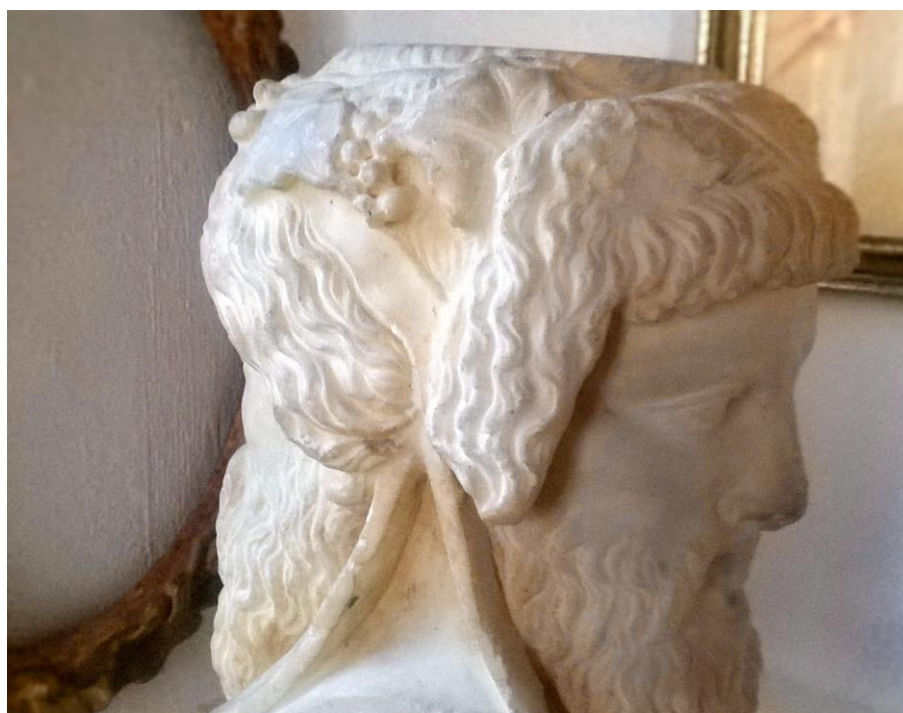




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# Defining law: the concept of force and its legitimacy

*Some considerations on Frederik Schauer's book "The force of law"*



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## DEFINING LAW: THE CONCEPT OF FORCE AND ITS LEGITIMACY

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Some considerations on Frederik Schauer's book "The force of law"

By Maria Borrello

### Abstract

The relation between force and law is very complicated one. However, if we want to understand what a rule is, what it can do, and how it does, we have to recognize the relevance of the coercive dimension; this is not a necessary character of every rule, but remains the most typical reason that explains why people accord their behaviors to the prescriptions of the rules. Dealing with force, in any case, is not an easy matter: the semantic field to which the term force belongs is very huge and with it we can cover a lot of different situations. For that reason, when we put together law and force, we immediately need to find a third element through which this relationship could be regulated. The force of law leads us to recognize that the acts of force we can accept are the ones that have been defined by the legitimate principle. The coercive dimension is comprehensible just for its legitimacy, and that implies an idea of justice.

The Author would like to stress her lecture of Schauer's reflection on the force of law, is that according to the position that recognise aof force in the very core of law, we are immediately obliged to give to this force a plan in which it can assume a legal meaning, and that is to say, the uncertain ground of the metaphysical, transcendental idea of justice.

### Riassunto

La relazione tra forza e diritto è molto complessa. Tuttavia, se vogliamo capire che cosa sia una norma giuridica, che cosa possa fare, e come lo faccia, dobbiamo riconoscere l'importanza della dimensione coercitiva; questo non è un carattere necessario di ogni norma, ma resta la ragione più tipica che spiega perché le persone accordano i loro comportamenti alle prescrizioni del diritto. Maneggiare il concetto di "forza", in ogni caso, non è cosa semplice: il campo semantico del termine 'forza' è molto grande e si riferisce ad un ampio numero di situazioni diverse. Per questo motivo, quando accomuniamo la "legge" e la "forza", abbiamo immediatamente bisogno di trovare un terzo elemento attraverso il quale questo rapporto possa essere regolamentato. La dimensione coercitiva è comprensibile solo alla luce del concetto di legittimità e implica un'idea di giustizia. La forza della Legge ci porta a riconoscere che gli atti di forza che possiamo accettare sono solo quelli che siano coperti dal

principio di legittimità. L'autrice tiene a sottolineare che la sua interpretazione della saggio di Schauer sulla "forza di legge", è nel senso che qualora si attribuisca la forza al nucleo centrale del concetto stesso di Diritto, saremmo immediatamente obbligati a collocare questa forza su un piano in cui si può assumere un significato giuridico, vale a dire il terreno incerto dell'idea metafisica e trascendentale della giustizia.

Maria Borrello, Professore Aggregato di Filosofia del diritto, Università di Torino.  
maria.borrello@unito.it

### 1. Premise

The relation between force and law is a very complicated one. We expect from law the ability to exclude force in interpersonal relationship, because in that way we can guarantee an order of justice; but law needs force to realize such order. Law needs force to realize itself, because as Von Jerhing says: "A rule of law without coercion is self-contradictory, it is a fire that does not burn, a light that does not shine" <sup>1</sup>. Dealing with law is dealing with force, but not every kind of force can achieve the statute of law. A raw force, a force that has not limits in its realization cannot be considered as a legal one. The very nature of law is indeed to set limits on arbitrariness. For that reason, introducing the idea of force in the concept of law poses a very big problem about such arbitrariness. This issue obliges to investigate the relationship between force and law by a specific point of view, which deals with the principle of legitimacy. In that sense, considering the relationship between law and force is always related to the question of legitimacy. In other terms, the problem is to identify the way through which the relation among force and law can be ordered, according with the idea of justice.

