Efficacy as a Condition of Validity in Kelsen's *General Theory of Norms*

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Abstract

The paper aims to reconstruct and critically analyse efficacy as a condition of validity in Hans Kelsen's *General Theory of Norms* both in the light of his newly introduced distinction between the conditional and full validity of a norm and the dynamic aspect of the legal order. It also aims to give a systemic account of efficacy as a condition of validity of both general and individual legal norms, taking into account the temporal aspect of validity, i.e., the moments in which a norm becomes valid and ceases to be valid, and the time span during which it remains valid. The paper first outlines Kelsen's understanding of the concept of efficacy (Section 2). It then analyses and reconstructs the efficacy condition as a condition for the beginning of a legal norm's validity (Section 3), and goes on to analyse and reconstruct the efficacy condition as a condition of the end of a legal norm's validity. Finally, the paper systematizes the conditions under which the general hypothetical sanction-decreeing legal norm and the individual hypothetical and categorical sanction-decreeing legal norms acquire and lose their validity (Section 5).

Keywords: Hans Kelsen. Validity. Existence. Efficacy. Legal Order.

1. Introduction

In both *General Theory of Norms* (1991 [1979]) and his previous works Kelsen uses the term 'validity' to refer to «the specific existence of a norm»[1], which «consists in that the norm *is to* be observed, and if not observed, then applied»[2]. 'Validity' refers to both general and individual norms, be they categorical or hypothetical. While general norms are those decreeing «some generally specified behaviour to

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1 Kelsen 1991: 2, 28.

2 Kelsen 1991: 3.

be obligatory»[3], individual norms are those decreeing «a once-only individually specified instance of behaviour to be obligatory»[4]. Categorical norms are those that «decree that a certain behaviour is obligatory unconditionally», and hypothetical (or conditional) norms those that «decree that a certain behaviour is obligatory only under certain conditions»[5].

According to Kelsen, the basic type of legal norm is the general (hypothetical) legal norm, which is formulated as follows:

> If the competent law-applying organ – in particular, a court – finds that a person has behaved in a certain way – e.g. has committed theft – the law-applying organ is to posit an individual norm decreeing that a certain coercive act – e.g. imprisonment (i.e. coercive deprivation of freedom) – is to be directed against this person[6].

Therefore, for Kelsen, there are only general *sanction-decreeing* legal norms, while general norms of behaviour (i.e., «those prescribing the behaviour which avoids the sanction») are merely «*implicit* in the sanction-decreeing norm» (hereinafter: implicit general norms of behaviour)[7]. The consequence of this view is that the immediate addressees of general legal norms are only «individuals who are empowered» (and usually also obligated) «to order concretely and to execute the coercive acts which serve as sanctions» (judges or administrative agencies, and execution-organs, respectively) and «the merely mediate addressees of the general legal norms […] the individuals whose behaviour is the condition for the coercive acts decreed in these norms»[8].

In a dynamic system of norms such as the legal order, which is characterized by a continuous process of normative production[9], the validity (or existence) of a norm has a temporal dimension, that is, a norm has its moment of becoming valid (or of coming into existence) and its moment of ceasing to be valid (or of ceasing to exist). The time in between these two moments is the time of a norm's being valid (or of being in existence).

According to Kelsen, there are two (factual) conditions under which one can say that a legal norm is to (or ought to) be observed, and if not observed, then applied, i.e., that a norm exists or is valid. These are: (i) the fact that a norm has been posited

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3 Kelsen 1991: 7.

4 Kelsen 1991: 7.

5 Kelsen 1991: 19.

6 Kelsen 1991: 53. Or: «'If a competent law-applying organ (especially a court) ascertains that a state of affairs specified abstractly in a general legal norm has occurred concretely, the competent court is to posit an individual norm which decrees to be obligatory a concrete coercive act which agrees with the coercive act specified abstractly in the general norm'». See Kelsen 1991: 140-141. For some perplexities arising from the wording of the second quoted formulation of the general norm, see Navarro 2013: 96.

7 Kelsen 1991: 142. See also Kelsen 1991: 56-57, 133-134.

8 Kelsen 1991: 52.

9 Guastini 2010: 435.

(and has not been repealed), and (ii) the fact that a norm is efficacious[10] or that it has the possibility of being efficacious[11].

As regards the normative production condition (which includes not only the acts of positing norms, but also the acts of intentionally eliminating norms from the system of norms), a norm becomes valid at the moment it has been posited. This applies to both general and individual norms. General norms become valid at the moment they have been posited either intentionally (e.g., by a legislative body) or by way of custom. Individual norms posited in correspondence with general norms become valid at the moment they have been intentionally posited (e.g., by a judge). In the case where an individual norm has not been posited in correspondence with a general legal norm, the individual norm becomes valid in virtue of the principle *res judicata* (provided this principle is in force in the positive legal order in question)[12]. Both general and individual norms lose their validity at the moment of their being derogated in the sense of their validity being repealed by another norm (e.g., by a derogating norm of a legislative body in the case of a general norm and by a derogating decision of a higher court in the case of a lower-court decision)[13]. Additionally, a legal norm loses its validity if the validity time for which it was posited runs out[14] or, in the case of an individual legal norm, when such norm is executed[15].

As regards the efficacy condition of validity, Kelsen claims that a norm (either general or individual) becomes valid at the moment it has been posited provided it has the possibility of being efficacious, and that a norm (either general or individual) ceases to be valid at the moment from which there is no longer the possibility of its being efficacious and, additionally, that a general norm ceases to be valid at the moment from which it is no longer actually efficacious (*desuetudo*)[16].

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[10] Following Pablo E. Navarro, who follows Bonnie and Stanley Paulson's translation of the first edition of Kelsen's *Reine Rechtslehre*, in this and other references to and quotations from Kelsen's *General Theory of Norms* and *Pure Theory of Law*, 2nd ed., instead of translating *Wirksamkeit* and *wirksam* as "effectiveness" and "effective", I prefer to use the terms "efficacy" and "efficacious". See Navarro 2013: n. 3, 77. The main reason for using the term "efficacy" instead of "effectiveness" is its prevailing use in Anglo-American jurisprudential literature on this issue.

[11] Kelsen 1991: 140.

[12] Kelsen 1991: 248-249.

[13] Kelsen 1991: 106-114.

[14] Kelsen 1991: 106.

