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WHAT IS THE PURE THEORY OF LAW?

Hans Kelsen

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The Pure Theory of Law is, as its name indicates, a theory of law. The way in which a theory is elaborated is determined by its object. In order to apprehend the peculiarity of a theory of law, we must know the nature of its object; we must, first of all, answer the question as to what is law.

Although the theory of law—or, as it is usually called, jurisprudence—is one of the oldest sciences, there is no generally accepted definition of the concept of law. There are two different views concerning this object. According to the one, law is a *fact*, a definite behavior of men, which takes place in time and space and can be perceived by our senses. Facts are the object of the natural sciences: physics, chemistry, biology, psychology, sociology. Hence, according to this view of the law, jurisprudence does not essentially differ from these natural sciences. Just as these sciences, jurisprudence describes its object in statements to the effect that something is or is not, that is to say: in *is*-statements. According to the other view, law is not a fact, but a *norm*. A norm is a rule whose meaning is that something *ought* to be or to be done, even if actually it is not, or is not done. A norm has the character of a command or prescription and is usually expressed linguistically in an imperative, as, *e.g.*, the Ten Commandments God issued on Mount Sinai: "Honor your father and mother," "You shall not kill," and so on. A norm may have not only the character of a command but also the character of an authorization; by a norm a person may confer upon another person the power or capacity of issuing commands. God authorized Moses to issue commands to the Jewish people; God conferred upon him the authority of a legislator. The constitution of a state authorizes a certain individual or a body of individuals to issue statutes—general norms—and statutes authorize courts and administrative organs to issue individual

norms—judicial decisions and administrative commands. Finally, a norm may have the character of a permission, that is to say, by a norm a person may be allowed to do something which without that permission is forbidden. For example, a general norm forbids killing, but by a special norm, restricting the first one, it is permitted as self-defense. These are the three functions of a norm: command or prescription; authorization; permission. If we say that a norm is a rule whose meaning is that something *ought* to be done, the term "ought" covers the meaning of all the three functions; it indicates the normative function.

The specific meaning of the statement that something *ought* to be or to be done can be determined only by referring to the difference which exists between this statement and the statement that something *is* or is done. Of this difference we are immediately and directly aware. The logical dualism of the "ought" and the "is" implies the impossibility of inferring from the statement that something ought to be or to be done, the statement that something is or is done, and vice versa.

We are aware of the "ought" as of something different from the "is" if the former is the meaning of an act of an individual intentionally directed at the behavior of another individual. If, for instance, *A* commands *B* to do something, we describe the *act* by the statement that *A* wills that *B* do something. This is an *is*-statement. But the *meaning* of the act can be described only by the statement that *B ought* to do something, not by an *is*-statement such as that *B* does or will do what *A* commands. That *B* ought to do something is the *subjective* meaning of the act of command; the meaning the act has from the point of view of the commanding individual. But it is not necessarily also the *objective* meaning of the act of command, that is the meaning the act has from the point of view of the addressee and of a third person not concerned. That *B* ought to do something is considered to be also the objective meaning of the act of command if this act is authorized. Then, its meaning is called a *norm*. To the question as to the difference between the subjective and objective meaning of acts prescribing a certain behavior, we shall return later.

According to the Pure Theory of Law, law is norm, or, more exactly, a set of norms, a normative order. Since a normative order is the object of jurisprudence, and the meaning of norms is that something ought to be done, that men ought to behave in a certain way, jurisprudence can describe its object not as natural sciences describe their object—in *is*-statements—but only in *ought*-statements. To the question as to what is the law in a certain matter, as for example, with respect to theft or murder, the answer is not that if a man commits theft or murder he is or will be punished, but that he ought to be punished because the law exists—and that means: the law is valid—even when in a concrete case a thief or murderer actually is not punished, because, for example, he has escaped punishment. If in a textbook of the criminal law of California a statement were made that a man who

commits theft or murder is or will be punished, such a statement would be false because, unfortunately, there are in California some cases in which—exceptionally—a murderer is not punished. But the law is that a murderer in all cases ought to be punished.

