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Assessed Essay (Second Round)

Does law have to be effective in order for it to be valid?

It is important to consider the terms 'valid' and 'effective'. There are various approaches to the concept of "validity" of law. Traditional natural law theories consider that the source of law is morality, thus, there is no separate idea of legal validity. In this theory the only concept of validity is moral validity.[1] Alf Ross, suggests that validity involves 'the actual effectiveness of the rule which can be established by outside observations … the way in which the rule is felt to be … socially binding.'[2] While Hans Kelsen suggests that the validity of a norm can be described by saying, something 'ought to, or ought not to, be done.'[3] This is the view that validity is 'the specific existence of the law'.[4]

The ordinary use of the word effective means to be producing a result, especially the desired or intended result. Kelsen explains that the effectiveness of a norm is 'the fact that the norm is actually applied and obeyed, the fact that people actually behave according to the norm.'[5] This is the legal positivist notion that one element of law is social efficacy. There is to be compliance with the norm via the imposition of sanctions for non-compliance, which makes the norm socially effective.

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[1] J Raz, 'Kelsen's Theory of the Basic Norm' (1974) 19 Am J Juris 94, 100.

[2] A Ross, *On Law and Justice* (Stevens & Sons, London 1988) 16.

[3] H Kelsen, *Pure Theory of Law* (University of California, California 1967) 10.

[4] H Kelsen, *An Introduction to the Problems of Legal Theory* (Clarendon Press, Oxford 1992) 60.

[5] ibid.

Law cannot be ascribed with truth or falsity, but it can be ascribed with validity.[6] Modern jurists have adopted certain criteria of validity, which, when applied, can determine whether a legal norm can indeed be called "law". Since there is no consensus as to one particular criterion of validity of law, there are differences between the criteria of validity that jurists have adopted. One element in the criteria of the validity of law, where there is debate, is the effectiveness of law. There are different concepts as to the relationship between the validity and the effectiveness of law. Kelsen states that the 'correct determination of this relationship is one of the most important and at the same time most difficult problems of a positivistic legal theory.'[7] Nevertheless, this essay will analyse the relationship between the validity and the effectiveness of law, to argue that, prevalently, law does not have to be effective in order for it to be valid.

There is some connection between the effectiveness of law and the validity of law. In taking a human behavioural approach to validity, Kelsen submits that the connection is that 'a minimum of effectiveness is a condition of validity'.[8] He argues that a law can be considered as valid only if it is applied and the behaviour that it is to regulate actually conforms to it, to some degree.[9] Hence, a law that is not applied or obeyed by anyone is not considered as a valid law.

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[6] H Kelsen, *General Theory of Law and State* (20th Century Legal Philosophy Series: Vol 1, Russell & Russell, New York 1961) 110.

[7] *Pure Theory of Law* (n 3) 211.

[8] ibid 11.

[9] ibid.

The Greater London (Central Zone) Congestion Charging Order 2004 imposes charges for using or keeping motor vehicles on specified roads in Greater London, during specified hours and on specified days. The aim of this Order, neglecting any cynicism, is to reduce the use of motor vehicles in the central areas of London. Take the scenario of this Order being violated but no charges are imposed. Also, the use of motor vehicles does not change at all, so as to move closer towards achieving the aim of the Order. In such a case, it would be justified to say that the Order is not effective. There is no difference between the Order being in existence and the Order not being in existence. Therefore, since the state of the Order is like that of non-existence, it would be futile to say that the Order is valid.

Prima facie, Ross' concept of the validity of law seems that effectiveness means validity. This would immediately provide an answer as to whether law has to be effective in order for it to be valid. It is commonly tempting to equate effectiveness as being equivalent to validity. Such an approach considerably simplifies the analysis, theoretically.[10] It simply concludes that if law is effective, it is therefore valid. However, such an approach assumes that effectiveness is the only criterion of validity. It fails to consider the formal elements of law, that is, the way in which law is created.[11] A Bill which has been passed by the House of Parliament is not law that it is valid, until it goes through the

[10] *An Introduction to the Problems of Legal Theory* (n 4) 60.

