

The Relevance and Modification of Hans Kelsen's Legal Positivism in Indonesian Legal Development

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Abstract

Introduction: The school of legal positivism developed by Hans Kelsen through the Pure Theory of Law and the Stufenbau Theory has an important influence on the development of modern law.

Purposes of the Research: This research aims to analyze Hans Kelsen's thoughts and their implications for legal development in Indonesia.

Methods of the Research: The method used is normative legal research with a conceptual and legislative approach supported by literature studies.

Findings of the Research: The results of the study show that Hans Kelsen's thinking contributes to the development of Indonesian law, especially in the application of the hierarchy of laws and regulations and the testing mechanism of legal norms. However, its application is not carried out purely because it still pays attention to the values of Pancasila, morality, and substantive justice. Thus, Hans Kelsen's theory of legal positivism remains relevant in the development of national law, even though it has been adjusted to the characteristics of the Indonesian legal system.

Keywords: Hans Kelsen; Legal Positivism; Indonesian Legal Development.

Submitted: 2026-06-20

Revised: 2026-08-27

Accepted: 2026-08-29

Published: 2026-09-20

How To Cite: Berliana Ath Thahirah, Lola Naury Marsetina, Rosnila Nur Ramadhannia, Mannissa Sannia Asyisytri, and Elviandri. "The Relevance and Modification of Hans Kelsen's Legal Positivism in Indonesian Legal Development." *TATOHI: Jurnal Ilmu Hukum* 6 no. 6 (2026): 282-290. <https://doi.org/10.47268/tatohi.v6i6.4011>

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INTRODUCTION

The development of modern society in Indonesia demands a legal system that is not only able to provide certainty and order, but also responsive to the ever-changing complexities of social life. Along with these dynamics, law exists as a result of the process of evolution of society itself and develops according to the needs that surround it¹. Law is essentially the product of human creation, taste, and karsa, law is born to create order². However, the applicability of the law is not solely determined by the social acceptance of a norm, but also by the existence of an authority that has the authority to form and enforce it. The state is positioned as an institution that gains legitimacy to establish legal norms, so the validity of a rule is often associated with the formal authority aspect of the institution that forms it.

It is at this point that differences of opinion arise on the basis of the applicability of law, which is essentially rooted in the character of philosophy as a discipline that does not stop at the descriptive level, but critically tests basic assumptions that are often taken for granted. Philosophy always places the question of "why" and "what is the basis of truth" as the main

¹ M. Saleh dan Z. A. Hoesein, "Relevansi Aliran Positivisme Hukum dalam Sistem Hukum Indonesia," *Journal of Innovative and Creativity* 5, no. 3 (2025): 31473-31488, <https://doi.org/10.31004/joecy.v5i3.4649>

² L. M. A. Ahadi, "Efektivitas Hukum dalam Perspektif Filsafat Hukum: Relasi Urgensi Sosialisasi terhadap Eksistensi Produk Hukum," *Jurnal USM Law Review* 5, no. 1 (2022): 110-127, <https://doi.org/10.26623/julr.v5i1.4965>

starting point in assessing the validity of a concept, including in understanding law as a system of norms. From this reflective and critical approach, various studies in legal philosophy have developed. Legal philosophy is a branch of philosophy that seeks to examine in depth the essence, purpose, and basis of the applicability of law in public life. Furthermore, legal philosophy plays an important role in providing a deeper view of justice and truth that is the basis for decision-making in legal practice³. This is in line with the normative principle in the Qur'an which emphasizes the importance of justice in every decision-making process, as Allah says in Qur'an. Al-Ma'idah verse 8: "O you who believe! Be the enforcers of justice for Allah's sake, (become) witnesses justly, and do not let your hatred of a people lead you to act unjustly. Be just, for it is closer to piety, and fear Allah, indeed, Allah is Thorough in what you do." (QS. Al-Maidah: 8)

One of the schools that has had a great influence on the development of modern law is legal positivism. The reasoning in legal positivism has its roots in the development of the school of positivism which was matured by the great changes that took place in European society, especially after the eruption of the Industrial Revolution in England and the Bourgeois Revolution in France in the mid-18th century⁴. In this period, the dominance of the power of the king and the church as the main source of authority of knowledge (old epistemology) began to undergo an increasingly intense shift and criticism. Traditional authority that was previously considered absolute is no longer taken for granted, because a new tendency has emerged in thought that emphasizes rationality, proof, and measurability as the basis of truth. The development of positivism in the realm of science has significant implications for the way law is understood, where law is reduced to an empirical object that can be observed as a social phenomenon, without having to rely on metaphysical values or moral considerations. Positivism itself only recognizes positive and measurable knowledge as a form of scientific truth, so in the context of legal science, this view ultimately confirms the existence of one type of law that is considered scientifically valid, namely legal positivism.

