THE IDEA OF A PURE THEORY OF LAW

Christoph Kletzer

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Most contemporary legal philosophers tend to take force to be an accessory to the law. According to this prevalent view the law primarily consists of a series of demands made on us; force, conversely, comes into play only when these demands fail to be satisfied. This book claims that this model should be jettisoned in favour of a radically different one: according to the proposed view, force is not an accessory to the law but rather its attribute. The law is not simply a set of rules incidentally guaranteed by force, but it should be understood as essentially rules about force.

The book explores in detail the nature of this claim and develops its corollaries. It then provides an overview of the contemporary jurisprudential debates relating to force and violence, and defends its claims against well-known counter-arguments by Hart, Raz and others.

This book offers an innovative insight into the concept of Pure Theory. In contrast to what was claimed by Hans Kelsen, the most eminent contributor to this theory, the author argues that the core insight of the Pure Theory is not to be found in the concept of a basic norm, or in the supposed absence of a conceptual relation between law and morality, but rather in the fundamental and comprehensive reformulation of how to model the functioning of the law intended as an ordering of force and violence.

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Introduction

IN THIS BOOK, I want to convince the reader that the law is an order of force or violence. I will also argue that this claim forms the doctrinal core of the Pure Theory of Law.

The book thus contains two sets of claims: a set of strong substantive claims and a set of weak exegetical ones. The strong claims take centre stage and come in the form of a theory of law which I try to clarify and present as being both defensible and superior to others. The weak claims are subsidiary and argue that this theory of law can be seen as comprising the core insight of the historical Pure Theory of Law.

This means that this book can fail or succeed on either both counts or on each count separately. Whilst I think that both the strong and weak, both the substantive and the exegetical, claims are inherently consistent and correct, the conjunction of both claims is by no means necessary and rests less on a necessary philosophical truth than on my desire to align myself with and contribute to the development of a tradition to which I feel I belong.

But what is the Pure Theory of Law? If we take the narrowest possible reading of the Pure Theory of Law, then it is limited to a couple of Hans Kelsen's writings; if we take the widest possible reading, then it is a theory that started with Fichte's philosophy of right, went through a neo-Kantian phase, reached its peak in the work of Hans Kelsen and his circle, was further developed and partly led astray by the Scandinavian Realists Ross and Olivecrona, was then carried forward into contemporary jurisprudence by the writing of Bobbio, Walter and Lippold, and is currently represented by, amongst others, authors like Paulson, Vinx, Jaestaedt, Jabloner, Somek and—I hope—me.

This book leans towards the wide reading of the Pure Theory of Law. It argues that behind all the different forms and shapes of theories that contribute to the historic Pure Theory of Law lies one idea: namely, that the law is an order of force or violence. That there is *one* idea behind these different forms and shapes of theories does not mean that the idea is a simple one. In this book, I try to introduce the complexity of this idea and defend it against criticism.

The exegetical claim thus provides the framework for the substantive claim. Whilst I put forward the strong substantive claim only because I believe it to be

true, I put forward the exegetical claim also out of respect for and deference to a tradition. Leaving out the exegetical claim would be intellectually dishonest; after all, I am only picking up a theory which is already laid out *in nuce* in the many writings of the Pure Theory.

So, if someone convinced me that the ideas presented in this book are irreconcilable with the tradition of the Vienna School of Legal Positivism—which I think is impossible—then I would grudgingly let go of the label, would have to reconsider my intellectual journey and would look for a different heading under which to defend the theory presented herein. This brief elaboration of my intent is meant from the very outset to counter exegetical protestations of the kind: 'But on page 71 of the second edition of the Pure Theory Kelsen said something flatly contradicting your argument.' Of course he did. But Kelsen himself might be wrong about the Pure Theory—and he would have been the first to accept that.

