INTERRELATIONSHIP BETWEEN VALIDITY, EFFICACY AND COERCIVENESS

Geçerlilik, Etkililik ve Cebrîlik Arasindaki İlişki

Yahya Berkol Gülgeç[*]

ABSTRACT

Validity, efficacy and coerciveness are all central concepts in legal theory. Every major legal theoretician has somehow touched upon in each of these concepts. However, their meaning and interrelationship remain problematic. Some of these problems originate from the adopted definitions of these concepts, some others from the ambiguous tone of legal philosophers. This article can be viewed as an effort to reconcile these three concepts and re-discover their central position in legal theory. In this regard, the article examines the work of three important positivists, each leading a different understanding of positivism: Austin, Kelsen and Hart. The article reaches the conclusion that the concepts of efficacy and validity are intertwined as the efficacy of the legal system has always been conceived of as the pre-condition for its validity. On the other hand, an individual norm's efficacy should have no effect on its validity. The connection of sanctions as the tool of coerciveness to these two concepts depends on the adopted definition of sanction. There are two understandings of sanctions: Normative and factual. In case the normative understanding or definition is adopted, sanction and coerciveness have very little to do with either validity or efficacy. If sanction is considered to be a factual "evil", however, its effect on the system's efficacy and validity increases.

Keywords: Validity, efficacy, coerciveness, sanctions, legal positivism.

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[*] Uludağ Üniversitesi Hukuk Fakültesi Anayasa Hukuku Anabilim Dalı

ÖZ

Geçerlilik, etkililik ve cebrîlik kavramlarının hepsi hukuk teorisinde merkezî bir role sahiptir. Bütün büyük teorisyenler bir şekilde bu kavramlara değinmiştir. Ancak, bu kavramların anlamı ve bunların karşılıklı ilişkisi hâlâ sorunludur. Bu sorunlardan bazıları kavramlara ilişkin benimsenen tanımlardan, diğer bir kısmı ise hukuk felsefecilerinin belirsiz üsluplarından kaynaklanmaktadır. Bu makale bu üç kavramı bağdaştırma ve bunların hukuk teorisindeki merkezî konumunu yeniden keşfetme çabası olarak görülebilir. Bu bağlamda, makale her biri farklı bir pozitivizm anlayışına sahip olan üç önemli pozitivistin çalışmalarını incelemektedir: Austin, Kelsen ve Hart. Makale, etkililik bütün bir hukuk sisteminin geçerliliğinin ön koşulu olarak görüldüğü için, bu iki kavramın iç içe geçmiş olduğu sonucuna ulaşmaktadır. Öte yandan, birel bir normun etkililiğinin onun geçerliliği üzerinde bir etkisinin olmaması gerekir. Cebrîliğin aracı olarak yaptırımların bu iki kavramla bağı benimsenen yaptırım tanımına bağlıdır. Yaptırıma ilişkin iki anlayış bulunmaktadır: Normatif ve olgusal anlayışlar. Normatif anlayış veya tanım benimsendiğinde, yaptırım ve cevrîliğin etkililik ve geçerlilik, özellikle de geçerlilik kavramıyla pek az ilgisi bulunmaktadır. Eğer yaptırım olgusal bir "kötülük" olarak algılanırsa, bir hukuk sisteminin etkililiği ve geçerliliği üzerindeki etkisi artmaktadır.

Anahtar Kelimeler: Geçerlilik, etkililik, cebrîlik, yaptırım, hukukî pozitivizm.

INTRODUCTION

This article aims to examine the relationship between the concepts of validity, efficacy and sanction. Though the nature of the relationship between validity and efficacy has been elaborated in detail in jurisprudence, the function of the latter is not clear. Even though legal positivism has focused on the effect of the legal system's (or an individual norm's) efficacy on its validity, questions with regards to the role of sanctions and the coercive character of law have not been directly associated with the concepts of validity and efficacy.

Question of efficacy as an external condition of the legal character of a system is an issue tackled in detail by positivist writers. Natural law theorist concentrate on the morality of law as an external condition and therefore, the issue of efficacy is mostly untouched in their legal theory. Due to this fact we will inevitably concentrate on the writing of the positivist writers. Therefore, the question of efficacy will be examined mainly in line

with the thoughts of Austin, Kelsen and Hart, and a critique of each author will be presented in order to clarify the relationship of efficacy with the questions of validity, legal existence and sanctions.

The article does not claim to suggest a new understanding of the concept of validity. What is important in our case is to determine a constant meaning of the term validity. Therefore, different reasons for validity stipulated in different theories will not be challenged as long as the meaning of validity does not differ. Whatever effect efficacy has on the validity of the legal system or an individual norm depends on this determined meaning of validity. With regards to the concept of efficacy, the importance rests on its effect on the validity of the "legal system" or its possible impact on the validity of individual norms. This is mostly due to the fact that efficacy has been created and used by legal theorists in order to constitute the validity of the legal system or to determine which social order is the legal one. It shall be defended furthermore that the concept of sanction or the coercive character of the legal order can only be directly related to the efficacy of a legal order and not the system's or individual norms' validity. Sanctions' effect on validity can only be indirect. Therefore, validity is, in a way, our ultimate notion. Impact of other concepts on validity and each other is the truly disputed matter. Once this impact is determined, the interrelationship between these concepts will be much easier to formulate.

A. THE CONCEPT OF VALIDITY

Validity stands as a crucial concept in positivist legal thinking. It is of upmost importance to examine how different positivists have defined and determined the pre-conditions of validity as this concept is most of the time related to a legal norm's existence. Nevertheless, the concept of validity is equally important for the natural law theorists. The difference between these two leading theories is that they determine the pre-conditions of validity based on ontologically separate grounds. Natural law theories require that the positive norms and legal systems conform to certain extra-legal and *normative* criteria such as morality, reason or religion. On the other hand, positivist theories generally require the extra-legal condition of efficacy for the validity of the legal norms or legal systems.

Nevertheless, as aptly pointed out, the discussion on the concept of validity concentrates on the pre-conditions of being valid whereas there is a general agreement even amongst natural law theorists and legal positivists on the fact that "valid" means legally binding.[1] Therefore, one may conclude that

[1] Sartor, 2000, pp. 585-586.

the meaning of the term "valid" is largely undisputed. Nonetheless, in order to assess the relationship of validity to the concept of efficacy, one needs to have resort to positivists.

I. Validity According to Austin

The sovereign and sovereignty are essential concepts in Austin's theory regarding the concept of validity. We will see below, that the pre-condition for the validity of legal norms in Austinian theory depends on the will of the sovereign. Therefore, we need to, in a few words, touch upon the sovereign.

According to Austin, the sovereign is the person or group of persons who are commanded by no one although they withhold the power to command all in a society.[2] In this perspective, it is fair to say that Austin's sovereign is pretty much similar to the *Leviathan* of Thomas Hobbes. Hobbesian *Leviathan* is a legally unlimited sovereign created by the social contract against which its subjects have no rights other than the ones granted by the sovereign.[3] Likewise, Austin's sovereign is not legally limited[4] as the aforementioned definition suggests. Considering that the sovereign is not limited by law, it is not difficult to see why he will serve as the basis (pre-condition) of legal validity. He is not legally limited first and foremost because he makes the law and determines what is legal.[5] In this regard, Austin's sovereign will fulfill the function of Kelsen's "fathers of the constitution" or the constituent power. The constituent power, too, is legally unlimited since there is no positive legal norm empowering and thus limiting the will of the constituent power.[6]

According to Austin, a law can be defined as the sovereign's general command to the subjects.[7] In this regard, commands lacking the quality of generality are not laws at all.[8] This definition therefore makes one wonder what those particular commands are if they are not laws. We are of the opinion that such distinction between legal "commands" based on their generality or particularity cannot be justified. As correctly stated,[9] such a distinction can be made between rules and particular norms but it cannot be used to separate what is legal from what is not especially considering the fact that no

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2 Austin, 2001, pp. 166-167.
3 *See* Hobbes, 1998, pp. 115-121.
4 *See* Fuller, 1958, p. 634; Raz, 1980, p. 16 (that the sovereign does not habitually obey anyone); Austin, 2001, pp. 166-167(independence of the sovereign).
5 Consider for example the situation of the constituent power. It cannot be limited by the provisions of the constitution because it is the entity creating that constitution.
6 Gözler, 1998a, p. 53.
7 Raz, 1980, p. 11; Fuller, 1958, p. 633.
8 Raz, 1980, p. 11.
9 *Ibid.*

justification for such a separation has been proposed. Therefore, we will assume that particular commands can also be considered as law as long as they have been issued by the sovereign.

Although all law needs to originate from the sovereign they do not need to be directly issued by the sovereign. Accordingly, any command issued on the basis of the sovereign's authorization is also a valid legal norm.[10] Therefore, although subordinated to any command issued directly by the sovereign, laws enacted by other entities authorized by the sovereign are also valid, i.e. they legally exist. We can conclude that in Austinian view of validity, those laws enacted directly by the sovereign derive their validity from the fact that they have been issued by the sovereign who is not legally bound or limited in any way but can command anyone within that society. Any indirect law issued by other entities, on the other hand, is only valid insofar they conform with the authorizing enactment of the sovereign. Any enactment so issued by the sovereign or originating from the authority delegated by the sovereign is valid, i.e. it has binding force.[11]

Austin perceives unsanctioned expressions of will as deficient:[12] "Though the author of an imperfect law signifies a desire, he manifests no purpose of enforcing compliance with the desire.".[13] He also states that the expressions of will or desire which do not also indicate an additional desire to enforce such wills or desires are laws improperly so called and they do not have binding force.[14] These are not considered to be commands, and therefore, laws in the proper sense of the word. It should be noted therefore that sanctions and the fact that an expression of will or desire is expressed with an additional desire to enforce such wills or desires are essential elements of what is law and legal. The details of this issue will be examined below where we focus on the concept of sanction and its relation to validity and efficacy.

The concept of the sovereign also needs some attention as the basic definition provided above may not be adequate in determining who the sovereign(s) in a legal system is. Austin writes the following regarding the sovereign: "If a determinate human superior, not in a habit of obedience to a like superior, receive *habitual* obedience from the bulk of a given society, that determinate superior is sovereign in that society, and the society (including

[10] Austin, 2001, pp. 191-192.
[11] *See ibid.*, pp. 190-195.
[12] Raz, 1980, pp. 10-11.
[13] Austin, 2001, p. 32.
[14] *Ibid.*

the superior) is a society political and independent".[15]Accordingly, Austin's sovereign has to fulfill two essential conditions, one positive and the other negative: The sovereign needs to receive the obedience of the majority in the society (the positive condition) and that the sovereign is independent, meaning he does not obey anybody else.[16] This analysis also shows that independence of the political society depends on the independence of its sovereign. Although Austin's sovereign is largely dependent on the sovereignty defined by Bentham, his definition differs from that of Bentham by indicating that the sovereign also needs to be independent, i.e. he should not obey anyone else within or outside that society.[17]

Austin's insistence on the role of the sovereign and its commands in a legal system has received many criticisms and been seen as the general defect of this important philosopher's theory. It may be argued that Austin's theory is deficient with a certain inadequacy in explaining the contemporary legal systems. Austin's sovereign as defined by him seems to have disappeared in our contemporary systems. Principles such as *Rechtsstaat* or its correspondence in Common Law systems, rule of law, express that the authority and power of the state is also limited by law. Most of the modern constitutions determine the "people" or the "nation" as the sovereign powers in a society.[18] However, one must bear in mind that such constitutional determinations regarding whom sovereignty belongs to do not necessarily mean that a sovereign in Austinian sense does not exist in our contemporary systems. Consider for example the notion of the constituent power enacting the constitution of any legal system. It is also legally and its command, the constitution, binds everyone else including the legislator of the legal system.[19] The main difference between Austin's time and our times is not one of quality but of quantity. Austin has also accepted that legal authority to legislate may be delegated to other entities. In our case, the bulk of the legislative powers have been delegated to the legislators to be elected by people. The execution

[15] *Ibid.*, p. 166.
[16] Raz, 1980, p. 7.
[17] *Ibid.*, pp. 8-9.
[18] *See, e.g.*, "Sovereignty unconditionally belongs to the nation." (Article 6/1 of the Turkish Constitution), "Sovereignty belongs to the people..." (Article 1/2 of the Italian Constitution), "The Spanish Nation... in the exercise of its sovereignty..." (First Preamble of the Spanish Constitution) or "Popular sovereignty is the foundation of the government." (Article 1/2 of the Greek Constitution).
[19] There are different theses defending that the constituent power is legally limitable. This may only be true in case international law is considered to be binding on the constituent power. This also requires a monist understanding with regards to the relationship of international law and municipal law. We simply believe that there is not sufficient proof to assume that a monist construction is viable and the rules of international law are legally binding on the constituent power. For a detailed discussion please see Gözler, 1998a, pp. 24-54.

and implementation of the general rules created by the constitution and the legislator are carried out by the executive branch. However, the most important difference is that the constituent power, or the sovereign, has decided not to intervene in the determination regarding the delegated legislation's conformity with its direct command, the constitution, by authorizing independent courts with regards to this matter. It has even authorized a qualified majority of the Parliament to amend its original command, albeit the possibility of including unchangeable provisions, provided that it conforms to the originally set constitutional criteria. Therefore, the constituent power has "sunk into sleep"[20] and no one knows when or if it is going to wake up. The trace of its last will before dropping asleep, the constitution, though still has impact on the contemporary legal systems. As a result, although Austin may not have addressed the specific problems caused by the state of the contemporary legal systems, as they were not present at the time, we do not believe that his theory has necessarily lost its importance or effect in contemporary times.