This school places law as a system of norms that derives its validity from the procedures and authority of its formation, not from moral, religious, or other subjective values. The presence of legal positivism is an important point in the history of legal thought because it offers the concept of legal certainty that is considered to be able to answer the needs of modern society for order and stability. Among the figures of legal positivism, Hans Kelsen is known as the thinker who succeeded in providing the most systematic theoretical formulation through the *Pure Theory of Law*. Through his theory, Kelsen sought to build an autonomous legal science and independent of the influence of other disciplines. However, the birth of this thought cannot be separated from the intellectual condition of his time which still debated the relationship between law, morality, politics, and justice. Therefore, Hans Kelsen's thought not only made a theoretical contribution to the development of legal positivism, but also influenced the formation of modern legal systems in various countries, including Indonesia.

Based on this description, it can be understood that Hans Kelsen's ideas contained in *the Pure Theory of Law* and *Stufenbau Theory* are one of the influential theoretical foundations in

³ A. I. Asa, M. M. Syamsuddin, A. Wahyudi, dan A. Hamzah, "Aliran Filsafat Hukum sebagai Cara Pandang (Worldview) Hakim dalam Menjatuhkan Putusan Pidana," *Jurnal Pembangunan Hukum Indonesia* 7, no. 2 (2025): 199–227, <https://doi.org/10.14710/jphi.v7i2.20-48>

⁴ M. Julyano dan A. Y. Sulistyawan, "Pemahaman terhadap Asas Kepastian Hukum melalui Konstruksi Penalaran Positivisme Hukum," *Crepido* 1, no. 1 (2019): 13–22, <https://doi.org/10.14710/crepido.1.1.13-22>

the development of modern legal thought. Through the Theory of Pure Law, Kelsen seeks to separate law from various external factors such as politics, ethics, religion, and social norms so that law can be understood as an independent system of norms, while the concept of norm hierarchy, which was later perfected by Hans Nawiasky, emphasizes the existence of a tiered relationship between legal norms, where the validity of a norm is determined by its conformity with norms at a higher level. These two ideas are not only the theoretical basis for understanding law as an autonomous system of norms, but also influence the development of legal practice in various countries. Therefore, the study of the school of legal philosophy, especially Hans Kelsen's legal positivism, is important to trace the influence of his thinking on the development of world law and its implications for the legal system in Indonesia.

METHODS OF THE RESEARCH

This research uses a qualitative method with a normative legal approach. The qualitative method was chosen because it allows researchers to examine and analyze legal concepts in depth through descriptive data sourced from literature studies, including scientific literature, academic works, and legal documents relevant to legal philosophy. This approach is used to comprehensively understand the construction of legal positivism thought, especially in the perspective of Hans Kelsen as one of the main figures in pure legal theory and norm hierarchy theory. Meanwhile, the normative approach is used to examine and examine norms and doctrines in law related to legal positivism, especially those that emphasize the concept of law as a system of norms that are autonomous and independent of moral, political, and metaphysical elements. The analysis in this study is focused on Hans Kelsen's thoughts on *the Pure Theory of Law*, including the concept of validity, hierarchy of norms, and the separation between law and morality in the modern legal system. In addition, the analysis is also directed at the implications of this thinking on the development of law in Indonesia, especially in understanding the position of individuals as legal subjects dealing with the Indonesian justice system which is morality. The collection of legal materials is carried out through *library research* by examining various written sources related to legal philosophy and legal positivism. Furthermore, the legal material is analyzed qualitatively by a descriptive-analytical method, namely by defining, interpreting, and reconstructing the legal concepts put forward by Hans Kelsen, then connecting them with modern law, it is hoped that the research can provide a deeper understanding of the position of legal positivism in the framework of legal philosophy and its relevance in contemporary legal science, especially in Indonesia.

