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# A Critique of Kelson's Pure Theory of Law

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## Abstract

*Hans Kelsen's Pure Theory of Law is a fundamental and influential framework in the field of legal philosophy. It provides a methodical and hierarchical approach to comprehending the essence of law. This abstract examines the fundamental concepts of Kelsen's theory, highlighting its perspective on law as a normative framework that is separate from moral or political factors. The Pure Theory revolves around the Grundnorm idea, serving as the fundamental norm for legal validity. Kelsen demonstrates the derivation of validity for higher standards from those at lower levels using a hierarchical framework of norms. Despite receiving criticisms, Kelsen's Pure Theory continues to exert influence in legal studies by offering a systematic framework for analyzing the fundamental nature of law. This abstract provides an introductory overview of Kelsen's Pure Theory, promoting further investigation and discourse on its ramifications for legal theory and application.*

**Keywords:** *Grundnorms, Normative Science, Norms, Hierarchical Manner, Essence of law*

## Introduction

Hans Kelson was a jurist who revived the first analytical legal thought within the twentieth century through his 'Pure Theory of Law'. Consistent with Kelson, theory of law needs to be pure. This suggests that the scope of jurisprudence should be free from all different social sciences and disciplines like politics, sociology, ethics, history, morality, nature, meta-physics and the different extra-legal areas.

Kelson explained that by mixing law with other outside elements, the real science of law is lost in the process. He thus divested ethical, ideal or moral parts from law and wanted to make pure science of law free these considerations. By this he tried to rescue jurisprudence from the obscure mysticism and different attempts by jurist at legal theorizing. He rejected Austin's definition and criticizes his fervent stress on command and sanction, as this created a subjective thought of law and he wanted for an objective thought. These ideas, to Kelsen introduced the extraneous psychological component of fear to law. Kelsen believes that law is nothing however a DE psychologized command – a command that doesn't impose a will. He conjointly discarded justice as law as several laws might not be just however still continue as law.

Kelson delineate law as a 'normative science' drawing its distinction from natural science. The laws of scientific discipline are capable of being accurately described, determined and discovered within the form of 'is' (das sein) however the science of law is the knowledge of what law 'ought' to be (das-sollen). It's the ought character that gives normative character to law. Scientific discipline relies on the idea that identical cause can perpetually have identical result. In different words, a specific result is that the results of a specific cause. In science thus, if A happens, then B necessary follows.

But with a legal norm, the matter is completely different. The system conceptualizes a legal norm as a theoretical Judgement: If A, then B or if A happens, then B need to happen. The norm connects bound legal conditions (A) with a legal consequence (B) and therefore the normative affiliation between A and B is that the 'ought' proposition, whereas in science, on the opposite hand, the norms is indicated by an 'is'.

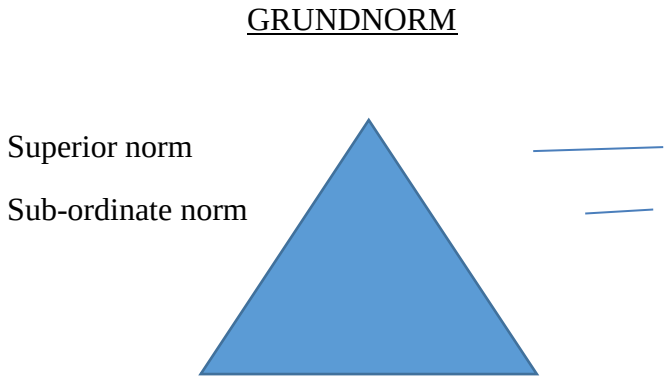
Kelson considers sanction as a necessary component however calls it 'norm'. Thus 'law is primary norm that stipulates sanction'. It's referred to as positive law as it is involved with actual and not with ideal law. Therefore, the pure theory is that the theory of legal positivism. And by no means naturalistic as it does not attempt to explain internal events through external observations of behaviour.

Legal order is that the hierarchy of norms having sanction and jurisprudence is that the study of those norms that comprise legal order.
Pure theory of law is additionally referred to as Theory of Interpretation and Kelson claims that his pure theory was applicable to all or any places and in the least times.

### Pyramid of norms and the Grundnorm

Kelson's pure theory of law is predicated on pyramidical structure of hierarchy of norms that derive their validity from the basic norm that he termed as 'Grundnorm'. Therefore, Grundnorm or basic norm determines the content and offers and validity to alternative norms derived from it.

Therefore, in Kelson view, the norm of any legal system is always organized in a hierarchy and interconnected. every norm within the legal system derives from the upper or superior norm within the system in a hierarchical manner. In alternative words, a norm derives its validity from a superior or higher norm on the hierarchy of norms.




