

LAW AND FORCE*

1. I propose here to call attention to a way of formulating the problem of the relation between law and force, which contrasts with the traditional definition of law, when this is understood as an organized body of coercive rules, or, which amounts to the same thing, rules guaranteed by force.

In the traditional definition, force is considered a *means* for the realization of law. According to the theory which I propose to examine, force is rather considered as the *content* of legal rules. I am concerned with this theory above all because, notwithstanding the novelty and the interest of this point of view, it appears to me that up to this date it has been very little analyzed, and then also because it lends itself to certain considerations referring to general problems of law.

This theory, as all the others which have become the common heritage of contemporary philosophy of law, was formulated by Hans Kelsen, beginning with the appearance of his *Allgemeine Staatslehre* (1925). Nevertheless, Kelsen himself did not attribute much importance to the theory, and he did not examine it further.

In the *General Theory of Law and State* (1945) this theory is mentioned *en passant*; there is no mention of it in the *Reine Rechtslehre*, not even in the last edition, which was expanded and thoroughly revised (1960). Hence it might perhaps have passed unobserved if it had not been accepted, made more precise, and put once more into circu-

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lation by Alf Ross (who in his general orientation of thought is nonetheless not Kelsenian) in his work *On Law and Justice* (1958).

In the *General Theory*, in connection with the theory which considers coercion an essential element of law, to defend it against the criticisms coming from current sociological trends Kelsen makes this remark: "This doctrine does not refer to the actual motives of the behavior of the individuals subjected to the legal order, but to its content."¹ A little later, to guard himself against the objection of an infinite regress, he repeats the same concepts with analogous words: "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 rules."²

It is rather strange that in both cases the thesis is stated not directly, but only as a response to an objection.

The thesis according to which law is not a body of *rules guaranteed by force* but a body of *rules about force* has therefore become one of the cardinal points of Karl Olivecrona. After having called attention to the fact that law is systematized force, or in other words, a system of force, and after having denied the independence of the primary rules in relation to the secondary ones, he expresses his own ideas clearly in this way:

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*

¹ Hans Kelsen, *General Theory of Law and State* (Cambridge, Mass: Harvard University Press, 1949), p. 25. Hereafter cited as GTLS.

² Kelsen, GTLS, p. 29.

force, rules which contain patterns of conduct for the exercise of force.³

Finally, the same thesis has been taken up again recently by Ross, who gives it a prominent place in his general theory of law. In one of the first sections entitled "The Content of Legal Systems"^{3a} he poses the problem as the question of how a single national law system might be distinguished in content from other single normative systems. He resolves it with the following statement:

A national law system is an integrated body of rules, determining the conditions under which physical force shall be exercised against a person (. . .); or shorter: A national law system is the rules for the establishment and functioning of the state machinery of force.⁴

Elsewhere, returning to what he has already said, he has more concisely stated: "A national law system is a body of rules concerning the exercise of physical force" and concluding the discussion he affirms: "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."⁵

The principal interest in the theory resides in the fact that it meets the objections which usually are made against the definition of law in terms of coercion without renouncing coercion as an element which is essential to law. Other points of interest, no less important, even though marginal, in the general development of the philosophy of

³ Karl Olivecrona, *Law as Fact* (London: Oxford University Press, 1959), p. 134. Hereafter cited as LF.

^{3a} Alf Ross, *On Law and Justice* (London: Stevens and Sons, 1958), p. 34. Hereafter cited as LJ.

⁴ Ross, LJ, p. 52.

⁵ Ross, LJ, p. 53.

law during the last century are: to have carried to its logical extreme the tendency initiated by Ihering to consider law from the point of view of secondary rules, rather than from the point of view of the primary ones; to have overcome the test always tried and never with success, of giving a definition of a legal rule in terms of its content.

I will illustrate these points in inverse order (respectively in Sections 3, 4, and 5) and will follow the illustrations with brief comments.