According to the extra-wide reading on which I ground my elaborations, the Pure Theory started with the author who first used the tern 'Reine Rechtslehre' or 'Pure Theory of Law', namely, Johann Gottlieb Fichte.[1] Whilst allusions to some themes of the Pure Theory can already be found in Kant's separation of legality and morality, it was Fichte who radicalised and tidied up these Kantian arguments and tried to explicitly develop a theory of law as law, ie a theory of law separate from and independent of both moral philosophy and empirical knowledge, or a 'pure theory of law'. Fichte's theory was, understandably, couched in the language of Kantian natural law theory rather than in modern positivist lingo. Still, it laid out important claims familiar to a more contemporary rendering of the Pure Theory: Fichte argued that, despite not being reducible or dependent on moral argument, the law is nevertheless normative (semantic anti-reductionism), and he believed that knowledge of the law constituted a separate and distinctive field of human knowledge (purity). On top of that, he was the first to combine these theses with the fundamental insight, worked out in this book, that the law is an order of force or violence, and that permission plays a crucial role in understanding the distinctive normativity of the law.

The theoretical apex of the Pure Theory is found in the Vienna School of Legal Positivism, and within this school of thought Hans Kelsen's work without doubt deserves to be the main focus of attention. However, the fact that all the other thinkers and numerous contributors to the development of

[1] See JG Fichte, *Foundations of Natural Right*, ed F Neuhouser, trans M Baur (Cambridge, Cambridge University Press, 2000) 254. Baur translates the German term 'Reine Rechtslehre' as 'Pure doctrine of right' and not 'Pure theory of law'. This may be justified by the internal coherence of his translation and that fact that Baur, of course, did not have Kelsen in view.

the Pure Theory, such as Merkl, Verdross and Sander,[2] have received so little attention in the English-speaking academic world gives cause for some concern: not only do many of the doctrines attributed to Kelsen have their origin in the work of those authors, but Kelsen himself has throughout his life reconsidered or even overthrown his ideas in the light of criticism and the discourse he has been engaged in. It would be hard to see any logic to these developments if one does not consider them all to be attempts to further a project somehow independent of the various historic renderings, namely the project of finding a coherent formulation of a Pure Theory of Law. This project, in turn, can only be understood in its significance as a collective project and not as the monomaniacal *idée fixe* of a single individual. The crux of the project is the following: how can we establish and deliver a knowledge of law as law, ie a knowledge of the law as not being a department of morality, metaphysics or the empirical social sciences? How would we have to conceive of the law for this kind of knowledge to be possible? As will be developed in this book, what came to the fore in these questions was that for such a knowledge to be possible we would have to understand the law as an order of force. I will outline the nature of the specific question of the Pure Theory and why I believe it has to be put in this specific way in the next chapter.

The idea that the law is fundamentally an order of force or violence was first made fully explicit by the Scandinavian realists, predominantly Olivecrona and Ross. In their attempt to isolate this point, however, they were led to believe that they had to jettison one of the core ideas of the Pure Theory, namely that the law is actually law and thus normative.

That discarding normativity is by no means necessary has been shown by Norberto Bobbio: we can understand that the law as an order of force without letting go of the normativity of the law. Similar claims have been forwarded by Paulson. In this book, I pick up these threads and try to develop them further.

This idea of the law as an order of force has merged somewhat into the background, if not completely vanished, in most contemporary treatments of the Pure Theory. In Vinx's important contribution *Hans Kelsen's Pure Theory of Law*,[3] for instance, force or violence hardly takes centre stage. I am not claiming that this makes Vinx's contribution worth any less. As an introduction and defence of *Kelsen's* Pure Theory of Law, his book is certainly of central

[2] Unfortunately, little of the work is available in English. For a good overview of the thinkers contributing to the Vienna School of Legal Positivism or associated with it, see R Walter et al (eds), *Der Kreis um Hans Kelsen. Die Anfangsjahre der Reinen Rechtslehre* (Vienna, Manz, 2008); for a volume bringing together the writings of Kelsen, Merkl and Verdross, see HR Klecatsky et al (eds), *Die Wiener rechtstheoretische Schule. Schriften von Hans Kelsen, Adolf Merkl, Alfred Verdross* (Vienna, Verlag Österreich, 2010).

[3] L Vinx, *Kelsen's Pure Theory of Law. Legality and Legitimacy* (Oxford, Oxford University Press, 2007).

importance and very instructive. Like most others, however, it stops just short of fully following through on the trajectory outlined.

I try to remedy this omission herein. This book thus does not aim to give a comprehensive rendering of the Pure Theory. This has been done very well by Kelsen himself, and, in addition to Vinx, by authors such as Walter[4] or Lippold.[5] In this book I want to highlight what has been left open in these renderings and what I think is nevertheless central to the understanding of the Pure Theory, since it forms the missing keystone of the theoretical arch of the Pure Theory. Only with this keystone can the other claims be rendered structurally sound.