When the legal authority uses in the norm issued by it the term "ought"—for example, a thief ought to be punished, a civil execution ought to be directed against the property of a debtor who does not repay his debt—this term has a *prescriptive* meaning. As a prescription or command, a norm is neither true nor false, but valid or not valid. However, the same term has a *descriptive* meaning when it is used by legal science in a statement affirming the validity of a legal norm. Such a statement may be true or false. Only the legal authority can *pre*scribe; legal science can only *de*scribe what the legal authority prescribes.

Although the principles of logic, such as the law of contradiction and the rules of inference, apply only to statements which can be true or false, they are indirectly applicable also to legal norms, insofar as statements about norms, statements affirming the existence, that is, the validity, of legal norms are subjected to these principles. Two statements of which one affirms the validity of a norm prescribing that men ought to behave in a certain way, and the other the validity of a norm prescribing that men ought not to behave in this way, contradict each other, just as two statements of which the one affirms that something is, and the other that it is not. If the one is true the other must be false. Two conflicting norms can be described as valid norms only by statements which contradict each other. In this sense we may say of conflicting norms that they "contradict" each other. Consequently two conflicting norms cannot be considered to be valid at the same time. Thus the science of law conceives of its object as a logical unit: a system of noncontradictory norms.

Although law is a norm, not a fact, there is nevertheless an essential relationship between norm and fact. The norm is—as pointed out—the meaning of a fact, the fact by which the norm is established. The fact by which a norm is established or, metaphorically speaking, created, is the act of an individual or a series of such acts intentionally directed at the behavior of another. If it is a legislative act or custom, it is a general norm. If it is a judicial or administrative act, it is an individual norm. The norm-creating act is a fact which exists in time and space and can be perceived by our senses. This fact can be described in an *is*-statement. But this fact is different from its meaning—that is, the norm—which is the object of jurisprudence, and which cannot be described in an *is*-statement, but only in an *ought*-statement. It is true that jurisprudence refers also to the procedure by which the legal norms are created; but only insofar as this procedure is prescribed or authorized by legal norms. The law regulates its own creation. Only the norms that prescribe or authorize the norm-creating acts are the object of jurisprudence. Jurisprudence deals with the legislative process only insofar

as that process is determined in the constitution, and with the judicial and administrative processes only insofar as they are determined in statutes or rules of customary law. The constitution, the statutes, the customary law are norms, and only as such the object of jurisprudence.

That a legal norm, in order to exist—and that means: in order to be valid—must be created by an act, which is a fact existing in time and space, is not the only relationship between norm and fact. A norm may or may not be obeyed and applied by a certain human behavior which actually takes place in time and space. A legal order as a whole and the particular legal norms which form this legal order are to be considered valid only if they are, by and large, obeyed and applied, only if they are effective. But their validity must not be confused with their effectiveness. Effectiveness is merely a condition of, but not identical with, validity. A legal norm may be valid before it becomes effective. When a statute is applied by a court for the first time after its adoption by the legislative organ, hence before the statute could become effective, the court applies a valid law; it can apply the law only if the law is valid. But the statute loses its validity if it has not become, or when it ceases to be, effective. The fact that a legal norm becomes effective must be added to the fact that it is created by an act; otherwise it can no longer be considered as valid. But just as the act by which the norm is created is not identical with the norm—which is the meaning of this act—the effectiveness of a legal norm is not identical with its validity.

The doctrine which defines law as a fact is based on the erroneous identification of the norm with the act whose meaning the norm is, and of the validity of the norm with its effectiveness. By avoiding this erroneous identification, the Pure Theory of Law separates jurisprudence, describing norms in *ought*-statements, from natural science describing facts in *is*-statements. This is the first reason that it is called a "pure" theory of law. The second reason is that it separates jurisprudence from ethics. The science of ethics describes norms, as does jurisprudence, but the norms described by ethics are not legal norms, but rather moral norms. The difference between legal and moral norms consists in that the former prescribe a certain behavior by attaching to the contrary behavior a coercive act as a sanction. A sanction is a forcible deprivation of life, freedom, property, or other values, as a reaction against a behavior considered by the legal authority as harmful to society. Law forbids murder, theft and the like by prescribing that if someone commits murder or theft, he ought to be punished by capital punishment or imprisonment. Law commands payment of one's debts by prescribing that if a person does not pay his debts, civil execution ought to be directed against his property. By attaching a sanction to a certain behavior, law qualifies this behavior as a delict, as illegal, and makes the contrary behavior the content of a legal obligation. In this sense, law is a coercive order. Moral norms too, forbid or command a certain behavior, and some of them prescribe the same behavior as law, but without

attaching to the contrary behavior a coercive act as a sanction. A moral order is a normative, but not a coercive order.

