

The Influence of Theorie Von Stufenbau der Rechtsordnung in the Indonesian Legal System

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Abstract

Article History:

Submitted:

04-06-2024

Received:

07-06-2024

Accepted:

07-10-2024

Keywords:

hierarchy; legals

norm; reviews;

validity

The aim of this research is to analyze the influence of Hans Kelsen's *Theorie Von Stufenufbau Der Rechtsordnung* on the Indonesian legal system. The research method employed is legal research with a statutory and conceptual approach. Primary and secondary legal materials are analyzed using normative analysis. The findings reveal that *Theorie Von Stufenufbau Der Rechtsordnung* significantly impacts the Indonesian legal system. There are at least two main influences identified. First, the system of laws and regulations in Indonesia has been structured hierarchically since the enactment of the Temporary People's Consultative Assembly Decree No. XX/1966 up to the present day. However, this hierarchy is not absolute, especially concerning the positions of *Perppu* and People's Consultative Assembly Decrees. Second, there is a recognized mechanism for reviewing legal norms to ensure their validity, whether through judicial review, political review, or executive review. The hierarchical structure of Indonesia's legal system reflects Kelsen's theory, which posits that law consists of interrelated levels of norms. Each level derives its authority from the norm above it, with the basic norm at the apex, serving as the source of legitimacy for the entire legal system. In the Indonesian context, this basic norm can be identified as the UUD NRI 1945, which underpins all subordinate legislation. The review mechanism for legal norms also illustrates the influence of Kelsen's theory. Judicial review, conducted by the Constitutional Court, assesses whether a law aligns with the Constitution. Political review is undertaken by legislative bodies such as the DPR, which can evaluate and amend legislation. Executive review is carried out by executive bodies, such as the President or ministers, who have the authority to adjust or repeal regulations deemed inappropriate.

1. Introduction

One of the main schools of law in jurisprudence is the positivism school which was first put forward by an English legal expert named John Austin (1790-1859) who stated that the law is an order from the ruler to the people so that the validity of the law lies in whether the rule is an order from the ruler or not. John Austin's opinion then developed in various forms. One of them is the positivism model developed by an Austrian legal expert named Hans Kelsen (1881-1973). Even though the basis of thought for both of them is the same, in several forms the two positivist figures are different. For example, even though they agree that law is an order from the authorities to regulate the people, Hans Kelsen further elaborates that "law is an order of human behavior. An order is a system of rules. Law is not, as it is sometimes said to be a rule. It is a set of rules having the kind of unity we understand by a system".¹ For this reason, for Hans Kelsen, to understand the rules of behavior in a country, law must be seen as an interrelated system.

¹ Hans Kelsen, *General Theory of Law and State* (Massachusetts: Harvard University Press, 1949).

With this view, Hans Kelsen issued *Theorie Von Stufenbau Der Rechtsordnung* or known as the theory of levels of legal norms. In this theory, Hans Kelsen views state law as a system, where one is interrelated. Lower legal norms originate from higher legal norms, and so on until the highest norms which he calls *Grundnorms* which are presupposed. As a result, lower legal norms have validity, if they are in accordance with higher legal norms.

Hans Kelsen views legal norms in a state as hierarchical, so that there is a relationship between higher legal norms and lower legal norms (super-and subordination). Legal norms which are the basis for the formation of other legal norms have a higher hierarchy (higher norm). The legal norms formed by the higher legal norms have a lower position (lower one). Both the higher norm and the lower norm are one unit as a legal system. Hence, the validity of lower legal norms depends on their conformity with higher legal norms.

Hans Kelsen's *Theorie Von Stufenbau Der Rechtsordnung* has greatly influenced the legal system of a country, including Indonesia. It can be said that *Theorie Von Stufenbau Der Rechtsordnung* has had a major influence on the Indonesian legal and regulatory system. Although not on all sides because there are still several differences. For this reason, this research will discuss and analyze how much influence Hans Kelsen's theory has on the Indonesian legal system.