Concerning the relationship between law and force, Schauer's book raises many insights and problematic aspects. Among them, are two questions that offer an important opportunity for a theoretical reflection on law: "What is the law?" and "Why do people obey the law?" Answering both of them implies dealing with the concept of force. That is a very complicated one and also one of the richest and most prolific in contemporary theoretical debates about law<sup>2</sup>. So, "The force of law" is set up in a very large and complicated ground,

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<sup>1</sup>R. von Jhering, *Lo scopo nel diritto*, a cura di M. G. Losano, Einaudi, Torino, 1972, p. 233. En. trans. by editor.

<sup>2</sup> On that point, Schauer says: "And thus a running subtext of this book is a challenge to a prevalent mode of jurisprudential inquiry. For most contemporary practitioners of jurisprudence, the principal or even exclusive task of their enterprise is to identify the essential properties of law, the properties without which it would not be law, and the properties that define law in all possible legal systems in all possible worlds. But that understanding of the jurisprudential enterprise turns out to rest on at least a highly contested and quite possibly a mistaken view of the nature of our concepts and categories, and of the nature of many of the phenomena – including law – to which those concepts and categories are connected. In stressing the importance of coercion to law as it exists and as it is experienced while not insisting that coercion is an essential feature of every imaginable legal system, I challenge the methods of modern jurisprudence as well as one of its important conclusions". F.

but gives us a new window through which view the legal relevance of coercion, that is considered a basic feature of understanding the law field and maybe changing the understanding of what legal positivism is<sup>3</sup>.

The merit of this book is to develop the reasoning concerning this relationship, as hinted earlier, in a not too abstract way, i.e. not just as a theoretical matter, far removed from real problems and real world experiences. In general, one of the more valuable aspect of Schauer' philosophical tools and analysis is that they help us understand actual institutions and problems. So, facing one of the most intricate problems for a philosophical analysis of law, we can achieve a deep comprehension of the law concept and, to quote Schauer: "Thus focusing on the coercive side of law helps us to understand why and when we might need law, and why and when law can do things that other political institutions and other forms of social organization cannot"<sup>4</sup>.

By the way, stressing the relevance of the coercive dimension doesn't conform necessarily with an imperativistic account. The point is not to assume that coercion is the sole feature that characterizes all the rules belonging to a certain law system<sup>5</sup>. According to Schauer's analysis: "In stressing the importance of coercion to law as it exists and as it is experienced while not insisting that coercion is an essential feature of every imaginable legal system"<sup>6</sup>. By a disenchanted point of view, we've just to recognize that: "even if, contra Austin, sanctions are not an essential component of the very idea of legal obligation, they seem nonetheless crucial in promoting a motivation to obey and thus in promoting compliance with law"<sup>7</sup>. It seems to me that to reclaim Bentham, or Austin's theory and counteract Hart's argument turns the analysis into a reconsideration of the traditional form

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Schauer, *The force of law*, 2015, p. 8. (We refers to the manuscript, that the Author has kindly granted before it was published).

<sup>3</sup> Schauer affirms in that sense: "Modern legal positivism, which originated with Bentham, thus emerged out of his desire to describe law very much from the outside, with neither sympathy nor endorsement. Theorists have been debating the nature and commitments of legal positivism ever since,<sup>17</sup> but at the heart of the positivist outlook is the goal of distinguishing the description of law from normative evaluation, particularly moral evaluation". (Schauer 34); prosigue su reflexión especificando: "I believe that Summers, Raz, and Finnis are largely correct, not only because many attempts to characterize positivism devolve into caricature, but also because excess dichotomization of perspectives into positivist and non-positivist (or antipositivist), as if they were the two sides in the World Cup finals, makes it more difficult to see the value, even if only partial, to be found within the individual members of an array of diverse perspectives and analyses", (p. 35 footnotes).

<sup>4</sup>F. Schauer, 2015, p. 298.

<sup>5</sup> They are well-known the three most relevant critics to that assumption. See N. Bobbio, *Diritto e forza*, in *Studi per una teoria generale del diritto*, Giappichelli, Torino, 1970, p. 104: "the many and frequent objections to the traditional theory can be reduced to essentially three arguments, repeated until the satiety: a) the general voluntary compliance; b) the existence in any legal system of rules without sanction; c) the process indefinitely (if a rule is legal because it is sanctioned, even the rule that provides a sanction, to be legal, must be sanctioned, and so on). En. Trans. by editor.

<sup>6</sup> F. Schauer, 2015, p. 8.

<sup>7</sup> F. Schauer, 2015, p. 146.

of legal positivism (that conceive law as a prescriptive dimension): it is not properly a new vision, but the old one, the traditional one, recaptured. As Bobbio says, “the theory which is usually regarded as one of the strong expression of legal formalism is actually the only one that provides a definition of law, understood as a legal system, starting only from the content of its rules”<sup>8</sup>. In other terms, if we want to understand what a rule is, what it can do and how it does, we have to recognize the relevance of the coercive dimension that is not a necessary character of every rule, but still remains the most typical reason that explains why people accord their behaviors to the prescriptions of the rules.

Dealing with force, in any case, is not an easy matter. On the one hand, the semantic field to which the term “force” belongs is very huge and with it we can cover a lot of different situations. However, when we put together law and force, we immediately need to find a third element through which this relationship is regulated. I mean, when we say that law has force or that there is the force of law acting to realize the proper goals of the legal system, we pretend to consider it distinguished from every other kind of force, and overall, we pretend to recognize it as a legitimate one. The force of law leads us to recognize that the acts of force we can accept are the ones that have been defined by the legitimate principle. This last aspect will be the one which I would like to discuss about. My reasoning is built around a question: how can we define this kind of principle? or, in other terms, how can we recognize an act of force, a raw force, as an acceptable one? A force to which everybody feels engaged to respect?