Insofar as moral norms are created by acts of human beings, by the founder of a religion, such as Moses, Jesus or Mohammed, or by custom, there are many different moral orders, valid at different times within different societies. Then the moral value has only a relative character. A definite legal order may or may not correspond to a certain moral order; but the validity of the legal order does not depend on its correspondence to a moral order. It may, from the point of view of a certain moral order, be considered as morally good or morally bad. That a legal order is morally good, means that it is just; that a legal order is morally bad, means that it is unjust. As a matter of fact, each legal order corresponds more or less to a definite moral order prevailing within a ruling group whose interests determine the law-creating process; and hence is considered, from the point of view of this moral order, as just. But at the same time it may be more or less contrary to a moral order prevailing within other groups, even of the same society for which the legal order is valid. Hence law must be distinguished from justice. A statement about the law must not imply any judgment about the moral value of the law, about its justice or injustice; which, of course, does not exclude the postulate that the law should be just. However, since there are not one justice, but many different and even contradictory ideals of justice, the postulate should never be raised without specifying which of these many justices is meant. Exactly as the Pure Theory of Law separates law from nature and thus jurisprudence from natural science, it separates law from morals, and thus jurisprudence from ethics. In these two respects it is a "pure" theory of law.

The Pure Theory of Law is a theory of positive law. Positive law is a coercive order whose norms are created by acts of human beings—by legislative, judicial or administrative agencies, or by custom constituted by acts of human beings. Legislative, judicial, and administrative agencies are human beings in their capacity as organs of the state. In so far as the law is created by these agencies, we say that the law is created by the state. We interpret the law-creating acts of definite human beings as "acts of state"; we attribute the function actually performed by a definite human being to the state. But, what is the state, and what is its relation to the law? The Pure Theory of Law shows that an act performed by a human being is interpreted as act of state only if this act is determined in a specific way by the legal order; that to attribute the performance of this law-creating act to the state means to refer the act to the legal order by which the act is determined; that the state as an acting person creating the law is nothing else but the personification of the legal order which regulates its own creation; and that a state as a social order or political organization is this coercive order we call law; that a state imagined as a real being different from the law is the hypostatization of this relatively centralized legal order, or of its

personification. Thus the Pure Theory of Law dissolves the misleading dualism of state and law prevailing in the traditional legal and political theory.

The Pure Theory of Law takes into consideration only positive law, norms created by acts of human beings. It does not take into consideration norms emanating from other, *i.e.*, superhuman authorities. Therefore it excludes from the province of jurisprudence any divine law, *i.e.*, law supposed to be created by God or a godlike entity. Consequently it excludes also so-called natural law, law which— according to the natural-law doctrine—is immanent in nature. Law—meaning norms regulating human behavior—can be immanent in nature only if nature is considered to be a legislator. To consider nature as a legislator implies to attribute a will to nature. This is either an animistic superstitution or a theological interpretation of nature, based on the belief that nature is created by God and hence a manifestation of God's absolutely good will. This is a metaphysical assumption incompatible with any scientific cognition and hence also with a science of law.

The same objection applies to that version of the natural-law doctrine which pretends to find the just norms of human behavior in the nature of man, particularly in his reason. Reason is the faculty of cognition. By our reason we are able to know, to understand or comprehend something which is given as an object of cognition, independently of this mental operation. To set a norm, to prescribe something, is a function of will, and human will is a psychic phenomenon totally different from human reason. Human reason can know norms after they have been created by acts of human will, but it cannot create norms. Only in God may reason and will be considered to coincide; only of God can people believe that knowing what ought to be is identical with willing that it ought to be. It is the old myth of the tree of knowledge: when men eat of the fruit of this tree, they will be like God, knowing good and evil. To God, knowing good and evil is the same as commanding the good and forbidding the evil. Only if the reason of man, as a being created by God in His own image, is part of the divine reason, can it be considered to be at the same time a norm-creating will, a so-called "practical reason." This self-contradictory notion, which is the basis of a law of reason, is of theological origin.

