Conceptual Article

Avoiding Misunderstandings About the Emergence and Position of Grundnorm as a Source of Law

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ABSTRACT

Immanuel Kant's teachings on the stages of human knowledge development regarding the universe became the foundation for Hans Kelsen's renowned legal theory, namely *Grundnorm*. According to Kelsen, *Grundnorm* exists at the rational-practical stage of each individual, is *a priori*, and has never been formalized through a constitutional process. However, law students often have a simplistic understanding of *Grundnorm*, particularly in constitutional law studies.The discussion below falls within the scope of legal positivism, employing a juridical-philosophical approach. *Grundnorm* is frequently reduced to a mere issue of consistency, where lower regulations must not contradict higher regulations. No further explanation is provided, apart from the assertion that a legal regulation is effective only if consistency between lower and higher rules is maintained. This oversimplified explanation can be misleading, as it fails to convey the essence of *Grundnorm* theory to law students. Based on this analysis, it can be concluded that, according to Hans Kelsen's teachings, *Grundnorm* is the highest source of legal norms, accepted as a necessity by individuals through their free will. *Grundnorm*, as an imperative-categorical basic norm, can be transformed into legal principles if it has been widely accepted by society.

Keywords : Grundnorm; Hans Kelsen; Immanuel Kant.

A. INTRODUCTION

The Legal Positivism school of thought is based on Hans Kelsen's teachings on *Grundnorm* theory. The term *Grundnorm* originates from German, meaning "basic norm." However, misunderstandings regarding the meaning of *Grundnorm* persist. In many cases, *Grundnorm* is oversimplified as merely ensuring the consistency of lower regulations with higher regulations. The only explanation often provided is that, based on *Grundnorm*, a legal regulation will be effective if there is alignment between lower and higher rules.

This misunderstanding arises when law students interpret the State Constitution as *Grundnorm*. Such an interpretation can mislead students regarding the true meaning of *Grundnorm* as a foundational norm. To address this issue, this article explores Hans Kelsen's *Grundnorm* from a legal-philosophical perspective.

Regarding previous studies (as published in journals and conference proceedings), this article compares several prior works with the present discussion.

Hopton (1978) concluded that Hans Kelsen's *Grundnorm* theory, in practice, has not always been the primary consideration in drafting or amending State Constitutions. However, Hopton's study did not examine the meaning of *Grundnorm* in depth from a legal-philosophical perspective.

Thilakarathna & Madhushan (2021) argued that in many countries, the constitution—being the supreme law of the land—is recognized as *Grundnorm*, regardless of whether those countries are labeled as democratic or not. They also noted that changes in constitutional order, if carried out according to constitutional provisions, are considered valid, whereas changes made outside these provisions raise serious questions regarding their legal validity.

Several other studies discuss *Grundnorm* in relation to Pancasila**,** rather than the State Constitution. Manullang (2020) argued that questioning whether Pancasila qualifies as *Grundnorm* is inappropriate under the philosophy of foundationalism. According to Kelsen, *Grundnorm* is merely a source of legal validity. In contrast, Pancasila is an idea with philosophical value, serving as a belief system that cannot be reduced solely to validity concerns.

Lita Tyesta ALW (2020) concluded that Pancasila could be regarded as *Grundnorm* or the basic norm of national life. Therefore, it must be reflected in both the material and formal aspects of law-making and regulation. Similarly, Saputri & Samsuri (2020) emphasized Pancasila's crucial role as a foundational norm in the formulation of laws and regulations. They argued that Pancasila should serve as a guiding principle in the development and implementation of legal frameworks.

In this discussion, the author presents an argument based on a philosophical approach within the Legal Positivism school of thought**,** using a juridical-philosophical method**.** This approach views law from a philosophical perspective, particularly in relation to human free will and the necessity of legal rules to regulate social interactions. Based on this conception, law is identified as:

a) A set of regulations derived from the highest meta-juridical imperative;
b) Concretely established by the highest legitimate authority;
c) Democratically structured based on mutual agreement;
d) Designed to regulate human behavior in social life;
e) Comprising commands and sanctions.

This analysis aims to clarify the true nature of *Grundnorm* within the framework of legal philosophy, preventing misunderstandings and ensuring a more comprehensive understanding of its role in legal theory.