The problem arises from the very character of positivism that enforce each of its assertion to be followed for the only reason that it is the law<sup>9</sup>. As we know, the formalistic approach could fall (as it happened in the last century), into an imperativistic/authoritarian rule-based society, in which law has no connection with the realization of justice<sup>10</sup>. The

<sup>8</sup> N. Bobbio, *Diritto e forza*, p. 118: “the theory which is usually regarded as one of the extremes of legal formalism, is actually the only one that provides a definition of law, understood as a system, starting only from the content of its rules”. En. Trans. by the editor.

<sup>9</sup> That point arises in its major problematic aspects after the Second World War, when, setting the Norimberga trial, the Nazi crimes were condemned even if that conducts were compelling with the law. Notoriously, the debate around that point has been very heated. We want just to recall Radbruch position, which has pointed out the exigency to refers to justice for identifying what law is. He said: “So, after a century of legal positivism, is powerfully resurrected the idea of a right to be above the law, which also commensurate with the positive laws can be represented as legal wrong”, G. Radbruch, *Propedeutica alla filosofia del diritto*, tr. it. D. Pasini, Giappichelli, Torino, [1948], 1958, p. 233. This assumption leads to the conclusion formulated by Radbruch: “The conflict between justice and legal certainty should be resolved in the sense that the positive right, guaranteed by statute and power, takes precedence even when it is, in its content, unfair and inadequate, unless the conflict between positive law and the Justice reaches an intolerable extent so as to ensure that the law, until it is unjust, must yield to justice”, G. Radbruch, *Gesetzliches Unrecht und Übergesetzliches Recht*, in « *Der Mensch im Recht* » Gottingen, [1946], 1957. En. trans. by the editor.

<sup>10</sup>In that sense, Hans Kelsen, *Teoria generale del diritto e dello Stato*, [1945], tr. it. E. Gallo, *Etas libri*, 1994. As we know, Kelsen approach to law consists in excluding moral considerations in identifying law. Law finds its legitimacy exclusively in rules, and in particular, the system is based on

criterion of justice seems to be, in the end, truly necessary in defining law, but it remains, nevertheless, transcendental and in its very nature, a metaphysical one<sup>11</sup>. This is in contrast with the major positivist approach to law and that's my point. We need something more to identify what law is, something that doesn't belong to it in a positive sense. We need to refer to the moral ground of the law. So doing, I will digress a little from the Schauer thesis as it will be necessary to investigate not only the concept of law in itself, but also this idea of force that cannot really be excluded from it. Put simply, it is not enough to recognize the presence of force: we have to face the process through which force becomes law.

## 2. Defining law (first question: what is law?)

The relationship between law and force is a very complicated one, and a preferential way to face it consists of defining the two terms implicated in that relation. Usually, a legal reasoning, a reasoning about the law, about its essence, or its function, or its utility, starts from a sentence that tries to define this concept albeit the definition of law seems to be always unattainable<sup>12</sup>. As Hart asserts: "Few questions concerning human society have been asked with such persistence and answered by serious thinkers in so many diverse, strange and even paradoxical ways as the question "what is the rule"<sup>13</sup>. There is always some aspects that are not included and other that are too stressed: the result is a definition that seems to be both over-inclusive or under-inclusive as to purpose<sup>14</sup>. Anyway, as Hart pointed out, we never stop to search for a definition of law, because law is still being the most pervasive, and compelling, aspect of our lives.

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the Grundnorm. He in that sense pointed out, p. 114: "A legal rule is valid by virtue of the fact that it was created according to a rule decisive, and only by that. The basic rule ... is the ultimate rule postulated according to which the rules of the system are in place or nothing". En. trans. by editor.

<sup>11</sup> We can find in literature a lot of efforts to give an explanation or a definition of what Justice is. But, none of them has been able to reach the goal, and they are, in the end, just tentative. Among them, a very particular place it has been taken by Rawls' theory of Justice (A theory of Justice, Harvard University Press, 1971). He pretends to identify the principles (freedom and equality) through which overcome the prevailing conception of law as utilitarianism, assuming as a goal to realize justice as equity). This theory has been criticized from different points of view, but it still remain at the core of the debate on justice. See, among others, A. Sen, *L'idea di giustizia*, Mondadori, Milano, 2010.

<sup>12</sup> The philosophical question of "definition" is a struggled one, that has undertaken a big part of the philosophical debates of the last century and still remain a central one till now. In legal theory this issue has been formulated in different ways. The exigency to define law, what law is, is a very widespread one: almost all the scholars starts their consideration by a certain definition of law and often they declaim that by the title of the books; among them, for instance: J. Austin, *The province of jurisprudence determined*, 1832, Cambridge University Press, 1995; H. Kelsen, *La dottrina pura del diritto*, [1960<sup>2</sup>], tr. it. M. G. Losano, Einaudi, Torino, 1966. The question of definition is however unresolved. About the difficulty to identify a definition of law, see P. Nerhot, *Law, Writing, Meaning. An essay in Legal hermeneutics*, Edinburgh University Press, Edinburgh, 1992, pp. 53-191.

<sup>13</sup> H. Hart, *The concept of law*, Oxford University Press, London, 1961, p. 3.

<sup>14</sup>They throw a light which makes us see much in law that lay hidden; but the light is so bright that it blinds us to the remainder and so leaves us still without a clear view of the whole.", H. Hart, *The concept of law*, p. 5.

Among all efforts to define law, the one attempted by Schauer has the merit of being disenchanted facing the way a society can assure of itself its existence: his effort is not just a theoretical one, but he tries to conceive law as it affects our society. In that sense, he assumes at the end of the book that: “The presence of unavoidable coercive power is what is typically behind the very phrase “the force of law”, and behind the ordinary citizen’s belief that coercion is central to the very idea of law. Like many other aspects of law as we experience it, coercion is neither necessary nor sufficient for law. But legal coercion’s contingent ubiquity testifies to the fact that in many domains there are valuable goals that cannot be achieved by cooperation alone, even the kind of cooperation in which people internalize second-order reasons for suppressing their first-order desires and decisions. If we ignore this fact, we will have ignored something very important about why law exists and what functions it serves”<sup>15</sup>.