II. Validity According to Kelsen

Hans Kelsen's pure theory of law is undoubtedly a major contribution not only for the positivist theory but also for the theory of law in general. Adopting Kant's dualism of is and ought ("*Sein*/*Sollen*"),[21] Kelsen has developed a theory of legal validity which is unique, although it admittedly holds similarities with the Austin's theory especially with regards to coercive character of law. Dualism of is and ought means that normative statements cannot be followed by or lead to factual determinations or *vice versa*. From the point of view of legal science this means that a legal norm may only be valid due to another legal norm.[22] In other words, legal norms derive their validity from another legal norm, validity of which needs to stem from a still superior norm.[23] Consequently, no legal norm can be valid due to an extraordinary necessity or any other factual consideration.

The norm which determines the conditions for the validity of the other norm, *a.k.a* the superior norm, fulfills this function in a twofold way. It either determines the procedure to be followed for the formation of the other rule or it delimits the content thereof.[24] In pure theory of law, the first is called the dynamic aspect of law and the second is named as the static aspect of law.[25]

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[20] Gözler, 2012, p. 50.
[21] *See* Delacroix, 2006, p. 27.
[22] Kelsen, 2008, p. 9; Raz, 1974, p. 96.
[23] Kelsen, 1949, p. 110; Kelsen, 2008, p. 193.
[24] *See* Kelsen, 1949, p. 123; Haase, 2004, p. 39; Heckmann, 1997, pp. 138-139, 146.
[25] Kelsen, 2008, pp. 195-196.

Since each norm derives its validity from another, i.e. some norms determine the reason for validity of the other norms, the legal system can be characterized as a hierarchical chain or ladder of validity.[26] Examination of this hierarchical structure fall outside the scope of our inquiry.

Until now, we have only touched upon how and why a norm is valid. Accordingly, a legal norm is only valid because it has been created in a way previously envisaged by another legal norm belonging to the same system.[27] We are yet to understand what "valid" means. To put it in a different way, we have determined what is needed in order for a legal norm to be deemed "valid" according to Kelsen, however, this does not mean that the concept of validity is clarified. These are simply pre-conditions of validity which may be determined differently by different legal theories.[28] In order to understand what "legally valid" means one has to determine the legal result of being legally valid.

According to Kelsen's theory a valid norm means that it has binding force. The fact that a legal norm has binding force connotes that it legally exists.[29] Legal existence and binding force in this case entails that the addressees of the norm are legally obligated to conform to the rule or command indicated by the norm.[30] That the content of the norm constitutes an "ought" for the addressees.[31] Therefore, valid norms need to be taken into consideration in the juristic thinking as well as by the courts and other law applying officials. However, in Kelsen's theory, it is assumed that a posited norm is valid until the competent organ declares the invalidity and therefore non-existence thereof.[32] The competent organ's (usually a court's) decision renders the norm in question invalid. It is asserted in this regard that the expectation of the inclusive legal positivism is to declare the norm's invalidity

[26] *See* Haase, 2004, p. 39; Heckmann, 1997, p. 141; Gustafsson, 2007, p. 85.
[27] *See* Raz, 1974, p. 97.
[28] *See* Sartor, 2000, pp. 607-608.
[29] Raz, 1980, p. 45.
[30] However, the meaning of the "legally binding" cannot be the same with regards to power conferring rules as they do not impose a duty to be followed by its addressees, but empowers them to perform certain actions. Therefore, a norm such as "Every Turkish citizen is free to express their ideas and opinions" cannot be regarded as a standard to comfort to. *See* Sartor, 2008, 217.
[31] We do not encounter the same problem when we use this phrase instead of implying that the behavior of the addressees must conform to the standard envisaged by the norm. Although Kelsen essentially thought that "ought" always implies a duty whether it is directed at the legal officials or citizens, eventually he has recognized the existence of power-conferring rules in a legal system and used the term "ought" in a sense to comprise such norms. *See* Hart, 1983, p. 328; Raz, 1980, pp. 109-110. However, we do not believe that this is due to a distortion or expansion of the meaning of "ought". Kelsen simply thought that power-conferring rules are not independent norms but dependent norms related to the taking of a coercive measure. *See* Kelsen, 2008, pp. 51-52. Also *see* MacCormick and Raz, 1972, p. 78.
[32] Kelsen, 2008, pp. 276-277.

ab initio.[33] One criticism originated in this assertion is that, in case the norm is invalid starting from the time it has been posited, this means that an invalid norm has been applied in the legal system, though it was invalid and therefore, a norm's legal existence and its validity cannot have identical meanings,[34] for those rules that were applied existed but were invalid. We simply do not think that this criticism is applicable to Kelsen's theory or any jurisdiction in the continental legal tradition. We will take the role of the constitutional courts as an example. Once a constitutional court examines the validity of a statute, meaning its conformity with the constitution, in case it determines that the statute is contrary to the constitution either in its procedure of creation or content, it invalidates the statute prospectively. Mentioning this act of annulment as a "declaration of nullity" is fallacious since the court's act has a constitutive and not a declaratory effect.[35] Therefore, the statute cannot be regarded as invalid *ab initio*. Also, the assertion that the positivist theory has such a demand does not embrace all branches of positivism, but only inclusive legal positivism and Kelsen's account thereof sufficiently indicates that *ab initio* invalidity of any legal norm, although usually thus expressed in the legal reasoning of the courts and work of many scholars, is misleading.

Pre-condition of validity is the fulfillment of the requirements envisaged by the superior norm. However, this requirement is only for the enactment of the legal norm and it is not sufficient for a norm to stay valid. In other words, there is a *sine qua non* condition for the validity of the legal norm. Kelsen claims that unless the legal system to which a specific norm belongs is generally efficacious, no legal norm in that system can be valid.[36] The details of this reasoning will be examined further in the next section. However, he further indicates that an individual norm also needs to have "minimum efficacy" if it is to stay valid. Exact words of Kelsen are as follows:

> A general legal norm is regarded as valid only if the human behavior that is regulated by it actually conforms with it, at least to some degree. A norm that is not obeyed by anybody anywhere, in other words a norm that is not effective at least to some degree, is not regarded as a valid norm. A minimum of effectiveness is a condition of validity.[37]

[33] Grelette, 2010, p. 28.
[34] *Ibid.*
[35] Kelsen, 2008, p. 277.
[36] Kelsen, 1949, p. 119.
[37] Kelsen, 2008, p. 11.

In case a particular norm completely lacks efficacy, that norm is invalid due to the doctrine known as *desuetude*.[38] We have elsewhere criticized this conclusion due to the fact that we find it inconsistent with the core of Kelsen's theory which rests upon the dualism between is and ought. Accordingly, the fact that norms can only derive their validity from other norms means that such validity can only be lost on the basis of another norm.[39] Factual considerations such as the efficacy of a norm should not be considered while determining whether that norm is valid *unless* such consideration has been envisaged by one of the superior norms. We simply think that this postulate damages the internal consistency of the pure theory and should be avoided. Kelsen's reasoning for the existence of such a *sine qua non* condition is also weak due to the fact that he relied on the concept of *desuetude* as an unchallenged fact and formulated his theory accordingly. This issue will be further examined below.

On the other hand, general efficacy of the legal system is a pre-condition not only for the validity of the system as a whole but also for individual norms thereof. Accordingly, legal systems and the legal norms within this system are no longer valid once the system loses its efficacy. This requirement of general efficacy for the legal system has a crucial role in distinguishing the legal order from other social orders or legal orders from each other. Moreover, it also determines for which kinds of social normative orders the basic norm can be presupposed. This issue also falls under the scope of the next section where we examine the concept of efficacy and, therefore, no further detail needs to be addressed here.

There remains one last point to discuss in relation to Kelsen's understanding of validity.[40] If all legal norms derive their validity from another legal norm validity of which also needs to rest upon a still higher positive norm, in order to contend that any norm is valid, there needs to be a final terminal in the chain of validity. Kelsen was aware that any search for "a still higher norm" would continue forever therefore preventing the any legal

[38] Kelsen, 1949, pp. 119-120.

[39] Gülgeç, 2016, pp. 22, 117.

[40] Obviously, there are numerous other issues connected with the concept of validity such as the basic norm and Kelsen's understanding of validity as a criterion of membership in the legal system. However, our purpose is not to present a total account of Kelsenian validity but to understand it in broad strokes in order to be able to establish its connection with the concept of efficacy and finally with the concept of sanctions. As a result, we evade from presenting any further account of discussions regarding Kelsenian validity. The problem regarding the basic norm's and Kelsenian validity's adequacy as a criterion of membership in a legal system though should be stressed as a crucial issue in order to understand Kelsen. For a detailed discussion *see generally* Raz, 1980, pp. 95-109; Hart, 1983, pp. 334-339; Raz, 1974, pp. 98-99.

scientist to consider the said system as a valid system of norms.[41] In order to view a legal system as valid and enable the legal science to fulfill its function, the search for a "still higher" norm needs to be ended at a certain point where the validity of the last positive norm is presupposed. This presupposition is the basic norm. Accordingly, the basic norm can be understood as a presupposed and not a posited norm of the legal system[42] which establishes the validity of the constitution of the legal system. It needs to be stressed that the basic norm, unlike the rule of recognition which will be examined below, is not for the officials to determine. The basic norm is only presupposed and exists in the mind of the jurist and it enables him/her to comprehend the normative system as a valid one. The content of the basic norm is determined by the facts related to the creation and application of the legal system in a particular society.[43] The concept of the basic norm has lead to many discussions regarding its adequacy to explain the concept of validity, identity of a norm in a legal system and its content. However, an account of these discussions will not be given here, as it is ample for the purposes of this article to show that the basic norm serves as a final knot in the chain of validity.

It is fair to say that Austinian and Kelsenian versions of validity are very similar. In both understandings of validity, legal norms need to be issued according to the higher norm conferring validity on it. However, what distinguishes Kelsenian validity from the Austinian version is the Kantian dualism between is and ought. Accordingly, Kelsen could not simply accept any sovereign's will as the cause of validity due to the fact that such will is a fact and facts cannot lead to normative validity. Therefore, Kelsen developed the concept of the basic norm in order to render the will of the constituent power a law creating fact. However, based on the fact that the basic norm is only a presupposition created in order to be able to view the legal system in Kelsenian terms, i.e. without breaking the dualism of is and ought, it may be argued that this difference does not constitute any significant change in understanding of the concept of validity. From a Kelsenian view too, if the fictional basic norm[44] is neglected, the validity of the norms of a legal system eventually originates from a legally unlimited constituent power.

III. Validity According to Hart

H.L.A. Hart has founded his theory on the criticism of Austinian command theory of law. The core of the criticism originates from the different

[41] Kelsen, 2008, p. 194.
[42] Gustafsson, 2007, p. 86; Raz, 1974, p. 97.
[43] Kelsen, 1949, p. 120.
[44] *See* Gustafsson, 2007, pp. 99-100.

view Hart adopts with regards to the nature of the legal obligation. He refuses Austin's command theory on the basis that the fact that somebody is powerful enough to make others obey his commands through the use of threat or force does not amount to be an obligation.[45] On the other hand, his theory may also be viewed as a criticism of the pure theory of law, even though the concept of validity in Hartian sense is also very similar with the Kelsenian understanding.

In order to understand how Hart perceives validity, we should first provide an account of some basic terminology used by Hart. Accordingly, a legal system is formed of two kind of rules: primary and secondary rules.[46] Primary rules are those rules which directly aim to regulate human behavior.[47] These kind of rules are very similar to Austin's commands. However, these kind of rules, directly relating to the behavior of the individuals, cannot adequately constitute a legal system. In Hart's theory, existence of the second set of rules, secondary rules is required in order to talk about a legal system.[48] These secondary rules are simply "rules about rules".[49] In other words, they do not relate to the behavior of the individuals directly, but rather determine how other rules can be created, changed or adjudicated. Based on their function, there are three different categories of secondary rules: rules of recognition, rules of change and rules of adjudication. Rule of change is a rule authorizing a person or body to change the existing primary rules of obligation, introduce new ones or abrogate the old ones.[50] Rules of adjudication authorize a person or body to make authoritative determinations regarding whether a particular primary rule of obligation has been violated in a concrete case.[51] Rules of recognition, on the other hand, play a central part in Hart's concept of validity.

A rule of recognition is the legal norm enabling the legal officials of that system to determine whether a particular rule belongs to that legal system or not.[52] Rules of recognition, provide certain criteria for the primary or other secondary rules without fulfillment of which the tested norm cannot be valid.[53] The first function is the epistemological and the second is the ontological

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45 Hart, 2012, pp. 27, 43-44.
46 *See* Raz, 1980, p. 195.
47 Hart, 2012, p. 91.
48 *Ibid.*, p. 95.
49 Marmor, 2011, p. 48. *But see* Hart, 2012, p. 94 (where Hart defines secondary rules as rules about primary rules of obligation). However, elsewhere, Hart also implies that the ultimate rule of recognition can be about other secondary rules. *See* Hart, 2012, p. 107. Therefore, since the rule of recognition is also a secondary rule, we have chosen to define secondary rules as rules about other rules. After all, primary rules of obligations are never about other rules.
50 Hart, 2012, p. 95.
51 *Ibid.* at 96.
52 Surlu, 2008, p. 55; Hart, 2012, p. 100.
53 Barber, 2000, p. 135.

function of the rule of recognition.[54] Therefore, the concept of rule of recognition will play a significant part in Hart's account of validity. However, since rules of recognition are also secondary rules, this means that there can be rules of recognition for a rule of recognition. In this case, it is revealed that there exists a hierarchy between different rules of recognition. This hierarchy ends with an ultimate Rule of Recognition, an ultimate criterion of validity.[55] Although Hart generally associates validity with existence, the existence of this ultimate Rule of Recognition does not relate to its validity.[56] In fact, it is not valid according to any other posited norm of the legal system, but is a social rule.[57] Therefore, its existence can only be factually showed.[58]

The Rule of Recognition for any system must be determined, i.e. adopted from the internal point of view, by their legal officials.[59] The ultimate Rule of Recognition basically serves two functions: To determine the legal norms to be applied and taken into consideration by the law applying organs and to provide the validity of the whole legal system. The first function answers the question of sources of law in a system while the second function provides for the existence, in other words validity of such sources.[60] Therefore, the Rule of Recognition is the ultimate source of validity in a legal system. This second function makes the Rule of Recognition resemble Kelsen's basic norm. The comparison between the basic norm and the Rule of Recognition has been provided by Hart himself;[61] however, an account thereof does not concern us at the present.