RESULTS AND DISCUSSION

A. History of the Birth of the School of Legal Positivism

The school of legal positivism was born as a response to the dominance of natural law thought that places morality, religion, and universal values as the basis for the applicability of law⁵. In the 19th century to the beginning of the 20th century, the development of the modern state demanded a legal system that was able to provide certainty, order, and uniformity in people's lives. This condition encouraged jurists to separate the law from non-juridical elements so that the law could be understood as a system of norms that stood alone.

⁵ A. Fanani dan M. S. Zulkarnain, "Understanding John Austin's Legal Positivism Theory and Hans Kelsen's Pure Legal Theory," *Peradaban Journal of Law and Society* 1, no. 2 (2022), <https://doi.org/10.59001/pjls.v1i2.41>

The applicability of a law in the view of legal positivism is not determined by the fairness or not of the content of the law, but by the procedure for its formation in accordance with the applicable rules. Therefore, this school emphasizes the importance of legal certainty as the main goal in the implementation of the legal system.

The development of the school of legal positivism cannot be separated from the contributions of thinkers such as Jeremy Bentham, John Austin, and Hans Kelsen. If Bentham and Austin are known as the pioneers of classical legal positivism, then Hans Kelsen is considered a figure who perfected legal positivism through a more systematic and scientific approach. Kelsen's thought seeks to answer the question of why. A legal norm can be considered valid as well as how the relationship between legal norms in a legal system is. This contribution makes Kelsen one of the most influential figures in the development of modern legal philosophy.

Hans Kelsen was born on October 11, 1881 in Prague, which at the time was part of the Austro-Hungarian Empire, to a Jewish family that later settled in Vienna, Austria⁶. His father was named Adolf Kelsen and his mother was named Auguste Löwy. From a young age, Kelsen showed a great interest in science, especially in the fields of law and philosophy. He studied law at the University of Vienna and later developed into an academic and legal expert who had a great influence on the development of modern legal theory. In addition to being known as a legal philosopher, Kelsen also played a role in drafting the Austrian Constitution of 1920 and was a judge at the Austrian Constitutional Court.

Hans Kelsen's thought was heavily influenced by Neo-Kantian philosophy which distinguishes between the world of facts (sein) and the world of norms (sollen)⁷. This influence encouraged Kelsen to view law as a system of norms that must be studied separately from political, moral, religious, and sociological aspects. According to Kelsen, law cannot be explained only through social facts, but must be understood based on norms that govern human behavior. This view then became the basis for the birth of a legal theory known as the Pure Theory of Law or Pure Law Theory.

Hans Kelsen's most famous monumental work is Pure Theory of Law (Reine Rechtslehre) which aims to build a legal science that is free from political, moral, and other non-juridical influences. Through this theory, Kelsen seeks to make law a pure and objective science. According to him, the task of law is not to judge whether a law is fair or not, but to explain how a norm obtains its validity in a legal system. Therefore, the Theory of Pure Law is one of the main foundations in the development of the modern school of legal positivism and is still widely used in the study of law to this day.

In addition to the Theory of Pure Law, another important contribution is the theory of the hierarchy of legal norms or Stufenbau Theorie. Through this thought, Kelsen explained that legal norms are arranged in stages, where lower norms derive validity from higher norms⁸. All legal norms in this theory ultimately originate from a basic norm called Grundnorm. This concept explains why a legal system can run regularly and have legal

⁶ C. I. Arimba, "Hans Kelsen's Nomostatics and Nomodynamics Legal Theory," *Justice Voice* 2, no. 2 (2023), <https://doi.org/10.37893/jv.v2i2.773>

⁷ R. O. P. Maulidha Eka Pratiwi, R. O. Paturu, T. M. Sariayana, dan Elviandri, "Hegemoni Positivistik dan Involusi *Local Wisdom*: Menata Pembangunan Hukum di Indonesia," *Al-Zayn: Jurnal Ilmu Sosial & Hukum* 4, no. 1 (2026): 6633-6644, <https://doi.org/10.61104/alz.v4i1.4134>

⁸ A. G. Anam dan W. Paradina, "The Concept of Grundnorm in the Customary Law System: Reconciliation of Hans Kelsen's Pure Legal Theory with Indonesian Legal Pluralism," *JIHAD: Jurnal Ilmu Hukum dan Administrasi* 8, no. 1 (2025), <https://doi.org/10.58258/jihad.v8i1.10333>

certainty. The thought about the hierarchy of legal norms then affects many legal systems in the world, including Indonesia which applies a hierarchy of laws and regulations based on its level.

