

Some Confusions surrounding Kelsen's Concept of Validity*

CARLOS SANTIAGO NINO

I.

Many writers assume that Kelsen's concept of validity is primarily related to such issues as the identity of a legal system, the membership of particular norms in a legal system, its internal consistency, and so on. The result is that, for many, Kelsen's concept of validity bears no affinity to the idea of validity prevailing in traditional legal philosophy, where the main concern has been with the justification of law. I believe, however, that this reading of Kelsen's concept of validity is mistaken. Proponents of this reading have been led to disregard important aspects of Kelsen's theory, formulating unwarranted and tortuous interpretations of it in order to show how it deals with issues that are erroneously supposed to be primarily connected to its concept of validity.

No doubt the peculiarities of Kelsen's theory help to explain how this confusion has been generated. In particular, Kelsen's strong positivistic bent makes it seem altogether implausible to attempt to associate his concept of validity with the concept familiar from traditional theories inspired by natural law. What is more, Kelsen does deal in his theory with problems like membership in a way that deceptively gives rise to an identification with the problem of validity.

By means of the following very general propositions, one can, I believe, provide a reasonably accurate summary of the recurrent

* *Editors' note:* Nino's article first appeared in *ARSP*, 64 (1978), 357–77. The first part of the article, at 357–65, appears with minor revisions here. Occasional alterations in quotations from existing English-language translations of Kelsen's works are made *sub silentio*.

features of the concept of validity employed in the justification of law in works as different as those of Aquinas,¹ Suárez,² and Puchta.³

(a) To predicate validity of a legal system, or of a particular legal rule, is to assert that it has binding force, that its prescriptions constitute conclusive reasons for action.

(b) When the validity of a legal system, or of a legal rule, is contested, this is tantamount to denying its existence, since the lack of validity is taken to imply that the system, or the rule, does not have the normative consequences that it claims to have. (Thus, for example, if an invalid rule purports to prohibit a certain act, that act would not thereby be prohibited; the rule would be as ineffectual in establishing *normative* relationships as if it had never been issued.)

(c) Even when the ascription of validity depends on certain facts (as, for example, in some conceptions, where the efficacy of a system is a necessary or even a sufficient condition for the ascription of validity), the meaning of 'validity' is nevertheless not descriptive but normative; that is, to say that a system or a particular legal rule is valid is to endorse it, to maintain that its application and observance are obligatory and justified. (This last-mentioned feature of the traditional notion of validity permits us to hold that the different authors whose views I am adumbrating employed the same concept of validity, notwithstanding wide discrepancies in their criteria for ascribing validity.)

It seems clear to me that these features are present in Kelsen's concept of validity, too. Under A, B, and C below, I offer support for this contention, showing that Kelsen's theory, like traditional philosophical accounts of law, equates the validity of the law with its binding force and its existence, and that it conceives of the ascription of validity as a normative judgment.

¹ See St Thomas Aquinas, *Summa Theologiae* (Blackfriars, 1966), *Primae-Secundae*, question 9, question 95 art. 2, question 96 arts. 4 and 5.

² See Francisco Suárez, *De Legibus*, Libro VI (Madrid: Instituto Francisco de Vitoria, 1971). [For bibliographical details on Suárez, see ch. 14 in this volume, at n.17.] For a very interesting analysis of the concept of validity in Suárez and a comparison of it with Kelsen's concept and that of other theorists, see Ernesto Garzón Valdés, 'Algunos modelos de validez normativa', *Revista Latinoamericana de Filosofía*, 3 (1977), 41-68, repr. in Garzón Valdés, *Derecho, Ética y Política* (Madrid: Centro de Estudios Constitucionales, 1993), 73-105, [appearing (in abridged form) in this volume as ch. 14].

³ See Georg Friedrich Puchta, 'Outlines of Jurisprudence as the Science of Right', in *Outlines of the Science of Jurisprudence*, ed. and trans. William Hastie (Edinburgh: T. & T. Clark, 1887), 1-134, at 41; Hastie's translation is taken from §§1-35 of *Cursus der Institutionen*, first published in 1841-2.