The Schauer position is of the assumption that force is still at the very core of the concept of law. In particular, he explicitly affirms that, all the book long; he said, for instance that: “Law is commonly and valuable coercive” (p.7); he continue saying that: “The coercion lie at the core of the idea of law” (p. 54) and he pointed out that: “the coercion is a pervasive characteristic of legal systems, and it is also an important if not logically essential component of the law as we know it”(p. 233). In other words, it is not possible to exclude the idea of force if we wants to understand law, what law is. Assuming force at the core of law, however, obliges to specify in which way these concepts are in relation. In general, it is very common to say that something has (or has not) the force of law, that means, evidently, that law has force, but that still is a problematic field, because it has a very peculiar relation with it. So, if we want to understand what law is, we have to investigate the role played by the concept of force. In fact, the principal goal of stating law is to determine and change behaviors<sup>16</sup>, either in determining them or to correct them. In both cases, however, needs this force, a coercive dimension that even if is not necessary in the definition of law, is in any case, the typical way the law expresses itself.

It is clear in fact that the principal goal of law is to dissuade people from doing what they want, or to constrain people to do something they don’t want to: of course, there are many different ways by which law attains its goals, but among them, one should not exclude the importance posed by the threat for sanction. In other words, the threat for sanction is the most relevant way of assuring the existence of law. Even if there is a large part of law that doesn’t provide for a sanction, it is through this coercive dimension that we can properly distinguish law from the various normative aspects of social life. As Schauer rightly asserts: “Law is hardly the only inhabitant of our normative universe. Morality makes demands upon

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<sup>15</sup> F. Schauer, 2015, p. 294.

<sup>16</sup> F. Schauer, 2015, p. 113.

our behavior too, and so also do manners, etiquette, and countless social norms. But law, unlike morality and etiquette, possesses the resources to compel compliance in ways that other normative systems do not”<sup>17</sup>. The force of law becomes the character that makes law distinctive. Even if force is not an element always present in each declination of law, it is the only specific aspect that differentiates it from other normative aspects of life.

Morality, etiquette or even religion, express a set of rules that effect our behavior, but there is a difference between the moral obligations and the mandates of the law. The distinction between law and moral obligations is that the latter does not need a sanction. It is internalized and operates without any form of constraints but the deep conviction that “you have to act that way”. On the contrary, when we are before the law, our willingness to submit our conduct to these assumptions, depends on threat of a sanction. We cannot even think about law without reference to the consequences that will happen if a gap is created between law and behavior. The coercive dimension therefore is what makes law different from morality, from suggestions, cravings and all the social norms by which our lives are governed. We experiment a lot of different kinds of rules, but it is only the ones that are enforced that can belong to the field of law. I wish to emphasize again, that the threat for a sanction makes law recognizable.

As we shall see, the form of constraint that differentiates law from all other “normative” fields of life consists in general of physical force: the raw force that does not allow any other possibilities. Law is constraint, it is coercive. In other words, it can be identified (or defined) as an expression of force, an act of force. In that sense, force is not just an instrument by which law attains its goals, but the very content of law, something belonging to its essence. Bobbio agreed totally with this viewpoint, when he considered the theories (Kelsen, Olivecrona, Ross) that conceive force not just as an instrument of law, but a part of the essence of law. In that sense, “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. The problem of coercion (constraint, sanction) is not the problem of securing the efficacy of rules, but the problem of the content of the rule”<sup>18</sup>, as Kelsen argues. His conception of the relationship between law and force has been developed by the Scandinavian realism doctrine that remarks that: “it is impossible to maintain that law in a realistic sense is guaranteed or protected by force. The real situation is that law – the body of rules summed up as law – consists chiefly of rules about force, rules which contain patterns of conduct for the exercise of force”<sup>19</sup>. Ross, a major scholar of that approach, also contends

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<sup>17</sup> F. Schauer, 2015, p. 12.

<sup>18</sup> H. Kelsen, *General Theory of Law and State*, Massachusetts, 1949, p. 29.

<sup>19</sup> K. Olivecrona, *Law as fact*, Oxford University Press, 1939, p. 134.



that: “a national law system is a body of rules concerning the exercise of physical force. (...) We must therefore insist that the relationship of the legal norms to force lies in the fact that they concern the application of force, not that they are upheld by means of force”<sup>20</sup>.

There is indeed a very big distance between them and Hart’s theory about the concept of law: as Schauer analyzes it in his book, it emerges in fact very clear that what characterizes Hart’s position is the commitment to a comprehension of law that wants to downplay a primarily role to force, in favor of a concept that finds its roots in the Enlightenment thesis, conceiving law as a result of an accord, an agreement, between people<sup>21</sup>. The “puzzled man” figure, that Hart refers to in arguing his position, can be translated as the citizen figure, elaborated at the XVIII century, that commits himself to law and then follows the rules without questioning because it is the law<sup>22</sup>. In other terms, Hart tries to explain law without considering force as an essential character: according to his view, we follow the rules not because of the threat for a sanction, but properly because “it is the law”. This statement in fact can explain a lot of situations, but it fails as a paradigm for the very reason that all people follow a legal rule. Hart, in other terms, wants to argue that law doesn’t need proper force, and in so doing, force is not a necessary element of law; we can in fact imagine a lot of situations, or cases, in which law occurs that aren’t an expression of force. According to the positions that distinguish the obligation that a rule can arise from the threat of using force, it seems that force is just an instrument, and a non necessary one. He thinks in general that “coercion is something added to legal commands to make them effective by the way of supplying additional motives for compliance”<sup>23</sup>. Law in that sense can exist without any reference to force. And, when force is in motion, then it isn’t an aspect of law dimension.

