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AN EXAMINATION OF PANCASILA POSITIVISM: A COMPARISON AND CRITIQUE OF HANS KELSEN'S POSITIVISM

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Abstract. The aim of this article is a comparative-critical analysis of Hans Kelsen's Pure Theory of Law and "Pancasila Positivism" as two models of legal philosophy. Employing a normative legal research method with philosophical and comparative-conceptual approaches, this study analyses Kelsen's primary works and literature on Pancasila legal philosophy through philosophical interpretation and critical synthesis. The analysis reveals fundamental differences across three dimensions: (1) Ontological: Kelsen's law is a "pure" order of norms (Sollen) separate from morality (Sein), while Pancasila's law is an embodiment of inherent moral values. (2) Epistemological: Kelsenian validity is procedural, culminating in a hypothetical, a priori Grundnorm. In contrast, Pancasila's validity is twofold (procedural and substantive), functioning as a formalised, value-laden Staatsfundamentalnorm that serves as a substantive touchstone. (3) Axiological: Kelsen dismisses justice as an irrational domain, whereas Pancasila posits substantive justice (social justice) as the law's raison d'être. The research articulates "Pancasila Positivism" as a theoretical synthesis of "moral positivism": a model where law remains positive (state-enacted), yet its validity is inherently bound to the substantive moral values of Pancasila, offering an alternative to the moral vacuum of pure positivism.

Keywords: Pancasila Positivism, Pure Theory of Law, Hans Kelsen, Grundnorm, Legal Validity, Legal Philosophy.

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Introduction

Legal philosophy is perennially marked by a tension between two primary poles: the natural law school, which identifies law with morality and substantive justice, and the legal positivism school, which emphasises law as the command of a legitimate authority (positive law) to achieve legal certainty (Islamiyati, 2018). Within the positivist tradition, the Pure Theory of Law (*Reine Rechtslehre*), conceived by the Austrian jurist Hans Kelsen (2008, p.1), represents the culmination of the effort to purify jurisprudence from all non-legal elements.[4]

Kelsen sought to construct a "science" of law that was objective, logical, and value-free. This method of "purity" demands a rigid methodological separation between the realm of "what ought to be" (*das Sollen*), namely legal norms, from the realm of "what is" (*das Sein*), which encompasses sociological facts, political considerations, and, paramountly, moral judgments.[5] For Kelsen (2017, p. 394), law is validated not by its moral content, but by its procedure.[6]

On the other hand, the Indonesian legal system is built upon a philosophical foundation that is diametrically opposed to Kelsen's postulate of purity. The Indonesian *negara hukum* (rule of law), as stipulated in Article 1, paragraph (3) of the 1945 Constitution, is not a secular-positivistic state in the Kelsenian sense. The national legal order explicitly posits Pancasila as the *Staatsfundamentalnorm* (the State's Fundamental Norm) and the source of all state legal sources.[7]

To contextualise this for an international audience, the Indonesian legal system operates within a civil law tradition, originally inherited from the Dutch colonial era but fundamentally reoriented to serve the nation's unique ideological identity. In practice, the legal order functions through a strict hierarchy of norms, as formally codified in Law No. 12 of 2011, which mirrors the Kelsenian *Stufenbau* by requiring every regulation, from local ordinances to national statutes, to vertically align with the 1945 Constitution and Pancasila.[8] The primary

[4] As Hans Kelsen himself explained: “It is called a "pure" theory of law, because it only describes the law and attempts to eliminate from the object of this description everything that is not strictly law: its aim is to free the science of law from alien elements. This is the methodological basis of the theory.”

[5] Kelsen explained: “...a glance upon the traditional science of law as it developed during the nineteenth and twentieth centuries clearly shows how far removed it is from the postulate of purity; uncritically the science of law has been mixed with elements of psychology, sociology, ethics, and political theory. This adulteration is understandable, because the latter disciplines deal with subject matters that are closely connected with law. The Pure Theory of Law undertakes to delimit the cognition of law against these disciplines, not because it ignores or denies the connection, but because it wishes to avoid the uncritical mixture of methodologically different disciplines (methodological syncretism) which obscures the essence of the science of law and obliterates the limits imposed upon it by the nature of its subject matter.”

[6] Kelsen explained: “The norms of positive law are "valid," that is, they ought to be obeyed, not because they are, like the laws of natural law, derived from nature, God or reason, from a principle of the absolutely good, right or just, from an absolutely supreme value or fundamental norm which itself is clothed with the claim of absolute validity, but merely because they have been created in a certain way or made by a certain person. This implies no categorical statement as to the value of the method of law-making or of the person functioning as the positive legal authority; this value is a hypothetical assumption. If it be assumed that one ought to observe the commands of a certain monarch or that one should act according to the resolutions of a certain parliament, this monarch's orders and this parliament's resolutions are law. They are "valid" norms, and human conduct "ought" to conform to their contents. As the absolute validity of its norms corresponds to the idea of natural law, the merely hypotheticalrelative validity of its norms corresponds to that of positive law.”