The inter-connection continues throughout the system and eventually terminates at the fundamental norm otherwise referred to as the grundnorm. This basic norm is that the final supply of validity of all the opposite norms within the system. For Kelsen thus, a law isn't valid simply as a result of it's a command that's backed by sanction, or as a result of it's accordance to external natural law, rather, a law is valid if it's connected to a different superior higher norm in a legal system. This superior higher norm is that the authorizing norm on the hierarchy and it's the norm that provides it validity. The method of one norm deriving its power from the norm immediately superior thereto, till it reaches the Grundnorm has been termed by Kelson as ‘concretisation’ of the system. Therefore, the system of norms issue from down to upwards and eventually it closes at the Grundnorm at the apex.

Thus, as an example the order of a judge to impose fine on someone who neglects to pay his property rate is even by a law of the government; the byelaw is going to be valid if created in keeping with the provisions of the native government law of that state, the law successively are going to be valid if created in accordance with the provisions of the constitution. This resulting in the grundnorm that is that the constitution.

He outlined Grundnorm as ‘‘the postulated ultimate rule according to which the norms of the legal order are established and annulled, receive or lose their validity.’ On question from where will the grundnorm derives its validity, Kelson states that it's a meta-legal question and out of the scope of jurisprudence. The validity of grundnorm can't be objectively tested. One should pre-suppose the legal validity of the grundnorm. At some stage, in each legal system, we have a tendency to get to associate to an authorizing norm that has not been approved by the other legal norm, and therefore it's to be plausible to be lawfully valid.

He derives the validity of grundnorm from the minimum effectiveness theory. In keeping with this the Kelsonian grundnorm throughout the revolutionary amendment should be determined by the political and extra-legal advantage in context of prevailing state of affairs and altered condition. This essentially suggests that Grundnorm ought to have minimum effectiveness at the time of a revolutionary amendment and once the whole form of government changes then the whole grundnorm conjointly changes.

Grundnorm needn't be same in each legal order however it should essentially be there. In his opinion the basic norm is that the results of social, economic, political, and alternative conditions and it's alleged to be valid by itself.

**Criticism Of Theory of Pure Science of Law**

Kelson's Pure philosophy of Law emerged as a response to the corrupting influence of fascist and totalitarian ideologies on legal philosophy. Kelson's remedies to the challenges of normativity and unity of the system revolve around the basic concept of a sequence of validity. Two laws are considered to be part of the same chain of validity if one law permits the opposite action or if there is a third law that permits both actions. The unity of the system lies in the fact that all its laws are interconnected and belong to the same chain of validity. The normativity of laws is ensured by the hierarchical derivation of validity, where each legislation in a chain receives its legitimacy from the preceding one. The fundamental standard is crucial in determining the resolution of every problem. It establishes the initial starting point necessary for the justification of norms, ensuring that all laws within a system are part of a consistent chain of validity.

The thrust of his theory revolves around grundnnorm however what's this grundnorm? Where will it get its validity from? And wherever really is it settled in an exceedingly legal order?

Kelson states that every norm except the Grundnorm is pure. This assertion has no logic. Julius Stone justifiably remarks ‘we are invited to forget the illegitimacy of the ancestor in admiration of the pure blood of the progeny’. Kelson himself states that grundnorm is the results of social, economic, political and different conditions and it's presupposed to be valid by itself. He stanchly opposed the ideologies of natural law school and still refers to the fundamental norm as a natural law. The question remains on how the following norms that derive their validity from grundnorm will be pure once the grundnorm itself is predicated on a hypothesis that it's an outcome of assorted social forces and circumstances in an exceedingly given society. Kelson’s pure theory is predicated on the connotation that law should be void of any political, social, economic, moral or meta-physical advantage. But the core of his theory is the grundnorm that provides this purity to any or all the other preceding norm. Any norm that doesn't derive validity from grundnorm is not a sound norm. The grundnorm, this means, provides the purity to the other norms as per the pure theory of law. This in itself proves that the pure theory of law fails at it’s terribly core since the grundnorm is impure and could be a result of numerous political, social and different extra-legal disciplines.
The validity of grundnorm was determined by Kelson through the theory of minimum effectiveness. This states that the Kelsenian grundnorm during the revolutionary change is determined by the political and extra-legal expediency in the context of prevailing situation and changes accordingly. This is not true in all the cases. For example, in India, article 368(1) provides for amendments in the constitution. Constitution is the grundnorm of the state as every law derives its validity from the constitution and it is the basic norm. Any changes brought about in the constitution through this article is not because of change in the political system but because of change in law. Therefore, the theory of minimum effectiveness does not hold true in all the senses as it does not cent percent applies to all the prevailing conditions of today’s societies.

In Nigeria for example, the placement of the grundnorm has generated and still generates disputation.