B. DISCUSSION

1. The Teachings of Hans Kelsen

Hans Kelsen (1881–1973) was a proponent of Legal Positivism**,** whose teachings remain relevant to this day. Kelsen's legal philosophy can be regarded as an outcome of the rationalist

school of thought that emerged in the 17th century. The distinction between Rationalism and Empiricism can be clearly understood from Paul Kleinman's explanation (Kleinman, 2013), which states that *Rationalism* is the theory that reason, rather than sensory perception, is the source of knowledge. Rationalists argue that without pre-existing principles and categories, humans would be unable to organize or interpret sensory information. Thus, according to Rationalism, humans must possess innate concepts and employ deductive reasoning. In contrast, *Empiricism* asserts that all knowledge originates from sensory experience, rejecting the notion of innate knowledge and maintaining that human understanding is exclusively *a posteriori*, meaning "based on experience."

Kelsen's legal philosophy can be seen as the result of a synthesis between:

a) His advocacy for legal and political principles that emerged from the French Revolution of 1789;
b) His alignment with the Neo-Kantian school of thought; and
c) His engagement with the Positivist tradition in legal philosophy.

The following sections elaborate on these influences.

2. The Influence of the French Revolution 1789

The philosophical foundations of any thinker are inevitably shaped by the historical and spatial context in which they lived. A philosopher's ideas emerge as a response to the realities of their time. Kelsen's legal philosophy was profoundly influenced by the modern legal system that arose following the French Revolution of 1789, as well as by Immanuel Kant's concept of the categorical imperative. Understanding the categorical imperative within Kantian philosophy is essential to comprehending Kelsen's legal thought.

The French Revolution of 1789 is widely regarded as a crucial milestone in the evolution of constitutional and political thought (Doyle, 2001). This revolution introduced key principles that continue to shape modern legal and political systems, including:

a) Popular sovereignty (government by the people or democracy);
b) Nomocracy (the principle of governance based on law);
c) Equality (the notion that all humans are inherently equal);
d) Human rights (fundamental rights and freedoms);
e) Free market principles; and
f) The modern legal system.

The ideas that emerged from the French Revolution were largely shaped by the empirical methods of reasoning developed during the Age of Enlightenment, which significantly influenced Western European thought in the 17th century (Fukuyama, 2014). Enlightenment thinkers challenged the medieval worldview, which was often characterized by mysticism and speculative reasoning.

Although Kelsen did not explicitly state his support for these principles in his writings, his legal philosophy clearly aligns with the ideals of popular sovereignty, democracy, rule of law, equality, human rights, and the free market.

As a proponent of the modern legal system, which was an outcome of the French Revolution of 1789, Kelsen argued that the creation of legal norms must be based on human will and formalized through democratic processes. According to him, the essence of democracy lies in the recognition of human equality. Once legal principles and rules are formulated through democratic means, their validity must then be affirmed by the highest legitimate authority.

3. The Influence of the Neo-Kantianism

The Neo-Kantian school of thought originated from the teachings of Immanuel Kant (1724–1804), who lived during the transition from the Enlightenment Era (17th century) to the Modern Era (post-1789 French Revolution). This transitional period shaped Kant's philosophy, which emphasized that humans are not merely passive observers of the world but active agents capable of shaping reality through reason and sensory experience (Renzikowski, 2019).

The intellectual shift from the Enlightenment to the Modern Era contributed to Kant's assertion that all individuals possess free will and must be treated as equals. According to Kant, every human being has the right to equal treatment and is also morally obligated to treat others equally. Kant recognized that humans are autonomous and free to act (Law, 2007).

Kant's epistemology posited that human knowledge arises from a synthesis of *a posteriori* (experience-based) and *a priori* (innate or rational) elements. This synthesis may even transcend the limits of sensory perception.

Kant's philosophy was influenced by both Plato (427–347 BC) and Aristotle (384–322 BC), who distinguished between the ideal world (spiritual, abstract, and containing absolute truths) and the empirical world (the realm of observable facts). According to them, the ideal world governs the empirical world, meaning that laws and regulations must be derived from fundamental, unchanging principles. In their view, human reasoning serves only to describe reality, rather than to transform it.

Building upon the philosophical foundations of Plato and Aristotle, Kant integrated elements of Empiricism (influenced by Francis Bacon (1561–1626) and David Hume (1711–1776)) with Rationalism, developing his own Transcendental Idealist philosophy (Kleinman, 2013; Landau, Szudek, & Tomley, 2011).

Through Transcendental Idealism, Kant asserted that both reason and experience are necessary for humans to comprehend and shape the world. In other words, Kantian philosophy represents a synthesis of Rationalism and Empiricism:

a) Empiricism holds that knowledge is derived from sensory experience (*a posteriori* knowledge).

b) Rationalism holds that knowledge originates from the human mind and relies on innate principles (*a priori* knowledge).