[7] See: Article 1, Paragraph (3) of the Decree of the People's Consultative Assembly of the Republic of Indonesia Number III/MPR/2000 states: “The source of national fundamental law is Pancasila as written in the Preamble of the 1945 Constitution, namely Belief in the One and Only God, Just and Civilised Humanity, the Unity of Indonesia, and Democracy Guided by the Inner Wisdom in the Unanimity Arising out of Deliberations Amongst Representatives, as well as the Realization of Social Justice for All Indonesian People, and the body of the 1945 Constitution.” This is further supported by Article 2 of Law Number 12 of 2011 concerning the Formation of Legislation, which states: “Pancasila is the source of all sources of state law.”

[8] see article 7 of Law No 12 of 2011: “(1) The types and hierarchy of Laws and Regulations consist of: a. the 1945 Constitution of the Republic of Indonesia; b. Decrees of the People’s Consultative Assembly; c. Laws/Government Regulations in Lieu of Laws; d. Government Regulations; e. Presidential Regulations; f. Provincial Regulations; and g. Regency/Municipal Regulations. (2) The legal force of Laws and Regulations shall be in accordance with the hierarchy as referred to in

mechanism for the practical application of this "Pancasila Positivism" is the Constitutional Court (*Mahkamah Konstitusi*), which serves as the ultimate arbiter of legislative validity. Unlike a purely formalist judicial body, the Court actively assesses whether the "letter of the law" fulfils the "spirit of the nation," ensuring that statutory certainty never overrides the substantive moral mandates of Divinity and Social Justice (Buana, 2020). Consequently, Indonesian jurisprudence is characterised by a persistent effort to harmonise European legal structures with indigenous value-laden norms (Hadiprabowo, et al, 2024).

This status of Pancasila inherently injects moral content, Divinity, Humanity, Unity, Democracy, and Justice, into the heart of the legal system. Law in Indonesia is not understood as a "pure" structure of norms sterile from morality, but rather as an instrument to realise the moral and ethical ideals of the nation as rooted in these noble values.

Here, lies the central theoretical tension examined by this article. Kelsen's Pure Theory of Law demands the separation of law from morals, whereas the Pancasila legal system demands their integration. A rigid application of Kelsenian positivism in the Indonesian context would not only delegitimise Pancasila as a legal source but would also ignore the demand for substantive justice, which is precisely the *raison d'être* of the Indonesian rule of law. This dilemma provokes a fundamental debate: is Indonesian law positive (because it is state-enacted) or is it natural law (because it derives from moral values)? If Indonesian law is positive, how can it maintain its moral claims? If it is moral, how can it guarantee legal certainty?

A literature review, such as Halim (2008) and Astomo (2014) indicates two primary trends. Firstly, some academics adopt a general critique of Kelsen, highlighting his excessive formalism and moral vacuum, often within the framework of Satjipto Rahardjo's Progressive Law critique, which rejects the dominance of Kelsenian "law in books." Secondly, other academics attempt to adapt the theory of Kelsen, or more precisely his student, Hans Nawiasky, by positioning Pancasila as the *Staatsfundamentalnorm*.[9]

However, a significant research gap exists. Much of the literature is trapped in the conceptual error of equating Kelsen's *Grundnorm* (Basic Norm) with Pancasila as the *Staatsfundamentalnorm*. Yet, as posited by F.X. Adji Samketo and Aga Natalis (2024), the two concepts are fundamentally different. Kelsen's *Grundnorm* is hypothetical, *a priori*, and formal (devoid of substance), whereas Pancasila is posited (formalised in the Preamble of the 1945 Constitution) and substantive (value-laden).

No research has yet systematically compared Kelsen's Pure Theory of Law and Pancasila legal philosophy across the three philosophical dimensions (ontology, epistemology, and axiology) to construct a coherent, alternative theoretical model.

paragraph (1).” Article 8 further elaborates on provisions that are not included in the preceding article: “(1) Types of Laws and Regulations other than those as referred to in Article 7 paragraph (1) include regulations stipulated by the People’s Consultative Assembly, the House of Representatives, the Regional Representative Council, the Supreme Court, the Constitutional Court, the Audit Board of Indonesia, the Judicial Commission, Bank Indonesia, Ministers, as well as agencies, institutions, or commissions of equivalent level established by Law or by the Government pursuant to a Law, Provincial Regional Houses of Representatives, Governors, Regency/Municipal Regional Houses of Representatives, Regents/Mayors, Village Heads or their equivalents. (2) Laws and Regulations as referred to in paragraph (1) are recognised in their existence and shall have binding legal force insofar as they are mandated by higher-level Laws and Regulations or established based on authority.”