The theory developed by Hans Kelsen has a great influence on the development of modern law because it is able to explain the relationship between the validity of law and the structure of norms in a systematic manner. However, the theory has also received various criticisms. A number of experts argue that the strict separation of law from morality has the potential to ignore the substantive justice aspects that live in society. Law, in practice, not only serves to create certainty, but must also be able to realize justice and social benefits. Therefore, the debate on the relationship between law and morality is still one of the important issues in contemporary legal philosophy and the state⁹.

This view shows that Hans Kelsen's thinking remains relevant to understand the structure and validity of the law, but its application needs to be adjusted to the social and philosophical context of each country. In the Indonesian context, Pancasila values remain an important foundation in interpreting and developing national law so that law not only functions as a system of norms, but also as a means to realize justice oriented towards humanity and divinity.

B. The Influence of Hans Kelsen's Positivist Thought on the World

Hans Kelsen's positivist thought began to develop in the early 20th century when Hans Kelsen introduced the Pure Theory of Law. This theory was born from a comparative analysis of various positive legal systems that form the basic concept to describe a legal community. This theory refuses to be a metaphysical study of law and seeks the basis of validity in basic norms, rather than in meta-juridical principles¹⁰. In comparison with analytical jurisprudence, Pure Legal Theory is more consistent in using its methods related to basic concepts, legal norms, legal rights, legal obligations, and the relationship between the state and the law.

Since its introduction in the 1920s, Hans Kelsen's thought began to have a great influence on the development of legal science in various countries. One of his most important contributions is the concept of a hierarchy of legal norms (steufenbau theory) which states that the legal system is a system of steps with tiered rules, where the lowest legal norm must adhere to the higher legal norm and the highest law must adhere to the most basic legal norm (grundnorm)¹¹. This influence has made many countries systematically prepare a system of laws and regulations so as to create order and certainty in the application of the law.

Entering the middle of the 20th century, the influence of Kelsen's thought expanded as modern countries developed that required a more systematic and organized legal system. The main strength of Kelsen's legal positivism lies in its ability to provide an objective and systematic framework of legal analysis. This is especially useful in modern countries that

⁹ E. Elviandri, A. Darmawan, A. Ridwan, A. Rifandi, dan R. T. Hui, "Validity of the Divine Value in the Phrase 'In the Name of Justice Based on the One Supreme Divine Being': The Dialectic of Hans Kelsen's Pure Theory of Law and the Transcendental Paradigm of Law," *Pena Justisia* 24, no. 2 (2025), <https://doi.org/10.31941/pj.v24i2.7137>

¹⁰ . Fadillah, G. Nabila, D. Fazriah, dan I. Y. Nurasri, "Semangat dan Kontribusi Hans Kelsen dalam Pengembangan Ilmu Hukum," *Das Sollen: Jurnal Kajian Kontemporer Hukum dan Masyarakat* 2, no. 1 (2024): 1-12, <https://journal.forikami.com/index.php/dassollen/article/view/537>

¹¹ M. N. Fadli, "Hans Kelsen: Positivism Hukum, Grundnorm, dan Stufenbau Theory," *LSF Discourse*, 2024, <https://lsfdiscourse.org/hans-kelsen-positivisme-hukum-grundnorm-dan-stufenbau-theory/>

emphasize legal certainty and procedural formality in the formation of legal norms¹². In this period, Kelsen's theory was widely used to strengthen the position of the constitution as the highest legal norm that became the source of validity for all regulations under it. As a result, various countries began to develop mechanisms for monitoring laws and regulations to remain in accordance with the constitution.