A. Validity as Equivalent to Binding Force.

In *General Theory of Law and State*, Kelsen writes:

To say that a norm is valid is to say that we assume its existence or—what amounts to the same thing—we assume that it has 'binding force' for those whose behavior it regulates.⁴

Kelsen then goes on to distinguish legal norms from commands, asserting that only legal norms, issued by authorized organs, obligate the individuals to whom they are directed. In the *Pure Theory of Law*, Kelsen writes:

The legislative act, which subjectively has the meaning of 'ought', also has that objective meaning—that is, the meaning of a valid norm—because the constitution has conferred this objective meaning upon the legislative act. The act whose meaning is the constitution has not only the subjective but also the objective meaning of 'ought', that is to say, the character of a binding norm, if—in case it is the historically first constitution—we presuppose in our juristic thinking that we ought to behave as the constitution prescribes.⁵

A bit further on in the same work, Kelsen writes:

To say that the behavior of an individual is commanded by an objectively valid norm amounts to the same as saying that the individual is obligated to behave in this way.⁶

Still further on in the *Pure Theory of Law*, Kelsen writes:

It was observed earlier that the validity of a norm (which means that one ought to behave as the norm stipulates) should not be confounded with the efficacy of the norm . . .⁷

B. Validity as Equivalent to Existence.

This feature of Kelsen's concept of validity, the notion that validity is equivalent to existence, is evident in the first quotation of the foregoing subsection, taken from the *General Theory of Law and State*. And it is still more evident in the preceding remark in that work: 'By validity we mean the specific existence of norms.'⁸ In the same work, Kelsen writes:

The existence of a legal norm is its validity; and the validity of a legal norm, although not identical with certain facts, is conditioned by them.⁹

⁴ *GTLS* 30.

⁷ *PTL* § 6(c) (p. 46).

⁵ *PTL* § 4(b) (p. 8).

⁸ *GTLS* 30.

⁶ *PTL* § 4(d) (p. 15).

⁹ *GTLS* 48.

And, at a later point in the work, he writes: '[N]ormative jurisprudence asserts the validity of a norm, and that means its existence.'¹⁰

There are similar remarks in the *Pure Theory of Law*, where there is also an interesting explanation of what is involved in identifying the binding force of a norm with its existence:

It is, however, necessary to distinguish the subjective and the objective meaning of the act [of will]. 'Ought' is the subjective meaning of every act of will directed to the behavior of another individual. But not every such act has also objectively this meaning, and only if the act of will has also the objective meaning of an 'ought', is this 'ought' called a 'norm'. If the 'ought' is also the objective meaning of the act, the behavior to which the act is directed is regarded as something that *ought* to be, not only from the point of view of the individual who has performed the act, but also from the point of view of both the individual to whose behavior the act is directed and a third individual not involved in the relation between the two.¹¹

C. Validity as a Normative Concept.

Validity qua normative concept is the crucial point in understanding Kelsen's concept of validity. For until the normative character of Kelsen's concept is fully grasped, interpretations that identify it with, for example, the membership of norms in a legal system will still command attention. In such interpretations, the assumption is made that when Kelsen equates validity with binding force, he is using 'binding force' in a special sense (to refer, for example, to the circumstance prescribed by another norm of the system, namely, that the norm in question be obeyed), and that when he equates validity with existence, 'existence' just means the membership of the norm in question in the legal system.

That the ascription of validity to a legal norm does not exhaust itself in the description of certain facts is something Kelsen asserts repeatedly. For example:

[That a] norm referring to the behavior of a human being is 'valid' means that it is binding—that an individual ought to behave in the manner determined by the norm. It has been pointed out in an earlier context that the question of why a norm is valid, why an individual ought to behave in a certain way, cannot be answered by ascertaining a fact, that is, by the statement that something *is*. The reason for the validity of a norm cannot be a fact. From the circumstance that something *is* cannot follow that something *ought* to be; and that something *ought* to be cannot be the reason that something *is*.¹²