[9] To avoid misunderstanding, the author does not assert that Hans Nawiasky established Pancasila as the *Staatsfundamentalnorm*. Rather, as Ni’matul Huda, expounding on Hans Nawiasky’s concept, explains, the state's fundamental norm (*staatfundamentalnorm*) is the highest norm in a state. Its existence is not derived from another, higher norm but is pre-supposed by society. This norm functions as the anchor or legitimizing basis for the entire legal order beneath it. The assertion that it is not formed by a higher norm is a logical consequence of its "highest" status, for if it were formed by another norm, that formative norm would be the highest (See: Ni’matul Huda, *UUD 1945 dan Gagasan Amandemen Ulang*, (Jakarta: Rajawali Press, 2008), p. 55). Thus, it is clear that Pancasila can be described as a *staatfundamentalnorm* consistent with Hans Nawiasky’s exposition.

Addressing this gap, this research focuses on the primary research question: how does Pancasila positivism, ontologically, epistemologically, and axiologically, offer a coherent theoretical alternative to the limitations of Hans Kelsen's Pure Theory of Law? As a secondary question, this study also examines: how does the conceptual difference between Kelsen's *Grundnorm* and Pancasila as the *Staatsfundamentalnorm* impact the conception of legal validity in Indonesia?

To address this theoretical gap, the overarching purpose of this article is to systematically compare and critique Hans Kelsen's Pure Theory of Law against the Indonesian legal philosophy of Pancasila to construct a coherent, alternative theoretical model. Specifically, the objectives of this paper are threefold: (1) to conduct a comparative analysis of Kelsenian and Pancasila legal philosophies across their ontological, epistemological, and axiological dimensions; (2) to clarify the fundamental conceptual distinction between Kelsen's hypothetical *Grundnorm* and Pancasila as a substantive, value-laden *Staatsfundamentalnorm*, and examine how this distinction impacts the conception of legal validity; and (3) to synthesise these findings into a novel theoretical framework of "Pancasila Positivism" termed "Moral Positivism," demonstrating how this model reconciles the positivist demand for state-enacted legal certainty with the Pancasila mandate for substantive social justice. By achieving these objectives, this study aims to provide a robust philosophical foundation for Indonesian judicial practice, particularly for the Constitutional Court in its role as the guardian of the nation's legal ideal (*rechtsidee*).

This normative legal study, as defined by Nasution (2024, p.42), utilises philosophy of law and conceptual-comparative approaches to analyse the tension between Kelsen's "law as written" and the "law as it ought to be" within the framework of Pancasila as Indonesia's *Staatsfundamentalnorm*. By examining primary materials, such as Kelsen's *Pure Theory of Law* and the 1945 Indonesian Constitution, alongside authoritative secondary sources, the research employs qualitative content analysis through hermeneutics, comparative pillars (ontology, epistemology, and axiology), and critical synthesis. Ultimately, the study seeks to bridge these legal philosophies by constructing a "moral positivism" thesis, demonstrating how Pancasila addresses the ethical gaps inherent in Kelsen's pure positivism.

During the preparation of this work, the authors used AI-assisted technology such as ChatGPT in order to check the grammar and spelling. After using this tool, the author/authors reviewed and edited the content as needed and take full responsibility for the publication's content, declaring that they have complied with the highest standards of scientific integrity.

1. The Ontological Dimension: What is the Nature of Law? (*Das Sein des Rechts*)

1.1. Kelsenian Positivism: Law as a Purely Formal Order of Norms

For Kelsen, the ontology of law is the norm. As explained by Paulson (2013), Law is not a social fact, a psychological will, or a moral command. Law, in its essence, is a hierarchical order of norms that can be analogised as a *Stufenbau* (step structure).[10] In this structure, a lower norm (e.g., an arrest warrant) derives its existence from a higher norm (e.g., the Code of Criminal Procedure), and so on, up to the constitution (Kelsen, 2008, pp. 221 – 222).[11] This nature of law resides exclusively within the realm of "what ought to be" (*das*

[10] It should be clarified that the first person to call Hans Kelsen's hierarchy theory the *Stufenbau* was not Hans Kelsen himself, but his colleague Adolf Merkl

[11] Regarding this, Kelsen explained: "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 the higher, the norm created in conformity with the former is the lower one. The legal order is not a system of coordinated norms of equal level, but a hierarchy of different levels of legal norms. Its unity is brought about by the connection that results from the fact that the validity of a norm, created according to another norm, rests on that other norm, whose creation in turn, is determined by a third one. This is a regression that ultimately ends up in the presupposed basic norm. This basic norm, therefore, is

Sollen). Its existence is strictly separated from the world of "what is" (*das Sein*), which includes sociological facts, political realities, or moral considerations (Kelsen, 2008, p.1).[12]

The "purity" principle of Kelsen's Pure Theory of Law functions as a fundamental ontological requirement, dictating that law is only truly law when it remains "pure" from the contamination of non-legal elements. As reinforced by Andrei Marmor (2021), Kelsen developed this anti-reductionist approach in the early 20th century in direct response to traditional legal philosophies, which he believed were hopelessly compromised by political ideology, moralizing, and attempts to reduce the law to natural or social sciences. Rejecting these flawed endeavours, Kelsen constructed a jurisprudence that aims at cognition focused exclusively on the law alone, establishing this "purity" not just as an ontological definition of what law is, but as the theory's "basic methodological principle."