At the end of the 20th century, the influence of Hans Kelsen's thought was not only seen in the field of legal theory, but Hans Kelsen also had an important role in the field of constitutional law. He was the main figure of the Constitution of the Republic of Austria in 1920 and contributed to the establishment of the Austrian Constitutional Court. His ideas about the rule of law and the importance of constitutional supervision through judicial institutions also influenced the legal system in various countries. Kelsen's thought is also one of the important foundations in the development of the concept of the rule of law which places law as the main basis in the administration of government. Through this approach, legal certainty is one of the main goals that must be realized by the state.

In countries that implement civil legal systems such as Austria, Germany, and other European countries. One of the important reasons that explains the popularity of this theory is its systematic and rational approach to law, which provides a more scientifically based alternative to previous ways of handling law that are often influenced by political, ethical, or social norm elements. In Austria, Germany, and other countries that follow the tradition of legal positivism, Pure Law Theory is considered to be in line with the demand to organize law rationally and objectively, particularly in the context of the development of a structured and hierarchical legal system.

Entering the 21st century to the present day, Hans Kelsen's thought still has a very strong influence on the development of world law. The greatest contribution of Pure Law Theory is its ability to explain hierarchical relationships in the legal system, where each legal norm derives validity from higher norms to Grundnorm as a basic norm. This approach facilitates the analysis of the relationship between norms in complex legal systems, especially in the field of constitutional law¹³. Although his thinking is often criticized for placing too much emphasis on formal aspects of law and paying little attention to the value of substantive justice, the influence of pure law theory can still be found in modern legal systems that prioritize certainty, order, and consistency of legal norms. Thus, since it was first proposed in the early 20th century until today, Hans Kelsen's legal positivism has had a profound influence on the development of legal science and legal systems in the world. Hans Kelsen's intellectual legacy is still very relevant today. His theories have become the basis for the study of legal positivism, as well as applied in the analysis of laws and regulations and constitutional systems in various jurisdictions. Through his systematic and rational approach, Kelsen has laid the foundation for the understanding of law as an independent, structured, and objective science.

C. Implications of Hans Kelsen's Thought in the Indonesian Legal System

The most obvious implication of Kelsen's thought in Indonesia can be seen in the hierarchical structure of laws and regulations as stipulated in Law Number 12 of 2011 concerning the Formation of Laws and Regulations. The concept of *Stufenbau des Rechts* is

¹² Fakultas Hukum Universitas Tarumanagara, "Hans Kelsen dan Revolusi dalam Pemikiran Hukum Abad ke-20," May 14, 2025, <https://fh.untar.ac.id/2025/05/14/hans-kelsen-dan-revolusi-dalam-pemikiran-hukum-abad-ke-20/>

¹³ I. Iskandar, D. Nurafifah, and I. Permani, "Critical Analysis of Pure Legal Theory in the Development of Contemporary Law," *Teraju: Journal of Sharia and Law* 7, no. 1 (2025): 49–65, <http://ejournal.stainkepri.ac.id/index.php/teraju>

manifested in the order. The 1945 Constitution is placed as the highest norm in Indonesia's positive legal system¹⁴ which functionally resembles the concept of *Grundnorm* in Kelsen's theory, followed by the Decrees of the People's Consultative Assembly, Laws and Regulations, Government Regulations, Presidential Regulations, and Regional Regulations. Pancasila itself is placed as a *Grundnorm* which is the source of legitimacy of all regulations under it. The judicial review mechanism implemented by the Constitutional Court and the Supreme Court is a concrete form of applying the theory of the Kelsen norm hierarchy in maintaining vertical consistency and legal certainty. The Constitutional Court is tasked with examining laws against the 1945 Constitution, while the Supreme Court tests regulations under the law. This practice reflects the principle of *lex superior derogat legi inferior* that prevails in this system is a direct reflection of Kelsen's theory of norms, where lower rules cannot conflict with higher rules¹⁵.

On the other hand, the application of Hans Kelsen's theory of pure law in Indonesia shows that there is a conceptual tension that is quite fundamental in the practice of constitutional law. The idea of a strict separation between law and morality is not fully in harmony with the plural social conditions of Indonesian society, which is characterized by the diversity of ethnicities, customs, cultures, and local values that live and develop in daily life. The contradiction between *Hans Kelsen's Pure Theory of Law* and the practice of law enforcement in Indonesia is clearly seen in the way that law is not only understood as a formal and autonomous system of norms, but also as an instrument for realizing substantive justice.