2. The traditional theory which defines law in terms of coercion was formulated by Ihering in these words: "Recht is der Inbegriff der in einem Staat geltenden Zwangsnormen."⁶ Anglo-Saxon writers go back to Austin, who defines law as 'command' and command as 'expression of desire' distinguished from every other expression of desire by the fact that the one commanded is subject to suffer being harmed by the one who gives the command in case his conduct does not satisfy the desire expressed in the command.⁷ Both versions of the theory, whether presented by Austin or Ihering, have illustrious adherents.

However numerous and frequent the objections to the traditional theory may be, they can be reduced fundamentally to three arguments repeated interminably:

- (a) the general spontaneous observance of the rules;
- (b) the existence in every legal system of rules without sanctions;
- (c) the infinite regress (if a legal rule is legal because

⁶ R. v. Ihering, *Der Zweck im Recht*, vol. I, p. 320.

⁷ J. Austin, *The Province of Jurisprudence Determined*, ed. Hart (London, 1954), p. 14. Cf. H.L.A. Hart, *The Concept of Law* (Oxford: The Clarendon Press, 1961), p. 6. Hereafter cited as CL.

it is sanctioned, the rule of the sanction which makes it legal must also be sanctioned, etc.).

According to the first argument the sanction is not necessary; for the second it is so little necessary that in fact it often doesn't exist. For the third argument, it does not exist, at least at the summit of the legal system, because it is impossible. More briefly, the three arguments insist on respectively the *necessity*, the *existence*, and the *possibility* of coercion. The first of these three arguments has been adduced, above all, by writers with a sociological orientation like Ehrlich;⁸ Hart has more recently insisted on the second with new remarks;⁹ the third was already formulated by Thon, who, though an imperativist, was not an advocat  of coercion.¹⁰

These three arguments are occasionally employed separately and more frequently collectively, to eliminate coercion as a characteristic feature of the concept of law, and to give a definition of law which does not depend on the idea of coercion. But even the theories which define law independently of coercion fall in serious difficulties which are no less than those suffered by the theories they attempt to oppose. The major difficulty of these theories consists, once coercion has been eliminated, in finding the criterion for distinguishing legal rules from moral rules and customary rules. This criterion has for the most part been sought either in the way in which rules are accepted by people (psychological theories), or in the ultimate aim which they serve (teleological theories). But in both classes of theories, coercion, though thrown out of the door, seems to have

⁸ E. Ehrlich, *Grundlegung der Soziologie des Rechts* (M nchen und Leipzig, 1913), pp. 15-16. Cited and discussed critically by Kelsen in GTLS, p. 25.

⁹ Hart, CL, pp. 27-41.

¹⁰ A. Thon, *Rechtsnorm und subjectives Recht* (Wielmar, 1878), p. 6.

re-entered through the window. According to psychological theories, a legal rule differs from a rule of custom in being obeyed with *animus se obligandi* (this result is obtained by extending the criterion of *opino juris*, ordinarily accepted for the rules of customary law, to all legal rules): but when we then try to explain why certain rules are obeyed with the belief, or the feeling, that one is obliged to obey them, we discover that either this belief, or feeling, derives from the belief or the feeling that refusal to obey them will be rejected with an act of force, or else it does not differ from the feeling or the belief which accompanies the acceptance of a moral rule (respect for the voice of conscience, of divine will, etc.). According to the teleological theories, the proper ends of law are either justice, or the common good, or peace: but, apart from the vagueness of these notions and of others that one might suggest, the only one that might better be clarified is the third (peace). But it is usually clarified in terms of the concept of order obtained coercively. It is well-known, for example, that in Kelsen's theory, the teleological criterion of peace and the theory of law as a coercive system (*Zwangsordnung*) not only find a place without contradiction but back each other up. If the element of coercion is left out, rules of law and rules of custom are difficult to distinguish in respect to their ends. Briefly, psychological and teleological theories, when not disguised as coercion theories, do not serve to distinguish legal rules from moral rules, and legal rules from the rules of custom, respectively.