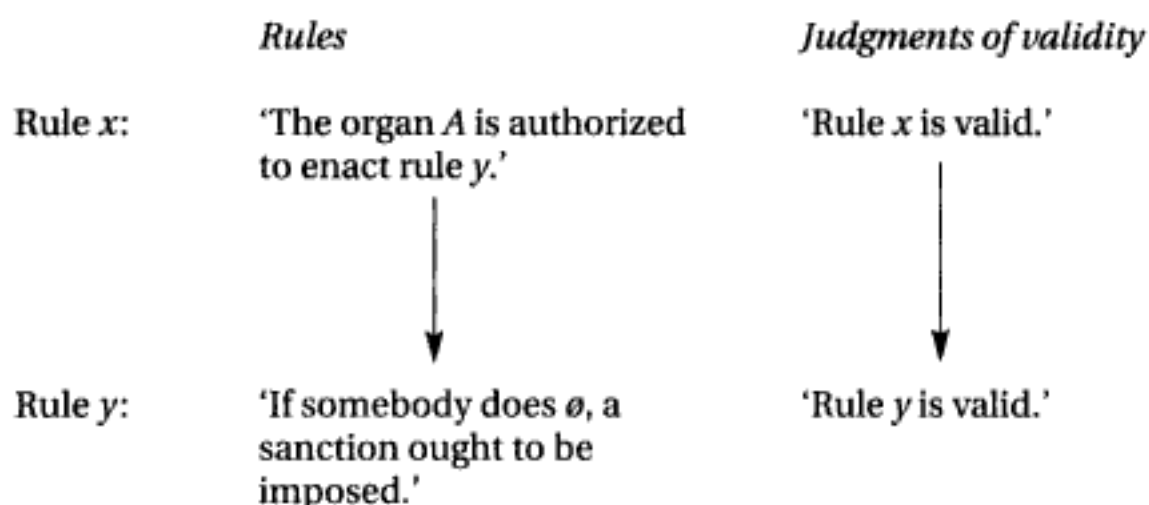
But perhaps this feature of the Kelsenian concept of legal validity can be more firmly established if, instead of relying on Kelsen's explicit

¹⁰ *GTLS* 170. ¹¹ *PTL* § 4(b) (p. 7) (Kelsen's emphasis).

¹² *PTL* § 34(a) (p. 193) (Kelsen's emphasis).

remarks, I show that a normative concept of validity is understood in the general structure of Kelsen's theory.

In Kelsen's theory, the validity of a legal rule requires that its issuance must be authorized by another rule, one that is itself valid. The judgment that a certain rule is valid presupposes, therefore, a judgment that another rule, which authorizes the creation of the former, is valid. Legal judgments of validity—judgments, namely, about rules that stand in a certain relation of 'derivation' to one another (constituted by the fact that one authorizes the issuance of the other)—themselves stand in a certain relation of 'derivation' to one another. Whereas one rule 'derives' from another when the latter authorizes the creation of the former, a legal judgment that a rule is valid 'derives' from the judgment that another rule is valid when the former judgment presupposes the latter. This can be illustrated as two parallel chains of 'derivation', one of rules and the other of judgments, formulated typically by jurists, of the validity of these rules:



Now, when it is the case that the rule to which a judgment of validity refers is the highest-level positive norm of a legal system, Kelsen states that its validity or binding force is presupposed and that the formulation of that presupposition *is* the basic norm of the system.¹³ He also says that 'since the reason for the validity of a norm can only be another norm, the presupposition must be a norm; not one posited (i.e. created) by a legal authority, but a presupposed norm.'¹⁴ Following this remark, Kelsen offers a well-known formulation of the basic norm, namely: 'One ought to behave as the constitution prescribes.'¹⁵ From assertions such as these, it is easy to infer that the basic norm is not a norm that belongs to the chain of derivation of rules, but is part of the chain of derivation of

¹³ See *GTLS*, at 115. ¹⁴ *PTL* § 34(c) (p. 200).

¹⁵ *PTL* § 34(c) (at p. 201); see also *GTLS*, at 116.

judgments of validity. In other words, the basic norm *is* a judgment of validity. It is the fundamental judgment of validity which must serve as the basis of all other judgments about the validity of rules whose creation is directly or indirectly authorized by the constitution. The obvious conclusion is that if the fundamental judgment of validity, according to Kelsen, is itself a norm—the basic norm—and if from norms nothing but norms can be derived, then all further judgments of validity about rules other than the constitution must themselves be norms. Judgments of validity (including the basic norm) prescribe that what is stipulated by the rules referred to in the judgments ought to be done. If the rule in question stipulates that some act is obligatory, to predicate of that rule that it is valid implies the statement that *there is* an obligation to perform that act. (This is not the same as merely saying that there is a rule that prescribes such an obligation; rather, it entails the statement that the rule succeeds in creating the obligation it prescribes.) Ascribing validity to a rule (which thereby comes to be conceived of as a *norm*) marks the shift in Kelsen's theory from an 'inverted-commas' normative language to a direct normative language for describing the content of the law.¹⁶

II.