[15] Kelsen 1991: 110. This, obviously, applies only to those individual legal norms which decree that a coercive act is to be executed. This, however, raises an interesting issue about individual norms which specify that no coercive act is to be executed (e.g., a court decision by which the plaintiff's case is dismissed or the accused is acquitted). On one (less plausible) interpretation, it seems that, paradoxically, these would acquire and lose their validity at the same time, i.e., at the time of their positing. On another (more plausible) interpretation, since such individual norms are, according to Kelsen, commands to the execution-organs to refrain from performing coercive acts in particular cases, they would lose their validity at the moment they lose the possibility to be violated (by the execution-organs), e.g., when the person acquitted of charges dies.

[16] Kelsen 1991: 139-140.

The paper focuses on the second of the two (factual) conditions of validity. Its main aim is to reconstruct and critically analyse efficacy as a condition of validity in Hans Kelsen's *General Theory of Norms* both in the light of his newly introduced distinction between the conditional and full validity of a norm and the dynamic aspect of the legal order. It also aims to give a systemic account of efficacy as a condition of validity of both general and individual legal norms, taking into account the temporal aspect of validity, i.e., the moments in which a norm becomes valid and ceases to be valid, and the time span during which it remains valid.

The paper first outlines Kelsen's understanding of the concept of efficacy (Section 2). It then analyses and reconstructs the efficacy condition as a condition for the beginning of a legal norm's validity (Section 3), and goes on to analyse and reconstruct the efficacy condition as a condition of the end of a legal norm's validity. Finally, the paper systematizes the conditions under which the general hypothetical sanction-decreeing legal norm and the individual hypothetical and categorical sanction-decreeing legal norms acquire and lose their validity (Section 5).

2. The concept of efficacy

According to Kelsen, efficacy can be a predicate of both legal norms and legal orders[17]. A legal norm is efficacious «if it *is* actually observed, and when not observed, then applied»[18]. A legal order is efficacious if «its norms which command a certain behaviour are actually observed and, if not observed, then applied»[19]. At first sight, the claim about the efficacy of norms might seem to be a modification of the view Kelsen took in *General Theory of Law and State* (1945). There he claimed that the efficacy of legal norms consists primarily in their being applied by the law-applying organs and, secondarily, in their also being observed by citizens[20]. However, since Kelsen did not modify his views on the relationship between so-called primary norms (sanction-decreeing norms in Kelsen's theory) and so-called secondary norms (norms of conduct in Kelsen's theory), it seems reasonable to assume that the inversion, in his definition of efficacy, of observance and application rests on the fact that the condition for the application of law is its violation (more precisely, the occurrence of the state of affairs which is the condition for the coercive act decreed

[17] See Kelsen 1991: 138. With one caveat, though, since, according to Kelsen, efficacy is in fact not a property of the norm, but of behaviour. «The observance of a norm is a property not of the norm, but of a certain factual behaviour, and thus of fact. This behaviour constitutes observance of a norm – it has the property of being the observance of a norm – if it agrees with a norm which decrees this behaviour to be obligatory» (Kelsen 1991: 219). The same claim is made in Kelsen 1945: 40.

[18] Kelsen 1991: 3 (emphasis in original).

[19] Kelsen 1991: 138.

[20] Kelsen 1991: 61-62.

in the general norm), so that a norm is efficacious: (i) if it is observed, and (ii) if not observed (i.e., if violated), then applied.

Kelsen defines the observance, violation, and application of a norm by drawing a connection between the difference between observing (or violating) and applying a norm, on the one hand, and the difference between the function of commanding (or prohibiting) and the function of empowering, on the other hand[21].

> The person whose behaviour is the condition for a sanction decreed in a legal norm violates the law […]. The person whose behaviour avoids the legal sanction observes the law […]. The plaintiff or the public prosecutor who requests the judge to order a sanction, and the judge who orders a sanction, and the execution-organ which executes the ordered sanction, all apply the law[22].

Specifically, as regards its application, a norm is considered to have been applied, and thus to have been efficacious, if an individual categorical norm has been posited by making use of the power conferred by the general norm. Kelsen identifies two cases of norm-application: (i) when the empowered court (or administrative agency) finds that a concrete state of affairs is subsumable under the state of affairs specified abstractly in the general norm, posits an individual norm decreeing to the empowered execution-organ to execute a concrete coercive act, and when the empowered execution-organ executes this coercive act; and (ii) when the empowered court (or administrative agency) finds that a concrete state of affairs which is subsumable under the state of affairs specified abstractly in the general norm does not exist, and posits an individual norm specifying that no coercive act is to be executed (i.e., dismisses the plaintiff's case or acquits the accused)[23]. The non-empowered positing of an individual categorical norm does not constitute law-application, it is void, it does not legally exist[24].

Thus, commands are observed or violated, and empowerments are applied. However, Kelsen says that, in addition to being «empowered by statutes to apply general legal norms to concrete cases»[25], judges are «[a]s a rule […] also commanded to do so»[26]. So «[a] judge violates the duties of his office if he refrains from making use of his power in a concrete case»[27]. And, one should add, he observes the duties of his office if he makes use of his power in a concrete case. This is evident

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21 Kelsen 1991: 104.

22 Kelsen 1991: 105.

23 See Kelsen 1991: 52-53, 140-141. In *Pure Theory of Law*, 2nd edition, Kelsen did not identify the second case of norm-application. That a «norm is *applied* by the legal organs (particularly the law courts) […] means that the sanction in a concrete case is ordered and executed». See Kelsen 1967: 11.

24 Kelsen 1991: 102.

25 Kelsen 1991: 103.

26 Kelsen 1991: 103.

27 Kelsen 1991: 103.

from the passages in which Kelsen speaks about the individualization of the general norm[28]. Thus, besides by the mediate addressees of the general norms, i.e., the individuals whose behaviour is the condition for the coercive acts decreed in these norms, norms are observed or violated by the organs empowered to apply law in cases where they are at the same time commanded to apply law.

Kelsen draws a distinction between the objective and subjective observance and violation, that is, between what is also called the "finistic" and motivational (or psychological) efficacy[29]. Whereas a sufficient condition of objective observance (or violation) is the mere correspondence (or lack of correspondence) of the actual behaviour of the norm addressee to the norm's normative content, a necessary condition of subjective observance (or violation) is the norm addressee's conscious and willing behaviour that corresponds (or fails to correspond) to the norm's normative content[30]. According to Kelsen, «when a norm is considered to have been observed or applied, no attention is paid to the motive which led to the behaviour which constitutes observance or application of the norm»[31]. Thus, the motive is not relevant for assessing whether or not a norm is efficacious. Although, of course, when judges are concerned, since they are empowered and usually also at the same time commanded to apply legal norms, their behaviour will, as a rule, constitute subjective observance or violation of a norm, i.e., they will, as a rule, consciously and willingly observe the norm they apply.

