HANS KELSEN

PURE THEORY OF LAW

TRANSLATED BY
MAX KNIGHT

H. L. A. HART

THE CONCEPT OF LAW

CHINA SOCIAL SCIENCES PUBLISHING HOUSE
CHENGCHENG BOOKS LTD.

HANS KELSEN

PURE THEORY OF LAW

TRANSLATED BY
MAX KNIGHT

图书在版编目(CIP)数据

纯粹法学理论:英文/(美)凯尔森著. -影印本.
-北京:中国社会科学出版社,1999.12
(西学基本经典·法学类/西学基本经典工作委员会 编)
ISBN 7-5004-2650-X

Ⅰ.纯… Ⅱ.凯… Ⅲ.法理学-英文 Ⅳ.D90

中国版本图书馆 CIP 数据核字(1999)第 68360 号

版权总代理:TAO MEDIA INTERNATIONAL
(2790 19th Avenue, Ste. 20, San Francisco, CA 94132 U. S. A)

西学基本经典·法学类
西学基本经典工作委员会 编
中国社会科学出版社 出版发行
(北京鼓楼西大街甲 158 号 邮编 100720)
E-mail:5004@Peoplespace.net
诚成图书有限公司 制作
中国建筑工业出版社密云印刷厂印刷
新华书店经销
1999 年 12 月第 1 版 1999 年 12 月第 1 次印刷
开本 880×1230 1/32 印张 165.25
法学类全 9 册 定价:450.00 元

总 策 划　严　平　野　夫
项目策划　张自文　任建成

西学基本经典工作委员会

主 任 委 员　张树相　刘　波
副主任委员　李茂生　野　夫　严　平　张新奇　张自文　卢仁龙
责任总编辑　曹宏举　任建成
委　　员　刘晓珞　宋小平　徐水平　叶　彤　纪　宏　王　磊
张金花　程三国　黄应全　阳仁生　陈晓梅　章新语
周晓慧　罗　莉
版 权 代 理　TAO MEDIA INTERNATIONAL U.S.A

※　※　※　※　※

西学基本经典专家委员会

主　　任　季羡林　费孝通
副主任委员　（以姓氏笔画排序）
王元化　厉以宁　江　平　李学勤　张世英　罗豪才
周一良　周辅成
委　　员　乐黛云　成中英　汤一介　张树相　李泽厚　李茂生
杜维明　孟昭兰　唐　逸　戴文葆
万俊人　王　焱　王蓉蓉　邓正来　朱苏力　庄孔韶
刘小枫　刘　新　汪丁丁　张祥龙　贺卫方　何光沪
陈嘉映　陈小文　高　毅　高丙中　秦　海　黄　平
梁小民

PURE THEORY OF LAW

Copyright © 1967 by The Regents of the University of California
Reprinted from the English Edition by University of California Press 1967

THE CONCEPT OF LAW

Copyright © Oxford University Press 1961
Reprinted from the English Edition by Oxford University Press 1965

此为试读，需要完整PDF请访问：www.ertongbook.com

TRANSLATOR'S PREFACE

The present work is a translation of the second German edition of Hans Kelsen's *Reine Rechtslehre,* published in 1960, a completely revised version of the first edition, published in 1934. In the first edition Kelsen confined himself to formulate the characteristic results of his Pure Theory of Law. In the second edition he attempts to solve the fundamental problems of a general theory of law according to the principles of methodological purity of jurisprudential cognition and to determine to a greater extent than before the position of the science of law in the system of the sciences.

It stands to reason that a theory whose first draft was contained in Kelsen's *Hauptprobleme der Staatsrechtslehre,* published in 1911, does not remain entirely unchanged during such a long time. Some changes were incorporated earlier—in Kelsen's *General Theory of Law and State* (Cambridge, Mass., 1945) and in the French translation of the first edition by Professor Henri Thevenaz, *Théorie Pure du Droit* (Paris, 1953). In the present work, the most important changes are pointed out in the footnotes, usually changes pertaining to a more rigorous exposition of principles—to the results of a development originating from tendencies that are immanent in a theory which, in itself, has remained essentially unchanged. (Many polemical footnotes, however, were omitted in this translation.)

With the diversity of the contents of positive legal orders increasing, a general theory of law is in danger of missing some legal phenomena among its fundamental legal concepts; some of these concepts may turn out to be too narrow, others too wide. Kelsen is much aware of this danger and has stressed that he welcomes constructive criticism. He regards even the present edition

not as the final word but as an enterprise that would benefit by continued additions, refinements, or improvements in general.