An amoral or unjust rule remains law in an ontological sense as long as it is part of the positive normative order. As Andrei Marmor explains, this aligns with Kelsen's view that the presupposition of a "basic norm" is optional, serving an entirely epistemological function rather than an ethical one. Consequently, Kelsen argues that the law can be interpreted in two distinct ways, either juristically, as an objectively valid system, or sociologically, as mere "power relations", depending entirely on whether that basic norm is presupposed.

For Hans Kelsen (2008, p. 33), as reinforced by Henry Cohen (1981), the fundamental nature of law is a formal, socially organised coercive order. At the core of this framework is Kelsen's definition of a legal norm, which must attach an immanent sanction to specific conduct to be considered valid. As Cohen notes, this strict requirement distinguishes the objective, normative function of sanctions from the mere sociological motive of fear. Because a norm only achieves the status of "law" if it explicitly stipulates a sanction, direct behavioural commands such as "thou shalt not murder" are rendered legally superfluous, provided that a primary norm already mandates a specific punishment for the act of murder. Morality lacks such socially organised sanctions. Therefore, the essence of law is its form and hierarchical structure, not its moral content.

1.2. Pancasila Positivism: Law as an Embodiment of Substantive Value

Conversely, the legal ontology in Pancasila philosophy is fundamentally and intentionally "impure." The nature of law cannot be separated from the values (*Wertungen*) that underpin it (Yuliartini, et al, 2022). Law is not merely a formal structure, but the embodiment or "positivation" of the nation's noble values.

The First Sila, "Belief in the One and Only God," posits that the nature of Indonesian law possesses a spiritual dimension. Law is not merely recognised as a product of human reason but is also understood as being rooted in religious morality. This is reflected, for example, in the preamble of court verdicts: "For Justice Based on Belief in the One and Only God." ("*Demi Keadilan Berdasarkan Ketuhanan Yang Maha Esa*") (Ikhlas & Arief, 2025; Nasution, et al, 2024).

The Second Sila, "Just and Civilised Humanity," establishes that the nature of law is the protection of human dignity. Law exists not for its own sake, but for humanity. The ontology of Pancasila law rejects the view that an inhumane law is still law (Warman, 2025).

Thus, ontologically, law within the Pancasila system is a "normative order imbued with Divinity and Humanity." It is an order that is inherently moral.

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the highest reason for the validity of the norms, one created in conformity with another, thus forming a legal order in its hierarchical structure."

[12] In relation to his theory, Hans Kelsen explained: "As a theory, its exclusive purpose is to know and to describe its object. The theory attempts to answer the question what and how the law is, not how it ought to be. It is a science of law (jurisprudence), not legal politics."

1.3 Ontological Comparison

This ontological comparison reveals a sharp divergence. Kelsen's ontology is formal-structural: law is form (a pure hierarchy of *Sollen* norms). Conversely, Pancasila's ontology is substantive-material: law is content (an embodiment of moral *Sein* values). Kelsen asks, "In what structure does law exist?" whereas Pancasila asks, "As what value is law manifested?"

2. The Epistemological Dimension: How is Law Known and Validated? (*Die Geltung des Rechts*)

2.1. Kelsenian Positivism: Procedural Validity and the Hypothetical *Grundnorm*

Kelsenian epistemology focuses purely on procedural validity (Kelsen, 2008, p. 4). A norm (e.g., a judge's ruling) is valid not because its content is just, but because it was created based on a higher norm that authorised it (e.g., a statute). That statute is valid because it was created based on the constitution.[13]

This chain of procedural validity in the *Stufenbau* must stop at a single apex. This point, for Kelsen, is the *Grundnorm* (Basic Norm). Herein lies Kelsen's most frequently misunderstood argument. Kelsen's *Grundnorm* is not the written constitution or, in this case, Pancasila. The *Grundnorm* is a hypothetical and *a priori* (non-empirical) presupposition (Kelsen, 2008, pp. 8 – 9).[14] The *Grundnorm* resides outside the positive legal system itself; it is not posited by any authority. It is a "juristic fiction" or a logical postulate assumed by practical reason to grant validity to the entire system (Samekto & Natalis, 2024).

The sole function of the *Grundnorm* is to provide logical validity to the first historical constitution. It is crucial to note that Kelsen's *Grundnorm* has no content or substance. It is merely a formal presupposition, for example: "Everyone ought to obey the effective constitution." Because it is empty of substance, it can validate any legal order, whether democratic or totalitarian, as long as that order is effective.

2.2 Pancasila Positivism: Dual Validity and the Substantive *Staatsfundamentalnorm*

The epistemology of Pancasila law is fundamentally different. Pancasila is not the hypothetical and empty Kelsenian *Grundnorm*. In more precise terminology, developed by Kelsen's student, Hans Nawiasky, Pancasila is the *Staatsfundamentalnorm* (the State's Fundamental Norm).