Another distinction used by Kelsen in respect of the efficacy of norms used by Kelsen is that between the immediate and mediate observance and violation (and application) of norms. For Kelsen, only individual categorical norms can be observed or violated (or applied) immediately, while general (either hypothetical or categorical)[32] norms and individual hypothetical norms can be so only mediately[33]. However, Kelsen is not entirely clear about what makes some types of norms capable of being only mediately observed or violated, which, in turn, raises some doubts

[28] See, e.g., Kelsen 1991: 240: «For even if Judge Körner addresses to himself the command 'I, Judge Körner, am to posit the individual norm "Maier is to be imprisoned"', so that this individual norm is valid, Judge Körner can, for some reason or other, fail to observe this norm, i.e. fail to posit the individual norm 'Maier is to be imprisoned'».

[29] Grabowski 2013: 335. See also Burazin 2017: 2.

[30] Kelsen 1991: 57, 37.

[31] Kelsen 1991: 138.

[32] In fact, Kelsen says «a general norm (whether categorically or hypothetically valid)» (Kelsen 1991: 46). However, since Kelsen claims that all norms (both categorical and hypothetical norms, i.e., both those decreeing that a certain behaviour is obligatory unconditionally and those decreeing that a certain behaviour is obligatory only under certain conditions) can be only conditionally (hypothetically) valid, i.e., that they can be valid only under the condition that they can be observed (see Kelsen 1991: 19-21), it seems that Kelsen refers here to categorical and hypothetical *norms* and not to the categorical or hypothetical *validity* of norms.

[33] See Kelsen 1991: 46, 50, 220-221.

about the types of norms capable of being observed or violated only mediately. Namely, he explicitly says that a norm is capable of being only mediately observed or violated when the «behaviour which can be characterized as observance or violation of a norm is possible only after the condition abstractly specified in the general norm is concretely realized» and gives the example of the (moral) norm «If someone makes a promise, he is to keep it»[34]. The norm is, says Kelsen, capable of being observed or violated «only after a specific person *A* has made a specific promise – e.g., to pay 1.000 – to a specific person *B*»[35]. However, if this is the case, if the fulfilment of the condition under which a certain behaviour is obligatory is what makes a norm capable of being only mediately observed or violated, then it seems that general *categorical* norms are also capable of being immediately observed or violated[36]. This, however, contradicts Kelsen's abovestated explicit view according to which only individual categorical norms can be observed or violated immediately, while general (be they categorical or hypothetical) norms can be so only mediately. In fact, from the series of examples Kelsen gives in order to explain the process by which a norm is observed or applied[37], and the necessity of the process of individualization of (general) norms[38] (which will be the topic of the next Section), it follows that what makes a norm capable of being only mediately observed (and violated) or applied is not (at least in the sense of a necessary condition) the fulfilment of the condition under which a certain behaviour is obligatory, but the need to posit a corresponding individual categorical norm. Namely, according to Kelsen, in order for it to be possible to apply (and, as a rule, observe) a general norm obligating the competent court to posit an individual norm decreeing the performance of a coercive act, the individual categorical norm 'You, the competent court, are to posit the individual norm' has to be posited.

Thus, whenever it is necessary, in order to observe or apply a certain norm, to posit a corresponding individual categorical norm, it can be said that the former norm is capable of being only mediately observed or applied, i.e., capable of being observed or applied only through the intermediary of the corresponding individual categorical norm. And this is so in the case of both general (hypothetical and cat-

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34 Kelsen 1991: 46.

35 Kelsen 1991: 46.

36 This interpretation can be supported by what Kelsen says at another point: «Only an unconditional (categorical) norm can be observed or violated immediately; a conditional (hypothetical) norm cannot, for as long as the condition is not fulfilled, there can be no question of observance or violation» (Kelsen 1991: 220-221).

37 See the examples given in Kelsen 1991: 46-48 (for general hypothetical and categorical moral norms), 53-54 (for general and individual hypothetical legal norms).

38 See Kelsen 1991: 50, 226. From the example Kelsen gives in Kelsen 1991: 53, it seems that, in order to be applied, individual hypothetical norms also have to be individualized (by positing the corresponding individual categorical norms).

egorical) norms and individual hypothetical norms[39]. By immediately observing, violating, or applying an individual categorical norm, one is at the same time mediately observing, violating, or applying an individual hypothetical norm or a general (categorical or hypothetical) norm.

Finally, Kelsen states that efficacy is a matter of degree in the sense that a norm can be considered efficacious not only when it is always observed or applied (under the condition that it can also be violated and non-applied), but also when it is observed and applied 'by and large'[40]. In particular, one can say that, according to Kelsen's theory, a norm is efficacious in the following cases: (i) if always observed, so that the courts (or other law-applying organs) are never in a position to apply it[41]; (ii) if sometimes observed and sometimes violated, but applied by and large in the case of its violation; and (iii) if never observed, but by and large applied[42].

Since, according to Kelsen,

> [t]he general norm can even be considered to be efficacious if it is never applied, but *only when* the courts are never in a situation to find a concrete state of affairs which is the condition for sanctions and is specified abstractly in a general norm, because such a state of affairs never occurs or no longer occurs, even though it is still possible for it to occur[43],

it seems that Kelsen excludes the possibility of a norm being considered efficacious if observed by and large, but never applied. Moreover, although Kelsen is not explicit about this, it seems that he also excludes the possibility of a norm being considered efficacious if observed by and large, but not applied by and large in the case of its violation. This interpretation might be supported by Kelsen's claim that

> [w]hether a general norm is efficacious therefore does not depend on the actual observance of the norm we have called the 'secondary' norm (i.e. on behaviour which avoids the sanction) but on the judicial finding that there obtains a concrete state of affairs which is the condition for a sanction[44].

Of course, with only one exception, namely, «when courts are *never* in a situation to find a concrete state of affairs which is the condition for sanctions and is specified abstractly in a general norm»[45].

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39 See the examples referred to in n. 37.

40 Kelsen 1991: 138-139.

41 Kelsen 1991: 141.

42 For the radical consequences of efficacy which seem to follow from Kelsen's doctrine on the constitutive character of judicial decisions, see Navarro 2013: 97-98.