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[54] Coleman, 1982, 141.

[55] *See* Marmor, 2011, p. 50. Note, however, that there is little suggesting in Hart's account of the concept that there might be numerous rules of recognition in a single legal system. Still, we believe that this interpretation by Marmor makes Hart's theory more coherent and intelligible. Since we will not be going into the details of Hart's account of the Rule of Recognition, we have avoided any discussion regarding the possibility of multiple rules of recognition in a legal system. Suffice it to say however that at least some of these rules of recognition are not social rules. They are positive legal norms created by a procedure previously determined by another legal norm.

[56] Hart, 2012, p. 110.

[57] Raz, 1972, p. 851.

[58] Hart, 2012, p. 101.

[59] Hart uses different terms to express what we here choose to call "legal officials". Officials and courts are among these expressions. There is discussion regarding whom Hart refers to with these terms although it is clear that he is referring to the group of persons who will determine the ultimate Rule of Recognition. We are of the opinion that these terms do not only refer to the judges in a legal system but to the law appliers in a system as general. For detailed discussions *see* Shapiro, 2008, pp. 6-7(especially note that Shapiro introduces an interesting solution. Accordingly, rule of recognition exclusively addresses the courts while rules of change and adjudication address different group of officials empowered by these rules. Nevertheless, we do not adopt this view, however innovative and advantageous it might be as there is nothing suggesting such interpretation in Hart's writing.).

[60] *See* Coleman,1982, p. 141.

[61] Hart, 2012, pp. 292-293.

Hart has brought about many criticisms regarding Kelsen's theory of law in general, however, what concerns us here is Hart's rightful criticism of Kelsen's comments on *desuetude*. Hart thinks that there is no necessary connection between the validity of an individual norm and its efficacy.[62] This is why he criticizes the idea that a norm which loses its efficacy through disuse also loses its efficacy. According to Hart, this is only possible if the Rule of Recognition of the system comprises such a principle envisaging that inefficacious norms are invalid.[63]

On the other hand, efficacy is important when it comes to the existence, i.e., validity of a legal system. Hart indicates that the validity of the legal system requires the fulfillment of two conditions. First: "...those rules of behaviour which are valid according to the system's ultimate criteria of validity must be generally obeyed...".[64] The second condition is that: "...its rules of recognition specifying the legal criteria of validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials.".[65] Hart specifically states that the first condition is to be fulfilled by the citizens irrespective of their motives for obedience and the second condition is one that is to be fulfilled by the officials of the system with what he calls the internal point of view.[66] As in Kelsen's theory, the concept of efficacy is inherently related only to the validity of the legal system and not any single norm. Further details will be provided below where we examine the concept of efficacy.

Hart's account of validity is mainly the same with Kelsen's understanding. In both theories, legal norm must fulfill the criteria determined by a hierarchically higher norm in order to be valid. Both theories present the general efficacy of the legal system as a pre-condition of validity and as a meta legal condition (since the general efficacy of the legal system is not required by any positive legal norm). Hart differs from Kelsen by not establishing a direct bond between the efficacy of a single norm and its validity. Lastly, the ultimate point of origin regarding the validity is not the basic norm but the Rule of Recognition, which is ontologically different from the basic norm in that it is not postulated as a presupposition, but a social fact, existence of which may be proved or disproved.[67]

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[62] Hart, 2012, p. 103. *Also see* Munzer, 1972, p. 26.
[63] Hart, 2012, p. 103.
[64] *Ibid.*, p. 116.
[65] *Ibid.*
[66] *Ibid.*, pp. 116-117.
[67] *Also see* Marmor, 2011, p. 50.

We have examined the concept of validity according to three leading positivist writers. It has been shown that there is a much or less agreement between different positivist traditions with regards to the preconditions and the result of validity. Accordingly, the validity of a legal norm depends on its compliance with the criteria set in a hierarchically superior norm (superior norm, secondary rule or authorizing rule of the sovereign) and it requires the general efficacy of the legal system it belongs to. The result of a norm's validity is its existence. If a legal norm exists, it has binding force. Finally, the legally binding force of a norm means that the content of the norm must be taken into consideration by the legal authorities whenever it is relevant[68] and that individuals are legally obligated to behave as the norm prescribes. Now we move on with the examination of what efficacy is and how it relates exactly to the question of validity, i.e. existence of law.

B. THE CONCEPT OF EFFICACY

We have briefly addressed the question of efficacy above in the context of its relation to the concept of validity. We have tried to avoid any discussions regarding the content of efficacy, its definition and meaning etc. Here our inquiry starts with what efficacy means. While trying to find an answer to this question we will show utmost effort to avoid adopting definitional perspectives. Different meanings of the concept of efficacy appears in the writing of legal philosophers; however, it is not seldom that they evade from presenting a definite account of how they perceive efficacy.

Legal efficacy may be defined as the capacity of the legal norms to achieve the envisaged results.[69] Therefore, it is a function of obedience of the individuals and implementation of sanctions by relevant authorities on the disobedient individuals, for the envisaged results cannot be achieved in case the individuals in a legal system disobey the legal norms or in case of obedience effective sanctions are not applied to ensure future compliance. Accordingly, the first condition of an efficacious legal system is that its norms are by and large obeyed by the individuals.[70] The second condition is that relevant authorities apply the required sanctions in cases of disobedience. It is possible to understand an efficacious legal system as a system in which legal rules are by and large obeyed by the individuals and, if not, sanctions are applied. Then the question is whether a legal system norms of which are not by and large obeyed by the individuals but in which legally envisaged

[68] Sartor, 2008, p. 217.
[69] Munzer, 1972, p. 5.
[70] Raz, 1980, p. 203.

sanctions are effectively applied is an efficacious legal system. This question can only be answered in the context of the legal theory concerned. However, the main problem with the concept of efficacy is that the theoreticians do not provide sufficient detail on the question of efficacy. Inevitably, efficacy is going to be defined by the legal theory itself and this makes it mandatory to examine how certain positivist traditions treat and define the concept of efficacy.

Austin's theory associates existence of a legal system mostly with the problem of efficacy. Accordingly, there are four conditions for the existence of a legal system and three conditions point to the principle of efficacy as a prerequisite of existence. These conditions are: 1) laws of the system are by and large efficacious, 2) the supreme legislator does not habitually obey anyone else and 3) the supreme legislator is superior to the subjects.[71] The second and third conditions merely ensure that the supreme legislator of a system is sovereign. The principle of efficacy in Austin's theory is expressed by the condition that the supreme legislator needs to be habitually obeyed and the result of this requirement is the first condition.[72] As seen, Austin's understanding of efficacy points to the obedience of the subjects to the legal rules. Austin does not seem to point at the sanctioning of disobedient behavior, at least not directly. We will demonstrate below that this is due to the categorization of unsanctioned expressions of will by the sovereign as "non-binding" in Austin's theory. What this perspective provides is a very basic understanding of efficacy - that citizens and other individuals whose behavior is intended to be regulated must obey the requirements of law regardless of the motives behind their compliance. Therefore, compliance of the courts or other law applying organs with the relevant legal rules is not relevant to the concept of efficacy. In Austinian terms, "...the efficacy of the system is relevant only in so far as it contributes to the personal obedience of the population to the supreme legislator.".[73]

Question of efficacy demands more attention in Kelsen's theory. The issue is two dimensional: the efficacy of the whole system and the efficacy of any individual norm. The first is postulated as a *sine qua non* condition for the validity of the individual norms of a system.[74] Kelsen's thoughts regarding the effect of general efficacy of the system on the validity of that legal system and its individual norms rest on the change of basic norm through revolution or

[71] *Ibid.*, p. 216.
[72] *Ibid.*
[73] *Ibid.*, p. 17.
[74] Kelsen, 1949, pp. 118-119.

other forceful methods of altering the legal system. He observes that legal orders created by successful revolutions which manage to receive obedience from the population are considered to be valid systems.[75] Should these revolutions fail, on the other hand, the acts of the revolutionaries are not considered as law creating facts but as illegal undertakings.[76] This is because in Kelsen's understanding, successful revolutions are law creating facts and they cause a change in the basic norm.[77] Consequently, any legal order losing its efficacy as a whole, due to the change in the basic norm, also loses its validity as a whole.[78] Since the legal order has lost its validity, individual norms belonging to that system cannot be considered as valid any longer.[79] However, Kelsen carefully distinguishes between the reason for validity of a norm and its efficacy: "The efficacy of the total legal order is a condition, not the reason for the validity of its constituent norms. These norms are valid not because the total order is efficacious, but because they are created in a constitutional way.".[80]

The problem with the effect of efficacy on the validity of the legal system is that efficacy is a factual consideration. Moreover, it is a factual consideration not required by any normative source. The conditions for validity of a norm contained in the superior norm will also require factual considerations such as whether the norm has been created by the competent authority or whether the majority requirements determined by the superior norm have been complied with. Unless there is a superior norm envisaging the effect of such considerations upon the validity of the legal system, such as the basic norm, it is difficult to see why these assertions should hold true in a Kelsenian understanding. The content of the basic norm is such that it confers validity on the constitution of a national legal system. Any further elaboration would endanger the purity of the pure theory, as it would make it possible to include transcendental elements in the content of the basic norm.[81] This risk is deteriorated by the fact that the basic norm is a mere presupposition, an epistemological tool in order to conceive of the legal order as valid and binding. Elsewhere, where Kelsen includes the role of international law in

[75] *Ibid.*, p. 118.
[76] *Ibid.*
[77] Kelsen, 2008, pp. 209-210. Note however that it is not the revolutionaries that change the basic norm. The basic norm is not a positive norm and therefore it is not posited and cannot be changed by anyone. With this in mind, Kelsen speaks of the basic norm "changing simultaneously" with the overridden former constitution (*ibid.*).
[78] Kelsen, 1949, p. 119.
[79] *Ibid.*
[80] *Ibid.*
[81] Delacroix, 2006, p. 54.

considering the validity of the national legal orders, he postulates that a norm of customary international law, called the principle of efficacy, determine that only those national legal orders that are efficacious are valid.[82] Although this view is also doubtful,[83] it at least is in compliance with the basics of Kelsen's theory.

Kelsen's answer to our question above is as follows: efficacy of the legal order is an important tool to distinguish legal order from other social orders which may also have normative character.[84] It is a criterion to distinguish any mafia leader's orders and commands from the state's legal rules. If the principle of efficacy was not incorporated into Kelsen's theory, legal scholars could determine the chain of orders within a mafia family as a legal order after presupposing a basic norm which confers validity on the orders of the leader. Accordingly, orders of the lesser leaders in the family would be valid if they were consistent with and created in a way prescribed by the supreme leader's original order. Suppose that SL is the supreme leader of a mafia family and LL1 and LL2 are two lesser leaders while LM is the legman. Any order given by SL is presupposed to be valid due to the basic norm and SL legislates the following: "Any order to be given by the lesser leaders regarding the drug trafficking requires the joint will of the lesser leaders.". In this case, only the joint will of LL1 and LL2 could create a valid order such as "LM is to cross the border and deliver the weapons to the buyer.". LL1 would not be legally authorized to order LM to perform any action on the matter of weapons trafficking. What really distinguishes a true legal system from the order based

[82] Kelsen, 2008, p. 215; Bernstroff and Dunlap, 2011, pp. 93-94.

[83] This view is doubtful because there are serious suspicions regarding the existence of such a rule of customary international law. State and its legal order are synonymous according to Kelsen (Kelsen, 1949, pp. 181-183) and that states formed after successful revolutions, Coup d'Etat or wars are recognized as valid legal orders (*See Ibid.*, pp. 368-369). We will leave the question of recognition as the necessary condition of a state's existence aside. However, states do not always recognize a newly formed state although their legal system is undoubtedly efficacious. The Turkish Republic of Northern Cyprus has been founded in 1983 and there is no doubt regarding the efficacy of their legal system. Nevertheless, the only act of recognition has been performed by Turkey. Does this mean that all those states which do not recognize The Republic of Northern Cyprus as an independent state violate a rule of customary international law? Moreover, although we must accept the difficulty in proving the existence of a rule of customary international law, Kelsen does not get involved in any sensible effort of showing the existence of such a rule. He simply states that if such a rule of customary international law did not exist, it would not be possible to perceive the Russian Federation as the continuation of the Soviet Union and that the fact that we can do so points at the existence of an international rule recognizing revolution as a law creating act(*Ibid.*, p. 368.). Following such an argumentation Kelsen resembles a scientist claiming that water exists so that humans could drink it. If factual considerations do not lead to normative conclusions, they should neither "point at" the existence of norms. As far as we are concerned, the recognition of effective legal orders as valid legal orders merely constitutes a statistical fact and it is not sufficient to prove the existence of a customary rule.

[84] For the discussion of this topic and Kelsen's examples please *see* Kelsen, 2008, pp. 48-49. Below we have provided our own example.

relationship in a mafia family? It is the general efficacy of the system. A supposedly stronger entity (the state) renders such acts of the mafia family illegal and envisages strong sanctions against the activities and the members of the mafia group. Moreover, the bulk of the population would comply with the norms of the state rather than the commands of the mafia. Here, we are not suggesting that mafia cannot complete any operations with success; we are suggesting that such a system will most probably not exist for long and its members (in fact its officials) are going to be arrested eventually by the governmental forces. In Kelsen's theory nothing can distinguish between the mafia family and the state if the principle of efficacy is neglected. Another example from the mafia family can be given in order to illuminate our point. Suppose that the SL legislates the following: "Any member who deliberately challenges the authority of the SL by not carrying out a given order shall be punishable by death upon the decision of the lesser leaders.". In case LL1 and LL2 decides that LM has committed such offence, the death penalty may very well be carried out. However, then the ones carrying out such order and the SL himself will be guilty of murder according to the legal system of the state they live in and the offenders will be captured and penalized by the officials of the legal system of the state. In such a case, the question is which of the normative orders is efficacious. The efficacy of the legal system of the state would win this contest in landslide. And if not, then the efficacy of the legal system is in question and most probably it has lost its efficacy. Thus is the legal order distinguished from any possible normative order constituted by the mafia or terrorist organizations. Mafia's order is not a legal order because it is not efficacious. Since it is not efficacious, its basic norm cannot be presupposed. Without the presupposition of a basic norm, the legal order is deprived of legal validity, and therefore legal existence.