Several articles that have been published by several researchers are presented below in order to strengthen the originality of this research. First, the article entitled Hans Kelsen's thoughts about the law and its relevance to current legal developments written by Syofyan Hadi and Tomy Michael.² This article explains Hans Kelsen's thoughts in general, while this research specifically discusses the influence of *Theorie Von Stufenbau Der Rechtsordnung* in the Indonesian legal system. Second, the article with the title Hans Kelsen's Positivism Theory Influences Legal Development in Indonesia, written by Darmini Roza and Gokma Toni Parlindungan S.³ This article explains the influence of Hans Kelsen's positivist thinking in general in Indonesia, while this research specifically discusses the influence of *Theorie Von Stufenbau Der Rechtsordnung* in the Indonesian legal system, so it is more specific. Third, an article entitled Philosophical Study of Hans Kelsen's Thoughts on Law and Satjipto Rahardjo's Ideas on Progressive Law, written by Muhammad Harun.⁴ The article explains the comparison of Hans Kelsen's thoughts on law and Sasjipto Raharjo's thoughts on progressive law, so the article uses a comparison, while this research specifically discusses the influence of *Theorie Von Stufenbau Der Rechtsordnung* in the Indonesian legal system as one of Hans Kelsen's thoughts.

2. Methods

This research is legal research, namely a process of discovering legal rules, doctrine and principles.⁵ The problem approach used is a statute approach and conceptual approach. Meanwhile, the legal materials used are primary legal materials and secondary

² Syofyan Hadi dan Tomy Michael, "Hans Kelsen's thoughts about the Law and its Relevance to Current Legal Developments," *Technium Social Sciences Journal* 38 (2022).

³ Darmini Roza, "Teori Positivisme Hans Kelsen Mempengaruhi Perkembangan Hukum di Indonesia," *Lex Jurnalica* 18, no. 1 (2021).

⁴ Muhammad Harun, "Philosophical Study of Hans Kelsen's Thoughts on Law and Satjipto Rahardjo's Ideas on Progressive Law," *Walisono Law Review (Walrev)* 1, no. 2 (2019).

⁵ Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana, 2021).

legal materials. Legal materials are analyzed using normative analysis using legal interpretation methods to obtain a prescription for the problems in this paper.

3. Results and Discussion

3.1. Core *Theorie Von Stufenbau Der Rechtsordnung*

Law can only be fully understood in Hans Kelsen's view if law is viewed as a system of norms. Because of this, he put forward one of his very influential theories, known as *Theorie Von Stufenbau Der Rechtsordnung* theory or norm level theory. Based on this theory, legal norms in a country are hierarchical or multilevel. There are higher legal norms and lower legal norms. Lower legal norms must originate from higher legal norms, because if there are inconsistencies then the lower norms lose their validity. Hans Kelsen stated "Since a legal norm is valid because it is created in a way determined by another legal norm, the latter is the reason of validity of the former...The norms determining the creation of another norm is the superior, the norm created according to this regulation, the inferior norm".⁶ In another book, Hans Kelsen states "...The relationship between the norm that regulates the creation of another norm and the norm created in conformity with the former can be metaphorically presented as a relationship of super and subordination. The norm which regulates the creation of another norm is higher, the norm created in conformity with the former is the lower one".⁷

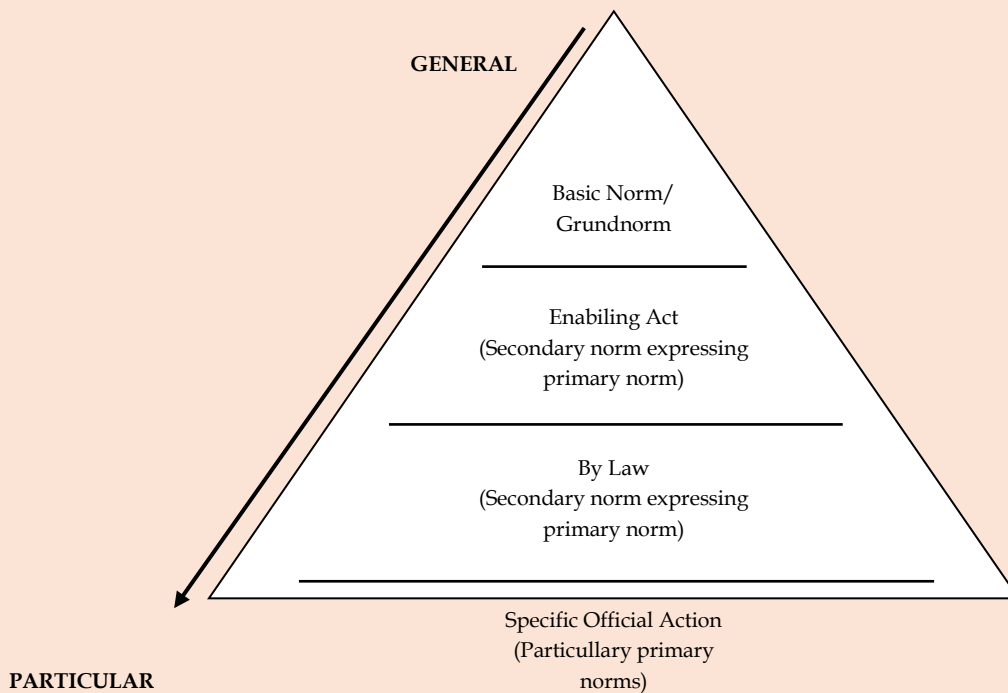
From the opinion above, Hans Kelsen emphasizes that legal norms in a state are hierarchical, so that there is a relationship between higher legal norms and lower legal norms (super-and subordination). Legal norms which are the basis for the formation of other legal norms have a higher hierarchy (higher norm). The legal norms formed by the higher legal norms have a lower position (lower one). Both the higher norm and the lower norm are one unit as a legal system. Hence, the validity of lower legal norms depends on their conformity with higher legal norms.