In Indonesia, in practice, this construction does not work absolutely, because the national legal system emphasizes a value-based approach that integrates ethics, morality, and Pancasila values in every law enforcement process¹⁶. This can be seen explicitly in every court decision which always begins with the phrase "For Justice Based on the One Godhead". An example can be found in the Constitutional Court decision Number: 46/PUU-VIII/2010 which progressively changes the construction of a child's civil relationship outside of marriage with his biological father. The decision states that a child born out of wedlock can still have a civil relationship with his biological father as long as it can be proven through scientific evidence and legal mechanisms. Prior to this decision, the positive legal construction only recognized the child's civil relationship with the mother, where the judge considered that a child born out of wedlock could not be burdened with legal consequences for the actions of his parents, so that the state has a constitutional obligation to guarantee and protect the rights of children without discrimination as stated in Article 28 B paragraph 2 of the 1945 Constitution¹⁷. This shows that the practice of constitutional justice in Indonesia is not completely tied to pure legal positivism as formulated by Hans Kelsen, the interpretation is carried out using a textual approach to the applicable norms and incorporating substantive considerations oriented towards justice, protection of children's rights, and human rights principles.

¹⁴ K. Dimiyati, H. Nashir, E. Elviandri, A. Absori, K. Wardiono, dan A. Budiono, "Indonesia as a Legal Welfare State: A Prophetic-Transcendental Basis," *Heliyon* 7, no. 9 (2021), <https://doi.org/10.1016/j.heliyon.2021.e07865>

¹⁵ W. Prianto, "Analisis Hierarki Peraturan-undangan Berdasarkan Teori Norma Hukum oleh Hans Kelsen dan Hans Nawiasky," *Jurnal Ilmiah Ilmu Sosial dan Pendidikan* 2, no. 1 (2024): 8–19, <https://jurnal.unusultra.ac.id/index.php/jisdik/article/view/52>

¹⁶ H. S. Quratuainniza, P. N. Sahwahita, N. Z. Paramesti, E. A. Azzahra, dan I. Triadi, "Keadilan sebagai Basis Moral Hukum: Analisis Filsafat dan Relevansinya bagi Sistem Hukum Indonesia," *ALADALAH: Jurnal Politik, Sosial, Hukum dan Humaniora* 4, no. 1 (2025): 155–168, <https://doi.org/10.59246/aladalah.v4i1.1695>

¹⁷ Y. Hasyimzum, "Hak-hak Konstitusional Anak Terkait Penelantaran Akibat Perceraian," *Jurnal Ilmiah Hukum dan Hak Asasi Manusia* 1, no. 1 (2021): 27–35, <https://doi.org/10.35912/jihham.v1i1.416>

Thus, the implications of Hans Kelsen's thought in Indonesia show that there is acceptance as well as modification of the theory of legal positivism. *Stufenbau des Rechts* is applied in a real way in the hierarchy system of laws and regulations and norm testing mechanisms through the Constitutional Court and the Supreme Court. Meanwhile, the concept of *Pure Theory of Law* which demands a strict separation between law and morality cannot be applied purely, because the Indonesian legal system actually integrates the values of Pancasila, morality, and the principle of substantive justice in every law enforcement process. Therefore, the legal system cannot be categorized as a completely positivistic system, because in its implementation the law does not only work within the framework of formal validity, but is also influenced by the demands of justice that live in society.

CONCLUSION

This study concludes that Hans Kelsen's legal positivism, through the Pure Law Theory and the *Stufenbau* Theory, provides an important structural foundation for the development of Indonesian law, especially in the formation of a legislative hierarchy and *judicial review* mechanism. However, its application is not pure, but has been *significantly adapted* to accommodate the values of Pancasila, morality, and substantive justice, resulting in a hybrid legal system. These findings confirm that the formal legal certainty of Kelsen's positivism needs to be balanced with the search for substantive justice that is in accordance with the character of the Indonesian nation.

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Conflict of Interest Statement: The author(s) declares that research was conducted in the absence of any commercial or financial relationship that could be construed as a potential conflict of interest,

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