As already mentioned, the book does not only, or even primarily, address this tradition; rather, it aims to convince everyone that the law actually is an order of force or violence. As such, it engages more with common sense, as portrayed by Hart and Raz, than with Sander, Vinx or Lippold. One certainly does not need to be a seasoned expert in the literature of the Pure Theory in order to be able to appreciate the arguments presented in this book.

In what follows, I will first (in chapter two) outline the project of the Pure Theory, and set out what kind of a theory the Pure Theory aims to be and what it can at best hope to be. Then, in the three chapters following this preliminary outline, I will present the core of the argument. In chapter three, I will introduce the main idea of the book, namely that the law is an order of violence. This will not only require careful arguments that aim to refute classical jurisprudential challenges to a claim of this kind, but will also require something both more subtle and more ambitious: a change of perspective or standpoint in relation to the law. I try to facilitate this change of perspective by giving examples, partly taken from ancient Roman law. In chapter four, I focus on the concept of permission, which, I argue, is necessary to understand the specific normativity of the law. Finally, in chapter five, I will introduce how, according to the Pure Theory, the law does all of that, namely, by means of functioning as a schema of interpretation.

After discussing the core of what I take to be the main contribution of the Pure Theory, the next two chapters deal with two important repercussions of this core doctrine. The first, discussed in chapter six, deals with the relation between law and morality. The argument presented is that law cannot have any relation to morality as both cannot be considered to be valid simultaneously. The second, developed in chapter seven, tries to locate the Pure Theory within the contemporary discussion of positivism and argues that the Pure Theory presents an attempt to formulate a theory of what could be called 'absolute positivism'.

[4] R Walter, *Der Aufbau der Rechtsordnung* (Vienna, Manz, 1974).

[5] R Lippold, *Recht und Ordnung. Statik und Dynamik der Rechtsordnung* (Vienna, Manz, 2000).

2

The Purity of the Pure Theory of Law

I. WHAT IS THE PURE THEORY OF LAW?

The content of the Pure Theory narrowly understood can be presented in terms of six canonical doctrines:

1. The doctrine of normativity (semantic anti-reductionism).[1]
2. The doctrine of the double purity of legal theory.[2]
3. The doctrine of the basic norm.[3]
4. The doctrine of the complete legal norm.[4]
5. The doctrine of the hierarchical structure of the legal system.[5]
6. The doctrine of alternative authorisation.[6]

I would certainly count anybody who subscribes to all or nearly all of these doctrines as a proponent of the Pure Theory of Law.

This book, however, is not directly concerned with these doctrines. In my view, these doctrines make up the vast periphery of the Pure Theory. I call them peripheral not because they are irrelevant, but because they all radiate from a core or centre. This centre of the Pure Theory can be put most succinctly in the following claim:

— The law is an order of force or violence.[7]

[1] Roughly, the claim that law actually is normative and that it is not explicable in factual terms only.

[2] The claim that in studying the law we have to make sure that we keep the law strictly separate from both morality and sociology.

[3] The claim that in referring to the law we have always already presupposed the basic norm.

[4] The claim that the only norm that is complete is the one that gives all conditions of the lawfulness of an act of force.

[5] The claim that the content of the law is created dynamically by a series of legal acts progressively individuating the conditions of the lawfulness of the use of force.

[6] The doctrine that, in authorising the annulment of certain laws, the law has thereby stipulated the (provisional) legality of unlawful law.

[7] In this book, the terms 'violence' and 'force' are used more or less interchangeably. My use of both words is meant to convey the sense of the Latin term *vis*, which, whilst considered to be closer to force than to violence, still carries the connotation of the latter: '*Vis* was a neutral concept, nearer to our "force" than "violence", so there was no difficulty in applying it to both illegal violence and legal self-help' (AW Lintott, *Violence in Republican Rome* (Oxford, Clarendon, 1968) 22–23).

On the one hand, this is a claim that can be either true or false—and I will argue that it is true. On the other hand, it is more than that: it represents a standpoint in relation to the law that is in competition with other jurisprudential standpoints. As a standpoint, it exhibits a certain internal complexity. This internal complexity consists not only in a loose series of supposedly true statements, but also in an integrated view of the law. This view can be outlined as follows:

— The law is a normative formation that orders society by permitting the use of force or violence by means of schematising the interpretation of force or violence.