In opposition to a theological or natural law doctrine the Pure Theory of Law, as a positivistic theory, does not see the reason for the validity of positive law in a divine or natural order, different from and above the positive law. It rejects the view that a positive law is valid only if its content corresponds to a divine or natural order, *i.e.*, valid only if the positive law is just. It considers every positive law—every coercive order which is established by acts of human beings and is by and large effective—as valid, without regard to its justice or injustice. The question of the reason for the validity of positive law— the question why the norms of any coercive order ought to be obeyed and applied—is, according to the Pure Theory of Law,

to be understood as the following question: What is the logical condition under which the subjective meaning of the law-creating acts—that men ought to behave in a certain way—can be interpreted as their objective meaning? In answering this question we must be aware that it is logically impossible to infer from the statement that something is or is done, the statement that something ought to be or to be done, just as it is logically impossible to infer from the statement that something ought to be or to be done, the statement that something is or is done. This logical principle applies also to the fact of an act of will whose subjective meaning is that something ought to be done. From the fact that an individual commands that another individual ought to behave in a certain way, it does not follow that the other individual ought to behave in this way. It does not follow from the subjective meaning of the act of command that the meaning of the act is an objectively valid norm, disobedience to which would constitute something wrong. If a gangster commands that another person pay him a certain sum of money, we do not assume that this individual ought to obey the command and that, if he does not obey, he commits something wrong. A norm cannot be deduced from a fact; it can be deduced only from a norm. Hence the reason for the validity of a judicial decision or an administrative command is not the fact that a judge has actually rendered the decision, or an administrative organ has actually issued the command, but the statute authorizing the judge to render decisions and the administrative organ to issue commands. The reason for the validity of statutes is the constitution, authorizing an individual or a body of individuals to issue statutes. If it is historically a first constitution, and if the reason for the validity of this constitution cannot—from the point of view of a positivistic theory of law—be considered to be a superior order created by a divine, superhuman will, authorizing a certain individual or a body of individuals to establish the constitution, the reason for the validity of the constitution and hence of the statutes, judicial decisions, and administrative commands established on the basis of the constitution can only be a norm we *presuppose*, if we are to interpret the acts whose subjective meaning the constitution, the statutes, the judicial decisions, the administrative commands are, as objectively valid norms. A norm is presupposed according to which men ought to behave in conformity with the constitution, hence in conformity with the general norms issued on the basis of the constitution by legislation or custom and, finally, in conformity with the individual norms issued on the basis of statutes or customary law by judicial and administrative acts; that is to say, in conformity with the legal order in its *hierarchical structure*. This norm, which is not a positive norm—not a norm created by an act of human or superhuman will, but only *presupposed* in juristic thinking—is the reason for the validity of a positive legal order. It is called the *basic norm*. Its presupposition is the condition under which every coercive order established by acts of human beings and by and large effective, may be interpreted as a system of objectively valid norms.

This presupposition is possible but not necessary. If the basic norm is not presupposed, a coercive order established by acts of human beings and by and large effective cannot be interpreted as a system of valid norms, but only as an aggregate of commands; and the relations constituted by such an order cannot be interpreted as legal relations, that is, as obligations, rights, competences and the like, but only as power relations. Thus the Pure Theory of Law, by ascertaining the basic norm as the logical condition under which a coercive order may be interpreted as valid positive law, furnishes only a conditional, not a categorical, foundation of the validity of positive law. Since the basic norm refers to a definite coercive order established by definite acts of human beings and by and large effective at a definite time and within a definite space, there is no choice between different basic norms. Only a basic norm referring to such a coercive order can be presupposed.

According to the Pure Theory of Law the basic norm may be presupposed with reference to every coercive order established by acts of human beings and by and large effective, whatever its content may be, that is to say, without regard to its justice or injustice. This theory does not aim at a moral or political justification of positive law. As a science of positive law, it refuses on principle to evaluate its object as just or unjust; it is unable to furnish a firm, an absolute, standard for evaluation. Those who expect such standard from jurisprudence may consider a positivistic theory of law in general and the Pure Theory of Law in particular as unsatisfactory. But their expectation can be fulfilled only by theological speculation: by metaphysics, not by science of law.