The concept of efficacy does not only distinguish legal order from other social orders but it also serves to delimit the legal orders' spheres of validity.[85] In an article, Hart claims that according to Kelsen's understanding of validity which is claimed to be merely a relationship of validity purport, cannot explain why English law is not valid in Soviet territory.[86] In fact, the concept of efficacy, as a factor delimiting the sphere of validity of the legal orders, provides the answer to Hart's question. Not even in Kelsen's theory can the laws of England be valid in Soviet territory. This is simply because English legal system (and therefore any norm thereof) cannot be effective in Soviet lands no matter what their contents are, even if they claim to confer validity on the norms of Soviet law.

[85] Kelsen, 1949, pp. 350-351.
[86] Hart, 1983, p. 319.

The same role of delimiting the spheres of validity of legal systems also makes it possible for new states to emerge during times of conflict. Assume that Country A is a dictatorship ruled by the political party X. For several years now there has been a civil war in A's territory between once legitimate government and its opposition Y and Z which also happen to be fighting against each other. During the several years throughout which the civil war lasted, X has lost military and political control over 70 % of its territory. Its military and political command continue in 30 % of its former territory. The remaining territory is shared between the forces of Y and Z which exercise effective control over the said territory. Accordingly, normative orders of Y and Z become the legal orders of the controlled territories the moment norm subjects start to by and large comply with the norms issued by Y and Z rather than the norms belonging to the legal order of X. On the other hand, no matter what the content of its norms are, the legal order of X continues to the legal order of the territory which is still under control thereof.

We have already seen how Hart rightly criticizes Kelsen's acceptance of *desuetude*. We will not discuss this issue any further but declare our support for Hart's account of efficacy's affect on the validity of individual norms: *desuetude* has no affect on the validity of a single norm unless the Rule of Recognition of that legal system (or any posited norms of the system for that matter) recognizes that a disused norm loses its validity.[87] What we want to focus on in this part of the paper is how Hart relates the efficacy of the legal system to its legal validity.

We have mentioned above that according to Hart's account the validity (legal existence) of a system depends on the fulfillment of two conditions: 1) individuals must by and large obey the rules of the system and 2) the rules of recognition and other secondary rules of the system must be treated as binding rules regarding official behavior by the officials of that system.[88] This shows that the first condition of the existence of the legal system reflects efficacy without a doubt. A legal system only exists, i.e. it is only valid, on the condition that citizens generally obey the primary rules of obligation which directly address the behavior of the individuals. Obedience here must be understood as conformity of the facts which are the behaviors or actions of the individuals with the prescription of the ought statement expressed by the norm. Hart also stresses that it is irrelevant whether individuals obey the rule due to the threat of sanctions or for any internal reasons.[89] It is not required

[87] Hart, 2012, p. 103.
[88] *Ibid.*, p. 116.
[89] *Ibid.*

that individual citizens recognize the binding force of the primary rules of obligation from an internal point of view. Internal point of view is required in the second condition for the existence of a legal system. Accordingly, in order for a legal system to exist, officials of a legal system need to treat the Rule of Recognition and other secondary rules as binding and valid standards for their behavior. While the first condition is directly and purely related to the concept of efficacy, what the second condition requires is not mere conformity with the rules but the thought or belief that such rules are legally binding on the officials functioning in a legal system. It might seem appropriate not to associate this second condition with the concept of efficacy due to the fact that all secondary rules are power-conferring in Hart's theory.[90] It is postulated that the power-conferring norms cannot be efficacious or inefficacious since they do not prescribe a certain behavior in the factual realm through which the "conformity rate" of the norm can be measured.[91] Here it is possible to raise certain questions. First is related to the identity of the officials Hart speaks of. The second concerns the presentation of all secondary rules as power-conferring rules by Hart[92] and the assessment that efficacy is immaterial to power-conferring rules. We will start by examining the first question.

Throughout his *opus magnum* "The Concept of Law", Hart makes no definition of the term "officials". With regards to the adoption of the rules of recognition, though, he sometimes uses the expression "officials" or exclusively talks about the courts.[93] Shapiro suggests that it is possible to concede that the rule of recognition is to be adopted exclusively by the courts while the rules of change and adjudication are to be adopted by the relevant official bodies which lay down rules or resolve legal disputes.[94] However, since rules of recognition provide the criteria by which the norms in a legal system are determined, or in other words, since such rules lay down the criteria by which the validity of other norms are tested, concluding that the rules of recognition are exclusively adopted by the courts leads to a certain problem. The courts are not obligated or authorized to apply certain rules in a legal

[90] Regarding the power conferring nature of the secondary rules *see ibid.*, p. 81.

[91] Munzer, 1972, p. 23, 27-28 (Kelsen's and Hart's account of efficacy cannot be extended to power-conferring rules).

[92] It is argued that although Hart's writing seems to suggest that all secondary rules are power conferring, the Rule of Recognition is an exception as it is a customary rule which must be regarded as a duty imposing norm while the power conferring nature of the other secondary rules is affirmed. *See* Raz, 1971, pp. 807-808Joseph. For a critique of Raz's position regarding the duty imposing nature of the Rule of Recognition please *see* Mullock, 1974-1975, pp. 29-33. We will not argue here that a Hartian reading of the ultimate Rule of Recognition is power conferring. But rather, we aim to show that other secondary rules may also be duty imposing.

[93] Shapiro, 2008, pp. 6-7.

[94] *Ibid.*, p. 7.

system.[95] If the courts are not authorized to apply a certain posited norm, are we to conclude that such norm is not a legal norm as its Rule of Recognition cannot be legally adopted by the courts? An example from Turkish law is provided below.

According to the first paragraph of Article 148 of the Constitution, statutory decrees created by the Council of Ministers chaired by the President of the Republic during times of state of emergency or martial law cannot be reviewed by the Constitutional Court or any other court for that matter. However, the third paragraph of Article 121 and the second and third paragraphs of Article 122 of the Constitution are clearly rules of recognition determining the conditions of validity for the statutory decrees enacted during times of state of emergency or martial law. These articles are rules of recognition taking the form of constitution. The paragraph reads as

> The Council of Ministers chaired by the President of the Republic may enact statutory decrees during the state of emergency and with regards to the matters necessitated by the state of emergency. Such decrees will be published in the Official Gazette and submitted for the approval of the Turkish Grand National Assembly on the same day; the time and procedure for the approval of these decrees by the Assembly will be determined by the Standing Order.[96]

Such decrees can only be enacted during state of emergency or martial law and it is required that the President of the Republic chairs such meetings of the Council of Ministers. Additionally there are legal requirements regarding the publication and submission of the statutory decree for the approval of the National Assembly. No norm can be regarded as a state of emergency or martial law statutory decree unless it fulfills the conditions laid down in these paragraphs and articles. However, who is to apply these norms of the Constitution which envisage certain conditions of validity for the state of emergency and martial law statutory decrees? Based on the prohibition of Article 148, the Constitutional Court is not competent to review the validity of such decrees by applying Articles 121 and 122 of the Constitution. However, this does not mean that these decrees are not legal rules as their rule

[95] *Ibid.* (Shapiro gives the example of the "political question doctrine" in the United States).

[96] Combination of the second and third paragraphs of the Article 122 basically repeats the same conditions for the statutory decrees enacted during martial law with a single difference: The Constitution does not state that statutory decrees issued during martial law need to be related to the situations necessitated by the martial law. Such statutory decrees are also applied during martial law and they need to be submitted to the Parliament on the day of publication.

of recognition has not been and cannot be adopted by the courts from internal point of view. Instead, we may perhaps say that relevant paragraphs of Articles 121 and 122 will be applied by the Council of Ministers or by the National Assembly which is authorized to repeal the statutory decree. We believe that this example shows how rules of recognition may be addressed to organs other that courts. In such a case, it is the legislative organ or the Council of Ministers itself which must adopt the Rule of Recognition for the mentioned articles of the Constitution from the internal point of view. When it is considered that Hart also talks about the practice of the legislatures with regards to the Rule of Recognition,[97] it becomes even more difficult to accept that the rules of recognition must exclusively be adopted by the courts[98].

It is really difficult to determine whom the rule of recognition addresses and whether any categorical distinction is possible. We will confine ourselves to the assumption that adoption of the secondary rules from internal point of view as required by the second condition for the existence of a legal system is to be performed by all law applying and legislating officials of that legal system.[99] Such general terminology definitely comprises the legislator, the courts and also the executive or the administration. The examination of the second question is much more crucial to our concerns in this paper.

Hart makes general statements about the secondary rules as power-conferring rules.[100] The Rule of Recognition however, that is the ultimate rule of recognition in a legal system, one that exists as a social fact, is (or must be) an exception to this generalization.[101] We will not challenge this argument. What we rather want to examine is whether rules of change and adjudication are all power-conferring rules. The importance of this assessment lies in the fact that if such other secondary rules can be duty-imposing, the second condition for the existence of a legal system may also be related to the concept of efficacy.

The assertion that secondary rules of change are power-conferring stems from the fact that they authorize a certain organ or body to create new primary rules or change and abolish the existent ones. However, it is also recognized that rules of change may envisage certain procedures for the enactment,

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[97] Raz, 1971, p. 807.

[98] It might be argued that the Constitutional Court can actually apply articles 121 and 122 while determining whether a norm falls under the restriction of Article 148. We suspect if the Constitutional Court truly applies articles 121 and 122 in such cases. However, even if this is the case, it cannot be argued that the legislature cannot apply and therefore adopt the Rule of Recognition for these articles.

[99] Raz, 1971, p. 807.

[100] HART, 2012, p. 81.

[101] *See* Raz, 1971, pp. 807-808; Shapiro, 2008, pp. 5-6.

amendment or abrogation of rules while also determining the authorized body.[102] At this point, it is difficult to understand how a norm envisaging that a certain authority will be exercised in accordance with a certain procedure can be identified as purely power-conferring. Obviously, the same norm could be power-conferring and duty-imposing at the same time since it requires the usage of an authority in a certain way. Moreover, even if the rule of change does not envisage a certain procedure for the enactment of a rule, it may be argued that it still entails a certain obligation as it determines "a certain body" to enact the rule. Since the norm is not the text itself, but its meaning in the mind of the interpreter,[103] any rule of change envisaging the enactment of a certain rule by the Parliament would also mean that no other body or organ is authorized to enact that rule. Although the rule of change may grammatically seem to confer powers, the interpretation of the text reveals that it also entails certain obligations even where no specific procedures for the enactment of the rule has been envisaged. Any provision of the constitution authorizing the Parliament to enact statutes forbids the enactment of the statutes by the administrative bodies. This is due to the fact that legal texts require interpretation and interpretation is not free as the legal realists would suggest, but bound by certain logical principles.[104] *Expressio unius est exclusio alterius* is such a logical principle applicable to the given example. State organs do not have authorities intrinsically. These powers are *post facto* conferred on the state organs.[105] This makes such authority accidental and *accidentalia* is subject to strict interpretation as required by dichotomy.[106] In other words, Parliament has been counted *numerus clausus* as the organ authorized to issue statutes. Other organs are forbidden to issue statutes. Therefore, it is most of the time[107] apt to conclude that power-conferring rules are also duty-imposing. The same logic applies to the authority granted to the courts in resolving legal disputes. The fact that a certain kind of dispute resolution authority has been given to a specific court means that other courts are forbidden to resolve such disputes unless expressly authorized by another norm. The result is that secondary rules are not purely power-conferring but they are most of the time both duty-imposing and power-conferring.

[102] Shapiro, 2008, p. 4.
[103] *See* Kelsen, 2008, pp. 3-4.
[104] *See* Gözler, 2013, pp. 27-32.
[105] *Ibid.*, pp. 73-74.
[106] *Ibid.*, pp. 59-60.
[107] We do not aim to prove or disprove that all power-conferring rules in fact are also duty-imposing. For our purposes it will be sufficient to show that at least certain kind of rules which are thought to be power-conferring are in fact also duty-imposing and that Hartian secondary rules may also be efficacious or inefficacious based on the conformity of the norms' addressees. For a very fruitful discussion regarding whether legal rules can be purely power-conferring *see* MacCormick and Raz, 1972, *passim*.

The importance of this determination lies in the claim that purely power-conferring rules cannot be declared efficacious or inefficacious based on Hart's definition of efficacy, as power-conferring rules are said not to enjoin behavior.[108] Based on the above explanation it can be seen why we would want to oppose such an assertion. Those rules labeled as "power-conferring" do not seem to enjoin behavior in a textual analysis. However, the meaning of the text will mostly entail a duty. Therefore, if it is acknowledged that the purely power-conferring rules in the Hartian sense only exceptionally exists in a legal system, it must be rejected that the secondary rules do not enjoin behavior.