This translation, carefully checked by the author, represents a compromise between a contents-conscious author and a form-conscious translator. Kelsen's immense experience with misinterpretations of his works as a result of "elegant" translations had to be the deciding factor when seemingly repetitious or Germanic-sounding passages, expunged from or rephrased in an earlier draft of the translation as too literally mirroring the original, were restored. In view of the detailed Contents page an index was dispensed with.

A personal note may be permitted. It was my good fortune to study under Professor Kelsen both at the University of Vienna and at the University of California. My admiration for the scope, integrity, and consistency of his theory has been matched only by my respect for his humanity and modesty, and my affection for the man himself. The long working association with him provided me with my most rewarding intellectual experience.

I would like to express my appreciation to Professor Albert Ehrenzweig of the University of California Law School in Berkeley whose initiative made this work possible, and whose good offices secured the sponsorship of the Institute of Social Sciences and of the Law School's Committee for International Legal Studies.

Max Knight

CONTENTS

此为试读,需要完整PDF请访问: www.ertongbook.com

I

LAW AND NATURE

1. The "Pure" Theory

The Pure Theory of Law is a theory of positive law. It is a theory of positive law in general, not of a specific legal order. It is a general theory of law, not an interpretation of specific national or international legal norms; but it offers a theory of interpretation.

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.

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.

Such an approach seems a matter of course. Yet, 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.

2. The Act and Its Legal Meaning

If we differentiate between natural and social sciences—and thereby between nature and society as two distinct objects of scientific cognition—the question arises whether the science of law is a natural or a social science; whether law is a natural or a social phenomenon. But the clean delimitation between nature and society is not easy, because society, understood as the actual living together of human beings, may be thought of as part of life in general and hence of nature. Besides, law—or what is customarily so called—seems at least partly to be rooted in nature and to have a "natural" existence. For if you analyze any body of facts interpreted as "legal" or somehow tied up with law, such as a parliamentary decision, an administrative act, a judgment, a contract, or a crime, two elements are distinguishable: one, an act or series of acts—a happening occurring at a certain time and in a certain place, perceived by our senses: an external manifestation of human conduct; two, the legal meaning of this act, that is, the meaning conferred upon the act by the law. For example: People assemble in a large room, make speeches, some raise their hands, others do not—this is the external happening. Its meaning is that a statute is being passed, that law is created. We are faced here with the distinction (familiar to jurists) between the process of legislation and its product, the statute. To give other illustrations: A man in a robe and speaking from a dais says some words to a man standing before him; legally this external happening means: a judicial decision was passed. A merchant writes a letter of a certain content to another merchant, who, in turn answers with a letter; this means they have concluded a legally binding contract. Somebody causes the death of somebody else; legally, this means murder.

3. The Subjective and Objective Meanings of the Act; Its Self-interpretation

The legal meaning of an act, as an external fact, is not immediately perceptible by the senses—such as, for instance, that color, hardness, weight, or other physical properties of an object can be

perceived. To be sure, the man acting rationally, connects his act with a definite meaning that expresses itself in some way and is understood by others. This subjective meaning may, but need not necessarily, coincide with its objective meaning, that is, the meaning the act has according to the law. For example, somebody makes some dispositions, stating in writing what is to happen to his belongings when he dies. The subjective meaning of this act is a testament. Objectively, however, it is not, because some legal formalities were not observed. Suppose a secret organization intending to rid the nation of subversive elements, condemns to death a man thought to be a traitor, and has a member execute what it subjectively believes to be and calls "a death penalty"; objectively and legally, however, not a death penalty but a Feme murder was carried out, although the external circumstances of a Feme murder are no different from the execution of a legal death penalty.

A written or spoken act can even say something about its own legal meaning. Therein lies a peculiarity of the objects of legal cognition. A plant is unable to tell the classifying botanist anything about itself. It makes no attempt to explain itself scientifically. But an act of human conduct can indeed carry a legal self-interpretation: it can include a statement indicating its legal meaning. The men assembled in parliament can expressly declare that they are enacting a statute; a man making a disposition about his property may call it "last will and testament"; two men can declare that they are making a contract. The scientist investigating the law, sometimes finds a legal self-interpretation which anticipates his own interpretation.