The distinction between Kelsen's *Grundnorm* and Pancasila as the *Staatsfundamentalnorm* is crucial:

[13] Hans Kelsen wrote: “The norm which confers upon an act the meaning of legality or illegality is itself created by an act, which, in turn receives its legal character from yet another norm. The qualification of a certain act as the execution of the death penalty rather than as a murder-a qualification that cannot be perceived by the senses-results from a thinking process: from the confrontation of this act with the criminal code and the code of criminal procedure. That the mentioned exchange of letters between merchants constitutes legally a contract, results exclusively from the fact that such an exchange conforms with conditions defined in the civil code. That a document is objectively as well as subjectively a valid testament results from the fact that it conforms to conditions stipulated by this code. That an assembly of people is a parliament, and that the meaning of their act is a statute, results from the conformity of all these facts with the norms laid down in the constitution. That means, that the contents of actual happenings agree with a norm accepted as valid."

[14] Hans Kelsen explained: “If a man in need asks another man for help, the subjective meaning of this request is that the other ought to help him. But in an objective sense he ought to help (that is to say, he is morally obliged to help) only if a general norm-established, for instance, by the founder of a religion-is valid that commands, "Love your neighbor." And this latter norm is objectively valid only if it is presupposed that one ought to behave as the religious founder has commanded. Such a presupposition, establishing the objective validity of the norms of a moral or legal order, will here be called a basic norm (Grundnorm). Therefore, the objective validity of a norm which is the subjective meaning of an act of will that men ought to behave in a certain way, does not follow from the factual act, that is to say, from an is, but again from a norm authorizing this act, that is to say, from an ought.”

1. Nature: Kelsen's *Grundnorm* is hypothetical, *a priori*, and resides outside of positive law. Pancasila as the *Staatsfundamentalnorm* is posited, written, and exists within the legal order (i.e., formalised in the fourth paragraph of the Preamble to the 1945 Constitution).
2. Content: Kelsen's *Grundnorm* is empty of substance. Conversely, Pancasila as the *Staatsfundamentalnorm* is full of substance; it is the material source and collection of values (Divinity, Humanity, Justice) that must imbue all laws beneath it.

As a consequence of this epistemological difference, legal validity in Indonesia is not singular (procedural) as in Kelsen's theory. The epistemology of legal validity in Indonesia is twofold (*dual-validity*):

1. Procedural (Formal) Validity: A law (e.g., a *UU* or statute) must be procedurally valid. This means it must be formed by the authorised institutions (the DPR [House of Representatives] jointly with the President) in accordance with the procedures stipulated in the 1945 Constitution. This is the positivist aspect of Indonesian law.
2. Substantive (Material) Validity: The content of the law must also be valid. That is, it must not conflict with the values contained within Pancasila as the *Staatsfundamentalnorm*.

A statute, as explained by Bo'a (2020), that is procedurally valid (has been enacted) can still be declared invalid if it fails the test of substantive validity; that is, when it undergoes judicial review by the Constitutional Court and is proven to conflict with the Pancasila values contained in the 1945 Constitution.

3. The Axiological Dimension: What is the Purpose and Value of Law? (*Der Zweck des Rechts*)

3.1 Kelsenian Positivism: Legal Certainty; Justice as an Irrational Ideal

Kelsen (2002, p.7) distinguished between two things. Firstly, the axiology of the Pure Theory of Law itself. Its purpose is cognition: pure knowledge of positive law, not a moral justification of that law.[15] Secondly, the axiology of positive law itself (within the positivist view). Its purpose is legal certainty (*Rechtssicherheit*). For Kelsen, justice (*Gerechtigkeit*) is an "irrational ideal." (Kelsen, 1941). [16] Kelsen (2008, pp. 48 – 50) challenges St. Augustine's claim that a state without justice is merely a "robber gang" by arguing that justice is inherently a subjective, relative, and emotional moral concept. Because jurisprudence must remain an objective and rational science, Kelsen insisted that this "irrational" concept of justice be entirely excluded from the domain of legal science, as it cannot serve as a scientific criterion for law. Consequently, the "Pure Theory" defines law not by its moral content, but strictly by its function as an effective coercive order. Under this objective framework, even regimes widely considered "unjust", such as post-revolutionary France or the Soviet Union, must be recognised as valid legal orders once their coercive systems become effective.