Thus, according to Kant, human understanding of the universe progresses through three stages:

Table 1 : Three Stages of Human Recognition of the Universe According Immanuel Kant's Philosophy

Sensory Stage	**Understanding Stage (Verstand)**	**Reasoning Stage (Vernunft)**
A posteriori;	A *priori*;	*A priori*;
Human's knowledge come from their experience of objects in the world, rather than their reason (empirical);	Human's knowledge come form the relationships between sensory data, then decide;	Human's knowledge come form conclusions from understanding; Both reason and experience were necessary to understand the world;
Humans only speak about the world (passive mind);	Humans do not just speak about the world, but begin to form the substance of recognition;	Humans do not just understand, but begin to form conclusions based on cause-effect relationships from previous understanding;
Knowing;	Understanding;	Arguing, as it becomes the basis of science;
Passive thinking	Active thinking	Active thinking

(Sources **:** Weeks, 2014; Bertens, Ohoitimur, & Dua, 2018).

Based on the description above, Immanuel Kant explains that the levels of human cognition regarding the universe progress through three stages, namely: a) The Sensory Stage – the stage of sensory perception, which is referred to as empirical experience; b) The Understanding Stage – the stage where humans do not merely perceive the world but begin to construct meaning from their sensory experiences; and c) The Reasoning Stage – the stage where humans go beyond understanding and begin to formulate conclusions based on cause-and-effect relationships derived from their prior knowledge (Bertens, Ohoitimur, & Dua, 2018).

At the Reasoning Stage, Immanuel Kant distinguishes between two categories of reason: theoretical reason and practical reason. Through theoretical reason, humans draw conclusions based on their intellectual understanding, organizing their arguments systematically, which

ultimately leads to the formation of scientific knowledge.

At the highest level—practical reason—humans, guided by their free will, actively discover what Kant refers to as categorical imperatives—principles that are inherently accepted as truths. These include fundamental moral and metaphysical beliefs, such as:

a) *God is the ruler of the universe and is all-good.*
b) *Humans are born free.*
c) *The soul is immortal.*

Thus, categorical imperatives are not derived from empirical experiences (*a posteriori* knowledge) but are instead accepted as necessary truths based on a priori reasoning. In other words, beliefs such as the existence of God, human freedom, the immortality of the soul, and the moral obligation to act in accordance with one's words are not scientifically provable but are embraced through human practical reason.

To better illustrate the progression of human cognition—from theoretical reason to practical reason—the following matrix is presented:

Table 2
Stage of Human Introduction to Nature Based on Reason

Immanuel Kant : **Reasoning Stage (V e r n u n f t)** **Humans do not just understand, but begin to form conclusions based on cause-effect relationships from previous understanding of the universe;**	
Theoretical Reasoning	**Practical Reasoning**
Humans, based on their free will, actively draw conclusions (based on understanding obtained from the Intellectual Stage), and construct cause-and-effect based arguments;	Humans, based on their free will, actively form something called the Categorical Imperative, namely ideas that contain postulates that must be accepted as truth. (for example: God is the ruler of the universe and is all-righteous, that humans are born free, that the soul is immortal);
Proven by science;	Not proven by science;
Creating science.	Forming beliefs based on will.

(Sources **:** Weeks, 2014); Bertens, Ohoitimur, & Dua, 2018).

Immanuel Kant's teachings on the stages of human cognition regarding the universe—culminating in practical reason—served as the foundation for Hans Kelsen's legal theory of Grundnorm. The term *Grundnorm* originates from German and translates into English as *basic norm*.

According to Hans Kelsen's theory, Grundnorm is a presupposed necessity, formed based on free will, yet not created through formal state procedures. Within the framework of

Immanuel Kant's philosophy, Grundnorm represents rational-practical reason, serving as the highest source of validity for legal norms. Consequently, the substance contained within Grundnorm is an imperative rational-practical product, accepted by individuals based on their free will (Kafara, 2022; Paz, 2015).

Thus, Grundnorm is not a source of necessity derived from sensory experience. This distinction is why Hans Kelsen asserted that Grundnorm is the highest source of legal necessity, independent of political influence and psychological elements (Cohen, 1978).