43 Kelsen 1991: 141. Emphasis in original.

44 Kelsen 1991: 141.

45 Kelsen 1991: 141. Emphasis mine.

3. Efficacy as a condition for the beginning of a norm's validity

According to Kelsen, efficacy is not a condition for a norm's validity in the sense that a norm has to be efficacious in order to be valid. If one speaks of a particular norm as being efficacious or inefficacious, this presupposes that the norm has already become valid, «since a norm becomes valid before it is efficacious and it can become efficacious only once it has become valid»[46]. However, a norm could not be considered valid if it decreed something which it is objectively, according to natural laws, impossible to either observe or violate since it is in the nature of law to address itself to the reality which is not identical with it (i.e., with the validity of law), with the aim of influencing this reality[47]. Therefore, a condition for the beginning of a norm's validity is not its efficacy, but only the *possibility* of its efficacy[48].

Since in *General Theory of Norms* Kelsen introduced a distinction between the conditional and full validity of a norm, one should explain what the possibility of a norm's efficacy as a condition of validity amounts to in relation to these two types, or, as shall be seen shortly, stages of validity. The new distinction Kelsen draws applies to both general and individual norms and takes into account the dynamic aspect of the legal order and the efficacy condition of legal validity.

A legal norm is valid as soon as it has been posited. However, according to Kelsen, this is only a norm's conditional validity, since a norm is valid only under the condition that it *can* be observed or violated, and applied or non-applied[49]. Thus, a condition for the validity of a norm is the possibility of its being efficacious in the sense of the possibility of its being observed or violated, and applied or non-applied[50]. In the case of general norms, it is, of course, sufficient that it is *generally possible* to observe or violate, and apply or not apply a norm and that it is *not necessarily impossible* to observe or violate, and apply or not apply it, i.e., it is not necessary that in every concrete case a general norm can be observed or violated, and applied or non-applied[51]. As has been said, a norm cannot be considered to be valid if it decrees something which, according to the laws of nature, can in no case happen or must happen (e.g., 'Human beings are to live forever' and 'Human beings are

46 Kelsen 1991: 140.

47 Kelsen 1967: 213 and Kelsen 1991: 59.

48 Obviously, efficacy is a necessary condition for the validity of customary norms.

49 Kelsen 1991: 19-20. Observance and violation refer here to the individuals whose behaviour is the condition for a coercive act. Application (which is often at the same time obligatory and thus represents observance) and non-application (which represents violation, if application is qualified as obligatory) refer to the behaviour of law-applying organs, i.e., to their positing of individual norms decreeing that a particular coercive act is obligatory (in the case of courts and administrative agencies as the law applying-organs), and that it is to be executed (in the case of execution-organs as the law-applying organs).

50 Kelsen 1991: 20.

51 Kelsen 1991: 140.

to die', respectively)[52]. A legal norm is fully valid if the possibility of its *immediate* observance or violation, and application or non-application actually obtains. Therefore, it could be said that only individual categorical norms are fully valid from the moment of their positing, and that all other types of norms (individual hypothetical norms and general categorical and hypothetical norms) are fully valid from the moment the required individual categorical norms have been posited.

As concerns general norms, they, in addition to being conditionally valid, are only mediately valid. Since a general norm is valid under the condition that it can be observed or violated, and applied or non-applied, and since, as was explained in Section 2, it can be applied (and observed, if application is qualified as obligatory) only mediately[53], i.e., through the application (and observance, if application is qualified as obligatory) of the individual categorical norm corresponding to the general norm[54], a general (hypothetical)[55] norm can be considered to be valid only under the conditions that it is *possible* for the condition abstractly specified in it to be concretely realized (i.e., that it is possible that a general implicit norm of behaviour be violated), and that it is *possible* that the corresponding individual categorical norm be posited[56]. Although, as a rule, the positing of the corresponding individual categorical norm which a court addresses to itself will be possible, one can, theoretically, imagine a case where this would not be possible, e.g., where there are no established courts. Therefore, the possibility of efficacy of a general sanction-decreeing norm is also conditioned by the possibility of positing the corresponding individual categorical norm[57]. A general

[52] Kelsen 1991: 20

[53] It seems that a general hypothetical sanction-decreeing norm can be observed by individuals whose behaviour is a condition for a coercive act also only mediately, i.e., through the observance of the individual categorical norm corresponding to the implicit general norm of behaviour, posited by such an individual (i.e., by the mediate addressee of a general sanction-decreeing norm).

[54] Kelsen 1991: 50.

[55] Here I limit myself to general hypothetical norms since, at least in Kelsen's theory, general legal norms in their correct formulation are hypothetical norms ('If a competent law-applying organ ascertains that […], it is to posit an individual norm […]').

[56] If one takes that the application of a general norm ends with the execution of a coercive act, an additional condition would be that it is *possible* for an individual norm decreeing the execution-organ to execute the coercive act to be applied (observed) or non-applied (violated). Although it will generally be possible for the execution-organs to execute coercive acts decreed by individual categorical sanction-decreeing norms posited by the courts, one can, theoretically, imagine a situation where this would not be the case, e.g., where there are no execution-organs. However, from Kelsen's 'correct' formulation of the general sanction-decreeing norm it follows that the application of this norm consists in the positing of the individual categorical sanction-decreeing norm, and not in the execution of the decreed sanction. The execution of the decreed sanction seems to be the application (observance) by the execution-organ of the individual categorical sanction-decreeing norm posited by the competent law-applying organ.

[57] Of course, it should also be *possible* for such individual categorical norm to be applied (observed) or non-applied (violated). However, I am unable to imagine a case in which it would be *generally* impossible for courts to apply (observe) or not apply (violate) the corresponding individual categorical norms they posit.

(hypothetical) norm becomes fully valid from the moment it can *actually* be applied (observed) or non-applied (violated)[58], that is, from the moment an individual categorical norm corresponding to the general (hypothetical) norm is posited[59].

A general (hypothetical) norm acquires its full validity through the process of its individualization[60]. The process of individualization starts with the law-applying organ (e.g., a court) determining whether a concrete state of affairs which is subsumable under the state of affairs specified abstractly in the general norm exists. If the court finds that a concrete state of affairs which is subsumable under the state of affairs specified abstractly in the general norm exists, the process continues with the positing of the corresponding individual categorical norm 'You, the competent court, are to posit an individual norm decreeing that a certain coercive act is to be executed'. Thus, says Kelsen, «[t]he 'validity' of a general norm, i.e. its specific existence, is not a static state of affairs, but a dynamic process»[61]. Validity develops in stages, i.e., from conditional to full validity.