[11] G Christie, 'The Notion of Validity in Modern Jurisprudence' (1964) 48 Minn L Rev 1049, 1051.

stage of Royal Assent.[12] It is only after Royal Assent that legislation becomes an Act of Parliament.

John Finnis identifies that the main proof of a rule's validity is to show that the rule was created by an act which 'according to the rules in force … amounted to a valid and therefore operative act of rule-creation'.[13] This means that law is valid, i.e. in actual existence, if it is validly created. Hence, law can be valid before it even has the opportunity to be effective.[14] This presents the possibility that validity of law might be independent of its efficacy.[15] But, it is argued that law that is validly created can lose its validity by way of desuetude.[16] Law that is never applied or obeyed may lose its validity, even though it is still in existence, per se, in a statute book. This is the situation where custom is authorized to be a form of law creation, thus it is given the capability to "repeal" statutory law.

Nonetheless, Kelsen himself acknowledges that validity and effectiveness do not coincide in time. That a law 'becomes valid before it becomes effective'.[17] This suggests that

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[12] —, 'Bill Stages' (UK Parliament) <http://www.parliament.uk/about/how/laws/stages.cfm> accessed 23 April 2008.

[13] J Finnis, *Natural Law and Natural Rights* (Clarendon Law Series, OUP, Oxford 1980) 268.

[14] *Pure Theory of Law* (n 3) 211.

[15] *An Introduction to the Problems of Legal Theory* (n 4) 63.

[16] *Pure Theory of Law* (n 3) 213.

[17] ibid 11.

effectiveness is not a pre-condition of validity. The relationship between efficacy and validity is attempted to be clarified by arguing that efficacy is a necessary condition but not a sufficient condition for validity.[18] This may suggest that validity of law is independent of whether efficacy comes before or coincides with it. Following this, it could be argued that, it is because efficacy is a necessary condition of validity that law can be valid before it is effective. That, once law is valid, it then becomes necessary for it to be effective. If it is permanently ineffective it will lose its validity.[19]

However, a law can continue to be ineffective whilst it remains valid. The use of a hand-held phone or similar device while driving was prohibited in the UK, in December 2003. This law was enforced with a fixed £30 penalty, which could be raised to as high as £2,500. Nevertheless, in 2006 alone, 164,900 fixed penalty notices were issued in England and Wales, an increase of 38,100 from the previous year.[20] The increase could be a reflection of the police's effort to enforce the law. It could also be a reflection that people are ignoring the law. Plus, it is unknown how many offenders are not caught. The law is applied but it does not seem, for the most part, to be obeyed. It is argued that using a mobile phone 'while driving must become as socially unacceptable as drink-driving has'.[21] The ban on the use of a mobile phone while driving is in actual

[18] *General Theory of Law and State* (n 6) 118.

[19] ibid 119.

[20] BBC News, 'Increase in mobile-using drives' (UK, 2008) <http://news.bbc.co.uk/1/hi/uk/7375432.stm> accessed 3 May 2008.

[21] ibid

existence and was validly created. But it has remained ineffective since it came into existence and is still valid law.

The above example may not quite fit the definition of permanently ineffective. Nevertheless, if a law that is validly created and is permanently ineffective, if it is still in specific existence, e.g. in a statute, it is still valid law. It will remain as valid law until it is repealed by subsequent law.

Kelsen's concept of effectiveness and his theory that a minimum of effectiveness is a condition of validity can be challenged as being insufficient. It is not sufficient for people to actually behave according to the norm, the majority of people have to behave according to the norm and they have to do so consistently. Effectiveness of law is more accurately defined when the law is socially accepted as the norm of behaviour in society. There are other reasons, besides sanctions, why people appear to "conform" to the law. Kelsen accepts this, but suggests that, in such cases, it is the law that is effective because these other reasons for obedience, e.g. religion, ethics, are effective.[22] But, the basis of obedience is in these other motives and not the law. There is no causal link between obedience to a religious rule, which happens to result in the behaviour that the law is trying to achieve, and the effectiveness of law.