Following Immanuel Kant's framework—where human cognition progresses toward practical rationality—Hans Kelsen positioned the highest source of legal necessity within the realm of the categorical imperative. This foundational concept was integral to Hans Kelsen's legal philosophy, developed in his Pure Theory of Law since the early 1920s (Paulson & Paulson, 1998), and remains highly influential in legal education today.

From the explanation above, it is evident that Immanuel Kant's Transcendental-Idealist Philosophy profoundly influenced the development of Hans Kelsen's Pure Theory of Law.

4. Integration of *Grundnorm* Teachings in *Stufenbeautheorie*

The *Stufenbeautheorie* teaching is actually a general teaching in legal positivism, which prioritizes law from its formal side. The main principle is that law is a set of regulations made by the highest authority, which contains orders and sanctions. The legal positivist school was originally developed by John Austin (1790 – 1859), an empirical positivist. John Austin is a figure who teaches law based on the Positivist-Empirical school of thought as his paradigm (Murphy, 2004).

Legal-Positivism was built with the following characteristics: (a) rejecting natural law because the source of its creation is unclear and therefore speculative; (b) the law must contain orders from the sovereign authority, as well as clear sanctions; Laws are made by supreme sovereign power, but concrete. In a more derivative explanation, John Austin's opinion is: law is the order of an authority that has sovereignty, an authority that is not subject to anyone. That's why the law is coercive, not optional and can be negotiated by members of society.

In a more detailed explanation, John Austin defined law as the command of a sovereign authority—an entity that is not subject to any higher power. Accordingly, law is coercive, non-optional, and cannot be negotiated by members of society.

Based on John Austin's theory, legal discussions do not concern morality, fairness, or justice; rather, they focus on orders issued by a sovereign power. As a result, Austin shifted the concept of justice—traditionally central to natural law—toward legal certainty, which arises from authoritative commands. In other words, Legal Positivism, as presented by Austin, emphasizes the creation of legal certainty to ensure

predictability. This means that if a person violates a law issued by a sovereign authority, the violator will inevitably face sanctions—provided that their violation is empirically verified through legal proof.

A prominent proponent of Legal Positivism, Gustav Radbruch, argued that legal certainty is one of the most fundamental contributions to legal thought and has been widely accepted. Radbruch asserted that law should serve the ideals of justice, utility, and legal certainty, and these three principles correspond to different stages in the development of law and society (Putro & Bedner, 2023). While justice had been a central concern since the pre-modern era, legal certainty only became crucial with the emergence of modern legal systems. According to Muh Afif Mahfud and Sia Chin Chin (Mahfud & Chin, 2024), legal certainty in legislation is closely linked to language, which plays a critical role in expressing legal concepts, interpreting legal texts, and enforcing the law. Legal language must be clear and precise, as it differs significantly from everyday social language.

Over time, Legal Positivism encountered intellectual challenges, particularly from emerging philosophical perspectives that emphasized respect for human autonomy. This shift recognized that individuals, in navigating their lives, do not rely solely on sensory experience, but also on reason and rationality. This evolution of thought is reflected in Hans Kelsen's legal philosophy, as articulated in The Pure Theory of Law (Pak, 2009).

The Grundnorm theory further refined Hans Kelsen's Stufenbau Theory, introduced in 1923, by emphasizing that the highest source of law is a categorical-imperative necessity—one that does not require empirical validation (Vinx, 2007). The categorical-imperative substance serves as a causa prima (*first cause*), generating a series of normative implications in the form of concrete legal commands. Therefore, the relationship between the causa prima and its consequences is a purely normative relationship (Paulson, 2013).

However, this normative relationship is not derived from psychological will or experience-based reality. Instead, it originates from a truly neutral will within individuals. If this neutral will is widely accepted by the majority, Hans Kelsen refers to it as objective will.

Table 3

Causality Relationships From Grundnorm Towards Concretization In Legal Principles

No.	Categorical Imperative: *Grundnorm*	Implication	Legal Principle
1.	Humans are creatures who have free will;	Human freedom must be guaranteed;	Every individual must be guaranteed the freedom to express opinions :
2.	Humans are born to be equal;	Human equality must be guaranteed;	Equality Before the Law (Every individual must be treated

			equally before the law);
3.	Law is the totality of conditions for the free will of people to be able to adapt to the free will of other people, subject to regulations prepared based on the collective will.	Humans must behave according to what they say.	*Pacta Sunt Servanda* (agreement is binding on the parties)

(Source : Samekto, 2024)