As I have already remarked, many contemporary theorists disregard the normative character of Kelsen's concept of validity, explicitly or implicitly assuming that it describes features of a legal system or of a particular legal norm, features that are for the most part related to the criteria for identifying a legal system, distinguishing it from others, and for establishing that a legal norm belongs to a certain legal system. It is true that Kelsen relates the question of the validity or the binding force of a legal system or norm to the question of the identification of legal systems and to the question of the membership of norms in those systems. He writes:

The legal order is a system of norms. The question then arises: What is it that makes a system out of a multitude of norms? When does a norm belong to a certain system of norms, an order? These questions are closely connected to the question as to the reason for the validity of a norm.¹⁷

But Kelsen's assertion that validity is closely connected to identification and membership by no means warrants the conclusion that questions of

¹⁶ See the distinction between 'inverted-commas' and 'direct normative language', in R.M. Hare, *The Language of Morals* (Oxford: Clarendon Press, 1952), at 124.

¹⁷ *GTLS* 110.

validity, in Kelsen's theory, are reducible to questions of identification and membership.

This impression has undoubtedly been caused by the fact that Kelsen's solutions to both kinds of problems can be stated in a superficially similar way. That is, Kelsen's answer to the question about what makes a legal system valid can be taken to be 'the basic norm', and he seems to give the same answer to the question of what identifies a given set of norms as a unitary legal system different from other such systems. It is, however, easy to see that the two answers are in fact substantially different. Kelsen's solution to the problem of the validity of a legal system might be paraphrased as follows: 'A legal system is valid when we presuppose a basic norm that prescribes that what the system's rules stipulate ought to be done.' A similar answer to the problem of the identity of a legal system would be not merely wrong but, indeed, absurd and wrongheaded. In fact, Kelsen's solution to this problem might be paraphrased as follows: 'A set of norms constitutes a unitary legal system if validity can be ascribed to these norms on the basis of one and the same basic norm.' To be sure, this is not a paraphrase of the basic norm or of any other norm, but a formulation of a criterion of identification that points to the circumstance that one and the same basic norm is presupposed when we ascribe validity to all the norms of the same legal system. Thus, authors like Carlos E. Alchourrón and Eugenio Bulygin¹⁸ are mistaken when they criticize Kelsen's basic norm on the ground that what is needed for the identification of a legal system is a criterion and not a norm. Kelsen's basic norm establishes the obligatoriness of a legal system; the identity of that system is determined by a criterion that takes into account the fact that one and the same basic norm is presupposed when obligatoriness is ascribed to all the norms of the system. As a criterion of identity, however, the foregoing is vacuous, for the content of each basic norm (and, consequently, its own identity) cannot, in the context of Kelsen's theory, be established apart from comprehending the norms that belong to the legal system to which the basic norm ascribes binding force.¹⁹

Kelsen also seems to resolve the question of the validity of a particular norm and the question of its membership in a legal system in an identical way. His answer to both questions can be stated as follows: 'A norm is valid or belongs to a legal system when it derives from a valid norm of that system.' This way of presenting his answer to those questions is, however, misleading. The answer can be broken down into two parts,

¹⁸ See Carlos E. Alchourrón and Eugenio Bulygin, *Normative Systems* (Vienna and New York: Springer, 1971), at 72-7.

¹⁹ See this criticism in Raz, *CLS*, at 102.

each of which deals with one of the two questions at stake: (a) 'A norm is valid when it derives from a valid norm,' and (b) 'A norm belongs to a legal system when it derives from a norm that belongs to that system.' The latter statement endorses a 'genetic' criterion of membership, which has not enjoyed a great deal of discussion in modern legal theory. (Of course, it would have to be completed with a clause dealing with the membership of the fundamental norms of the system, a clause not provided by Kelsen.) The genetic criterion of membership is quite independent of the validity of the norms in question; nowhere in Kelsen's works is it suggested that this criterion applies to valid legal norms alone.