3. The only sure way of distinguishing legal rules from customary rules, apart from coercion, would be to distinguish them on the basis of the diversity of their content. But notwithstanding the various attempts that have been

made to define legal rules through their content, the effort to specify the content distinctive of legal rules is an undertaking which seems until now to have been hopeless.

The content of the rules of chess is the game of chess, just as the content of grammar is speaking; of rhetoric, persuasion; of aesthetics, poetry; of logic, thought; of fashion, dressing. But is there a type of behavior which, different from any other type of behavior, is the proper content of legal rules? Is there a legal behavior of which law is the rule, in the same way that there is a linguistic behavior of which grammar can be said to be the rule? One speaks, it is true, of legal behavior, but when one uses the expression 'legal behavior', one denotes a behavior conforming to legal rules; it becomes obvious therefore that one cannot define a rule in terms of a behavior, when this behavior is defined in turn in terms of the rule itself. The rules of grammar are defined starting from a certain kind of behavior; legal behavior, in contrast, is defined in terms of a certain type of rule. Furthermore, the answer according to which the content of legal rules is social life is unsatisfactory. Social life is not the content of legal rules, but only the context in which legal rules operate. In large part, this is also how customary rules and moral rules operate. Legal rules, customary rules, and moral rules operate in the context of social life, but in different ways; therefore, once more, what seems to distinguish them is the 'how', and not the 'what'. It is often said, putting this differently, especially in sociology, that these rules are different modes of social control.

Since to define law in terms of the content of legal rules seems to have been until now a hopeless undertaking, the way in which Kelsen, followed by Olivecrona and Ross, solves the problem of the relation between law and coer-

cion is particularly interesting, for it can be viewed as an attempt to distinguish the content of legal rules, and therefore to define legal rules, no longer in terms of form, or ends, and of the quality of the person who enacts them and of the person to whom they are addressed, but exclusively in terms of their object. If law is the body of rules which regulate coercion, or the exercise of force, this means that coercion or force is the specific object of legal rules, in the same way as language is the specific object of grammar. This is the same as saying that between the various acts or classes of acts of man, such as talking, dressing, playing, writing poetry, one can list also acts of force (in this context by 'force' we are to understand always 'physical force') which like all other human acts are in need of being regulated by rules. The rules which regulate them are a class of rules which can be distinguished from other classes of rules in terms of their object. This class of rules is 'law'. As grammar is the rule of language and fashion is the rule of dressing, so is law the rule of force.

4. From the point of view of the development of the general theory of law during the last century the definition of law as regulating force is the result of the particular emphasis given, starting with Ihering, to the secondary rules in relation to the primary ones. Ihering, as is well known, was the first to maintain that legal rules are not addressed to citizens, but to the agencies or organs of the state charged with the exercise of the coercion. Until then the belief was that law imposed duties on citizens, but this confused the accessory with the principal; principally, law imposes duties on judges and on executive agencies in general, but only indirectly on citizens. In spite of the apparent strangeness of the thesis, and the lively and authoritative criticisms

and discussions which it aroused, the proposal to shift the view of the general theory of law from the primary rules to the secondary rules, has had some success. Kelsen made of this view one of the cardinal points of his general theory, and finally, Hart also saw in the secondary rules the characteristic of legal systems (even if he accepted a broader view of the secondary rules, including therein also the rules of recognition). The irresistible argument in favor of the new view is the following: a system composed only of primary rules would not resemble at all the systems which we ordinarily call legal; instead, a system composed only of secondary rules not only resembles systems which ordinarily we call legal, but makes perfectly useless the formulation of primary rules. The emphasis laid on the secondary rules has gone hand-in-hand with a transposition of legal philosophers' interest from the study of legal rules taken singly to the study of the system of the rules; the principal characteristic of legal philosophy in our day, at least in continental Europe, has been the discovery of the legal system and of the problems thereto related. Hence the importance of institutional theories in France and Italy, which have studied the function of the legal system, and of Kelsen in Germany who studied its structure (one of the fundamental contributions of Kelsen is the concept of legal system as dynamical system).