From the opinion above, legal norms in the country are not formed in equivalent legislation. However, their relationship is vertical. The highest legal norm (the highest) in Hans Kelsen's view is what he calls "*Grundnorm*". Below is outlined the hierarchy of legal norms according to Hans Kelsen:⁸

⁶ Kelsen, *General Theory of Law and State*.

⁷ Hans Kelsen, *Pure Theory of Law* (New Jersey: The Lawbook Exchange, 2008).

⁸ Zang Wan Hong, *Jurisprudence* (Cavendish Publishing Limited, 2002).



From the opinions above, there are two consequences of Hans Kelsen's theory of levels of legal norms, namely as follows:

- a. Higher legal norms become the source of formation of lower legal norms. The source of all legal formation is the presupposed Grundnorm; And
- b. The validity of lower legal norms depends on their conformity with higher legal norms, therefore lower legal norms must not conflict with higher legal norms.

3.2. The Influence of *Theorie Von Stufenbau Der Rechtsordnung* in the Indonesian Legal System

Theorie Von Stufenbau Der Rechtsordnung has at least 2 (two) influences on the Indonesian legal system. These two influences are as follows:

- a. Hierarchy of Indonesian laws and regulations

The hierarchy of Indonesian laws and regulations is strongly influenced by *Theorie Von Stufenbau Der Rechtsordnung*, although it is not applied absolutely. Since MPRS Decree no. XX/MPRS/1966 to Law Number 12 of 2011 concerning the Formation of Legislation, Indonesian legislation is structured hierarchically.

Article 2 of Law Number 12 of 2011 concerning the Formation of Legislative Regulations determines that Pancasila is the source of all sources of law. If seen from *Theorie Von Stufenbau Der Rechtsordnung*, Pancasila is a *Grundnorm/Staats fundamentalnorm*. As a Grundnorm, Pancasila is presupposed. because Pancasila was not formed from a higher legal source but was extracted from the soul and culture of the Indonesian nation (*volkgeist*). The nation's spirit and culture existed before Indonesia's independence, which was then formulated into Pancasila and recognized as the basic ideology and philosophy of the nation and state. All laws and regulations in Indonesia must be based on the values of Pancasila.

The Pancasila values that underlie legislation in Indonesia are divine values, human values, unity values, people's values and social justice values.

These Pancasila values were then concretized into lower statutory regulations, namely the 1945 Constitution of the Republic of Indonesia. In the theory of *Theorie Von Stufenaufbau Der Rechtsordnung*, the 1945 Constitution of the Republic of Indonesia is an Enabling act/*Staats Grundgesetzes*. The 1945 Constitution of the Republic of Indonesia is a document that contains certain rules and provisions that are basic or basic regarding Indonesian state administration. For this reason, the legal norms contained in the 1945 Constitution of the Republic of Indonesia were translated into a law/*formele gezet* to make them more concrete. The provisions in the Law are also translated into lower laws and regulations in the form of Government Regulations, Presidential Regulations, Regional Regulations, and other regulations.