Consequently, we need to re-assess the meaning of the condition that the secondary rules of a system must be regarded as the standards of official behavior by the system's officials. Hart's own words are as follows: "[secondary rules] must be *effectively* accepted as common public standards of official behaviour by its officials.".[109] The expression "effectively" attracts attention. How can some standard be accepted effectively? Hart provides an answer in the next page: "They [the officials] must regard these [secondary rules] as common standards of official behavior and appraise critically their own and each other's deviations as lapses.".[110] Where the officials deviate from the requirements of the secondary rules or do not conceive a critical approach to such deviations, it means that the secondary rules have not been effectively accepted. Therefore, it can be argued that the second condition for the existence of a legal system which pertains to the acceptance of the secondary rules by the officials also relates to the concept of efficacy and that Hart, just like Kelsen, perceives efficacy as a condition for the existence of a legal system. Then why does Hart have two different sub-categories for what must be presented as the efficacy of a legal system in general? I believe that this is due to Hart's conceptualization of the secondary rules as purely power-conferring rules. Therefore, he could not correlate the behavior conformity criterion used for the efficacy of the duty-imposing rules and had to invent a different criterion. Hart has introduced the acceptance from an internal point of view as the distinguishing criterion for the efficacy of the secondary rules. Although, much of these inferences are mere speculations due to the lack of textual basis, we are convinced that the criterion of secondary rules' being accepted from internal point of view by the officials is also related to the concept of efficacy, in that, Hart's expression regarding the "effective acceptance" entails nothing different from the officials' actual compliance with and application of the secondary rules.

[108] Munzer, 1972, p. 27.
[109] Hart, 2012, p. 116 (emphasis added).
[110] *Ibid.*, p. 117.

What is even more surprising is that Hart perceives secondary rules as standards of behavior deviance from which should lead to criticism by fellow officials. Standards can be defined as "a required or agreed level of quality or attainment".[111] How can a purely power-conferring rule be a standard requiring a certain level of quality or attainment? If the power-conferring rules do not entail any obligations or duties to be fulfilled, how can one deviate from them and be criticized by others? Either Hart recognizes that power-conferring rules are simultaneously duty-imposing or he inadvertently calls the secondary rules as standards and expects criticism where officials deviate from the standards provided. Because, even if the power conferred by the secondary rules are obligatory to be exercised in certain cases, it should be acknowledged that no power-conferring rule is pure since at least the exercise of the duty conferred is conditionally obligatory.

So far, the question of efficacy still hangs in the air. The unresolved part of the question of efficacy stems from the fact that none of the above thinkers have come up with a clear definition of what efficacy is and how a legal system is effective. They have concentrated on the role of efficacy for the legal system or individual norms of that legal system while refraining from clearly defining or at least exemplifying what efficacy is, thus treating it as a crystal clear fact. We do believe that there still is a certain ambivalence regarding what efficacy truly requires.

There are different ways to understand efficacy. One understanding of efficacy can only be "measured" in case certain norms are violated. In this alternative, the efficacy of the system - or individual norms - concerns whether the related system envisages certain sanctions against violations and if the said sanctions are applied by the authorities. Another separation within this category may appear as to the meaning of the sanction. Is sanction a norm or a mere factual retribution for the violation of the legal norm? The details of this discussion and distinction will be provided in the next section. The other understanding of efficacy relates to the compliance rate of the legal system or individual norms. In this alternative, legal system is effective if the addressees of such legal system or an individual norm comply with the prescription of these norms. In this view, the measurement of the legal system's efficacy is solely based on factual considerations. Such consideration does not need to take the internal point of view suggested by Hart into account as the addressees may or may not comply with the prescription of the norm based on the fact that they feel legally obligated to do so. They may also comply out of

[111] Oxford Dictionary, http://www.oxforddictionaries.com/definition/english/standard (last visited 2.18.2016).

fear of sanctions or moral and even religious considerations. The condition for the efficacy is the compliance of the norm addressees regardless of the motives they might have for such compliance. The first question regarding this second alternative is whether power-conferring legal norms can be complied with. Above, we have suggested that the majority of the norms considered to be power-conferring are, to a certain degree, also duty-imposing. The same logic applies here. Majority of the power-conferring rules also impose duties.[112] Any norm envisaging the Parliament's law making authority also prescribes certain procedures for the exercise of such authority. Even if no sanction for the violation of such procedures has been regulated by the legal system, it may still be observed whether the Parliament abides by the determined criteria of lawmaking more often than not. Numerous other examples can be shown supporting the idea that no legal norm is purely power-conferring; however, we do not aim to prove this point here. This question only interests us insofar it relates to the relationship between efficacy and sanction. On the other hand, even if we settle for the possibility of purely power-conferring legal norms, we believe that they can still be considered in "measuring" the efficacy of a legal system or norm. Objection to this statement stems from the belief that "efficacy" can only be a matter of compliance with a duty-imposing rule. We are not qualified to start a linguistic discussion. However, if compliance is the correlation between an "ought" and "is", "compliance" for the purely power-conferring norms, existence of which we seriously doubt, can be perceived as the correlation between a "can or may" and an "is". Just as not every "is" is what the "ought" prescribes, not every "can" results in an "is" or vice versa. Therefore, if the power given is exercised by the relevant authorities or individuals and if the legal results tied to the exercise of the power conferred occur, the purely power-conferring norm would be efficacious. In other words, "Such a rule is efficacious if and only if, if the rule is used in order to secure a certain result, that result is actually secured in the way specified by the rule.".[113] Munzer also stresses the relationship between the efficacy of the power-conferring rules and the efficacy of certain duty-imposing rules. Accordingly, if a power-conferring rule is efficacious, certain duty-imposing rules will also be efficacious.[114] Since power-conferring rules are efficacious in case certain legal results are really attained through the exercise of the

[112] We do not mean to assert that all norms purporting to confer a power are duty imposing. This is not our concern here. However, even those norms which seem like pure power conferring rules impose some kind of duty since the norm is not the text or the structure of the text itself, but the meaning thereof reached through interpretation. We are, therefore, inclined to think that all power conferring rules are somewhat duty imposing.

[113] Munzer, 1972, p. 33.

[114] *Ibid.*

power conferred, this exercise of power will result in certain changes in the rights and duties of the individuals and such changes can be formulated as duty-imposing rules.[115]

Between these two alternatives the second one is more appropriate. The first alternative referring to the violations and sanctions applied against such violations is not by itself a credible criterion. For instance, it is possible to decide that a legal system is inefficacious because some exceptional violations have not or could not be retaliated. In fact, such approach would most of the time result in labeling of highly efficacious legal systems as inefficacious and therefore invalid since it disregards the majority of the legal norms of that system which are followed by the population. In fact, such a legal system would be the ideal despite the fact that certain violations or even all of the breaches could not be retaliated. The second alternative is superior to the first in that it enables the measuring of the system's efficacy by taking all legal norms into consideration. Association of efficacy with compliance - and perhaps with an even broader concept which also includes the possibility of measuring the efficacy of purely power-conferring rules should their existence be accepted - does not only provide a more reliable basis for the determination of the legal systems' efficacy. It also better explains the validity of individual norms in Kelsen's theory should it be preferred over Hart's. Since, according to Kelsen, individual norms should also have a minimum degree of efficacy in order to be valid, the efficacy of an individual norm would most of the time not be measurable if it has not been violated. However, we have above denied the relationship between the efficacy of a single norm and its validity and therefore do not sponsor this advantage of the second alternative where the efficacy of a single norm can be measured in cases where it has not been violated. This argument only shows the functionality of the second alternative.

However, a hybrid solution for the question of efficacy is also possible and even more appropriate. As Joseph Raz simply puts it, "It [a legal system] is in force if it is effectively followed, observed and *enforced* within the community".[116] Therefore, enforcement of law is also a factor in its efficacy. Enforcement of law comes into question once a legal norm has not been complied with on a specific occasion. Therefore, the fact that sanctions for the breaches of norms has been envisaged and that they are effectively applied contributes to the efficacy of the legal system. The second alternative concerns cases where legal norms of a legal system are voluntarily (or due to the threat of use of force for that matter, but without the involvement of any evil imposed

[115] *Ibid.*, pp. 33-34.
[116] Raz, 1977, p. 344 (emphasis added).

on the individual in any case) obeyed. In case they are not, the efficacy is adversely affected. Nevertheless, with the consideration of a hybrid formulation between the first and second alternatives, non-compliance with a norm of the legal system does not directly cause a negative impact on the efficacy. Rather, it needs to be observed whether sanctions have been effectively applied as the consequence of the breach in which case the efficacy of the legal norm and the system is not adversely affected. However, as we will suggest below, there are two understandings regarding the concept of sanction. Sanction is either a norm specifically prescribing the imposition of an evil on the violator or it is the factual evil itself which is merely a legally envisaged action or behavior of the legal officials. In case the normative understanding is adopted with regards to the concept of sanction, the second alternative does not really become altered as sanction is still a norm compliance with which is expected from the individual. We think that "effective application of sanctions", where the hybrid solution to the question of measuring the efficacy is concerned, should not only involve creation of sanctions as norms, but their forceful imposition if necessary. In other words, since the criterion of compliance with legal norms includes compliance with sanctions, the second factor incorporated to the hybrid solutions needs to concern the physical evil, Austin's ultimate sanction. Otherwise, the solution offered would not be a hybrid solution, but merely a repetition of the second alternative. One would eventually have to refer to some kind of use of force while observing whether a sanction has effectively been applied. This relationship between the concepts of efficacy and sanctions will be elaborated further below.

Concepts of validity and efficacy have been handled above and many problems regarding the relationship between these two have been tackled. Here we would like to summarize our findings so far before going onto the next section. Validity can be simplified as the legal existence of a norm. Invalid norms cannot exist and therefore the usual expression of "invalid statute" is a contradiction, for a statute is that which is valid according to the criteria provided by the superior norms (or rules of recognition providing the test of validity for these statutes) and it is a logical fallacy to acknowledge that there can be something like an "invalid statute".[117] Efficacy does not play a role in the validity of individual norms despite what is asserted by Kelsen. On the other hand, efficacy is perceived as a necessary condition for the validity of the legal systems as a whole in every positivist tradition examined above. The question why efficacy of the legal system carries importance in Austin's

[117] *See* Kelsen, 1949, p. 263.

theory is clear: the person or body whose orders are not effectively implemented cannot be regarded as sovereign and nothing that is enacted by anyone other than the sovereign is not law, meaning they do not have legal existence, i.e. they are invalid. Austin places importance on efficacy because it is an inseparable quality of the sovereign around which the whole Austinian theory revolves. The same cannot be said for the theories of Kelsen and Hart. Kelsen bases his theory on a strictly normative understanding according to which the efficacy of the legal system could only be envisaged by another legal norm, or at least the basic norm of the said system, in order to play a part related to validity. This is not the case in the pure theory. Kelsen's explanations in this regard is merely the repetition of the result generated by the linkage of the legal system's validity to its overall efficacy. The situation is even more obscure in Hart. Hart's two conditions regarding the validity of the legal system (namely, the observance of the norms by the citizens and the adoption of the ultimate Rule of Recognition by the officials and observance thereof) seem to be meta-legal elements in his theory. It is as if these conditions stem from the "nature" (!) of law. It is obvious for us that this relationship between the general efficacy and the legal system's validity as a whole is accepted due to practical reasons of separating the legal system from other social orders or legal systems. As rightly stressed, "If legal science is to be a *useful* activity, it can only apply a basic norm to efficacious systems, so as to interpret them as a consistent field of meaning.".[118] For the purposes of this article, we do not contest the idea that law needs to be effective overall.

C. SANCTIONS: COERCIVENESS OF THE LEGAL ORDER

In this section our purpose is to determine whether concepts of validity and sanction or efficacy and coerciveness are somehow interconnected. In order to achieve this target, we need to start off with what sanction is. Simple as it may seem, the definition of sanction demands some clarification. Is sanction an action taking place in the factual realm, a factual evil imposed on the violator or is it simply a norm in relation to another, that is a norm to be created where another has been violated? The answer to this question lies at the heart of our inquiry as the results to be reached afterwards depends on the answer to this specific question.

I. Definition of Sanction: A Definitional Crisis of Law?

We have determined above that in order to be valid, legal systems are supposed to be efficacious. Efficacy here means that individuals who are the

[118] Nino, 1978, p. 369.

addresses of the norms of a specific legal system by and large conform to the prescriptions of the norms. In other words, a legal system is efficacious "if the individuals by and large by their behavior fulfill the conditions of the rewards and avoid the c**o**nditions of the punishments...".[119] Sanctions are one way of motivating individuals to follow the prescriptions of law.[120] Let us have a closer look at Kelsen's notion of sanction. His perception will be illuminating in the discussion we plan to have.

According to Kelsen, the first characteristic of the legal order (or law) is that it is a social order.[121] What concerns us more here is the second characteristic of law. Accordingly, law is a coercive social order. Being a coercive social order means that compliance with the norms of a legal system will be assured through coercive measures imposed against the individual's will.[122] Such measures taken against the individual's will are legal sanctions. Kelsen stresses that there are hardly any legal norms without sanctions and that in order to provide compliance without sanctions legal rules need to exist in such a way that their mere existence is advantageous for the individuals.[123] This coercive character of the legal systems ensured via sanctions is what legal systems from different eras, legal orders of societies with different cultural backgrounds have in common.[124] They all take advantage of coercive measures in order to ensure compliance with their norms.

However, are these sanctions Kelsen speaks of norms of an individual character created by relevant authorities in order to ensure compliance with the violated norm or to provide retribution due to the violation of the norm, or are they physical beings, actions taken in accordance with or as required by a positive norm of that system. Let us consider an example to simplify the situation. Assume that X and Y have entered into a contract C. Y has submitted a case to the court claiming that X has acted in breach of C. The court has, after hearing the case, found that X has breached C and therefore orders X to pay damages to Y in accordance with the statute S. Now there are two possible scenarios. X either pays damages to Y or s/he does not and therefore Y makes a submission to the relevant execution office EO. Let us assume that X did not pay the relevant amount and Y has applied to the EO. EO, in accordance with

[119] Kelsen, 2008, pp. 26-27. Above we have argued that effective coercive measures against the breaches of legal norms also have an impact on a legal system's level of efficacy albeit a lesser factor. Here we intend to cover Kelsen's side of the story.
[120] *Ibid.*, p. 35.
[121] *Ibid.*, pp. 25, 31, 33.
[122] *Ibid.*, p. 33.
[123] Kelsen, 1949, p. 15.
[124] *Ibid.*, pp. 19-20.

the decision of the court, sends a notice to X, stating that the payment needs to be made in a certain period of time and otherwise X's assets will be sequestrated in order to compensate for the damages of Y. In case X avoids the notice and does not pay the damages to Y, Y's damages will be compensated via sequestration procedures. Which of the above mentioned acts is the sanction? Where does the coercive character of law, which Kelsen thinks is so dominant and distinctive, steps in?