<sup>20</sup> A. Ross, *On law and Justice*, Stevens, London, 1958, p. 34 e pp. 52-53.

<sup>21</sup> Our conception of law finds its roots in the 18 century philosophical reflections. We have a very big debt with that theory that find a common ground around the idea of social contract. It has been developed in many different ways, but it still constitute the very basis of our legal system. See, for instance D. Diderot, *Autorité politique*, *Encyclopédie*, in *Œuvres*, Tome III, *Politique*, Ed. R. Laffront, Paris, 1995, pp. 23-24: “La vrai et légitime puissance a donc nécessairement des bornes. (...) Le prince tient de ses sujets mêmes l’autorité qu’il a sur eux; et cette autorité est bornée par les lois de la nature et de l’Etat. Les lois de la nature et de l’Etat sont les conditions sous lesquelles ils se sont soumis, ou sont censés s’être soumis à son gouvernement”. In the same perspective, see: I. Kant, *Sul detto comune: questo può esser giusto in teoria ma non vale per la pratica*, [1793], in *Scritti politici*, Laterza, Bari-Roma, 2003, p. 143: “There is therefore an original contract that is the only one on which you can base a civil constitution, universally legal, among men and you can set up a community. But this agreement (...) considered as the union of all the particular and private wills of people in a common and public will (...) is not a fact (...) this contract is a rather simple idea of reason but has a certain practical reality: that is, its reality is to oblige every legislator to enact its own laws 'as if' they may derive from the common will of an entire people and in considering every subject, as it wants to be a citizen, 'as if' he had given his consent to such a will”. En. trans. by editor

<sup>22</sup> As Rousseau affirms, law becomes the sole way through which freedom can be achieved; he says: “L’obéissance à la loi qu’on s’est -st liberté”. J.J. Rousseau, *Contrat social*, *Œuvres Complètes*, Tome III, *Bibliothèque de la Pléiade*, Editions Gallimard, 1964, Livre I, Ch. VIII, p. 365.

<sup>23</sup> Schauer discusses the Hart argument of the « puzzled man », see p. 39.

Even when the sanction is there, we can consider as we usually do, that it is not for the threat of a sanction that people in general respect law or realize its mandatory assumptions. So, there is a large part of the debates that must be underlined as to whether the capacity of law to arouse accord in the behavior of people depends on the presence of threat: it is a very common ground about law definition to consider it able to obliged people or behavior because it is law and for no other reasons.

Schauer discusses a lot about the theory of law to change people's behavior for the sole fact that it is law. Hart commits his construction to this theory, but it seems very clear that this theory doesn't work for everybody: it works for the puzzled man, although there are those who do not act in accordance with law because it is law. Moreover, Schauer says: "if people do not believe that law provides a reason for action by virtue of its being law, then there is no reason to believe that law will have the consequence of changing their reasons and thus of changing their sanction-independent behavioral intentions"<sup>24</sup>. But, what Schauer pointed out against Hart's assumption is that even if I don't need a law that threatens me with sanction to prevent my killing other people, it remains true as well that we need this kind of law: that's because people act both positively or negatively: it is a question of freedom that is arising now.

The problem of freedom is certainly very relevant for a correct conception of law and justice, and it is deeply related to the relationship between law and force. As Schauer notice, choosing how to act, which behavior to assume, what life offers and so on, means facing the fact that there is not always correspondence between what people want and the "general interest"<sup>25</sup>. In that conflict, it is not unusual that personal interests will prevail. And considering this possibility, we know well that a threat for something negative is a good, or a better way of obtaining compliance with the law. In that sense, Schauer affirms: "the negatives are often more powerful than positives in affecting behavior"<sup>26</sup>. In other terms, we try in anyway to explain why law changes our attitude, how it determines the plurality of possible actions, we have to recognize that the exercise of force, the idea of coercion, or in general, the threat of a sanction has a very big role. "This is not to deny that law can have an effect on behavior other than by direct coercive force. But insofar as the effect is produced by

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<sup>24</sup> F. Schauer, 2015, p. 265.

<sup>25</sup> This concept has been elaborated by the Enlightenment philosophical reflections. It is indeed one of the most difficult one, because it's not easy to identify to what correspond; it doesn't refer to people as "majority", but is considered as something able to transcend the particular interest of people on which the society can be built. According to one of the major thinkers of the XVIII Century: "Trouver une forme d'association qui défende et protège de toute la force commune la personne et le bien de chaque associé, et par laquelle chacun, s'unissant à tous, n'obéisse pourtant qu'à lui-même, et reste aussi libre qu'auparavant. Tel est le problème fondamental dont le Contrat Social donne la solution". J.-J. Rousseau, *Contrat social*, Livre Premier, Ch. VI, Gallimard, Paris, 1964, p. 243

<sup>26</sup>F. Schauer, 2015, p. 216.

way of triggering the coercive force of social norms, then coercion is still occupying center stage in explaining how law affects behavior, although in this context we might think of law as simply outsourcing its coercive power to private actors<sup>27</sup>. So doing, Schauer points out the simple fact that legal norms are in need of a feature that can win against personal inclination, when following them would be in contrast with the assumptions of law. It is not always enough to refer to law as an internalized system of behavior: in each case and situation, law operates like a question (do I follow that prescription?) that implies choice. It isn't mandatory, but shows an expression of freedom, of free will. James Madison expresses this point succinctly, saying that if men were angels, no government would be necessary; but, as we know, governments exist also because they can count on the system of coercive prescription that enforces the law. In that sense, Schauer concludes that: "if people are generally disinclined to obey the law qua law, then coercion reemerges as the obvious way in which even advanced legal system in mature democracies can secure compliance"<sup>28</sup>. And for that reason, coercion enables us to understand and explain law as it exists and as it works, in bad as well as good society.