The positing of an individual norm by a court, which decrees that a concrete coercive act which is subsumable under the coercive act specified abstractly in the general norm is to be executed, presupposes the recognition of the general (hypothetical) norm. The recognition of the general (hypothetical) norm consists in the positing of the corresponding individual categorical norm addressed to the competent law-applying organ, e.g., the competent court. According to Kelsen, there are two possible cases of recognition. Either the competent court itself recognizes the general (hypothetical) norm it is to apply and addresses the corresponding individual categorical norm to itself or the higher court recognizes the general (hypothetical) norm the competent court is to apply (but has not recognized) and

[58] It is unclear whether Kelsen would allow it to be inferred that a general sanction-decreeing norm becomes fully valid even in the case where its mediate addressee (the individual whose behaviour is a condition for a coercive act) posits an individual categorical norm, addressed to himself/herself, corresponding to the general norm of behaviour which is implicit in the general sanction-decreeing norm. This, however, does not seem sufficient since the individual could still fail to observe the individual categorical norm he/she addressed to himself/herself, which, in turn, would call for the application of the general sanction-decreeing norm. It would, therefore, have to be claimed that, in this case, the general sanction-decreeing norm becomes fully valid if the individual not only recognizes the implicit general norm of behaviour and posits the corresponding individual categorical norm, but, in addition, observes it. However, this would not be in accordance with either Kelsen's own criterion for full validity (which does not require the observance of the corresponding individual categorical norm) or his view about the position and relevance of 'norms of behaviour' in the legal order.

[59] P.E. Navarro seems to confuse the individual categorical norm a court addresses to itself in recognition of the general norm with the individual norm a court addresses to the execution-organ. This leads him to conclude that, according to Kelsen, «a general norm is valid – 'fully' valid – only in so far as it *is* applied – which is tantamount to saying that the norm is fully valid only if it is efficacious». See Navarro 2013: 99.

[60] See Kelsen 1991: 50.

[61] Kelsen 1991: 50.

addresses the corresponding individual categorical norm to the competent court[62].

Of course, it is possible for the competent court to not recognize the general (hypothetical) norm for the concrete case and thus to not posit the corresponding individual categorical norm addressed to itself. If its decision is not appealed and becomes *res judicata*, the general (hypothetical) norm will not acquire its full validity for this case[63]. Likewise, the general (hypothetical) norm will not acquire its full validity if the court is the court of last instance and this court does not recognize the general (hypothetical) norm which is to be applied[64]. However, «the fact that a court does not recognize and so does not apply a general legal norm to a concrete case does not repeal the validity of the general legal norm, and consequently it can be applied as a valid legal norm in a similar case by the same judge and especially by other judges»[65].

A few examples of conditionally and fully valid norms are in order here.

(i) The general sanction-decreeing norm 'If the competent court finds that someone committed murder, it is to posit the individual norm decreeing the execution-organ to imprison this person for 10 years' is conditionally valid in that it is valid under the condition that there is a possibility of its observance or violation, and application or non-application, or more concretely, that there is a possibility of someone committing murder (i.e., violating the implicit general norm forbidding murder), that the competent court finds that someone committed murder, and that the court addresses to itself the corresponding individual categorical norm 'You, the competent court, are to posit an individual norm decreeing to the execution-organ to imprison that person for 10 years' (which, consequently, makes it possible for the general sanction-decreeing norm to be applied). The norm is fully valid where the competent court actually finds that, e.g., John committed murder and actually addresses to itself the corresponding individual categorical norm 'You, the competent court, are to posit an individual norm decreeing to the execution-organ to imprison John for 10 years', i.e., if the condition under which the norm is valid is satisfied.

(ii) The individual categorical sanction-decreeing norm 'You, the execution-organ, are to imprison John for 10 years', which is posited by the competent court, is conditionally valid in that it is valid under the condition that there is a possibility of its application (observance) or non-application (violation), i.e., that the empowered and decreed behaviour (i.e., imprisoning) is possible, or more concretely, that there is the execution-organ and that John is alive. The norm is fully valid where there actually is the execution-organ and John is actually alive, i.e., if the condition under which the norm is valid is satisfied.

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62 See Kelsen 1991: 53-54, 239.
63 Kelsen 1991: 53.
64 Kelsen 1991: 54.
65 Kelsen 1991: 54.

(iii) Finally, the individual hypothetical sanction-decreeing norm 'You, the execution-organ, are to imprison Elisabeth for 5 years if she commits another delict within the next 3 years'[66] is conditionally valid in that it is valid under the condition that there is a possibility of its observance or violation, and application or non-application, or more concretely, that there is a possibility that Elisabeth commits another delict within 3 years (the possibility of violation of the implicit individual norm of behaviour)[67], that the competent court finds that she committed another delict within 3 years, that the court posits the individual categorical norm decreeing the execution-organ to imprison Elisabeth for 5 years, that there is the execution-organ and that Elisabeth is alive. The norm is fully valid where the competent court actually finds that Elisabeth committed another delict within 3 years, the competent court actually posits the individual categorical norm decreeing the execution-organ to imprison Elisabeth for 5 years, the execution-organ actually exists and Elisabeth is actually alive, i.e., if the condition under which the norm is valid is satisfied.

Therefore, the following can be said:

(i) A general hypothetical sanction-decreeing norm is conditionally valid for all possible cases after it has been posited since it is valid under the condition that it can be observed or violated, and applied or non-applied, that is, if it is possible for the condition abstractly specified in it to be concretely realized (the possibility of violation of the implicit norm of behaviour by the mediate addressee) and that the corresponding individual categorical norm has been posited (which, consequently, makes it possible for the general sanction-decreeing norm to be immediately applied). A general hypothetical norm is fully valid for each individual case if the condition abstractly specified in it is concretely realized (i.e., if the mediate addressee of the general hypothetical norm has violated the implicit general norm of behaviour) and the corresponding individual categorical norm is posited.
(ii) An individual categorical sanction-decreeing norm is conditionally valid for an individual case after it has been posited since it is valid under the condition that it can be applied (observed) or non-applied (violated), that is, that sanctioning (i.e., the execution of the coercive act) is possible (i.e., that the condition for its application to the subject of the coercive act is realized), and is fully valid for an individual case if it can actually be applied (observed) or non-applied (violated),

[66] Of course, the correct formulation would be '[…] if *the competent court finds that* Elisabeth committed another delict […]'.