The Pure Theory thus consists of cascading claims of derivations leading us from the surface to the more basic or primitive operations of the law. The argument runs through the following stages: on the surface level, the law regulates society by creating obligations. But how does the law create obligations? It does so by regulating force or violence. How does it regulate force? By permitting the use of force. How does it permit force? By schematising interpretations.

This is roughly what I will be arguing and defending in this book. Before doing that, however, I want to clarify the nature and status of the claims made in the book. Those not interested in such a clarification of what kind of a theory the Pure Theory of Law is can skip immediately to the next chapter.

II. THE CONTEST OF STANDPOINTS

As mentioned above, the Pure Theory of Law is more than just a series of statements that claim to be true. Rather, it presents a standpoint in relation to the law, a certain view of the law. This standpoint and the view it offers are fundamentally different from the standpoint and view usually taken. The Pure Theory claims that its standpoint is superior to the one commonly taken and thus invites us or requires us to change our point of view.

To claim superiority over another standpoint does not mean to claim that one's arguments are straightforwardly right and the other's are simply wrong. It is unlikely that in philosophy anybody's position is simply wrong about anything. The conviction that someone is simply wrong is often indicative less of the weakness of the attacked position and more of the incompleteness of one's engagement with it.

If the claim of superiority does not mean that another position is simply refuted, what does it mean? It is less mysterious than it might sound: in order to demonstrate that a standpoint is superior to another, all one needs to show is that the other standpoint is encompassed by the standpoint presented as

superior, but not the other way around. So, in order to demonstrate the superiority of a standpoint, one needs to demonstrate that, by taking this standpoint, one can see everything that can be seen from the other standpoint, but not vice versa. The superior standpoint thus has in view both everything that the other standpoint sees *and also* the other standpoint itself. Thus, the superior standpoint can not only explain how the intellectual terrain is actually laid out, but also why, viewed from an inferior standpoint, it appears the way it does.

What characterises the relation of the higher standpoint to the lower is *explanatory primacy*: the higher standpoint gives a better explanation than the lower because it explains everything the lower standpoint does and also explains things the lower standpoint cannot explain. What characterises the relation of the lower standpoint to the higher is *superfluity*: given the higher standpoint, the lower one becomes superfluous. Throughout the book I will thus keep referring not only to the wrongness of alternative claims, but also to their superfluity, and I will refer not only to the rightness of the Pure Theory, but also to its explanatory primacy.

Of course, I will be arguing that one should take the standpoint that the law is a comprehensive order of violence or force because the law actually is such a comprehensive order. However, I will also offer the weaker claim that the Pure Theory presents a higher standpoint in relation to competing theories, such as that the law is a union of primary and secondary norms, a set of orders backed up by a threat of sanction, or the morally most appealing interpretation of the rules that allow for the use of violence or a comprehensive, supreme and open institutional normative system.

III. THE KANTIAN MANOEUVRE

The author who was the first to explicitly make use of such a standpoint claim was Kant. He did not claim that rival philosophical positions, like empiricism or dogmatism, were simply wrong. This would have been an unpromising strategy: proving something wrong requires some external standard, and it is hard to see what could play the role of such an external standard for a comprehensive philosophical worldview—especially as empiricism and dogmatism both seem internally consistent.

So Kant had to take a detour: he did not argue that empiricism and dogmatism are wrong by any external standard, but that holding them comes at too high a theoretical cost. He argued that one cannot be committed to empiricism and at the same time make sense of our knowledge of the external world. The same is true for dogmatism. So, whilst Kant does not directly demonstrate the falsity of empiricism or dogmatism, he demonstrates that we cannot hold them *and* have a working theory of knowledge. We just cannot have it all.

This move was necessary in order to demonstrate that his own theory, transcendental idealism,[8] which at first is highly implausible, if not offensive to common sense, is not only a contender to philosophical truth, but ends up as the only route left open. The result of this long journey is not simply that transcendental realism is false and that transcendental idealism is true, but rather that transcendental idealism presents the higher standpoint in relation to transcendental realism. It explains everything that we hoped transcendental realism can explain, it explains things which cannot be explained from the inferior standpoint and it explains why the inferior standpoint falls for the illusions in the way it does. For common sense, it might at first be a real struggle to reach this higher standpoint, but it turns out that, judged by common sense's own standards, it is worth it.