Considering law as the body of rules directed to judges and to executive agencies, coercion could no longer be considered as the means for backing law, but has consequently to be considered as the very content of legal rules. In this way the field of law comes to be narrowed, no longer regulating all human behaviors which have some relation with social life, but exclusively coercive behaviors, and that is behaviors directed at obtaining certain results by means

of force. As coercive behaviors comprise various ways of using force, once law is resolved in the secondary rules, it becomes the body of rules which regulate the exercise of force.

'Coercive power' is a general term which is used principally for designating four forms of the application of force: (1) The power to compel (by means of force) those who do not do what they should do; (2) the power to restrain (with force) those who do what they should not do; (3) the power to substitute (by force) what they should have done, for those who did not do what they should have done (forced action); (4) the power to punish (with force) those who have done what they should not have done (punishment and fine). In other words, and briefly: by distinguishing the possible human behaviors which are relevant for law in actions and omissions, force is directed in respect to action either to provoke or to substitute them, in respect to omissions either to prevent them or punish them.

As a body of rules that regulate the exercise of force, law has, in relation to coercive power, which forms the object of the regulation, principally four functions: (1) of determining the conditions under which coercive force may or may not be exercised; (2) the persons who can and must exercise it; (3) the procedure by which it must be exercised under those determinate circumstances by determinate persons; (4) the *quantum* of force at the disposal of him who, observing certain procedures, is charged with the exercise of coercive power under determinate circumstances. To say that law is a rule whose object is force signifies in other words that law is the ensemble of the rules or norms that regulate the *when*, the

who, the *how*, and the *how much* in the exercise of coercive power.

5. After having expounded the two aspects which, in section 1, we called marginal to the theory of law as a rule regulating the exercise of force: (a) the particular relevance given to the secondary rules; (b) the recognition of a specific content of law, we are now in a position to understand the place that this theory occupies in the century-old discussion around the problem of the relation between law and coercion. In the face of all the difficulties encountered by all the theories which tried to exclude the idea of coercion from the definition of law, the new theory has accepted the idea of coercion but has modified its role: coercion is no longer the instrument for the realization of law (understood as the body of primary rules), but the object of law (understood as the body of secondary rules). In this way the possible solutions of the relation between law and coercion are not two but three: (1) coercion as an essential instrumental element; (2) coercion as a nonessential element; (3) coercion as an essential material element. And these display themselves (logically if not chronologically) in the line of development which can be summarized in this way: the difficulties of the theory of law as a set of rules backed up by force occasioned the theories of predominantly sociological orientation, which do not consider force as a distinctive feature of law; the difficulties, which can be still more serious, encountered by sociological theories lead to the theory of law as a rule regulating the exercise of force, which should avoid the difficulties of the traditional theory, without falling into the difficulties of the sociological one.

6. As we have seen in section 2, the traditional theory meets with three major objections. An answer to the first, which is based on the fact of spontaneous obedience can be found in Kelsen's *General Theory*: the statement according to which individuals for the most part conform in their conduct to that which is established by legal rules for reasons other than fear of sanctions is not at all incompatible with the theory according to which law is the rule regulating the exercise of force.¹¹ The statement and the theory refer to different things: the first refers to the motives which make individuals act one way rather than another, the second refers to a special technique of social control which begins to work when individuals start to act in a certain way. To this objection, the new theory does not give an answer that is different from the one which the traditional theory might give: whether coercion be considered as an instrument or means, or whether it be considered as content of legal rules, spontaneous obedience would be a valid argument only if it were general and constant; but in fact it is neither general nor constant. If, then (by a hypothesis which would be absurd), it were general and constant, the ordering of society which would derive therefrom would be entirely different from the one which ordinarily we call legal system.