[67] In analogy to Kelsen's view that, under the assumption that there are in fact two different types of norms, namely, norms addressed to the individuals whose behaviour is the condition for a sanction (norms of behaviour) and norms addressed to the law-applying organs (sanction-decreeing norms), norms of behaviour are merely implicit in sanction-decreeing norms, I present here the individual norm of behaviour as implicit in the individual hypothetical sanction-decreeing norm.

that is, if sanctioning (i.e., the execution of the coercive act) is actually possible (i.e., if the condition for its application to the subject of the coercive act is actually realized). In the case of individual categorical norms, the moments of their becoming conditionally and fully valid coincide (i.e., they are both conditionally and fully valid from the moment of their positing).

(iii) An individual hypothetical sanction-decreeing norm is conditionally valid for an individual case after it has been posited since it is valid under the condition that it can be observed or violated, and applied or non-applied, that is, if it is possible for the condition specified in it to be concretely realized (i.e., the possibility of violation of the implicit individual norm of behaviour by the mediate addressee of the individual hypothetical sanction-decreeing norm), that the competent court finds that the condition has been realized, and that it posits an individual categorical norm decreeing the execution of the specified sanction, which can be applied (observed) or non-applied (violated). An individual hypothetical sanction-decreeing norm is fully valid for an individual case if the competent court finds that the condition specified in it has been realized (i.e., if the mediate addressee of the individual hypothetical norm has violated the implicit individual norm of behaviour) and posits an individual categorical norm, which can be applied (observed) or non-applied (violated), empowering and decreeing the execution of the sanction specified in it.

To conclude. The possibility of efficacy as a condition for the beginning of legal validity of a general hypothetical sanction-decreeing norm means the possibility of observance or violation of the implicit general norm of behaviour and the possibility of immediate application (observance) and non-application (violation) of the general hypothetical sanction-decreeing norm (which exists if there exists the possibility of the courts positing the corresponding individual categorical norms). The possibility of efficacy as a condition for the beginning of legal validity of an individual categorical sanction-decreeing norm means the possibility of its application (observance) or non-application (violation). The possibility of efficacy as a condition for the beginning of legal validity of an individual hypothetical sanction-decreeing norm means the possibility of observance or violation of the implicit individual norm of behaviour and the possibility of application (observance) or non-application (violation) of the individual categorical sanction-decreeing norm which was posited in correspondence with the individual hypothetical sanction-decreeing norm.

4. Efficacy as a condition for the end of a norm's validity

According to Kelsen, a norm ceases to be valid (i.e., loses its initially acquired validity) if derogated, that is, if repealed by another norm, if the validity time for which it was posited runs out, and, in the case of individual norms, if a norm is

executed. However, as with the beginning of a norm's validity, here too efficacy plays the role of a validity condition. A legal norm loses its validity if it loses its «efficacy or the possibility of efficacy»[68]. Efficacy is a condition for the end of a norm's validity. More precisely, when it comes to general legal norms, a norm of this type loses its validity in the following two cases: (i) if it loses the possibility of efficacy, or (ii) if it loses efficacy. When it comes to individual legal norms, such a norm loses its validity if it loses the possibility of efficacy[69].

The possibility of efficacy, as was already said, means the possibility of observance or application of a norm. Therefore, a general sanction-decreeing norm loses its validity if it is no longer possible to observe or apply it. This can be the case when it is no longer possible for a state of affairs specified abstractly in a general sanction-decreeing norm, which is a condition for a coercive act, to be realized. This is primarily the case when the norm of behaviour implicit in a general sanction-decreeing norm loses the possibility to be observed or violated. However, since the implicit norm of behaviour can no longer be observed or violated, the general sanction-decreeing norm cannot be applied. The general sanction-decreeing norm cannot be applied since the court will never be in a situation to ascertain that the state of affairs specified abstractly as a condition for a coercive act has occurred concretely. However, a general sanction-decreeing legal norm would lose its validity, even if the implicit norm of behaviour did not lose the possibility of being observed or violated, if it lost the possibility of being applied. This would, at least theoretically, be the case if the courts were dissolved some time after the positing of the general sanction-decreeing norm.

Individual legal norms also lose their validity if they lose the possibility of efficacy. An individual categorical sanction-decreeing norm loses its validity if it remains non-applied until it can no longer be applied (although its validity time has still not run out)[70] (e.g., it loses its validity if it remains non-applied until the person ordered to be imprisoned dies or, at least theoretically, until all the execution-organs in the legal order are dissolved)[71]. The same applies to individual hypothetical sanction-decreeing norms. An individual hypothetical sanction-decreeing norm loses its validity when it remains non-applied until it can no longer be applied (although its validity time has still not run out) (e.g., if, after the condition specified in such a norm

[68] Kelsen 1991: 139.

[69] It seems that in *Pure Theory of Law*, 2nd edition, Kelsen claimed that the loss of efficacy is a condition for the end of validity of individual norms as well. See Kelsen 1967: 213, 207-208.

[70] I added this condition to Kelsen's original formulation of the loss of the possibility of efficacy of individual norms as a condition of their validity in order to differentiate between the situation where an individual norm loses its validity because it lost the possibility of efficacy and the situation where it loses its validity because its validity time ran out, which, as was said in Section 1, Kelsen identifies as a separate condition for the end of validity of a norm.

[71] Kelsen 1991: 139-140.

is realized and the competent court posits an individual categorical norm decreeing a coercive act to be executed, the former norm remains non-applied until the person against whom the coercive act was ordered dies or, at least theoretically, until all the execution-organs in the legal order are dissolved).

An individual hypothetical sanction-decreeing norm also loses its validity when the individual norm of behaviour implicit in the individual hypothetical sanction-decreeing norm has been observed (e.g., an individual hypothetical sanction-decreeing norm decreeing civil execution on *A*'s assets if *A* does not pay 1000,00 EUR to *B* within two weeks loses its validity if *A* pays the said amount of money to B within the specified period of time). However, this does not seem to be the case where a norm loses its validity for the reason that it lost its efficacy. Namely, if, by analogy, one takes Kelsen's view that a general sanction-decreeing norm can be considered efficacious even if never applied, but under the condition that the norm of behaviour implicit in it is always observed by citizens, one could claim that an individual hypothetical sanction-decreeing norm is efficacious even if never applied, under the condition that the individual norm of behaviour implicit in it has been observed, although the individual hypothetical sanction-decreeing norm has thus lost its validity.

A special case of general legal norms losing their validity is the case of their losing (not the possibility of efficacy, but) efficacy itself. It is the case of so-called *desuetudo*. According to Kelsen, a general legal norm loses its validity «if [it] cease[s] to be observed by and large, and when not observed, to be applied»[72]. The example Kelsen provides is the following:

> a general legal norm which prohibits the sale of alcoholic beverages by specifying that whoever sells alcoholic beverages is to be punished with imprisonment would lose its validity if it happened that as a result of resistance by the subjects of the norm it was not observed and furthermore not applied by the competent organs[73].