4. The Norm

a) The Norm As a Scheme of Interpretation

The external fact whose objective meaning is a legal or illegal act is always an event that can be perceived by the senses (because it occurs in time and space) and therefore a natural phenomenon determined by causality. However, this event as such, as an element of nature, is not an object of legal cognition. What turns this event into a legal or illegal act is not its physical existence, determined by the laws of causality prevailing in nature, but the objec-

tive meaning resulting from its interpretation. The specifically legal meaning of this act is derived from a "norm" whose content refers to the act; this norm confers legal meaning to the act, so that it may be interpreted according to this norm. The norm functions as a scheme of interpretation. To put it differently: The judgment that an act of human behavior, performed in time and space, is "legal" (or "illegal") is the result of a specific, namely normative, interpretation. And even the view that this act has the character of a natural phenomenon is only a specific interpretation, different from the normative, namely a causal interpretation. 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.

b) Norm and Norm Creation

Those norms, then, which have the character of legal norms and which make certain acts legal or illegal are the objects of the science of law. The legal order which is the object of this cognition is a normative order of human behavior—a system of norms regulating human behavior. By "norm" we mean that something *ought* to be or *ought* to happen, especially that a human being ought to behave in a specific way. This is the meaning of certain human acts directed toward the behavior of others. They are so directed, if they, according to their content, command such behavior, but

also if they permit it, and—particularly—if they authorize it. "Authorize" means to confer upon someone else a certain power, specifically the power to enact norms himself. In this sense the acts whose meaning is a norm are acts of will. If an individual by his acts expresses a will directed at a certain behavior of another, that is to say, if he commands, permits, or authorizes such behavior—then the meaning of his acts cannot be described by the statement that the other individual *will* (future tense) behave in that way, but only that he *ought* to behave in that way. The individual who commands, permits, or authorizes *wills;* the man to whom the command, permission, or authorization is directed *ought to.* The word "ought" is used here in a broader than the usual sense. According to customary usage, "ought" corresponds only to a command, while "may" corresponds to a permission, and "can" to an authorization. But in the present work the word "ought" is used to express the normative meaning of an act directed toward the behavior of others; this "ought" includes "may" and "can". If a man who is commanded, permitted, or authorized to behave in a certain way asks for the reason of such command, permission, or authorization, he can only do so by saying: Why "ought" I behave in this way? Or, in customary usage: Why may I or why can I behave in this way?

"Norm" is the meaning of an act by which a certain behavior is commanded, permitted, or authorized. The norm, as the specific meaning of an act directed toward the behavior of someone else, is to be carefully differentiated from the act of will whose meaning the norm is: the norm is an *ought,* but the act of will is an *is.* Hence the situation constituted by such an act must be described by the statement: The one individual wills that the other individual ought to behave in a certain way. The first part of this sentence refers to an *is,* the existing fact of the first individual's act of volition; the second part to an *ought,* to a norm as the meaning of that act. Therefore it is incorrect to assert—as is often done—that the statement: "An individual ought" merely means that another individual wills something; that the *ought* can be reduced to an *is.*

The difference between *is* and *ought* cannot be explained further. We are immediately aware of the difference. Nobody can deny that the statement: "something is"—that is, the statement by

which an existent fact is described—is fundamentally different from the statement: "something ought to be"—which is the statement by which a norm is described. Nobody can assert that from the statement that something is, follows a statement that something ought to be, or vice versa.

This dualism of is and ought does not mean, however, that there is no relationship between *is* and *ought*. One says: an *is* conforms to an ought, which means that something is as it ought to be; and one says: an *ought* is "directed" toward an is—in other words: something ought to be. The expression: "an is conforms to an ought" is not entirely correct, because it is not the is that conforms to the ought, but the "something" that one time is and the other time ought to be—it is the "something" which figuratively can be designated as the content of the is or as the content of the ought.

Put in different words, one can also say: a certain something—specifically a certain behavior—can have the quality of is or of ought. For example: In the two statements, "the door is being closed" and "the door ought to be closed," the closing of the door in the former statement is pronounced as something that is, in the latter as something that ought to be. The behavior that is and the behavior that ought to be are not identical, but they differ only so far as the one is and the other ought to be. Is and ought are two different modi. One and the same behavior may be presented in the one or the other of the two modi. Therefore it is necessary to differentiate the behavior stipulated by a norm as a behavior that ought to be from the actual behavior that corresponds to it. We may compare the behavior stipulated by the norm (as content of the norm) with the actual behavior; and we can, therefore, judge whether the actual behavior conforms to the norm, that is, to the content of the norm.

The behavior as it actually takes place may or may not be equal to the behavior as it ought to be. But equality is not identity. The behavior that is the content of the norm (that is, the behavior that ought to be) and the actual behavior (that is, the behavior that is) are not identical, though the one may be *equal* to the other. Therefore, the usual way to describe the relation between an actual behavior and a norm to which the behavior corresponds: "the actual behavior is the behavior that—according to the norm—

此为试读,需要完整PDF请访问: www.ertongbook.com