Legal principles are general propositions expressed in general terms about a set of values to serve as appropriate guidelines for carrying out a legal action. This legal principle provides clear guidelines for action, which is the "heart" of legal regulations (Martitah et al., 2023). However, there is no agreement on what norms constitute as general principles of law . The most commonly accepted examples of general principle are *pacta sunt servanda, res judicata, and reparation for damage* (Merdekawati, Triatmodjo, & Hasibuan, 2024). On the other hand, *Grundnorm* was initiated by Hans Kelsen in the paradigm of rational-individualist societal thought, which places individuals, with their rationality,and free-will, as the center of change. Hans Kelsen's thinking about law is largerly based on his belief in the truth of the principles which emerged from French Revolution of 1789: (individualism, democracy, nomocracy, human rights, modern legal system, Republic and –*most important*- rule of law). According to Myrna A.Safitri (Safitri, 2018), concerning the principle of rule of law, *World Justice Project* calls four pillars that must be robust. The first is related to accountability in both government agencies and the private sector. The second pillar is just law that is characterized by clear, publicized, stable, and just regulations. Those are applied evenly; and protect the fundamental rights, including the security of persons and property and the certain core of human rights. Aries Hariyanto (Haryanto, 2023), meanwhile, wrote in his article ,based on the principle a rule of law, the role of the state and government as protectors of society is to make regulations that benefit the community. Although there is specific principles of a rule of law, state may differ across countries, the fundamental tenet is that all individuals in power within the state must comply with both written and unwritten legal norms. Put differently, the goal remains the same: to achieve and safeguard the liberty of the individual from the capriciousness of group authority (Widiyono & Khan, 2023). The principle of rule of law consists of four important characteristic: 1) protection of human rights; 2) distribution of power; 3) governance based on law and; 4) state administrative court (Warsono et al., 2023) and therefore, the implementation of the principle of the rule of law is impossible without the possibility of a person's access to an independent, impartial court, the proceedings in

which meet the requirements of a fair trial (Rastorhuiev et al., 2021).

Currently, there is a tendency that the creation of positive legal regulations ignores the teachings about *Grundnorm.* As a result, the implementation of these regulations creates injustice. The discussion of Hans Kelsen's teachings on *Grundnorm* is very important to make readers and students of law aware that positive law must actually be based on imperative-categorical values. These imperative-category values were then introduced by Hans Kelsen as *Grundnorm,* as the highest source of meta-juridical law. So, this study reminds us that positive law must be accountable based on universal morality. For example, that humans are essentially equal. However, morality is not always related to morality based on religious teachings.

C. CONCLUSION

Based on the discussion above, this explanation leads to the conclusion concerning *Grundnorm*, with the following arguments:

Grundnorm is Hans Kelsen's teaching which is integrated in his theory known as *Pure Theory of Law* and originates from the belief in the truth of Immanuel Kant's philosophical teachings about the rational-practical nature that exists in every human being. *Grundnorm* therefore, does not originate from psychological will that is driven after the individual experiences reality so they have to accept orders. Practical ratio is the highest stage in the stage of human recognition of the universe because it is based on free will to accept necessity which does not need to be proven;

Grundnorm is the highest source of legal necessity, which every human individual accepts, based on his free will to submit to orders that are no longer disputed because they are accepted as truth. That's why *Grundnorm* is *a priori*;

The substance in *Grundnorm* is thus not formed by the state through formal constitutional processes or something that is formed due to political processes within a country. Therefore, *Grundnorm* is called the peak of human recognition of the universe which is imperative-categorical;

The teachings about *Grundnorm* further refine Hans Kelsen's teachings about *Stufenbeautheorie*, which were introduced in 1923, by emphasizing that the highest source of law is a categorical-imperative necessity that does not need to be proven based on theoretical reasons. Imperative-categorical substance is a source of causation (*causa prima*) which gives rise to implications (effects) of more concrete commands. Thus, the relationship between the *causa prima* and its implications is a normative relationship. From this normative relationship, legal principles are be provided.

From the explanation above, it can be understood that, the discourse on *Grundnorm*, is not just a teaching that lower laws should not conflict with higher rules. Such an understanding is a simplification and greatly simplified the meaning of *Grundnorm* taught by Hans Kelsen. The teachings about *Grundnorm* were actually

built from the extraordinary legal philosophical thoughts of Hans Kelsen, and their truth is undeniable to this day. A less in-depth understanding of *Grundnorm* tends to be misleading. Therefore, an understanding from a philosophical perspective regarding *Grundnorm,* will help academics and legal practitioners in building background arguments for the preparation of legal regulations.

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