Kayode Eso in his article ‘Is there a Nigerian Grundnorm’ opined that the grundnorm within the Nigeria pre-colonial era might be settled within the British crown and parliament. Thereafter, there was a shift to the executive or the Judiciary as the case may be depending on whether the regime has been military or civilian.

Within the democratic setting, the grundnorm in Eso's view might be settled within the Judiciary thanks to its final interpretative powers over the acts of the executives and also the legislative assembly.

In military era, the grundnorm lay within the government arm of executive thanks to its overall domination in overruling the other arms of government by the utilization of decree. His opinion with respect isn't reasonable once placed aspect by aspect with Kelsen's. As place by Ojealaro, it seems to confuse the construct of grundnorm therewith the sovereign in an exceedingly political society. Additionally, it's obvious that the aforementioned Judiciary, govt or assembly aren't norms however mere arms of government whereas a grundnorm could be a norm whereby the Sais arms of government derive their validity. Professor Abiola Ojo on his half opined in an editorial, 'constitutional law and military rule in Nigeria' that any search for the Nigerian grundnorm outside the then armed forces Ruling Council or the expression of its powers as declared in decrees was a futile exercise. This argument once more is misconceived within the lightweight of Kelsen's assertion on the grundnorm.

The Judiciary haven't been left behind within the rummage around for the Nigerian Grundnorm. In ONDO STATE V. ADEWUNMU and OBADA V. GOVERNMENT OF KWARA STATE, the read was expressed that the grundnorm of the military regime lay in Decree No. 1 of 1984 as amended by alternative decrees. Again, this read is clearly contrary to Kelsen's construct that the grundnorm cannot be a norm of positive law however a precept that is presupposed in jural thinking.

In Nigerian Grundnorm – A critical Appraisal by Dr. Akinola Aguda, he posited that between 1979 and 1983, the unquestioned and incontrovertible grundnorm of the Nigerian Legal order was the 1979 constitution. This read is troubled with above mention syndrome for as we've noted, though the grundnorm operates sort of a constitution within the transcendental logical sense, it's not the formal constitution of a country within the positive legal sense. And on goes totally different opinions and theories on wherever lies the grundnorm in an exceedingly legal order. It's an undeniable fact that this arguing is poached naturally and manner within which Kelsen espoused his theory as his description and clarification were removed from been clear.

C.K Allen in Law within the Making determined that in reality, it's troublesome to envision how the norms of a given legal order relate or connect with the grundnorm. In his argument, he reasoned that Kelsen assumed wrong that a system is sort of an excellent and consistent piece of design. Legal rules are more in the nature of some patch work and not pyramidal or hierarchical as Kelsen postulates.

Despite Kelsen's passion in maintaining that for a theory of law to be pure, it should detach itself or be free from any external issues, he definitely shot himself on the foot once he opined in his theory that the grundnorm cannot be found in legal order because it isn't a norm within the legal order however will solely be presupposed in jural thinking. This little doubt is appealing to external issues so resulting in the question echoed by alternative Jurists, that is, however pure then is Kelsen pure theory?

As far as purity is concern, there is no such standard by which negligible viability not entirely settled. The thought isn't practical in that frame of mind, as per pundits. There is no standard by which the insignificant viability of an overall set of laws can be judged, and the viability of an overall set of laws can't be evaluated by a hypothesis. It left out the social issues of ethical quality and reasonableness, the two of which play a part in viability.

## Conclusion

The "Pure Theory of Law," developed by legal philosopher Hans Kelsen, is a comprehensive framework for understanding the nature of law, particularly in its pure form, divorced from moral, political, or social considerations.

At its core, Kelsen's theory posits that law is a system of norms or rules, hierarchically organized, with a basic norm (Grundnorm) at its foundation. This basic norm serves as the ultimate source of validity for all other norms within the legal system.

In conclusion, the Pure Theory of Law offers a rigorous and systematic approach to understanding the essence of law, emphasizing its structure, hierarchy, and the role of the Grundnorm. While it has faced criticisms and challenges, particularly regarding its treatment of morality and its ability to account for the complexities of legal systems, it remains a significant contribution to legal theory, providing valuable insights into the nature of law itself.

Critics might question his hypothesis' capacity to portray overall sets of laws as they presently exist. A few kinds of regulations are challenging to represent involving Kelsen's idea of regulation as a norm with a discipline joined. Procedural and evidential regulations, regulations laying out associations, regulations granting opportunities and freedoms, and regulations dropping different regulations generally fit into the unadulterated hypothesis precariously. Right now ever, his contentions for the intelligent intelligibility of global and public legitimate systems are unconvincing. Kelsen's thoughts of regulation have unquestionably worked regarding the matter of statute, notwithstanding being muddled and loose in a few regions and getting various scrutinizes.

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