If we refuse to recognize the important role played by force in the existence of law, then we have to ask ourselves why people obey the law. Hart's answer emphasizes the idea that people do so because law is law, and that it requires an interior attitude to follow its prescriptions. But that assumption poses a problem: how do we recognize a law as a law, that will influence every behavior? There is a presumption behind this sentence that strictly connects law and moral: we follow a rule because we presume that it is right, but where does it find the source of its rightness? How can we be sure that it is right when we have to follow the law without contesting it? This is where the problem of fundament arises. In other terms, the relationship between law and force obliges one to investigate the question of fundament in law.

Saying that force is not enough, but in any case necessary, for the existence of law, we are compelling with a conception of society in which the sole fact that something is established as a legal rule becomes mandatory. Its content doesn't matter even though Kelsen states that the content of rules is precisely the exercise of force). This constitutes a very problematic aspect that deals with the way something can rise to the statute of law. So, it is not enough to downplay the presence of force in the existence of law (as a typical aspect, a content, or as an unnecessary feature in defining law). We have to specify which force is acceptable. Or we must qualify that force. Again, it is necessary to specify which role the

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<sup>27</sup>F. Schauer, 2015, p. 266.

<sup>28</sup>F. Schauer, 2015, p. 182.

concept of force is playing when a rule is established<sup>29</sup>. In fact, we do not want to fall in that representation of society that leads everything to the invincible relation of force. If it is a mistake to expel that element from the definition of law, it will also be reductive and wrong to consider society's legal system just as a coercive one. Force cannot extinguish the definition of law. We need a third feature by which and through which we can regulate the relation that force has with law. And that is the process of legitimizing law.

### **3. Legitimizing law (why do people obey the law)**

“There is no place in the world in which one can escape the law, although its presence is felt more in some places than in others. And because of law's very inescapability, its coercive capacity is largely (although, again, both necessity or universally so) mandatory”<sup>30</sup>. We cannot disagree with that consideration, because we cannot even find an aspect of our existence that is not amenable to the law or to a norm present in the law system. Law is at the end the most pervasive and totalizing aspect we experience during our lives. So, if the capacity of law to exist depends on force, we have to specify which kind of force can rise to the legal statute, or which one can achieve this peculiar position that would make its presence not only acceptable, but necessary and desirable. In other words, one of the most important aspect of the reflection developed by Prof. Schauer is related to the legitimizing process, that in a very strong sense, is the way by which we can distinguish force from violence or a way through which an act of raw force can distinguish itself from every other acts of force.

Every time we are concerned with an act of force, the first problem is to specify the nature of that force: in other words, we always have the same problem, i.d. distinguish force from violence. When we are dealing with law, we usually consider the legal force as a legitimate one, for the only reason that it comes from the State institutions. But that force has a goal, that is not simply to enforce some behavior, but, more essentially, to enforced them to realize justice<sup>31</sup>. So, law in general uses force to realize justice. The urgency of the qualification in terms of justice clarifies the sense of the relation between force and law, that

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<sup>29</sup> In that sense, Bobbio pointed out: “We can speak of two uses of force: a fair use or fair, an illegitimate or unjust, according to whether it refers to the force sought to enforce the law violated, or to violate the law”. N. Bobbio, “Diritto e Forza”, p. 132. En. trans. by the editor.

<sup>30</sup> F. Schauer, 2015, p. 294.

<sup>31</sup> The relation between law and justice is a very struggled one: it had known a lot of different representations, finding its roots on the idea that law is a rational matter, that can achieve a goal. Justice, in that sense is what to which the law is committed, as a realization of its very nature. There is a very strictly relation between the two terms, that makes the sense of law. Law, in its very sense, is justice, has to realize justice. The equivalence between law and rationality comes, as it is well known, from the 18 century reflections, that develops this idea in the same way we still to consider it till now. See, in that sense: Montesquieu, *L'esprit des lois*, Livre Premier, [1748], in *Œuvres Complètes*, Editions du Seuil, Paris, 1964, p. 532: “La loi, en général, est la raison humaine, en tant qu'elle gouverne tous les peuples de la terre; et les lois politiques et civiles de chaque Nation ne doivent être que les cas particuliers où s'applique cette raison humaine”.

Kelsen, for instance, corroborates to the fact that law doesn't exist without force, but it is not identifiable with force<sup>32</sup>. Law express in fact a very specific kind of force, that is to say, a legitimized force that at the same time can be distinguished from an act of violence. In other terms, we usually distinguish force from violence, qualifying the first as a legitimate one, because of the demand of justice that law express in itself. Law has to express itself in terms of justice if it wants to be recognized in its cogency, if it wants to be acceptable in its coercive dimension. For that reason, the force that law expresses cannot be violence, cannot coincide with violence.

But, this difference between force and violence can still not be so easy to achieve in every occasion. The literature about this point is vast, in particular in the 20 century, and it usually stresses the fact that at the very beginning, law is no other than an act of force that in no way differ from violence. In particular, it is the idea of violence that comes out from a non bias consideration of law, because, they say, from a theoretical point of view, there is no difference at all between force and violence<sup>33</sup>. If we admit that force is still at the very core of law, and we cannot properly distinguish force from violence, we have to recognize therefore that there is violence at the very core of law.