The traditional theory and the new theory do not give the same answer to the second objection which argues that there are unsanctioned rules in every legal system. Here the new theory is in a position to offer an answer which seems to give it an advantage. If, in fact, the traditional theory answers, as it should answer to avoid self-contradiction, that the rules which are not sanctioned are not legal

rules, it is committed to excluding from the system a great part of the secondary rules, that is, those very rules which are the characteristic rules of a legal system. For the new theory, on the other hand, the secondary rules are the rules which directly and indirectly regulate the exercise of force—or on the basis of the criterion chosen to define law, are the true and proper legal rules. At most, it may be very difficult for this theory to qualify the primary rules as legal; but it succeeds quite well in avoiding the obstacle by considering the primary rules as rules which establish sufficient conditions for making the secondary rules begin to work. In so doing, it shows its superiority to the traditional theory: in fact, while the traditional theory, which is founded principally on the recognition of the primary rules does not succeed in giving an explanation of the secondary rules (or at least, of the tertiary and quaternary ones), the new theory, founded principally on the recognition of the secondary rules, succeeds in giving a satisfactory explanation of the primary rules. Above all, the road remains open to the new theory to consider the primary rules as nonlegal rules (and therefore as conditions which are sufficient but not necessary), that is, to adopt the same argument used by the traditional theory for the secondary rules. With this difference to the advantage of the new theory: that a system without secondary rules is no longer a legal system, while a legal system without primary rules is virtually possible.

The third objection—the infinite regress—confronts the traditional theory with the same difficulty as the second objection, but in a more aggravated form. Unsanctioned rules not only exist in every system but they do so necessarily at its summit. The more serious the difficulty of the traditional theory the more manifest the advantage of the

¹¹ GTLS, pp. 25-26.

new theory. At its summit, the traditional theory is forced to contradict itself maintaining that, looking at law from the point of view of supreme power and not from that of the citizens, force is not at the service of law, but law is at the service of force. It can free itself from this contradiction only by a dialectical sophism: force and law condition one another reciprocally. The new theory, on the other hand, answers triumphantly: if it is true that coercion is the content of legal regulation, the rules at the summit which attribute to the supreme agencies the availability of coercive power, are the legal rules par excellence.

7. The theory of which we have been speaking has the merit of having emphasized the fact that what characterizes the body of rules that are called a legal system, is the presence not of sanctions, and therefore of rules that are sanctioned, but of rules that regulate sanctions. Here, however, two clarifying specifications are needed. Kelsen, with whose theory we began, defines a legal system as "eine bestimmte Ordnung (oder Organisation) der Macht."¹² The clarifications I would suggest here relate in turn to the idea of *Ordnung*, with particular bearing on the problem of the relation between system in its entirety and the singular rules, and the other to the idea of *Macht* with particular bearing on the problem of the relation between law and force.

There is no doubt that what perplexes us in the face of the theory under examination is the total sacrifice to which it leads of the primary rules, and the disregard of the citizens for whom the legal rules are formulated. It is a little bit difficult to believe that traffic rules are made for the

¹² *Reine Rechtslehre*, II ediz. (Wien, 1960), p. 221.

traffic police, or even for the judges, and not for automobile drivers. On the other hand, the observations made in the preceding paragraph have shown that the primary rules and the secondary rules have a completely different status. That is, the criteria which may be used to qualify the first are those which disqualify the second and vice versa. Meanwhile, it seems useless to continue to search for a criterion which could serve equally well to qualify both primary and secondary rules as legal. It is natural, therefore, if we begin with the primary rules to find ourselves in great difficulty when we try to include the secondary rules among the legal rules and contrariwise if we begin with the secondary rules we are forced to first eliminate the primary rules. A way out can be found only by observing that when Kelsen, Olivecrona, and Ross speak of force as the object of regulation, and have in mind not the single rules, but the system in its entirety, and consequently that their definition of law amounts not to a criterion for distinguishing a legal rule from one that is not legal, but a legal system from other nonlegal systems. Kelsen speaks repeatedly of coercive order or of *Zwangsordnung*; Olivecrona always speaks of organized force when speaking of law. Ross sets out to establish the characteristics of a national law system. In contrast, the criterion adopted by the traditional theory had pretensions of characterizing single rules.