Kelsen does not seem to associate sanction with physical force, a factual occurrence. At one place he states that it is also possible to associate rewards and positive motivations with the term of sanction, though this is not the usual case.[125] He further indicates that "...physical force is not the sanction itself, because it is only necessary in case there is resistance.".[126] In that case, sanction exists regardless of mere physical force, which only occurs in case the coercive act is resisted by the concerned.[127] What Kelsen understands from coercion is that the sanction can be applied without taking the consent of the concerned.[128] Therefore, if X had willfully paid the damages to Y, sanction still would have existed. In such a case the decision of the court ordering X to pay damages should be considered as the existing sanction. Therefore, sanction, in this case, is a norm.[129] Moreover, while evaluating certain criticism with regards to the perception of law as a coercive order, Kelsen's remarks that he, without a doubt, considered sanctions to be legal norms prescribing coercion.[130] Similarly, the notification of EO based upon the application by Y and the decision of the court is another norm sanctioning the non-fulfillment of the court decision. Only when what is prescribed by this notification, the "ought" statement expressed by such notification, is not complied with does the merely factual (although legally envisaged) imposition of evil take place. Therefore, we can infer that any decision taken by EO in relation to non-compliance with the notification can be considered as another norm sanctioning the violation (or avoidance) of the notification. Whatever happens afterwards is related to the officers of the relevant authorities complying with the last decision of EO regarding seizure of X's assets. In this last decision X is not the addressee of the norm. She is not the

[125] Kelsen, 2008, pp. 24-26; Kelsen, 1949, p. 17.
[126] Kelsen, 2008, p. 34.
[127] Kelsen, 1949, p. 19.
[128] Kelsen, 2008, p. 108(Coercion does not necessarily entail use of physical force.
[129] Kelsen thinks that court decisions are norms (*see ibid.*, pp. 236-237. Also *see* Gülgeç, 2016, pp. 108-110.). We share the same idea and following his footsteps we conclude that any legal act that is not purely factual, regardless of their generality, abstractness or objectivity which are the criteria for a norm to constitute a rule, is a norm and it takes its place in the hierarchy of norms of the relevant legal order.
[130] *See* Kelsen, 1949, pp. 28-29.

concerned party. Legally authorized EO takes a decision addressing its own officers and the assets of X is the subject-matter of this decision. The fact that execution proceedings are performed against the will of X stems from the fact that X is not party to or concerned with the last decision of EO.[131]

From this follows that sanction is a norm created as a response to the violation of another norm and applied even against the will of the concerned individual. Therefore, sanctions do not appear as acts or practices subject to factual considerations and evaluations. They are, as Hauser states, norms, however, not every norm is a sanction.[132] In other words, "sanction is a norm at the service of another norm".[133] Clark also concludes that the term sanction has never meant and does not mean today the actual punishment or evil inflicted but the norm envisaging the infliction of such evil or imposition of such punishment.[134] We shall refer to this understanding and definition of the sanction as the normative understanding.

Is the normative understanding of the term sanction the only alternative? Can the sanction not be defined as the factual retribution act and not as the norm created due to the violation? Certainly, there are definitions seeming to adopt a factual understanding of the concept of sanction. Kemal Gözler defines sanction as "... a coercion imposed as a reaction to the violation of a norm.".[135] However, one should not make haste for the conclusion that this "coercion" signifies the factual sanction. He later concedes that sanction is a norm.[136] This interpretation is in line with the Kelsenian understanding of a sanction where sanction is not the physical force itself, but still a coercive act and a norm since the creation of such norm is realized against the will of the concerned, that the norm related to the individual is issued unilaterally and is generally perceived as an "evil".

This understanding of coercion as "being against the will of the concerned or the addressee" is a fundamental characteristic of almost all acts

[131] Despite, according to our view, Kelsen considers sanctions to be norms created against the will of the concerned, that is coercively, he uses expressions that would suggest otherwise. See for instance, the examples he gives for the sanctions as civil execution. (Kelsen, 2008, p. 109.) We tend to think that such impression is caused by the expression he uses (such as "forcible taking away" and "forcibly bringing someone before the court" and not the decision - or the norm - prescribing such forcible actions) and it can be interpreted to comply with the normative understanding of the concept of sanction (for uses of language supporting our interpretation *see ibid.*, p. 110 where Kelsen refers to the decisions of courts as sanctions). However, such an interpretation may be considered as a distortion of his writing. This is why, to be studious, we will have to consider that a factual understanding of the concept is also possible.

[132] Hauser, 1968, p. 9 ("*...jede Sanktion is ein Sollen, aber nicht jedes Sollen eine Sanktion*.").

[133] Perrin, 1979, p. 93 (quoting Gözler, 1998b, p.43).

[134] Clark, 1883, p. 133.

[135] Gözler, 1998b, p. 44.

[136] *Ibid.*, p. 45.

in the domain of public law. Unilaterality is even a distinctive quality of administrative acts: they are issued and give rise to legal obligations upon the will of the public authority alone. Therefore, it is doubtful whether it functions as a distinctive criterion for sanctions, other than indicating that sanctions have public law roots and that they indicate the exercise of public authority. All statutes and majority of the administrative acts are or may be, in this sense, created coercively and against the will of the concerned.

Austin has also viewed sanction as a use of force, as an evil imposed on the individual for violating the command of the sovereign.[137] A further characteristic of the sanction is that it is annexed to law, that is to say that it needs to be envisaged by the legal order.[138] However, this definition is not sufficient to conclude that Austin thought sanction is not a norm but the final act of evil carried out in order to punish the violation of a norm.[139] Austin distinguishes physical compulsion from sanction considering that individuals, with the fear of greater evil, may feel obliged to consent to the sanction (the evil inflicted as a reaction to the violation) although no physical compulsion exists.[140] Austin mentions that physical suffering (physical compulsion?) is the ultimate sanction.[141] We understand that Austin has considered both, creation of a norm as a reaction to the violation and acts performed in the actual fulfillment of the sanctioning norm against the will of the concerned, as "necessary evils" and therefore sanctions. If we go back to our example, not only decision of sequestration taken by EO but also actual acts of the officers while seizing X's assets are sanctions. The ultimate sanction is not a norm, but a fact. It is not an "ought", but an "is". At some point, a factual sanction needs to exist as otherwise sanctions would continue to be violable "ought statements" making way for inefficacious legal systems.[142] Austin's understanding seems to be a combination of two alternative definitions of sanction. Except for this last point, on which Kelsen is far from clear, there seems to be a correlation between Kelsen's and Austin's understanding of sanction. Sanction does not need to exist against the will of the violator. Sanction is a reaction, although normative in character, to the violation of a norm.

[137] Austin, 1875, p. 217. The violated command needs not to be issued directly by the sovereign as any command issued based on a delegation of power by the sovereign is valid and binding according to Austin. *See* Austin, 2001, pp. 191-192.
[138] Austin, 1875, p. 253.
[139] Felix Somló seems to think that Austin stumbles into holding sanction as something independent from the norm envisaging it. Somló, 1917, p. 65, fn. 2.
[140] Austin 1875, pp. 222-223.
[141] *Ibid.*, p. 223.
[142] *Ibid.*

We do not believe that theories perceiving sanctions as factually inflicted evil would necessarily be wrong. In fact, in terms of its relation to the concepts of efficacy and validity, how sanction is defined is not crucial. After all, different definitions focus on different concepts. They are reverse denominations for different things and concepts. What matters is not how different things are named the same. What matters is whether the definition, meaning of this thing is consistent with the role assigned thereto in the relevant theory. Therefore, without further discussion, we will concede that although there is a strong inclination in legal theory to define sanctions as norms and we show the same tendency, this does not have to be the situation. Consequently, while analyzing the role sanctions play in relation to the concepts of efficacy and validity we will try to consider the other, although distinctly, possible definition of sanction.

II. Role of Sanctions in Legal Theory

In this sub-section we aim to discuss what role is associated with sanctions in legal theory, whether they are considered as a compulsory element of legal norms or legal systems. Since we have concluded that there are two possible perceptions with regards to the concept of sanction, such as normative and factual understandings, while evaluating the role associated with the sanctions in legal theory, we will take into account both possibilities where relevant.

Law is a social order. Social orders may in general prescribe sanctions or not. Where they prescribe sanctions, the nature of the sanctions prescribed may be different.[143] What distinguishes law from other social orders is that it is coercive, that is to say it prescribes sanctions and these sanctions are socially immanent, not transcendental sanctions.[144]

Since law is conceived of as a coercive order Kelsen thinks that the basic norm of any national legal order could be formulated as "Coercion of man against man ought to be exercised in the manner and under the conditions determined by the historically first constitution.".[145] The basic norm is presupposed with such content because the legal order is perceived as a coercive order and coercion, therefore, sanction is an essential and inseparable element of what is legal.[146] According to him, legal obligation with regards to

[143] Kelsen, 2008, pp. 27-28.
[144] *Ibid.*, p. 33.
[145] *Ibid.*, p. 50.
[146] *Ibid.*

a certain behavior only arises when the opposite of that behavior is made the condition of a sanction.[147]

Kelsen recognizes two basic objections against the definition of law as a coercive order. The first stipulates that the legal orders are not merely formed of duty-imposing norms and that there are also power-conferring rules which do not attach any sanctions to the non-performance of the authorized behavior. The second claims that non-compliance with the sanctioning norm itself is not sanctioned.[148] Kelsen believes that this second objection is invalid and it is important that his words are directly referenced here:

> The second objection is not valid, because the definition of law as a coercive order can be maintained even if the norm that stipulates a coercive act is not itself essentially connected with a norm that attaches, in a concrete case, a sanction to the non-ordering or non-executing of the coercive act - if, therefore, the coercive act stipulated in the general norm is to be interpreted objectively not as commanded but only as authorized or positively permitted...[149]

From this passage it is inferred that Kelsen is primarily concerned with perceiving the legal order as a coercive order in general and that individual norms do not have to be sanctioned, i.e. commanding. This indicates that the legal norms comprising a sanction is not itself coercive, but it is what makes the general norm, to which the sanction is connected, a coercive norm. As a result, all sanctions non-application of which has not been set as the condition of another sanction are to be conceived of as authorizing norms. Let us concretize the situation: According to Article 148 of the Turkish Constitution of 1982, the Constitutional Court is to annul any statutes contrary to the Constitution either in method or principle. This is envisaged as a sanction against the laying down of statutes in a way contrary to the constitutionally prescribed procedure or statutes with a content contrary to the constitution. However, what would happen in case the Constitutional Court does not annul a statute which is either in method or principle contrary to the Constitution? The Constitution itself does not provide any sanction against the non-application of Article 148 in which case the sanction against the unconstitutional statutes is not a commanded but an authorized action.

[147] *Ibid.*
[148] *Ibid.*, p. 51.
[149] *Ibid.*

The first objection can be refuted based on the concept of "dependent norms". Accordingly, dependent norms are those norms which do not themselves stipulate a sanction, however, are connected to a sanction stipulating norm in that the stipulated sanction is either a reaction to the non-fulfillment of the seemingly unsanctioned norm or the unsanctioned permissive norm is related to limiting the scope of any sanction to be applied otherwise. Therefore, Kelsen believes that the conception of law as a coercive order can still be maintained insofar as the unsanctioned norm is a dependent legal norm.[150]

Legal norm is not a text, but the meaning of a certain text. Therefore, it is natural that norms are not limited with the text of a certain article. It is perfectly in order to present the generally commanded behavior in one article (or any particular "piece" of the legislation) and the sanction in another. Since constitutional norms are generally considered to be unsanctioned, let us consider another example related to the lawmaking authority of the parliament from the Turkish Constitution: Article 87 of the Turkish Constitution grants lawmaking power to the parliament which needs to be used via statutes. In appearance, this norm does not include any sanctions in case of non-fulfillment; it does not even include any particular procedure to lay down the statutes. This is only because the norm is perceived to be limited with the text. In another article (Article 96/1) the Constitution provides for that all decisions in the parliament (including those relating to the enactment of statutes) shall be taken by the simple majority of the votes cast unless the constitution specifically provides otherwise. Moreover, Article 95/1 envisages that further procedures relating to the internal organization and operation of the parliament shall be laid down by the house regulations. We have so far mentioned three norms complementing one another and have not heard of a sanction. This is where Article 148 pitches in. In case the parliament enacts a statute in a way contrary to the procedure provided in the previous articles, the Constitutional Court is to annul such statute upon application by certain parties.[151] The norm related to the lawmaking activity of the parliament is not comprised of a single article, but is the meaning inferred from the text of several articles. Consequently, it is not precisely correct that the three articles mentioned above are "unsanctioned norms".

[150] *Ibid.*

[151] As per Article 150 of the Constitution, the President of the Republic, parliamentary groups of the majority and the main opposition party, in addition to the one fifth of the total number of the members of the parliament are entitled to apply for the annulment action in the Constitutional Court with claim of unconstitutionality.