According to that, there is no such thing as "law" apart from violence. The very fundament of law seems to be the violence and what gives it force, that is a legitimate one, it is a postponed act that transform violence into force. They say that it's just a question of definition, a lexical distinction that doesn't correspond to anything but a mere differentiation of grammar! If we have a look at history, we will easily discover that it is impossible to distinguish violence from law. The fundament, the first act by which a society constituted itself, is an act of violence: law, in that way, is just the result of an exercise of violence. There is no society that articulates the legal system out of this scheme<sup>34</sup>. But the very problem with this consideration is the relation with justice. That point is a problematic one because it means, overall, that legitimizing law is always something determined *après-coup*, to quote Derrida's words. What we call justice, according to this theory, is just an act of violence, an

<sup>32</sup> H. Kelsen, *La dottrina pura del diritto*, p. 243, he said: "And then the solution proposed here is only the scientifically exact formulation of the ancient truth: law can not exist without force, but does not identify itself with the force". En. trans by editor.

<sup>33</sup> In that sense, Walter Benjamin states: "The function of violence in the legal creation is, in fact, twofold, in the sense that the legal creation, while pursuing what is established as a right, as a goal, with violence as a means (...) does not dismiss at all the violence, but it is only now in the strict sense, that is, immediately, a violence creative of law, as it settles as Law, under the name of power, not an end immune and independent from violence, but intimately and necessarily linked to it. Creation of law is creation of power, and therefore an act of manifestation of violence". W. Benjamin, *Per la critica della violenza*, Einaudi, Letteratura, [1921], 1982, p. 151. En. trans. by editor.

<sup>34</sup> In that sense, Kant points out: "You can not rely on any act of initiation of a legal system than that produced by force, on whose compulsion is based public law" I. Kant, *Réflexions métaphysiques*, Vrin, Paris, 2011. En. trans by editor.

abuse, into which we make our accord of peace. That is to say, we do not have an external, transcendental element with which we judge our legal system, but it is relatively considered in each moment of history, and in each place... it changes, but always with the same way, that is starting from violence. Every act of violence could become a legitimate law system, or in other terms, our society are nothing more that violence masquerading as law.

As Walter Benjamin noted, there is something he defines as “rotten” at the very core of law, and this is the source of law that resides in violence. And Derrida, that pursues that reflection, notices how force is the very aspect that characterizes the law; he turns basically on that assumption: “Pas de droit sans la force (...) La force est essentiellement impliquée dans le concept même de la justice comme droit, de la justice en tant qu’elle devient droit, de la loi en tant que droit”<sup>35</sup>. But, in so doing, he admits that law finds its roots in violence. However, this point was already pointed out by Blaise Pascal, when he said: “cause we are not able to give force to law, we called law the exercise of force”<sup>36</sup>.

Following these conceptions, we are committed to an approach that recognizes arbitrariness as the very nature of law. Everything can become law, after an act of violence imposes it as law. And the way we define what is law depends on what has been stated as law.

By the way, this approach, belonging to a relativist setting, could turn very fast into nihilism, making acceptable the idea for which there is not the opportunity to contest the law as a “non-law”. (the natural law argument for which: “if law loss its moral dimension, it is not just law”<sup>37</sup>). In that way, the question turn to: Is the law something totally arbitrary? Or something that can express its legitimacy finding its roots in a transcendental concept of justice?

It is more plausible to reconnect the idea of law and the law system structure as something that doesn’t depend on pure arbitrariness, (expressed by different figures of sovereignty). The idea of justice can make law consistent with people’s behavior and it is no possible to justify otherwise the acceptance of that system if it is not relied on that idea of justice. As Schauer points out in his book: “perhaps, a population accepts a legal system sometimes because of a normative belief in its legitimacy, and at other times simply because of the force of habit, and at still other times because of the advantages of implicit

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<sup>35</sup> J. Derrida, *Force de loi*, Galilée, Paris, 1994, p. 17.

<sup>36</sup> B. Pascal, *Pensées*, Classique Garnier, Paris, 1925, p. 153, art. 298: “Et ainsi, ne pouvant faire que ce qui est juste fut forte, on a fait que ce qui est forte fut juste”. En. trans. by the editor.

<sup>37</sup> F. Schauer, 2015, p. 35. The relevance of moral is central for the natural law school. For an authoritative contribution in such debate which provides a restatement of natural law doctrine see: J. Finnis, *Natural law and natural right*, Clarendon, 2011. Positivism, on the contrary, tries to identify law without any reference to moral. In that perspective see: H. Kelsen, *La dottrina pura del diritto*.

coordination with others who have the same habit”<sup>38</sup>. In any case, it seems necessary this reference to something ulterior, that can convince people to follow the law; it rests that the very problematic aspect lay in the way we conceive legitimacy.

So, we have to investigate this concept if we want to understand what law is. Take for instance the question analyzed by Schauer about the situation of Egypt in 2013: there were two different positions, both claiming the legitimacy of power: Mubarak on the one hand, and the revolutionary movement on the other.

Following Schauer analysis we can push the relation between force and law and recognize that if we expel the role of force, we cannot decide which one will be the legitimate one. But, by the force, we can assure to just one of them the legitimacy. So doing, we are arguing that it is impossible to expel the idea of force from the definition of the law concept. We have no other devices for identifying what law is, but the force of law. Schauer considers that: “in the final analysis, it was the decision of the ultimate repository of raw force that determined which was the legal system of Egypt and which was not”<sup>39</sup>.

But, following this consideration, we have to assume that force, a raw force, is the only way we have to recognize a rule-based society, and this last sentences seem to be quite unsatisfactory, or worse, unacceptable. Of course, the only reference to force is not enough to endure peace (that is to say, the existence of a legal system, playing by the rules, that everybody will accept to be determined by): law needs something else, i.e. the legitimacy comes from the idea of justice. The moral aspect of law is not something unnecessary but, using Prof. Schauer’s expression<sup>40</sup>, it is “typical”, for identifying law. “It is a mistake to assume that the legal status of a legal system necessarily ultimately rests on the use or threat of force, but it is just as much of a mistake to assume that it never or rarely does”<sup>41</sup>. We cannot think about the relation between force and law without thinking, at the same time, about moral dimension, if we want to explain which kind of force is in accordance with law.