A similar constellation of common sense, intellectual costs and philosophical truth can be found in the emblematic example Kant used to rely on, the Copernican revolution: one can of course describe the movement of the celestial objects starting from and in line with what we immediately perceive and with what seems right to common sense, namely that the earth is fixed and the sun moves around the earth, but this comes at a very high theoretical cost: we have to introduce pseudo-forces to explain the odd paths drawn on the sky. Pseudo-forces as such are not necessarily anathema in physics. We often use them to make sense of mechanical systems. The centrifugal force, for instance, is such a pseudo-force, yet we have no qualms about referring to it. So it is not primarily that the common-sense standpoint is simply wrong or incoherent that pushes us to leave it behind, it is that we can avoid the costs that come with it. As soon as we leave the comfortable zone of our common-sense views and posit something seemingly absurd, namely that the earth moves around the sun, we see how things suddenly all fall into place. Whilst common sense might have first rebelled against moving in the direction of the higher standpoint, in the end it finds fuller satisfaction there.

The Pure Theory requires a similar jettisoning of some tacit common-sense convictions. That such a discomfort is worthwhile, however, can only be established by demonstrating that the Pure Theory does indeed deliver the higher standpoint it promises.

Thus, the Pure Theory, just like Kant's criticism or the Copernican manoeuvre, does not require a complete suspension of common sense. It would be hard to know what should guide us if we were to completely discard common sense. The Pure Theory requires merely the willingness to partially and temporarily suspend a certain satisfaction we find in common sense in

[8] I roughly follow Henry Allison's take on transcendental idealism. See H Allison, *Kant's Transcendental Idealism: An Interpretation and Defence* (New Haven, Yale University Press, 1983).

order to reach a firmer and deeper satisfaction in the end. The Pure Theory turns common sense against itself.

There is another, related, sense in which the Pure Theory is a deeply Kantian project: it takes seriously the difficulty of reaching a truly human understanding of the law, or an understanding of the law *as* law. This must sound odd. Does not every contemporary jurisprudential school, apart maybe from avowedly theological schools of natural law, succeed in at least describing law as human all the way down?

This has to be doubted. To see why, let me again outline a Kantian dilemma first and then show how the Pure Theory struggles with similar themes: Kant argued that, unbeknownst to ourselves, in our everyday model of knowledge we essentially rely on the idea of god as a regulative idea. Henry Allison put it as follows:

> By such a theocentric model I understand a programme or method of epistemological reflection, according to which human knowledge is analysed and evaluated in terms of its conformity, or lack thereof, to the standard of cognition theoretically achievable by an 'absolute' or 'infinite intellect'. By the latter I understand one that is not encumbered by the limitations of the human intellect, and which, therefore, knows objects 'as they are in themselves'. Such an intellect functions in this model essentially as a regulative idea in the Kantian sense. Thus the appeal to it does not commit one either to the existence of such an intellect or to the assumption that knowledge of this type is actually possessed by the human mind. The point is only that a hypothetical 'God's-eye view' of things is used as a standard in terms of which the 'objectivity' of human knowledge is analysed.[9]

According to our common-sense model of knowledge, our representations of the world are true if and only if they correspond with the things as they are out there in the world independently of our representation of them. It is hard for us to even conceive of an alternative model of truth and knowledge. However, the problem with such a model is that only an absolute intellect has access to the things as they are in themselves, independently of our apperception. Thus, we can never compare our representations with how things really are in themselves. Still, if we hold on to our everyday notion of knowledge, we have to deem such a comparison possible. In our ordinary, everyday model of knowledge, be it a thoroughly empiricist or naturalistic one, we thus implicitly refer to a divine point of view—a point of view, however, which we can never inhabit. Sceptical arguments, which flatly deny the possibility of any knowledge, rest their plausibility precisely on this differential between a divine and a human point of view. A successful refutation of the sceptic thus does not consist in the demonstration of a flaw in his argument, but in the rejection of the standards of true knowledge that he presupposes.

[9] ibid 19.