Sometimes, however, a certain prescribed action in an article really does not entail any sanctions in case they are not performed, i.e. the conditions set in the article are not fulfilled. Kelsen suggests that even in this case the coercive character of law in general may not be affected if it is possible to perceive the concerned article as a limitation of an otherwise applicable sanction's scope. Kelsen shows natural obligations fulfillment of which cannot be enforced in a court as an example.[152] For example, according to Turkish law gambling debts or debts which have lapsed due to statute of limitation are natural obligations fulfillment of which cannot be enforced in any court. In Kelsen's view, the norm preventing the enforcement of gambling debts in courts is a norm restricting the validity of the sanction applicable in case a contractual obligation has not been fulfilled.[153]

Lastly, there may be cases outside the scope of the first two categories where the sanction is stipulated in another article (or another norm as Kelsen puts it) or the concerned article does not constitute a limitation to already existing sanction. In such cases, Kelsen asserts that the norm's subjective meaning cannot be considered as its objective meaning and that the norm is legally irrelevant.[154] One important point is that Kelsen does not claim such norms are invalid, but legally irrelevant. It is not clear what legal irrelevance entails. One possibility is that such norms do not have a content to be taken into consideration in legal reasoning. They do not impose legal obligations. For instance, Articles 121/3 and 122/2 of the Turkish Constitution regulates the enactment of statutory decrees during state of emergency or martial law. Accordingly, such norms may only be laid down in relation to the situations necessitating the state of emergency or martial law and they can only be implemented for the duration of emergency and martial law. Nevertheless, the constitutionality of such statutory decrees enacted during the state of emergency or martial law by the Council of Ministers chaired by the President of the Republic cannot be reviewed by any court. There is no sanction the condition of which is non-compliance with the requirements set in Articles 121/3 and 122/2 regarding the conditions required for the issuance of these statutory decrees. Since no other norm attaches a sanction to the opposite behavior and natural obligation does not come into question this provision is legally irrelevant according to Kelsen.[155] But is this truly so?

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[152] Kelsen, 2008, pp. 51-52.
[153] *Ibid.*
[154] *Ibid.*, p. 52.
[155] We will not go into detail, however, this inference may not be entirely true. Statutory decrees issued during state of emergency or martial law need to be submitted to the parliament. The Parliament possesses the power to abrogate such decrees. However, judicial review of these decrees is prevented

First of all, as we have mentioned above, Kelsen is primarily concerned with defining law as a coercive order and regardless of the pertinence of this concern, the perception of law as a sanctioned social order is naturally crucial. However, does the fact that law is a coercive order require each and every single norm to be somehow related to a sanction prescribing norm? Does the same fact necessitate the labeling of unsanctioned norms or norms that are in no way related to other norms prescribing sanctions as legally irrelevant? Honestly, it is not possible to see the connection between the coercive character of law in general and the necessity of each and every single norm to relate to a sanction in Kelsen's pure theory.[156] In our opinion, it is perfectly possible to conceive law as a coercive order even if certain norms in the system do not contain, prescribe or in any way relate to sanctions. This is partly due to the fact that our ideas in relation to the concept of law in general must depend on meta-legal, factual or non-factual observances. Kelsen does his part of factual observation while trying to distinguish law from other social orders. Law must be perceived as an efficacious order if we are to distinguish law from other social orders or the system constituted by a gang of robbers or mafia family.[157] This inference is not a result of the techniques provided by the normative science of law, but an initial consequence of an external observation. We are inclined to think that despite such initial meta-legal observation and the inference as a result thereof, the subject of legal norms should have been elaborated restrictively with reference to the normative science of law. If the condition for validity of legal norms can only be determined by other legal norms (except for the constitutional norms perhaps which are presupposed to be valid according to the basic norm) and if validity is the equivalent of legal existence, how can a perfectly valid legal norm be legally irrelevant? Below we attempt to demonstrate that the norms falling under this third category can also be considered as legally relevant and constitute the legal basis of actions performed by the state officials.

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by Article 148/1 of the Constitution. It might be asserted, therefore, that the Parliament has the authority of authentic interpretation regarding the conditions set for these kind of statutory decrees in Articles 121/3 and 122/2. In any case, however, the authentic interpretation power does not belong to the courts due to the fact that judicial review of such decrees is not legally possible. We assume that any decision of the Parliament with regards to these kind of statutory decrees cannot be considered as sanctions or we simply disregards that the Constitution has laid down such requirement. Similarly, a certain minority in Turkish legal literature thinks that the Council of State is entitled to perform the judicial review of such statutory decrees based on Article 125/1 which envisages that all kinds of acts and actions of the administration will be subject to judicial review (*see, e.g.*, Tülen, 2004, pp. 91-93. We have previously sided with the view that statutory decrees issued during martial law or state of emergency are not subject to judicial review (*see* Gülgeç, 2016, pp. 202-206.).

[156] *See* Raz, 1980, p. 81.

[157] Kelsen, 2008, p. 54.

Legal realism has stemmed from the fact that in legal systems certain organs (actually courts) have an authentic interpretation authority. It is undeniable that every legal text requires a certain degree of interpretation in order to be perceived as an "ought", to be understood as a norm.[158] Authentic interpretation authority means that the interpretation of the interpreter cannot be changed by any other organ and has an ultimately binding effect. Supreme courts authority of which cannot be challenged by any other organ exemplify authentic interpreters. In Turkish Law, the Constitutional Court, Court of Cassation ("*Yargıtay*") and the Council of State ("*Danıştay*") are amongst organs possessing authentic interpretation power. However, organs other than courts may also possess this power. In some cases, courts are not the final chain with regards to the application of law. In our example above, regarding the statutory decrees issued by the Council of Ministers chaired by the President of the Republic, the authentic interpretation authority with regards to the disposition of Articles 121/3 and 122/2 belongs to the Council of Ministers and the President of the Republic.

Article 148 of the Turkish Constitution envisages that the Constitutional Court is authorized to perform judicial review of constitutionality with regards to the house regulations of the Turkish Grand National Assembly, statutes and statutory decrees. Statutory decrees issued during state of emergency or martial law is an exception. Constitutionality review of these norms cannot be performed by the Constitutional Court due to the disposition of Article 148/1. However, in case Kelsen's postulate regarding sanctions are accepted, the limitation of the Constitutional Court's power of judicial review with statutes, house regulations and statutory decrees is legally irrelevant. Because such limitation is not a dependent norm sanction for which has been envisaged in another article. There is no sanction against the Constitutional Court's decisions contrary to the Constitution. Therefore, this limitation cannot be considered as a condition restricting the scope of another sanction. Neither can the existence of a natural obligation be postulated. It is not only that natural obligation exists in relation to matters of private law[159] but also that it exists in relation to obligations non-fulfillment of which is normally the condition for the application of a sanction. Although the first part of the article granting the Constitutional Court to issue an act of annulment seems permissive, such permission is not unlimited. Therefore, two norms can be mentioned with the first being a permissive norm and the latter being a duty-imposing norm limiting the scope of this permission.

[158] Gözler, 2013, p. 17.
[159] *See* Kelsen, 2008, pp. 52-52 (civic execution).

We cannot accept such an understanding of legal obligation. The legislator may choose to confer the legality review of a norm to an organ other than the one enacting such a norm. This is the usual inclination of the liberal legal systems of our contemporary world. However, we see no legal reason requiring this to be the situation. It may well be that the constitutional fathers wished to leave the consideration of the legality of the decisions of the Constitutional Court to the judges of the same court. Or, as for our other example, the legality of the statutory decrees issued during state of emergency or martial law is to be performed by the Council of Ministers chaired by the President of the Republic just as only judges of the Constitutional Court, may review the legality of the Court's decisions. If the Constitutional Court is legally obligated to reject reviewing the constitutionality of norms other than the ones stated in Article 148, so are the Council of Ministers and the President of the Republic required to limit the application of the statutory decrees with the duration of the situation necessitating the martial law or state of emergency and enact statutory decrees only in relation to the matters required by the emergency.

These examples also suggest that factual understanding of sanction may not entirely be appropriate. The decisions of the Constitutional Court in Turkey are sanctions prescribed against the legislator's enactment of a norm contrary to the constitution. However, this sanction does not entail any change in the factual realm.[160] The sanction itself is a norm and there is no reflection of this norm in the factual realm, that is there is no Austinian ultimate sanction constituting a physical compulsion in this case. The sanction imposed by the Constitutional Court creates a change only in the normative realm. The relevant statute is annulled and no longer valid or legally existent. Therefore, a pure factual understanding of sanction would not categorize such acts as sanctions. It may be concluded that normative understanding of sanction or at least a hybrid version of the two understandings is more explanatory of how the word sanction is used in legal language. However, even this does not ultimately prove that sanction should be defined in a certain way and not the other, fundamentally because definitions are, as previously stated, reverse denominations.

Austin is another positivist who placed great importance on sanctions in his theory. This importance follows directly from Austin's understanding of law. We have mentioned above in related sections that Austin considers law

[160] *But see* Hart, 2012, pp. 33-35 (Hart explains that nullity is not a sanction. We will not discuss this in detail; however, we see no reason why declaration of nullity or annulment actions should not be considered as sanctions applied against the creator of the norm.).

to be the product, the command of a sovereign or products and commands issued by those authorized by the sovereign. Sanctions are perceived as the evil imposed on those disobeying a valid command of the sovereign.[161] Since he perceives sanction as an evil, Austin's understanding diverges from those of Locke and Bentham who include rewards within the meaning of the term sanction.[162] According to Austin, "this extension of the term is pregnant with confusion and perplexity"[163] and "...to talk of commands and duties as *sanctioned* or *enforced* by rewards, or to talk of rewards as *obliging* or *constraining* to obedience, is surely a wide departure from the established meaning of the terms".[164] The term command expresses that 1) a wish or desire is expressed by the sovereign in relation to a subject of the sovereign which is 2) backed by a threat of sanctions in case of non-compliance and 3) expressed by use of vocal or written language or other signs.[165] Accordingly, sanctions are inherent in Austin's understanding of law and legal norm. According to him, unsanctioned expressions of will of the sovereign are *lex imperfecta*. Austin states that since the issuer of such wishes or desires does not imply that it wishes to enforce it, these are not binding.[166] Unsanctioned expressions of will or desires are not law properly so called even though they are issued by the sovereign or issued upon an authorization by the sovereign. Moreover, only general commands are considered to be law.[167]

Austin and Kelsen perceived legal order as an essentially coercive order and this definition found its reflections in every corner of their legal theory. Hart on the other hand, did not understand law as a mere coercive order. He considered "sanctions" only as the plan B of the legal systems. The plan A consisted of the vision that subjects would willingly abide by the requirements of law.[168] Accordingly, Hart thought that there are easily noticed fields of law where understanding of law as a coercive order fails.[169] First of all, there are, in every legal systems, some norms that are not coercively enforced.[170] This lack of coercive action against the breaches of the norm is not due to the non-application of the prescribed sanctions by the governmental authorities or courts but due to the fact that sanctions have not been legally envisaged. Any

[161] Austin, 1875, p. 217.
[162] Austin, 2001, p. 23.
[163] *Ibid.*
[164] *Ibid.*
[165] *Ibid.*, p. 24.
[166] *Ibid.*, p. 32.
[167] Raz, 1980, p. 25.
[168] Green, 2012, p. xxx.
[169] Hart, 2012, p. 27.
[170] Green, 2012, p. xxx.

restriction imposed on the Turkish Constitutional Court exemplifies duties without sanctions. Similarly, the house regulations of the Turkish Grand National Assembly envisage certain procedures regarding the lawmaking procedure. However, violation of these procedural requirements is not the condition for any sanction. According to Article 148/2 of the Constitution, the statute can be annulled only in case the majority required in the final voting procedures is not reached. Secondly, Hart does not adopt Kelsen's individuation of norms or Austin's assertion with regards to the duty-imposing character of seemingly permissive norms. Hart is disturbed by the fact that legal theory barrenly presents two alternatives in relation to the concept of sanction: it either is a natural necessity of the terms law and legal order or the fact that legal systems are mostly sanctioned orders.[171] Hart's theory affords a third alternative where sanctions are not the *necessary*, *natural* or *indispensible* component of that which is legal.

We share the opinion that not all norms of a legal system are sanctioned and coercively enforced. Examples of such cases might be rare and difficult to detect; however rare they may be, their existence demands an explanation. We do not think that labeling of such norms as "legally irrelevant" or reducing them to "non-binding expression of wills or desires improperly called as law" help jurisprudence in any way. They still exist in legal material, created by legally envisaged organs or persons and according to legally prescribed procedures. However, we do not share Hart's idea that power-conferring rules cannot be coercively enforced. Power-conferring norms can be summarily defined as those legal rules granting rights or authorizing certain individuals or groups. There is no doubt that such rules are at first sight power-conferring and they do not impose any obligations or legal duties. However, this is only the case for the direct addressees of the power-conferring norms. "Granting a right" implies that the legal order means to protect and legalize certain behavior of the individuals subject to that legal order. In case such rights and freedoms are breached by others, whether by government officials or private individuals, the legal order may react against such breach if the appropriate legal mechanism, i.e. a sanctioning mechanism, has been envisaged. As previously indicated, authorizing a certain individual, group or body, especially in the field of public law where powers are accidental, means that the said authority can only be exercised by the mentioned individual, group or body.[172] Therefore, it is possible to interpret power-conferring rules as norms

[171] Hart, 2012, p. 199.

[172] Because in the field of public law, *expressio unius est exclusio alterius* is the valid principle of interpretation unless otherwise is clear from the letter of the provision. *See* Gözler, 2013, pp. 70-71.

which confer powers (or grant rights) to certain individuals, groups or organs while imposing a duty of observance on others (or even to the same individuals, groups or organs to which the powers or rights are granted). It is irrelevant whether the sanction is provided in the same article or even in the same legal material because legal norm does not have to be made up of a single article, material or text. Consequently, we are of the opinion that the so-called power-conferring rules, just like any other legal norm, may or may not be coercively enforceable depending on whether the sanctioning mechanism has been provided for or not.