[15] Hans Kelsen explained: "the Pure Theory of Law aims solely at cognition of its subject-matter, its object. It attempts to answer the questions of what the law is and how the law is made, not the questions of what the law ought to be or how the law ought to be made."
[16] In his essay, Kelsen wrote:" Justice is an irrational ideal. The usual assertion that there is indeed such a thing as justice, but that it cannot be clearly defined, is in itself a contradiction. However indispensable it may be for volition and action of men, it is not subject to cognition. Regarded from the point of view of rational cognition, there are only interests, and hence conflicts of interests. They can be solved by an order that either satisfies one interest at the expense of the other, or seeks to establish a compromise between the two. That only one of these two orders is " just" cannot be established by rational cognition. Such cognition can grasp only a positive order evidenced by objectively determinable acts. This order is the positive law. Only this can be an object of science; only this is the object of the pure theory of law, which is a science, and not metaphysics. This science seeks the real and possible law, not the just, and in this sense it is radically realistic and empirical. It declines to justify or condemn"

3.2 Pancasila Positivism: Substantive Justice as the *Raison d'Être*

The axiology of Pancasila law is explicitly teleological (purpose-oriented). The purpose of law is never merely certainty. Indonesian legal philosophy, in line with the view of Gustav Radbruch, recognises three basic legal values: Certainty (*Rechtssicherheit*), Utility (*Zweckmässigkeit*), and Justice (*Gerechtigkeit*) (Islamiyati:2018). However, among these three, Pancasila posits justice as the highest axiological value. The ultimate purpose (*ultimum vale*) of the law is imperatively formulated in the Fifth Sila: "Social Justice for All Indonesian People." (Andriawan, 2022).

Furthermore, the Second Sila, "Just and Civilised Humanity," also explicitly establishes justice and civilization as the objectives of law. Law is a tool or means (an instrument) to achieve social justice, realise civilization, and protect human dignity (Prasetyo: 2022). Whereas in Kelsenian positivism, justice is a *problem* for legal science, in Pancasila positivism, justice is the purpose and *raison d'être* of the law itself.

4. Conceptual Critique of the Limitations of Kelsenian Positivism

The comparative analysis in the Results section demonstrates that Kelsen's Pure Theory of Law and Pancasila Positivism operate on fundamentally different philosophical assumptions. This Discussion section will develop two primary arguments: first, a conceptual critique of the limitations of Kelsen's Pure Theory of Law, particularly within the Indonesian context; and second, a theoretical synthesis articulating Pancasila Positivism as a model of "moral positivism."

4.1 Excessive Formalism and the Moral Vacuum

By positing an absolute separation between law and morality, Kelsen created a theory that is "dry" and sterile, and ultimately vulnerable to a moral vacuum. The Kelsenian system, which focuses only on procedural validity, lacks an internal mechanism to critique a law that is procedurally valid but substantively unjust.

Theoretically, a totalitarian regime could enact the most heinous laws (e.g., racial laws or genocide) and, as long as those laws were enacted according to the procedures set by the effective constitution, Kelsen's Pure Theory of Law would be compelled to recognise them as valid "law." This critique is globally relevant, but it holds a special resonance in Indonesia. The dominance of rigid, legalistic positivism, where law is equated merely with statutes, is seen as one of the root problems in law enforcement in Indonesia.

The emergence of critiques, such as that posited by Satjipto Rahardjo through the concept of Progressive Law, is a direct response to this failure of positivism. Rahardjo argued that legal positivism has failed to present a true picture of law because it is too narrow and detached from social reality. Progressive Law, which resonates strongly with Pancasila philosophy, demands that law serve humanity, not the other way around. This is a firm rejection of Kelsenian formalism, which prioritises *law in books* over *law in action* and substantive justice.

Examples frequently cited in critical legal literature in Indonesia, such as the acquittal of illegal loggers (the Adelin Lis case) or the initial verdict in the murder of human rights activist Munir (the Pollycarpus case), are often seen as manifestations of legalistic positivism. In these cases, judges were criticised for being "trapped" by formal rules and procedural evidence, thereby (and were perceived as) disregarding the sense of substantive justice prevalent in society.

4.2 The Inapplicability of the *Grundnorm* in an Ideological State

The second, and theoretically more fundamental, limitation is the inapplicability of Kelsen's *Grundnorm* concept within the context of an ideological state such as Indonesia. Kelsen's *Grundnorm*, as has been analysed, is hypothetical, *a priori*, and relative. It is a logical analytical tool required by a jurist to understand the validity of a legal system, but it possesses no ideological substance itself. The problem is that nations like Indonesia are not founded upon an empty logical presupposition. Indonesia was founded upon a substantive and declared consensus of values, namely Pancasila. The Indonesian founding fathers did not assume a hypothetical basic norm; they consciously formulated and posited a value-laden *Staatsfundamentalnorm*.

Kelsen's theory collapses at this point. It cannot explain *why* a substantive *Grundnorm* (Pancasila) *ought* to be obeyed, other than the mere fact that it *is* obeyed (the aspect of efficacy). Kelsenian theory fails to capture the fact that Pancasila is obeyed not just because it is effective, but because it is regarded as the nation's philosophical truth and moral consensus. The attempt to "save" Kelsen's theory by positing Pancasila as the *Grundnorm* is a category mistake. Kelsen's *Grundnorm* is a formal-logical concept, whereas Pancasila is a material-ideological concept. The two cannot be equated.

4.3 Synthesis: Pancasila as a "Moral Positivism" Model

Pancasila legal philosophy is often drawn into a classic dichotomy: is it a school of Natural Law (as it is based on the morals of Divinity and Humanity) or a school of Positivism (as law must be state-enacted)? This article posits the thesis that Pancasila transcends this binary.

