

THE FORCE OF LAW, BY FREDERICK SCHAUER**THE FORCE OF LAW, DE FREDERICK SCHAUER***William Soares Pugliese***Luiz Henrique Krassuski Fortes***

KEYWORDS: Coercion. Distinctive Elements of Law. Jurisprudence.

PALAVRAS-CHAVE: Coerção. Elementos Distintivos do Direito. Teoria do Direito.

After *Playing by the Rules* (SCHAUER, 1991) and his latest *Thinking Like a Lawyer* (SCHAUER, 2009), Frederick Schauer published in the first half of 2015 a new book called *The Force of Law*. At first glance, the title can lead the reader to envision a dialogue with writings more familiar to the Brazilian jurists such as Jacques Derrida's (2007) and Giorgio Agamben's (2004) – but the issue faced by Schauer is quite different.

The author does not hide, from the very beginning, that his objective when he started writing the book was to challenge the notion championed by Herbert L. A. Hart, in *The Concept of Law* (2012), that the nature of the law does not include coercion. In other words, Schauer's intention is to rescue the investigation of the role of force in the legal systems or retake the study of coercion, long abandoned by legal theory in the post-hartian tradition.¹ Consequently, the author also proposes to challenge the methods of contemporary Jurisprudence, for reasons that become clear over the book argument.

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¹ One cannot ignore, however, the central role of coercion in the continental European tradition, especially in the thought of Hans Kelsen, with whom Herbert Hart had developed a rich theoretical debate. It is for his particular views on the centrality of coercion that Kelsen once said in a widely debated passage: "The law is, to be sure, an ordering for the promotion of peace, in that it forbids the use of force in relations among the members of the community. Yet, it does not absolutely preclude the use of force. Law and force must not be understood as absolutely at the variance with one another. Law is an organization of force. For the law attaches certain conditions to the use of force in relations among men, authorizing the employment of force only by certain individuals and only under certain conditions." (KELSEN, 1949, p. 21).

The initial chapters review the classic bibliography that saw in the coercive dimension the distinctive feature of the law. It encompasses, in short, the names of those to whom Hart directed his main criticisms: Bentham and Austin. Despite identifying interesting and reasonably valid theses, Schauer admits not having arguments against Hart's thesis – even more enhanced in recent years by authors such as Scott Shapiro (2011)² – in the sense that coercion is not a distinctive feature of law. The author recognizes this, because for him it is also conceivable a system in which the law is developed without coercion. The problem, however, is that systems like this only occur in theory.

In the author's words, to define a concept excluding everything that is not common to it ends up exhausting the concept itself. To say, therefore, that coercion is not part of the concept of law is like dismissing the "flight" characteristic of birds, simply because penguins do not have such ability. Doing so means excluding a distinctive trait of a concept because it does not occur in a peripheral case.

To achieve the books' aims, Schauer rescues Hart's "puzzled man", that is, the person who wants to know the behaviour required by the law not because he seeks to avoid problems, but because he wants to act according to the law. From this character, Hart and his followers concluded that coercion does not play a definitive role for the law in the perspective of the internal observer.

The problem for Schauer is that this is not the question asked by the true "puzzled man". The author demonstrates that the issue that effectively implies concrete results for the definition of law is whether a person who comes to a conclusion after considering "all but the law" will change their mind just because of the existence of a legal rule without a sanction.³ Empirically, it is shown in the book that the answer is overwhelmingly negative.

The finding is that people tend to act differently, that is, in opposition to the law, if they do not agree with it and if there is no sanction that enforces it. Coercion is also vital to set standards of conduct both to the citizenry as to officials, even though their acts depart from legality with the best of intentions, for this would mean an unwanted discretion. In the author's words, "a constitution exists in part to keep bad officials from doing bad things, but it also, and more importantly, exists to keep good officials from doing what they think are good things, or may even be good things in the short run, to the detriment of the long run public interest" (SCHAUER, 2015, p. 92).

² It is possible to trace the germ of Schauer's reflections on the importance of coercion in legal theory in an article published in the *Yale Law Journal* (2010) in which he dialogues directly with Shapiro's theory and concludes that the coercive dimensions of law provide one fruitful field for theoretical and philosophical inquiry.

³ "The question now is whether people, when they have reached this all-things-except-the-law-considered judgment, will, sanctions aside, subjugate that judgment to the prescriptions of the law." (SCHAUER, 2015, p. 62).

It is also argued that coercion is the only element of the law used by even the most advanced democracies to ensure compliance with its own democratic standards. Of course, coercion is also one of the few elements present in the most authoritarian systems – which are not advocated, but by no means cease to be examined by the author to demonstrate his views.

All this leads Schauer to point out the ubiquity of coercion. For the author, with the exception of systems designed only in theory, it is the coercive element that distinguishes law from other normative systems and other mechanisms of social organization. Here it is worth recalling the second goal of the book - to challenge the legal theory methodology: Schauer's methodology tries to observe reality and portray the legal systems as they actually exist. It is, therefore, in the sense of leaving behind a theory distant from the reality that the proposed methodological challenge may be understood.

Consequently, the development of the arguments also prove themselves sufficient to achieve the primary goal set at the beginning: although coercion may not be required to define a legal system in theory, it is, on the other hand, an indispensable element of law observed in practice. More than that, coercion is the element that gives strength to law, hence the reason for the title of the work.

In conclusion, the book argues that there are several criteria that distinguish law from other forms of regulation and social organization, including the sociological, the procedural, the methodological and the one of its sources. But the author argues for a new one (or its revision): the coercive, precisely because it is the law that regulates and legitimizes the use of force and draws on it incessantly.

Reading Schauer's work does not provide a complete and full definition of legality. Nor does it give answers to all of the most vibrant issues in Brazilian law. But this is not the purpose of the book. By proving, theoretically and empirically, that coercion is an element found in contemporary legal systems, the author intends to redeem the importance of this element in the legal debate, something that has long been overlooked by judicial theorists, which, in his view, has unfulfilled the task of providing a better understanding of the legal phenomena.

What *The Force of Law* provides to the reader is actually a toolbox aimed at the understanding of the coercion for the law, both for ordinary citizens and officials – including judges. Therefore, the old debate is placed in contemporary terms, as there is coercion not only on individuals, but also on state officials and on public entities, which proves an important argument against discretion. In the author's words (2015, p. 168),

focusing on the coercive side of law helps us to understand why and when we might need law, and why and when law can do things that other political institutions and other forms of social organization cannot. [...] if we ignore or slight that capacity [law's coerciveness], or even think that exploring it is not part of a theoretical or philosophical enterprise, we may lose some of the understanding of law that helps us to see when using law is wise – and when it is not.

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