There are, thus, two conditions that have to be met in order for it to be considered that a general sanction-decreeing norm lost its efficacy and, consequently, its validity. First, general ('by and large') non-observance of the implicit general norm of behaviour by the mediate addressees of the general sanction-decreeing norm and, second, general ('by and large') non-application of the general sanction-decreeing norm by the competent organ. A norm would not be considered to have lost its efficacy if only the individuals whose behaviour is the condition for the coercive act decreed in the general sanction-decreeing norm were by and large not observing the implicit norm of behaviour, while the competent organs were at the same time by and large applying the general sanction-decreeing norm.

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72 Kelsen 1991: 139.
73 Kelsen 1991: 139.

However, following what seems to be Kelsen's view on when a norm can be considered efficacious[74], it seems that a norm loses its efficacy even when observed by and large if, when violated, it is not applied by and large, irrespective of the extent of this violation. Thus, it seems that Kelsen's above quoted statement about when a norm loses its efficacy and, consequently, its validity, needs to be slightly refined. A norm loses its efficacy and, consequently, its validity when non-applied by and large in the case of its non-observance (violation), irrespective of whether or not the norm was non-observed by and large.

The general non-observance of a sanction-decreeing norm by its mediate addressees (i.e., the addressees of the implicit general norm of behaviour) and the general non-application of the norm by the competent law-applying organs over a long period of time constitute a custom[75]. According to Kelsen, there are two ways in which such a custom can give rise to a norm's loss of efficacy and, consequently, its loss of validity. The first is when the custom of non-observance and non-application is not accompanied by a behaviour-prescribing norm arising by way of custom[76]. For example, to use the above quoted general norm regarding the sale of alcoholic beverages, if people sell alcoholic beverages and the competent courts do not find that people sell alcoholic beverages and do not posit individual categorical norms decreeing the execution-organs to imprison them. The second is when such a custom is accompanied by a behaviour-prescribing norm arising by way of custom[77]. In the second case, the norm in question can be either «a norm prescribing the omission of an action commanded by a hitherto valid norm, or a norm prescribing an action whose omission is commanded by a hitherto valid norm»[78]. For example, if, in addition to the custom of non-observance and non-application of the general norm regarding the sale of alcoholic beverages, a new (implicit general) customary norm arises which decrees as obligatory the sale of alcoholic beverages, and a new general customary sanction-decreeing norm arises which decrees as obligatory the imprisonment of those found by the competent organs to have failed to sell alcoholic beverages. Although in the second case there exists an incompatibility between what the new customary norm and the non-observed and non-applied statutory norm decree as obligatory, there is in fact «*no conflict of norms*, since the custom which gives rise to the new norm implies the long-standing non-observance and non-application of the hitherto valid norm, which thus loses its efficacy and consequently its validity»[79]. Therefore, the reason, in both cases, for the general norm's loss of efficacy is the long-standing actual behaviour contra-

74 See Section 2.
75 Kelsen 1991: 109.
76 Kelsen 1991: 109.
77 Kelsen 1991: 109.
78 Kelsen 1991: 109.
79 Kelsen 1991: 109.

dicting the behaviour stipulated by the norm as the behaviour that ought to be[80].

While Kelsen gives a (conceptual) argument for the possibility of efficacy as a condition of validity[81], in his *General Theory of Norms* he only stipulates that a general legal norm loses its validity if it loses its efficacy. I shall therefore examine the arguments he provides in *Pure Theory of Law* (1967 [1960]) and *General Theory of Law and State* (1945). Also, since the mere custom of non-observance and non-application of a norm (and not also a new incompatible customary norm) is sufficient to regard the norm as having lost its efficacy and, consequently, its validity, I will focus on Kelsen's explanation of why this is necessarily so.

According to Kelsen, efficacy is stipulated as a condition of validity of the constitution, the legal order as a whole, and each legal norm by the basic norm of the legal system[82].

> The reason for the validity – that is, the answer to the question why the norms of this legal order ought to be obeyed and applied – is the presupposed basic norm, according to which one ought to comply with an actually established, by and large efficacious, constitution, and therefore with the by and large efficacious norms, actually created in conformity with that constitution. In the basic norm the fact of creation and the efficacy are made the condition of the validity – "efficacy" in the sense that it has to be added to the fact of creation, so that neither the legal order as a whole nor the individual legal norm shall lose their validity[83].

Therefore,

> a norm is not regarded as valid which is never obeyed or applied. In fact, a legal norm may lose its validity by never being applied or obeyed – by so-called *desuetude*. *Desuetudo* may be described as negative custom, and its essential function is to abolish the validity of an existing norm. […] If efficacy in the developed sense is the condition for the validity not only of the legal order as a whole but also of a single legal norm, then the law-creating function of custom cannot be excluded by statutory law, at least not as far as the negative function of *desuetudo* is concerned[84].

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[80] The custom of non-observance and non-application cannot constitute a derogating customary norm. According to Kelsen, «a derogating norm cannot arise by way of custom». See Kelsen 1991: 109. The reason is that customary norms can refer only to human behaviour (i.e., they can be only behaviour-prescribing norms), while derogating norms refer to the validity of other norms. See Kelsen 1991: 106-107. However, it seems that in his earlier works Kelsen allowed for the existence of derogating customary norms. In *General Theory of Law and State* he says that «[d]esuetudo annuls a norm by creating another norm, identical in character with a statute whose only function is to repeal a previously valid statute». See Kelsen 1945: 119.

[81] See Section 3.

[82] Kelsen 1967: 208, 212.

[83] Kelsen 1967: 212.

[84] Kelsen 1967: 213.

As Kelsen himself admits, this interpretation is valid only if efficacy is a condition of validity not only of the legal order as a whole but also of each single legal norm of the legal order. And it seems that, for Kelsen, this is a contingent matter. That is, it depends on whether something like an international law principle of effectiveness (according to which «a legal order must be efficacious in order to be valid»)[85] is «adopted to a certain extent also by national law»[86]. If adopted, «within a national legal order the validity of a single norm may be made dependent upon its efficacy» in the sense of *desuetudo*[87]. On the one hand, however, when formulated in this way, efficacy is a contingent condition of validity of a legal norm. On the other hand, Kelsen did not demonstrate that any national legal order adopted efficacy as a condition of validity in the above sense or, more importantly, did not present any argument for why the basic norm would stipulate efficacy as a condition of validity of each single legal norm, instead of limiting itself to the general efficacy of the legal order as a whole, which is sufficient to presuppose the basic norm. The basic norm, according to Kelsen, «refers directly to a specific constitution, actually established by custom or statutory creation, by and large efficacious, and indirectly to the coercive order created according to this constitution and by and large efficacious»[88].