The advantage of establishing the characteristics of a legal system in its entirety, rather than of the single rule, resides in this: after having established the characteristics of a legal system in its entirety, in order to establish whether or not a single rule is a legal rule, it is enough to demonstrate its belonging to the system through the so-called criterion of validity. In other words, once the criterion for distinguishing a legal system from nonlegal systems is es-

tablished, the single rules to be legal need only belong to the system. The criterion used to establish that the system is legal is different from the criterion which serves to establish that a single rule is legal: but in this case the diversity no longer constitutes an insurmountable obstacle to the formulation of a single theory. This is because the two criteria do not claim to define different rules, but define separately, though not antithetically, the one (the system) the other a different thing (the single rules). Only by keeping in mind that the theory of law as a rule of force defines law as an aggregation of rules, and that is, as a system—and does not at all, as the traditional theory attempted to do, try to set up a criteria for the definition of legal rules taken in isolation, we can retain the advantage which it presents without being disturbed by the elimination of the primary rules. The problem of the single rules, and therefore also of the primary rules, is a different problem, which can be resolved only if one begins with the legal system once this is ascertained, and within this same system. The only way to save the primary rules is to admit that the criterion by which they can be identified or known is different than the criterion by which we can know a legal system. And this is possible only if we realize that the theory of law as rule of force, so far examined, is a theory not of the legal rule taken in isolation, as the traditional theory does, but of the legal system in its entirety.

8. The second of these clarifying specifications concerns the concept of coercion. Both in Kelsen, as in Olivecrona, and in Ross, the idea of coercion is intimately bound up with the idea of (physical) force. To say that the legal system is a coercive order (*Zwangsordnung*) is the same as to say that it contains rules for the exercise of force, indeed

it is characterized by these. This presupposes that the only means needed by a legal system to make the primary rules effective is recourse to force. Now the problem is to see whether or not such affirmation is acceptable, and in what sense. Recourse to force can be verified principally in the four typical situations, expounded in section 4, which can be grouped into two categories: (1) the power to compel (or to prevent) an action, with the consequence that the nonexecution or nonobservation of a rule can be avoided; (2) the power to repair the effects of an action or of its omission after the violation has occurred. The second power is identified with the power to establish and to execute sanctions where the word 'sanction' means: any undesirable consequence attributed by the legal system to the infraction of a rule of the system. That the power to enforce (or to prevent) is related strictly to the use of force does not create any problem. It might be useful instead to clarify what relation there is between the use of force and the various types of sanctions.

In order to understand how the different types of sanction operate, it is necessary to begin with the consideration that man is a rational being. He is capable of actions which conform, or which he believes conform to his aims. He avoids actions which take him, or which he presumes will take him to those ends which he wants to avoid. The means by which he does this are either fitting or not; the ends are either those which are desired or those which are not. Keeping in mind these four possibilities, we can distinguish two principal types of sanctions: (a) those that make it possible for the observance of a rule to be a fit means, and transgression to be an unfit means, for reaching the desired goal; (b) those which make it possible for the observance of the rule to be a fit means and the transgression an unfit means,

in avoiding the goal which is not desired. Dealing as they do with the relations between means and ends, these two situations can be expressed in technical rules having different formulations. The first might be expressed in this way: 'If you want x , you must do y ', where x is the end desired and y an action regulated by the rule; the second can be expressed in this way: 'If you do not want x' , you must do y' ', where x' is the end not wanted, and y' the action regulated by the rule. The undesirable consequence of transgression, in which every form of sanction consists, is in the first case the deprivation of a good, in the second the infliction of a harm. Only in the second case can one speak of punishment in the proper sense; in the first case one might speak more properly and (though the word has not entered into legal language) of frustration. Consequently, sanctions can be divided in two great classes: privative and punitive. The first class consists of nullifications; the second, of punishments.