From Lon Fuller's perspective the "is" and "ought" of law can not be separated. This

[22] *Pure Theory of Law* (n 3) 12.

suggests that the effectiveness of law (the is-fact) and the validity of law (the ought) are fused together. He seemingly equates effectiveness to validity, validity in the sense of the existence of law. Fuller argues that in order to have law that is effective it must, to some degree, fulfil the requirements of legality. This is because 'some minimum adherence to legality is essential for the practical efficacy of law'.[23] Fuller argues that law is effective, thus, valid, if it is general, public, operates prospectively and is comprehensible; if it is consistent, possible to be obeyed, constant over time and if the administration of law corresponds with the law declared.[24] One could argue that the principle of legality can not be simply confined to a criterion of eight conditions. However, never does Fuller declare his eight conditions that make law possible an exhaustive list.

On the one hand, there appears to be a flaw in Kelsen's hierarchical structure of norms. He argues that effectiveness 'is stipulated as a condition for the validity by the basic norm'.[25] But in both dynamic and static legal systems the validity of the basic norm is presupposed.[26] There is no legal basis for this presupposition; it can be summed up as being a mere belief. It is suggested that 'the basic norm is not an actual norm of the positive legal order - since it is simply an idea'.[27] Therefore, the concept that

[23] L Fuller, *The Morality of Law* (Revised edn Yale University Press, New Haven 1969) 156.

[24] ibid 39.

[25] *Pure Theory of Law* (n 3) 208.

[26] 'The Notion of Validity in Modern Jurisprudence' (n 9) 1052.

[27] N Duxbury, 'Kelsen's endgame' (2008) 67(1) CLJ 51, 59.

effectiveness is a condition of validity can be argued to be a mere assumption.

On the other hand, efficacy as a condition of validity may be found when considering a particular law as part of a legal system. It is argued that a norm is valid only on the condition that it belongs to a system that is 'on the whole, efficacious'.[28] In this, Kelsen argues that a particular law is valid as long as it is part of a valid legal system.[29] Where a legal system is, on the whole, failing to regulate human behaviour to conform to the law, its validity will be brought into question and contest by the people.

But this means that the concept of effectiveness as a necessary condition of validity does not apply to a single law, only to a legal order. Thus, confirming that a particular rule can be valid and not be effective. Hart suggests that one 'who makes an internal statement concerning the validity of a particular rule of a system may be said to *presuppose* the truth of the external statement of fact that the system is generally efficacious.'[30] This emphasises that the concept of effectiveness as a condition of validity largely rests on an assumption or belief. Hart argues that there is no necessary connection between a rule's validity and efficacy 'unless the rule of recognition of the system includes among its criteria … the provision … that no rule is to count as a rule of

[28] *General Theory of Law and State* (n 6) 42.

[29] ibid 122.

[30] HLA Hart, *The Concept of Law* (Clarendon Law Series, 2nd edn OUP, Oxford 1994) 104.

the system if it has long ceased to be efficacious.'[31]

Furthermore, Kelsen's concept of effectiveness seems to have been slightly altered in his later writings. He suggests that 'efficacy is a quality of the actual behavior of'[32] people and not a quality of law itself. But, effectiveness is a measurement of law's ability to regulate human behaviour to conform to itself. It is law's ability to govern human behaviour to produce its intended result in society. Nevertheless, a law can be valid when it lacks this ability, providing that it was validly created and especially if it is applied by officials and the Courts.

Therefore, as to the relationship between effectiveness and validity, it may be adequate to conclude that law, in reference to a legal system as a whole, has to be effective in order for it, to remain valid. In this concept of effectiveness and validity, it is said that a particular law of the legal system is valid as long as the legal system itself is valid and effective. But this concept is theoretically flawed as it supports the conclusion that law does not have to be effective in order to be valid. As long as the legal system as a whole is valid and effective, particular laws can be validly created and never be effective, but still be deemed as valid. Moreover, the reality of law in society is that there are laws that are effective and valid and there are also laws that are not effective but still valid. Therefore, for these reasons and those outlined in this essay, it is more appropriate to

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[31] *The Concept of Law* (n 32) 103.

[32] *General Theory of Law and State* (n 6). Cf *Pure Theory of Law* (n 3) 10.

conclude that law does not have to be effective in order for it to be valid.

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