Furthermore, Kelsen himself seems to offer another, conceptually more adequate, efficacy condition for the end of validity of a single legal norm, that is, the loss of efficacy of the legal order as a whole.

> The norms of a positive legal order are valid […] only *as long as* this legal order is efficacious. As soon as the constitution loses its efficacy, that is, as soon as the legal order as a whole based on the constitution loses its efficacy, the legal order and every single norm lose their validity[89].

This is the view Kelsen also explicitly expresses in *General Theory of Law and State*, where he claims that «[a] norm is considered to be valid only on the condition that it belongs to a system of norms, to an order which, on the whole, is efficacious»[90] and that «[e]very single norm loses its validity when the total legal order to which it belongs loses its efficacy as a whole»[91].

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85 «According to this principle of international law, an actually established authority is the legitimate government, the coercive order enacted by this government is the legal order, and the community constituted by this order is a State in the sense of international law, in so far as this order is, on the whole, efficacious» (Kelsen 1945: 121).

86 Kelsen 1945: 122.

87 Kelsen 1945: 122.

88 Kelsen 1967: 201.

89 Kelsen 1967: 212.

90 Kelsen 1945: 42

91 Kelsen 1945: 119.

Therefore, it seems that efficacy as a condition for the end of validity of a single legal norm does not mean that a legal norm necessarily loses its validity if it loses its efficacy[92], but, rather, if the legal order as a whole ceases to be by and large efficacious. Since legal norms exist only as members of a system of norms, they, by definition, lose their validity when the system loses its validity. Furthermore, such an efficacy condition for the end of validity of a legal norm allows for there to be a valid legal norm even if it is not efficacious by and large or is completely inefficacious for a long period of time as long as there is a by and large efficacious legal order in place, that is, as long as there is the possibility that the norm acquire (if completely inefficacious from the moment of its positing) or reacquire (if inefficacious from a later moment) its efficacy.

Of course, one might argue that a norm would lose its validity when it lost its efficacy if a custom were established as a law-creating fact within a certain legal order[93]. However, according to Kelsen, it is not the new incompatible customary norm that arises alongside the old and inefficacious statutory norm which ends the validity of the statutory norm, but instead the custom of long-standing non-observance and non-application of the statutory norm[94]. Therefore, in order for a norm to lose its validity after having lost its efficacy, *desuetudo* would have to be established as a law-*repealing* fact by the legal order. However, besides the fact that legal orders, as a rule, do not regulate *desuetudo*, it would be unreasonable for them to do this also for the reason that this would mean that they would at the same time order the law-applying organs to apply valid legal norms and empower them to not apply them when they do not wish to and thus to bring their validity to an end.

From this it follows that general legal norms in fact lose their validity not when they lose their efficacy, but instead, and as is the case with individual legal norms, when they lose the possibility of their efficacy. However, since they also lose their validity when the legal order as a whole ceases to be by and large efficacious, that is, when the legal order's norms start being by and large inefficacious, one can say that a general legal norm loses its validity when a sufficient number of other norms of the system cease to be efficacious. Therefore, a general legal norm loses its validity either if it loses the *possibility* of *its* efficacy or if a sufficient number of other norms of the order lose *their efficacy*.

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92 Obviously, the loss of efficacy (*desuetudo*) is a condition for the end of validity of customary norms.

93 See Kelsen 1934: 73.

94 In *General Theory of Law and State* Kelsen says that «[d]esuetudo annuls a norm by creating another norm, identical in character with a statute whose only function is to repeal a previously valid statute». See Kelsen 1945: 119. Therefore, it seems that he allows for the existence of derogating customary norms. However, in *General Theory of Norms* he claims that «a derogating norm cannot arise by way of custom». See Kelsen 1991: 109. The reason is that customary norms can refer only to human behaviour (i.e., they can be only behaviour-prescribing norms), while derogating norms are metanorms, referring to the validity of other norms. See Kelsen 1991: 106-107.

5. Conclusion

According to Kelsen, efficacy is a condition for the validity of legal norms. However, from the analysis and reconstruction of Kelsen's views in *General Theory of Norms* it follows that in the case of norms posited by way of legislation, it is, in fact, not a norm's efficacy, but the possibility of its efficacy which is a condition for its validity. It turns out that the possibility of a norm's efficacy is a condition for both the beginning and the end of the norm's validity, with the exception of the case where a legal norm loses its validity when a sufficient number of other norms of the order lose their efficacy.

More specifically, taking into account the dynamic aspect of the legal order, the different types of norms, the distinction between the conditional and full validity of a norm and the distinction between norm-observance and norm-application, the analysis and reconstruction of Kelsen's view on efficacy as a condition for a norm's validity leads to the following conclusions.

(i) A general hypothetical sanction-decreeing legal norm acquires its validity when posited, under the condition that it is possible to observe or violate the general norm of behaviour which is implicit in it, and to immediately apply (observe) and non-apply (violate) the general hypothetical sanction-decreeing norm (which presupposes the possibility of the law-applying organs positing the corresponding individual categorical norms). It remains valid until derogated, or until its validity time runs out, or until the general norm of behaviour which is implicit in it loses the possibility of being observed or violated, or until the general sanction-decreeing norm loses the possibility of being mediately applied, or until a sufficient number of other norms of the legal order lose the possibility of being observed or applied.

(ii) An individual hypothetical sanction-decreeing legal norm acquires its validity when posited, or in virtue of the principle *res judicata* (if not posited in correspondence with a general sanction-decreeing norm), under the condition that it is possible to observe or violate the individual norm of behaviour which is implicit in it, and to apply (observe) or non-apply (violate) the individual categorical sanction-decreeing norm posited in correspondence with the individual hypothetical sanction-decreeing norm. It remains valid until derogated, or until its validity time runs out, or until the individual norm of behaviour which is implicit in it has been observed, or executed, or until it loses the possibility of being applied (although its validity time has still not run out).

(iii) An individual categorical sanction-decreeing legal norm acquires its validity when posited, or in virtue of the principle *res judicata* (if not posited in correspondence with a general sanction-decreeing norm), under the condition that it is possible to apply (observe) and non-apply (violate) it. It remains valid until derogated, or until its validity time runs out, or until executed, or until it loses the possibility of being applied (although its validity time has still not run out).

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