Table 1. The hierarchy of laws and regulations in Indonesia can be seen in the table below:

Hierarchy of Legislative Regulations in Indonesia	
1.	TAP MPR No. XX/MPRS/1966 a) UUD 1945; b) TAP MPR (S); c) UU/Perppu; d) PP; e) KEPPRES; f) Other Implementing Regulations, such as: - Ministerial regulation - Ministerial Instructions - etc.
2.	TAP MPR No. III/MPR/2000 a) UUD 1945; b) TAP MPR; c) UU; d) Perppu; e) PP; f) KEPPRES; g) PERDA; -PERDA Provinsi -PERDA Kabupaten/Kota -PERDES.
3.	UU No. 10/2004 a) UUD 1945; b) UU/Perppu; c) PP; d) PERPRES; e) PERDA; -PERDA Provinsi; -PERDA Kabupaten/Kota; -PERDES.
4.	UU No. 12/2011 a) UUD 1945;

- b) UU/Perppu;
- c) PP;
- d) PERPRES;
- e) PERDA;
 - PERDA Provinsi;
 - PERDA Kabupaten/Kota;
 - PERDES.

From the table 1, the hierarchy of laws and regulations in Indonesia is arranged from general to specific. The higher the position, the more common the norm. The lower the position, the more specific the norm. For this reason, these laws and regulations have a hierarchical relationship (super-and subordination). When viewed from its binding force, higher statutory regulations have more binding force, when compared to lower statutory regulations. Article 7 paragraph (2) of Law Number 12 of 2011 concerning the Formation of Legislative Regulations determines that the binding power of statutory regulations is in accordance with their degree/hierarchy. This is also in accordance with the legal principle "*lex superior derogate legi inferiori*". Lower statutory regulations have juridical validity if they are in accordance with higher statutory regulations.

However, *Theorie Von Stufenbau Der Rechtsordnung* cannot be applied absolutely to the hierarchy of Indonesian laws and regulations. The type of legislation in Indonesia is not the same as other countries that Hans Kelsen used as examples. For example:

1. regarding the position of Government Regulations in Lieu of Law (PERPPU) cannot be placed in the *formal gezet* hierarchy, because the formal gezet can only be interpreted as law. Even though PERPPU and law are not absolutely the same, especially in the formation procedures. Therefore, PERPPU can only be seen as a wet in material permit. If you look at Hans Kelsen's *Theorie Von Stufenbau Der Rechtsordnung* above, PERPPU is not included in it. PERPPU is a legal product typical of the Indonesian legal system.
2. Regarding the position of the TAP MPR, it cannot be placed in the *staatsgrundgezet* or in the *formele gezet*.

b. Reviewing/toetsing/supervising legal norms

Theorie Von Stufenufbau Der Rechtsordnung greatly influenced the development of reviews of legal regulations in Indonesia. The validity of lower legal norms is only obtained if they are in accordance with higher legal norms. Therefore, the Indonesian legal system adheres to a legal norm control mechanism to ensure that one norm does not conflict with another.⁹ In Indonesia, there are three types of review of statutory regulations, namely judicial review, executive review and legislative review. Regarding this matter, Bagir Manan stated:¹⁰

"To ensure that the constitutional principles contained in the Constitution and other constitutional laws and regulations are not violated or ignored, it is necessary to have a body or procedures to supervise them. In the existing literature, there are three broad

⁹ Jimly Asshiddiqie, *Perihal Undang-Undang* (Jakarta: Rajawali Pers, 2020).

¹⁰ Bagir Manan dalam buku Ni`matul Huda, *Negara Hukum, Demokrasi & Judicial Review* (Yogyakarta: UII Press, 2005).

categories of testing of statutory regulations, namely testing by judicial bodies (judicial review), testing by political bodies (political review), and testing by state administrative review bodies or officials."

Below we describe several types of reviews that exist in the Indonesian legal system:

1. Judicial review

John Alder calls the term judicial review "supervisory jurisdiction", which has the meaning of "the high court's power to police the legality of decisions made by public bodies".¹¹ With this concept, judicial review is a form of supervision by judicial institutions regarding all actions carried out by administrative bodies or public officials. Judicial review is a concept derived from the rule of law principle which requires that every government action must be based on the law (the rule of law has been said to require that the legality of government action).¹² Therefore, judicial review is closely related to legal protection for society. In line with this, Alan R. Brewer-Carrias stated that judicial review or controle juridictionale is the supervision of judicial power over legislative and executive powers. Judicial review is the inherent duty of the courts to ensure that legislative and executive legal actions conform to the highest law (the same inherent duty of courts to ensure that each legal action conforms to a superior law).¹³

In the Indonesian legal system, the judicial review mechanism is implemented by 2 (two) judicial institutions, namely (1) judicial review of the 1945 Constitution of the Republic of Indonesia which is the authority of the Constitutional Court in accordance with the provisions of Article 24C paragraph (1) of the Law -The 1945 Constitution of the Republic of Indonesia; (2) testing of statutory regulations under the law against laws is the authority of the Supreme Court in accordance with the provisions of Article 24A paragraph (1) of the 1945 Constitution of the Republic of Indonesia. Testing is carried out by the Constitutional Court and the Supreme Court against Legislative regulations are included in the abstract norm review category. Jimly Asshiddiqie stated:¹⁴

"Abstract norm review is a review of legislative products that contain abstract and generally binding legal norms, such as review of laws by the Constitutional Court and review of statutory regulations under laws by the Supreme Court."