Hart reiterates the fact that sanctions are not an essential component of what is legal while discussing the legal quality of international law. Hart evaluates the criticism directed at international law's legal character based on the fact that it does not have an effective sanctioning mechanism and, therefore, any coercive nature at all. For the sake of argument, Hart ignores the sanctions that can be applied by the Security Council within the context of the Chapter VII of the Charter of the United Nations. If international law cannot be considered as a binding order, i.e. an order which truly gives rise to obligations, due to the absence of centrally organized sanctions, this indicates that "having an obligation" or "being bound" is identified with "likeliness to suffer the sanction or punishment threatened for disobedience".[173] This identification is a direct result of the assumption that law is a coercive order. If this assumption is based on an observation, it is generally true and "...not all rules give rise to obligations or duties; and ...the rules which do so generally call for some sacrifice of private interests, and ... generally supported by serious demands for conformity and insistent criticism of deviations.".[174] However, there are exceptions to this observation which generally holds true. These exceptions are norms fulfilling the criteria of validity provided by the legal theories conceiving of sanctions as an essential feature of law and legal norms. In case efficacy is understood, as we have suggested above, as a combination of rate of conformity with the norms of a legal system and effective application of sanctions against the breaches, there is no reason - none theoretically - suggesting that a completely unsanctioned system of norms cannot be efficacious as long as its norms are by and large observed by the individuals subject to that legal system.

As a result, the idea that coercion and sanctions are essential elements of the legal system and the legal norm respectively must be abandoned. We do not deny here that majority of the legal systems are coercive orders nor do we

[173] Hart, 2012, p. 217.
[174] *Ibid.*, p. 218.

deny that most of the legal norms in such systems are sanctioned: legal texts or individual sections thereof either envisage the sanction to be applied themselves or such sanction is determined by another text or section. However, this should not be made an absolute characteristic of that which is legal. Why does Kelsen not categorize unsanctioned norms (those norms which are neither permissive, thus limiting the scope of an applicable sanction, nor individuated) as "invalid" but as "legally irrelevant"? What does legal irrelevance entail? If legal validity means legal existence,[175] why would something that is legally existent be legally irrelevant where at least its existence is of legal relevance? Why does Austin not expressly declare that unsanctioned norms are invalid expressions of an unlimited, supreme sovereign? If validity of the norms stems from the will of the sovereign,[176] why does Austin say that norms without sanctions are not binding? If it is possible to comply with legal norms without or before the application of any sanctions, why should the mere fact that the sovereign has not expressed the will to enforce its desire abolish the binding force of the desire? Answers to these questions have not been satisfactorily provided by the defenders of the theories embracing sanctions and coerciveness as the absolute elements of the legal system and/or the legal norm. An understanding of sanctions as an auxiliary concept of jurisprudence on the other hand cracks the door open for new possibilities where more light can be shed on the qualities of what is legal.

III. Validity - Efficacy and Sanction

The concept of validity or coercive character of law does not have any direct relation to validity. Validity is the legal existence of a legal system or a legal norm. The validity of the legal order as a whole has usually, i.e. in Kelsen and Hart, been associated with an ultimate norm, validity of which cannot be questioned, and the general efficacy of the system. Coerciveness does not appear as a separate condition for the validity of the legal order in legal positivism. It might, however, be related with the general efficacy of the legal system. The validity of individual norms in a legal system, on the other hand, means that the norm is existent, that it must be observed, or its meaning needs to be considered in juridical thinking. In other words, the valid norm has binding force.[177] Although the result of validity is somewhat agreed upon, pre-

[175] Kelsen, 2008, p. 10.
[176] Raz, 1980, p. 14.
[177] We are not using the term "binding force" as "the imposition of a duty or obligation". This identification seems to be problematic especially with regards to rules conferring powers. Here norms with "binding force" only means that the relevant organs of the legal system or the individuals subject thereto needs to take these norms into account while trying to predict the legal consequences of their actions. Norms with binding force are capable of producing legal results.

conditions of validity for individual norms may display differences in different theories. In Kelsen's and Hart's theories, sanction does not constitute a pre-condition for the validity of individual norms.[178] In Austin, however, the existence of a connection between being sanctioned and valid is apparent, if validity is identified with binding force. While mentioning the improper use of the term "law" Austin asserts that unsanctioned norms do not have binding force and therefore are not commands.[179] Not only that such expressions are not commands, but since command and law are identical in Austin's theory, they cannot be considered as law or legal in the correct sense of the term. We have, however, previously concluded that such an understanding identifying law with command and obligation with the likeliness to be sanctioned as unsatisfactory and will not go into detail here in order to avoid repetition.

Validity is a pre-condition, in fact the only pre-condition, for the legal existence of a sanction, as long as the normative understanding of the concept is concerned. In normative understanding, sanction is a norm which is to be created when another norm has been breached and application (or even mere creation) of which constitutes an evil for the violator. Therefore, just like any other norm, sanction prescribing act needs to be created in a way prescribed by the relevant criteria of validity. On the other hand, there is no such relationship between validity and the existence of sanction in case the factual understanding of sanction is concerned. In this alternative, sanction is a factual occurrence. It is a behavior, usually of the state officials, which is required by a valid norm of the legal system. Therefore, the question cannot be the validity of this behavior but its conformity with the norm envisaging such behavior.

Above, following Hart, we have rejected the idea suggested by Kelsen that minimum efficacy is a condition for the validity of an individual norm. However, it is, of course, still possible to speak of the individual norms' efficacy. Therefore, the relationship between the efficacy of the individual norms and the concept of sanction needs some attention. We have decided that efficacy *essentially* means the observance of the norms of a legal system by the individuals subject thereto. An efficacious legal system means that the norms of the legal system are by and large observed. Similarly, an efficacious norm would mean that the prescription of the norm is observed more often than not. However, this is only one aspect of efficacy. Another factor related to the efficacy of the legal system and the individual norms would be the effective application of sanctions or other coercive measures in case the norms

[178] Although Kelsen declares norms which do not prescribe any sanctions or which are not in any way related to sanction prescribing norms as "legally irrelevant", we do not think that he tries to mean they are invalid.

[179] Austin, 2001, p. 32.

are breached. Sanctions are not in any way related to the first aspect of the concept of efficacy where individuals willingly abide by the norms of a system. They only pitch in once the norm is breached regardless of whether normative or factual understanding of the concept is concerned. Consequently, it is apt to conclude that sanctions and the fact that they are enforced in case of breaches have a positive impact on the legal system's or the individual norm's rate of efficacy.

Nevertheless, it needs to be reiterated that normative understanding of the concept of sanction would unify the factors affecting the rate of efficacy. In case the sanction is a norm, "effective application of sanctions" would mean nothing more than creation of certain norms and the concerned individuals compliance therewith. Therefore, in the normative understanding of sanction, the second factor of the rate of efficacy needs to refer not to the sanction (norm) itself but its coercive enforcement.

The concept of sanction and validity are only indirectly interrelated. Validity comes into question regarding sanctions only when the normative understanding of sanctions is accepted. Moreover, this is not any different from what validity means for any other norm. Sanction is a norm and it only exists as a sanction if it is valid. From the point of view of factual understanding, validity is irrelevant. On the other hand, sanctions have a direct effect on the rate of efficacy of a system or norm. Nevertheless, any unsanctioned norm or system would not amount to be an inefficacious norm or system since the concept of efficacy has two determinants. The first, and in our opinion more important,[180] determinant is the rate of compliance where sanctions have not yet come into question. Thus, an identification of efficacy with the existence and application of sanctions would be a mistake. Even a completely unsanctioned legal system could be efficacious in case the rest of the norms are by and large complied with. However, sanctions, as the plan B of the legal system, act as the guarantors of future compliance in case the plan A fails. This seems to be the only way sanctions can be coherently incorporated into a theory of legal positivism.

CONCLUSION

Majority of our inferences regarding the relationship between the concepts of validity, efficacy and sanction (or coerciveness) has been stated above. We will simply reiterate and combine these results.

The concept of validity is the focus and the building block of legal positivism. This is mostly because positivism cannot derive norms from

[180] This is not a statistical inference; however, only a few would deny that legal norms are generally obeyed, observed and complied with. Instances of compliance are more than breaches.

sources untouched by human creation and will. We have concluded that in theories examined above, the meaning of validity is mostly the same although the pre-conditions for the validity of the legal system and individual norms may differ. In our case, the fact that pre-conditions of validity are determined differently in different theories does not inhibit us from adequately considering the interrelation between validity, efficacy and sanctions. The important thing is that a more or less constant meaning is determined for validity and "valid norm".

In case efficacy is merely considered to be the rate of observance of the norms of a legal system or of a single norm, any norm which is not observed makes a negative contribution to the efficacy of a legal system or norm. Nevertheless, we also need to consider the suggestion that sanctions applied in case of such breaches also play a part in the determination of a legal system's or norm's efficacy level. Every breach of a norm is a negative impact on the total level of efficacy. However, if coercive sanctions are effectively applied as a reaction to such breaches, the norm's efficacy level should not be as low as an unsanctioned norm's. The same applies to the efficacy of a legal system which envisages sanctions for the breaches of its norms and sanctions of which are effectively applied. Therefore, we have suggested to conceive of efficacy as formed of two components. One is the rate of observance. The other is the effective application of sanctions. Only a combination of these two factors may determine the total efficacy of a legal system or efficacy level of an individual norm.

The concept of efficacy is a meta-legal, but still a jurisprudential concept. It is meta-legal because, as far as legal positivism is concerned, no legally authorized organ has enacted a norm envisaging that legal systems must be efficacious on the whole in order to be valid.[181] It is still a jurisprudential concept, though, since it is established as a condition for the validity of a legal system as a whole. As the condition for the validity of the legal system, the concept of efficacy may be said to fulfill two important functions: firstly, it serves to separate the legal system from other social orders in a society. In other words, it defines the legal system as the most efficacious social order in

[181] Here we need to note that one exception to the meta-legal conception of efficacy appears in Kelsen's monist theory of international law where Kelsen considers this relationship between the general efficacy of a legal system and its validity as prescribed by a norm of customary international law. This norm is called the principle of efficacy. An assessment of this assertion would require much detail and attention such as consideration of propriety of a monist construction between international and municipal law. Moreover, the existence of such a norm of customary international law would have to be questioned. Such an inquiry is certainly possible, nevertheless, it is also outside the scope of our endeavors in this article. This is why, for now, we need to disregard this possibility and continue to treat the concept of efficacy as a meta-legal concept.

a given society. Secondly, it explains the rise and fall of the legal systems and their geographical delimitation. A legal order may be invalidated by the rebel or revolutionary forces or by Coup d'Etat. Consequently, its importance for jurisprudence cannot be underestimated. Since efficacy is a meta-legal concept and at the same time a condition for the validity of the legal system, any consideration with regards to the validity of a legal system also demands reference to factual considerations that are not subject to normative dispositions.

The same cannot be said with regards to the validity of individual norms. The evaluation of validity of such norms does not require inclusion of meta-legal concepts.[182] A norm belonging to a legal system is valid, if it is created in a way conforming to the requirements set by the superior norm(s). Validity of the legal system cannot be based on legal grounds. This is because the boundaries of what is legal is determined by the legal system, validity of which cannot stem from another legal system as in such case there would not be two legal systems but only one. The same cannot be said for the validity of individual norms belonging to a legal system. Requiring individual norms to possess a minimum level of efficacy is an impurity within the pure theory of law and it needs to be cleansed of it. Therefore, above we have adopted a view favoring Hart's point of view on the subject which perceives efficacy as a condition for the validity of the legal system but not for individual norms. Efficacy can only affect the validity of individual norms in case a superior norm envisages such a condition of validity. For instance, constitutionally envisaging *desuetude* as a method of rule abrogation would mean that legal norms, other than the constitution itself, have to possess a minimal efficacy in order to remain valid. As a result, we can conclude that the concept of efficacy and the validity of the legal system are directly related. Efficacy of an individual norm and its validity, on the other hand, may only be related if expressly regulated by the norms of a legal system.

The assumption that law is a coercive order may hold true in many aspects. It may statistically be verified that legal norms are sanctioned. We follow Kelsen's idea that sanctions need not to be stated in the same legal text

[182] Perhaps the constitution is the only exception to this assertion in Kelsen's pure theory as its validity stems from the presupposed basic norm which is not a positive norm but a meta-legal concept (Delacroix, 2006, p. 49.). However, even if this view is acknowledged, there is no logical reason for the consideration of the efficacy of a constitutional norm in order to determine whether it is valid. Kelsen's views regarding the basic norm of national legal systems indicates that it confers validity on the constitution as a whole (Kelsen, 2008, pp. 198-199.). Requiring in addition that the constitutional norms need to have a minimum efficacy would amount to incorporating the efficacy requirement into the basic norm.

or material with the duty imposing norm. However, declaration of norms which do not prescribe any sanctions and which also are not related to the validity and scope of other sanctions as legally irrelevant is problematic. Legal norms can be said to impose obligations even if breaches are not the condition for the application of sanctions. Otherwise, not only is it impossible to explain how organs with the power of authentic interpretation generally conform to the prescriptions of legal norms but it is also illogical to conclude that a legally valid, therefore legally existent norm is nevertheless legally irrelevant. Therefore, unsanctioned norms can and actually do lead to legal obligations.

The relationship between validity and sanctions or coercive character of law only exists in a limited way in case the sanction is understood as a norm and not the physical force applied as Austin's ultimate sanction as a result of the resistance to the last chain of normative sanctions. Accordingly, the relationship of validity and sanctions is not any different from that of validity and norms: validity is the legal existence of sanctions and sanctions may only exist, i.e. be valid, according to the determined pre-conditions of validity in the relevant legal theory. The only consideration with regards to the concept of validity and sanction defined according to the factual understanding - since factual sanction also needs to be legally envisaged - relates to conformity, in that the factual sanction needs to conform to the sanction prescribing norm just like any other behavior.

Sanctions and the fact that the legal system envisages coercive measures against the breaches of its legal norms have a more direct effect on efficacy. The majority of a system's efficacy stems from the willful observance of its norms by the individuals subject to that system. In case the normative understanding of the concept of sanction is adopted, the phrase “effective application of sanctions”, in other words, the second factor impacting the efficacy rate of a legal system, does not have a different meaning than “compliance with the system's norms” as the sanction mentioned is also a norm which demands the compliance of the norm addressees. Therefore, in order to be able to comment on a legal system's efficacy, “effective application of sanctions” needs to be considered as a factual observation. In this case, it needs to be observed, in addition to the rate of compliance with the system's norms, whether factual coercive measures have been taken against the breaches.

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