An action is said to be *invalid* if it does not conform to legal rules which the legal system sanctions with nullification. An action is said to be *illicit* if it does not conform to legal rules which the legal system sanctions with punishment. The judgment of invalidity of an action implies that the action has no legal effects; the judgment that an action is illicit implies that the legal consequences of the action are not those that are desired by the transgressor.¹³

¹³I know that recently Hart has denied the possibility of placing nullifications in the category of sanctions: in fact, the difference between nullifications and punishment has seemed to him so great so that he affirms that "the extension of the idea of a sanction to include nullity is a source (and a sign) of confusion." CL, p. 32.

But the question as to whether or not the nullities may be called 'sanctions' is probably only a verbal one, and therefore the decision is an arbitrary one, since the term 'sanction' refers usually, especially in ordinary language, to the

What is the different relation that these two classes of sanctions have for the exercise of force? The question is important because while the connection is evident for punishments or for forced executions of actions, it seems less evident, and indeed it is contestable, for nullifications. When we say that the legal system is a coercive system characterized by the existence of rules which regulate the exercise of force, we mean, as we have seen, that the legal system establishes the conditions (substantial rules) on the basis of which the intervention of force becomes legitimate and the modalities (procedural rules) with which this intervention must be exercised. Now, punishment (or the forced execution of actions) represents for the transgressor the harm which can come to him from the force which opposes him; nullification represents for the transgressor, instead, the loss of the benefits of the force which is favorable to him. In other words, the judgment of illicitness presupposed by a punishment or a forced action poses the conditions for the intervention of a repairing or vindicating force; the judgment of invalidity which is presupposed by nullification posits the conditions for the nonintervention of a protective force. The connection between sanctions and force in the two cases is the following: in the case of punishment, sanction for the trans-

various forms of punishments (or of reparations). In fact, in order to avoid a much deprecated confusion resulting from the use of the word 'sanction', jurists often borrow the term 'guarantee' from the terminology of private law, since it is less committed to the unwanted connotations of penal law. The fact remains that nullity and punishment, notwithstanding the profound differences between them which we have emphasized here as determining the different ways in which they can intervene in the means-end nexus, just because they do intervene together, even if in different ways, in the means-end nexus, can be considered as belonging to the same general category, i.e., to the category of the expedient by which a legal system seeks to obtain the maximum respect for established rules by creating a situation which is unfavorable to the violator.

gressor consists in having to submit himself to a force which diverts him or takes him away from his pre-established goal; in the case of nullification, sanction for the transgressor consists in not being able to avail himself of the force which should have helped him in arriving at his established goal. Illicitness and invalidity are two kinds of valves which open and close, depending on the case, and therefore regulate the flux of force which is at the disposal of a dominant power to make effective the rules pertaining to the system as a whole.

9. One of the most frequent objections made to Kelsen is that of formalism. The expression 'legal formalism' has different meanings which I have elsewhere tried to illustrate.¹⁴ Although Kelsen's theory cannot be called formalistic in every sense of the expression 'legal formalism', it is usually held that it is certainly formalistic in the sense that, defining right as a special social technique, and therefore because of the way in which this technique comes to be exercised and not because of the quality of the behaviors that one can regulate with these techniques, excludes the possibility of determining right from the material that is regulated. Kelsen has made this criticism many times, affirming that there are no pre-constituted or pre-established limits to the material validity of legal rules, and that therefore, there are no specifically legal contents. But this affirmation applies only to the primary rules, and that is to the rules that according to Kelsen are not the true and proper legal rules. For the secondary rules, and that is for the true and proper legal rules, not only is it wrong

to affirm that legal rules have any content, but a contrary affirmation actually holds; legal rules can have only a single content, or, as we have tried to illustrate in these pages, can have as content only the exercise of force. One of the paradoxes that the theory under examination brings to light is also this: the theory which is frequently considered to be one of the main points of legal formalism is in reality the only one which gives a definition of law, understood as a legal system as a whole, the point of departure being exclusively the content of the rules.

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¹⁴ *Sul formalismo giuridico*, in "Rivista italiana di diritto e procedura penale," N.S., I, 1958, pp. 977-998.