Pancasila is not pure Natural Law. If it were pure Natural Law, then the Sila of "Social Justice" would inherently be binding law without needing positivation. In fact, Pancasila's values (e.g., social justice) must undergo a process of positivation, translated into Statutes, Government Regulations, etc., by legitimate state authorities to possess formal juridical binding force. On the other hand, Pancasila is clearly not Kelsenian Positivism. As has been thoroughly discussed, it rejects the absolute separation of law and morals, rejects pure procedural validity, and rejects the disregard for substantive justice.

The thesis advanced, comparable to Hermanti (2016), is that Pancasila offers a unique synthesis, a *sui generis* model that can be articulated as "Moral Positivism" or "Value-Based Positivism." This "Moral Positivism" model has two core components that operate simultaneously:

1. The Positivist Aspect: Law in Indonesia remains positive law. The validity of a legal rule (Statute, Government Regulation, Regional Regulation) requires an act of legislation or regulation by a legitimate state authority (DPR, President, Regional Government). Law does not float in the realm of pure morality; it must be posited.
2. The Moral Aspect: However, the validity of said positive law does not depend solely on procedural legality. Its validity is inherently bound to substantive validity, namely its conformity with the values of Pancasila.

In this synthesis model, Pancasila (as the *Staatsfundamentalnorm* formalised in the Preamble of the 1945 Constitution) serves a dual function: it is the material source (source of values) for the formation of new law, while simultaneously functioning as a moral filter and a substantive touchstone for existing positive law.

5. Theoretical and Practical Implications: The Constitutional Court as the Guardian of the *Rechtsidee*

5.1 Institutionalising Dual Validity: From Kelsenian Formalism to Pancasila-Based Judicial Review

This "Moral Positivism" model is not merely a theoretical abstraction. It possesses profound theoretical implications and has been tangibly practiced within the Indonesian constitutional system. Its primary theoretical implication is the institutionalisation of the concept of dual validity (formal and substantive) as the national legal standard. This directly rejects Kelsen's view that validity is solely singular (procedural). This theory provides a robust philosophical foundation for the practice of judicial review that is not merely textual (testing statutes against the articles of the 1945 Constitution), but also philosophical (testing statutes against the Pancasila values that imbue the Preamble of the 1945 Constitution).

The most evident practical implication is seen in the authority and practice of the Constitutional Court (MK) of the Republic of Indonesia. The MK does not act as a passive-formalistic "guardian of the constitution," as Kelsen envisioned constitutional review (Rigaux, 1998). Conversely, the Indonesian Constitutional Court (MK) actively and progressively serves as the guardian of the legal ideal (*rechtsidee*) of Pancasila. The Court consistently uses Pancasila, enshrined in the Preamble of the 1945 Constitution, as the highest substantive "touchstone" to assess the constitutionality of statutes.

The most prominent case study of this "Moral Positivism" in practice is Constitutional Court Decision No. 100/PUU-XI/2013. In this decision, the Constitutional Court (MK) judicially reviewed Law No. 2 of 2011 concerning Political Parties, which contained the phrase "Four Pillars of National and State Life" (encompassing Pancasila, the 1945 Constitution, NKRI [the Unitary State of the Republic of Indonesia], and Bhinneka Tunggal Ika [Unity in Diversity]). The Court annulled said phrase. The Court's reasoning (its legal consideration) was purely philosophical-ideological. The Court argued that positioning Pancasila as a "pillar" was a fatal error, as this act equated Pancasila (which is the basis/foundation) with the 1945 Constitution, NKRI, and Bhinneka Tunggal Ika (which are the pillars that stand upon that foundation) (Basuki, 2015).

This act by the Constitutional Court is a perfect manifestation of "Moral Positivism." The MK used Pancasila as a substantive "touchstone" to annul a positive law (a statute) that, despite being procedurally valid, was deemed philosophically erroneous and threatened the position of Pancasila as the *Staatsfundamentalnorm*. The MK, thereby, does not merely uphold legal certainty, but actively enforces the philosophical and ideological truth of the state.

5.2 Moral Positivism in Practice: Religious Freedom, the Blasphemy Law, and Minority Rights

The practical application of "Moral Positivism" is most acutely observed in the tension between the First Sila and the individual right to freedom of conscience and religion (Wardana, et al, 2025). In the Indonesian legal order, according to Waringga and Mucthar (2021), this right is not interpreted through a secular-positivistic lens of absolute individual liberty; rather, it is understood through the spiritual dimension of the First Sila, which posits that law is rooted in religious morality. Consequently, the state is mandated to "positivise" religious values into law to maintain social harmony, creating a unique legal landscape where moral mandates from the *Staatsfundamentalnorm* directly shape the boundaries of civil rights (Elvandri, et al, 2025).