Apart from abstract norm review, concrete norm review is also known, namely testing carried out on concrete legal norms. Such as testing of State Administrative Decisions which are the authority of the Administrative Court as regulated in Article 47 of Law Number 5 of 1986 concerning State Administrative Courts.

2. Political review

Political review is supervision carried out by the people's representative institution or parliament. Revisions to a law can be carried out through and by the people's representative institutions themselves as institutions that have the authority to form and change laws. If in the course of time it turns out that the people's representative body considers that a law

¹¹ Jhon Alder, *Constitutional and Administrative Law* (New York: Palgrave Macmillan, 2005).

¹² Alder.

¹³ Irfan Fachruddin, *Pengawasan Peradilan Administrasi Terhadap Tindakan Pemerintah* (Bandung: Alumni, 2004).

¹⁴ Jimly Asshiddiqie, *Pokok-Pokok Hukum Tata Negara Indonesia Pasca Reformasi* (Jakarta: Bhuna Ilmu Populer, 2007).

which has been in effect as binding on the public must be revised, then the people's representative council itself has the authority to take the initiative to make improvements to the law through the mechanism for forming the applicable law.¹⁵ If linked to PERPPU, then the authority of the People's Representative Council in assessing PERPPU as intended in Article 22 paragraph (2) of the 1945 Constitution of the Republic of Indonesia can be classified as a form of political review/legislative review.

3. Executive review

Executive review or administrative control is the supervision or control of legal norms carried out by administrative institutions that carry out government functions (*bestuur*). Bodies that are delegated authority by law to implement the law in question can take the initiative to evaluate and, if necessary, initiate efforts to make improvements or changes to the law in question.¹⁶

An example of an executive review in the Indonesian legal system is the review of Village Regulations by the Regent/Mayor in accordance with the provisions of Law Number 6 of 2014 concerning Villages. Even in the Indonesian legal system, the term executive pre-review is known in the form of facilitation and evaluation of Provincial and Regency/City Regional Regulations by the Central Government as regulated in Law Number 23 of 2014 concerning Regional Government in conjunction with Minister of Home Affairs Regulation Number 80 of 2015 concerning the Formation of Regional Legal Products.

4. Conclusions

Theorie Von Stufenbau Der Rechtsordnung states that legal norms in a state have a hierarchical relationship (super-and subordination). Higher legal norms (higher norms) are a source of law for lower legal norms (lower norms). The validity of lower legal norms depends on higher legal norms. *Theorie Von Stufenbau Der Rechtsordnung* greatly influenced the Indonesian legal system. There are at least 2 (two) influences of this theory, namely (1) hierarchy of statutory regulations. Since the enactment of MPRS Decree no. XX/MPRS/1966 to Law Number 12 of 2011 concerning the Formation of Legislation in conjunction with Law Number 13 of 2022, the Indonesian legal and regulatory system is regulated hierarchically and in stages. All of these laws and regulations originate from Pancasila as the Grundnorm. However, *Theorie Von Stufenbau Der Rechtsordnung* cannot be applied absolutely to the hierarchy of Indonesian laws and regulations. The type of legislation in Indonesia is not the same as other countries that Hans Kelsen used as examples. For example, regarding the position of Government Regulations in Lieu of Law (PERPPU) cannot be placed in the *gezet formele* hierarchy, because the *gezet formele* can only be interpreted as a law and regarding the position of the MPR TAP it cannot be placed in the *staatsgrundgezet* or in the *gezet formele*; and (2) the regulation of review/toetsing/supervision mechanisms for legal norms, either through judicial review, executive review, or political review in order to maintain the validity of lower legal norms. Even for judicial review of laws, a Constitutional Court was formed to test the constitutionality of legal norms with the constitution.

5. Acknowledgments

Thank you for faculty of law, Universitas 17 Agustus 1945 Surabaya.

¹⁵ Asshiddiqie, *Perihal Undang-Undang*.

¹⁶ Asshiddiqie.

6. Funding (optional)

No funding was received for this study.

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