Despite the fact that the criterion of membership of non-fundamental norms and the criterion for 'transmitting' validity from the constitution referred to by the basic norm to norms not directly referred to by the basic norm are independent of one another, both criteria are based on the same notion of 'derivation', according to which one norm 'derives' from another when its issuance is authorized by the other. The result is that when the fundamental norms of the system are held to be valid, the class of norms that are valid according to a certain basic norm is coextensive with the class of norms that belong to the system to which that basic norm applies. Kelsen, quite obviously, is much in favour of maintaining this coextensivity (which many authors have confused with identity), and it is this feature of his theory that brings so many unwelcome results. The fact is that while, in relation to membership, the derivation of one norm from another (in the sense explained) seems a *prima-facie* sound criterion, it is clearly insufficient in relation to the 'transmission' of validity. If we accept the validity of a certain set of legal norms, we are committed to accepting the validity of certain other norms, not only when the norms whose validity we accept authorize the issuance of these other norms, but also when they 'recognize' or establish the obligation to obey these other norms. Thus, it has been argued²⁰ that a legal system could recognize as valid the rules of other legal systems or of private associations without thereby implying that those rules become part of the legal system in question. But the insufficiency of Kelsen's criterion for 'transmitting' validity is best manifested in his treatment of another problem: that of invalidatable norms.²¹

Norms that have been issued in violation of the conditions established by valid norms of the system are, in some circumstances, considered to be obligatory until some competent organ declares them invalid. According to the genetic criterion of membership, these norms are not part of the legal system in question. Whether or not this is a sound solu-

²⁰ See Joseph Raz, *Practical Reason and Norms* (London: Hutchinson, 1975), 2nd edn. (Princeton: Princeton UP, 1990), at 152-4.

²¹ [On this terminology, see *LT* § 31(h) (at p. 73 n.56).]

tion may be in dispute. If, however, validity were equivalent to membership, there would not be any inconsistency whatsoever in the proposition that a norm that is not valid in a legal system is, nevertheless, obligatory according to that legal system (just as in the case of norms of another legal system that are deemed obligatory by rules set down in the field of conflicts of law).²² The fact that Kelsen does worry about this problem suggests again that he identifies validity not with membership but with obligatoriness or bindingness. Given this identification, a norm that is obligatory must obviously be valid. But Kelsen considers a norm to be valid only if its issuance is authorized by a valid norm. Thus, he is compelled to adopt the absurd view that invalidatable norms are, in fact, authorized by the applicable higher-level norms, since the latter have, along with the explicit content violated by the invalidatable norm, a tacit clause authorizing the creation of any norm, with any content whatever and issued by means of any procedure whatever.²³ Of course, the clear escape from this problem would be to recognize that validity or obligatoriness is transmitted from one norm to another not only when the former authorizes the creation of the latter, but also when the former imposes the obligation to obey or to apply the latter. Thus, an invalidatable norm would be a norm that, not having been authorized by valid norms of the system in question (and so not belonging to that system), is held by other norms of the system to be obligatory, and therefore valid, until some special procedure providing for invalidation has been carried out. This solution would undermine the claim of the coextensivity of legal validity and membership in a legal system—but that is all to the good, since the defence of coextensivity is one of the most remarkable weaknesses in Kelsen's theory and the source of the recent confusion, among interpreters of that theory, between legal validity and membership.²⁴

²² See this analogy in Eugenio Bulygin, 'Sentenza giudiziaria e creazione di diritto', *RIFD*, 44 (1967), 164–80.

²³ See *GTLS*, at 153–62.

²⁴ For a more extensive treatment of the problem of conflicts between norms at different levels in the Kelsenian legal system, see my paper 'El concepto de validez y el problema del conflicto entre normas de diferente jerarquía en la Teoría Pura del Derecho', in *Derecho, Filosofía y Lenguaje. Homenaje a Ambrosio L. Gloja*, ed. Genaro R. Carrió (Buenos Aires: Editorial Astrea de Alfredo y Ricardo Depalma, 1976), 131–44.