A primary and controversial example of this model in action is Indonesian Law No. 1 PNPS 1965 on Blasphemy. From a Kelsenian perspective, the validity of the Blasphemy Law rests solely on its procedural enactment by a legitimate authority, rather than its moral content. This aligns with Andrei Marmor's explanation that an act or event gains its legal-normative meaning exclusively through another legal norm that confers this meaning upon it. Consequently, an act can only create or modify the law if it is executed in accordance with a "higher" legal

norm that authorises its creation, with that higher norm, in turn, owing its own legal validity to yet another authorizing norm situated above it in the legal hierarchy. However, under the "Moral Positivism" framework, its validity is also tied to its substantive function as a "moral filter". Proponents of the law argue that it serves as a necessary instrument to protect the "Divinity" and "Social Justice" values of Pancasila by preventing the degradation of religious symbols that could lead to social instability (Silfiah, et al, 2016).

The Constitutional Court's jurisprudence (notably Decision No. 140/PUU-VII/2009) further illustrates this role as the guardian of the *rechtsidee*. In its review of the Blasphemy Law, the Court did not merely apply a formalistic "law in books" approach. Instead, it progressively argued that the limitation of religious expression was justified by the need to protect the broader substantive value of religious harmony, which is inherent in the Pancasila-based *negara hukum* (Somawijaya & Ramdan, 2021; Crouch, 2012). This demonstrates that in Indonesia, legal certainty is often balanced against, and sometimes subordinated to, the moral consensus of the state.

The evolution of minority rights, such as those of the Ugamo Malim and other indigenous belief systems (*aliran kepercayaan*), provides a compelling case for the "substantive justice" mandate of the Second and Fifth Silas. Historically, the "positive" administrative law of Indonesia limited religious recognition to specific institutionalised faiths. However, in Decision No. 97/PUU-XIV/2016, the Constitutional Court utilised the "Just and Civilised Humanity" value of Pancasila to strike down discriminatory administrative requirements on national identity cards (Harsyahwardhana,2020). This ruling exemplifies how the "Moral Positivism" model allows substantive justice to correct procedurally valid but inhumane positive laws.

Ultimately, the interplay between the 1945 Constitution, the Indonesian Human Rights Act (Law No. 39 of 1999), and the Blasphemy Law reveals the true hierarchy of "Moral Positivism". While the Constitution and the Human Rights Act provide the "formal" procedural framework for rights, the values of Pancasila serve as the "substantive touchstone" that defines their limits. This synthesis ensures that law in Indonesia remains "positive" (state-enacted) but never "morally vacuumed," as it is inherently bound to the collective ideological truth of the nation.

Conclusion

This research examined the deep-seated theoretical tension between Hans Kelsen's Pure Theory of Law and Pancasila legal philosophy. The findings demonstrate that Pancasila Positivism fundamentally differs from Kelsenian Positivism across all three philosophical pillars. Ontologically, Kelsen's law is a "pure" formal structure of norms void of morality, whereas Pancasila's law is an embodiment of substantive moral values, specifically Divinity and Humanity. Epistemologically, Kelsenian validity is purely procedural, terminating in a hypothetical and empty *Grundnorm*, whereas Pancasila's validity is twofold, procedural and substantive, culminating in a formalised, value-laden *Staatsfundamentalnorm*. Axiologically, Kelsen dismisses justice as an "irrational ideal" and prioritises certainty, while Pancasila posits substantive social justice as the law's *raison d'être*.

The primary theoretical contribution of this article is the articulation of "Pancasila Moral Positivism" as a *sui generis* synthesis. This model resolves the perennial binary conflict between legal certainty and substantive justice by retaining the positive nature of law while institutionalizing Pancasila's moral values as the mandatory substantive validity standard. By positioning Pancasila as the *Staatsfundamentalnorm*, the model ensures that while law remains state-enacted, its validity is inherently bound to the nation's ethical consensus. This synthesis offers a coherent alternative to the moral vacuum of pure positivism, providing a robust framework for international scholars to understand the non-secular rule of law in Indonesia.

Crucially, this research has demonstrated that this model is not merely a theoretical abstraction but is actively practiced by the Constitutional Court as the guardian of the Pancasila *rechtsidee*. Through the lens of Moral Positivism, the study explores sensitive issues of religious freedom, the Blasphemy Law, and the rights of minorities like the Ugamo Malim. By mapping the interplay between the 1945 Constitution, the Indonesian Human Rights Act, and statutory regulations, the analysis shows how the Indonesian legal system uses Pancasila as a "substantive touchstone" to ensure that formal legality never overrides the nation's ethical consensus. This synthesis is clearly reflected in the Court's authority to assess whether the "letter of the law" fulfils the "spirit of the nation," ensuring that statutory certainty does not violate substantive moral mandates.

This "Moral Positivism" model is demonstrably dominant at the Constitutional Court level, which functions as the guardian of ideology. Further research is needed to empirically examine: (1) To what extent is this "Moral Positivism" model understood, accepted, and applied by judges in the first instance and appellate courts, who deal with positive law daily? (2) How is this model applied to resolve concrete legal conflicts where the demands of substantive justice (Pancasila values) directly clash with the rigid and formalistic text of statutes (positive law)?

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