The coercive dimension is comprehensible just for its legitimacy, and that implies an idea of justice. In that reference resides also the possibility to identify a distinction between force and violence, that is a functional one, not ontological or theoretical, but can help to find a way of expelling violence from the universal law definition. In particular, the distinction between force and violence resides on the possibility to measure its realization, and that

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<sup>38</sup> F. Schauer, 2015, p. 159.

<sup>39</sup> F. Schauer, 2015, p. 161.

<sup>40</sup> Schauer qualifies as “typical” the character of force.

<sup>41</sup> F. Schauer, 2015, p. 162.

measure it's law, the legal qualification gives to force a range into which it can express itself<sup>42</sup>; out of that limit, we are compared with violence<sup>43</sup>.

In other words, we need to find a fundament – measuring principle - for that process that turns violence into law. Finding this kind of feature has been the most difficult project that the 20 century doctrine has assumed.

We know that different answers from different thinkers have been formulated about that, but none of them has been able to achieve the goal: the rule of recognition, the Grundnorm, to recall the most known definitions of that principle, assumed the goal to found law, explaining where law finds its source and in which ground it germinates, or in other terms, all of these concepts pretend to explain how law has been posed. All of them anyway, cannot answer correctly the question about the fundament of law<sup>44</sup>, because they presupposes, even from different definition, that over the law there is something that make law suitable, and that's a necessary reference to transcendence, although claiming to be formal, makes the thesis fragile. Moreover, with that assumption is the very idea of positivist system that goes down. A positivist approach pretends in fact to be founded in “something” that has been posed, in “something” that can be identified as the root, as the source, conceiving it in that way as something available, disposable; according to that point of view, law coincide with an act of will, of a pure will, that can have whatever as a content; but, avoiding the slippery slope of the arbitrariness, at a certain point we have to stop, and finding a fundament that is not coincident with will. At that request, Hart states the concept of rule of recognition, that is, by its proper definition, something that we cannot express in other words, but saying that we have to presume that it exists. Albeit from a different approach, Kelsen came on the same ground, elaborating the concept of Grundnorm, that is again a kind of rule without content, but that we have to presume it exists, if we want to maintain the sense of the entire system.

Both Hart and Kelsen constructions are very emblematic not only of a certain culture (the conception of State-nation that has been elaborated in the 19 century) but more relevantly, these constructions are very emblematic of a peculiar aspect of law, and of its

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<sup>42</sup> S. Cotta, *Il diritto come sistema di valori*, San Paolo, Cinisello Balsamo, (Milano), 2004, p. 71: “Violence is an activity-against, without measure, from which is absent the regulative idea of measurement; while the force is an activity-against but orderly, measured and measuring”. En. trans. by editor.

<sup>43</sup> “We can speak of two uses of force: a fair use or fair, an illegitimate or unjust, according to whether it refers to the force sought to enforce the law violated, or to violate the law”. N. Bobbio, “Diritto e Forza”, p. 132. En. trans. by editor.

<sup>44</sup> N. Bobbio, *Sul principio di legittimità*, Milano, Giuffrè, 1966, p. 58, conclude: “Strange rule, indeed, the basic rule is invoked to establish a power, which then itself needs to be established”. En. trans. by editor.



legitimacy that seems to refuse to be expressed out of a metaphysical approach. They presupposes the acceptance (the existence of the Grundnorm, or the presumption that the meaning of the entire system originates, from the rule of recognition), that is a fact, not a norm, that means that law “ultimately rests on non-legal foundations”<sup>45</sup>.

When we consider the Hart or Kelsen thesis about the foundation of law, we are in front of a non-legal fundament: the rule of recognition as well as the Grundnorm escape from the possibility to find a positivist attached to the system<sup>46</sup>: they provide an explanation that call in cause a fact, a pure fact of faith (as well as Weber points it out when he analyzes the concepts of legality and legitimacy).

That analysis makes clear the need for a transcendental reference, that is a very problematic question. How does one identify the content of that idea of justice? How can we assure ourselves that what law expresses coincides with justice? As we well know, history tells us that we defect from this kind of features. There is no certainty about what justice is in its content; we just have a chance to make law as consistent as possible to what we represent as justice. It is not so much, but it is all we have. So, legitimacy is the way we have elaborated to give to law the occasion to express justice<sup>47</sup>.

In conclusion, what I would like to stress in my reading of Schauer’s reflection on the force of law, is that, according to the position that recognizes a steal of force in the very core of law, we are immediately obliged to give to this force a plan in which it can assume a legal meaning, and that is to say, in my opinion, the uncertain ground of the metaphysical, transcendental idea of justice. With all the limits that this position carry out with itself.

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<sup>45</sup>F. Schauer, 2015, p. 153.

<sup>46</sup> On that point, see N. Bobbio, *Sul principio di legittimità*, cit., p. 57-58: “A rule, not a power, is the original foundation. The basic rule is purely and simply the roof was missing, or were believed missing, to the building of a regulatory system. But then, when you question what is the foundation of the basic norm, which should establish the validity of all other rules, the answer is - and there is no other possible answer - that the foundation of this last, could not be another superior rule, but it is its effectiveness, that is the fact, the mere fact, historically and sociologically ascertainable, that the obligations deriving from it are usually observed, or, correspondingly, the power established by it, which is precisely the ultimate power, beyond which there is no other power, is actually obeyed”. En. trans. by editor.

<sup>47</sup> “The legitimacy ... represents the end of the circle upward from facts to values, and the principle of the downward cycle from values to facts: it is the end of history already made, and the beginning of the story to do. Like the idea of justice, which corresponds and from which it draws its nourishment, needs, according to the times, events and men, to justify the accomplished facts and to inspire the facts to be made” N. Bobbio, *Sul principio di legittimità*, cit., p. 61. En. trans. by editor.