# 18 Critical Legal Studies and the Rule of Law

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## Introduction

The World Justice Project publishes a "Rule of Law" Index. For 2016 the nations with the highest scores were Denmark, Norway, and Finland. Germany outranked Singapore, which in turn outranked the United States. Russia and Ecuador were tied at the relatively low 45th position, but both were above Bolivia (104) and Venezuela, which came in dead last. The Index attempts to measure compliance with what its sponsors identify as "universal principles of the rule of law." These are that "[t]he government and its officials and agents as well as individuals and private entities are accountable under the law," that "laws are clear, publicized, stable, and just, are applied evenly, and protect fundamental rights, including the security of persons and property," that "[t]he process by which the laws are enacted, administered, and enforced is accessible, fair, and efficient," and that "[j]ustice is delivered by competent, ethical and independent representatives and neutrals who are of sufficient number, have adequate resources and reflect the makeup of the communities they serve."[1] Some of these universal principles replicate in other terms Lon Fuller's famous list of elements of the rule of law; others go beyond Fuller's minimum requirements.

The Index breaks these general principles down into nine factors, and then specifies several components of each factor, leading to a list of forty-seven discrete measures incorporated into the overall assessment that produces the ranking. Significantly for present purposes, the first factor is "Constraints on Government Powers." And, also significant, when summarizing the importance of the rule of law "in everyday life," the Annual Report places first the "business environment," and asks the reader to "[i]magine an investor

[1] The material in the text is drawn from World Justice Project, *WJP Rule of Law Index 2016 Report*, available at https://worldjusticeproject.org/our-work/publications/rule-law-index-reports/wjp-rule-law-index%C2%AE-2016-report, https://perma.cc/VKG3-CP8Y.

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seeking to commit resources abroad." Inadequacies in the rule of law would discourage her from those investments.

The Rule of Law Index is the product of a project closely associated with leaders of the American Bar Association.[2] From a critical legal studies perspective, the Index shows that the "rule of law" is an ideological project. Like all successful ideological projects, it identifies some things that are, in E.P. Thompson's famous words, "unqualified human good[s]."[3] The rule of law in this aspect guarantees that those holding power (perhaps only those holding government power) not act arbitrarily in adversely affecting the interests of others. Other aspects of the rule of law support the distinctive interests of the powerful, as indicated by the inclusion of property in the Index's list of universal principles. So, for example, supporters of this version of the rule of law invoke it against radicals who seek to replace regimes that fall within some "acceptable" range, while mounting no such objections to similar extralegal efforts to displace regimes outside that range (Iran in 1953, perhaps Venezuela today). What counts as "acceptable" is, again, ideologically defined.

## 1 The Rule of Law in Critical Legal Scholarship

The corpus usually identified as critical legal studies contains relatively few prominent discussions of the rule of law as such. Discussion of "the" or better "a" critical legal studies perspective on the rule of law requires taking some general themes in critical legal studies and extrapolating them to the topic.

The absence of express discussion of the rule of law in critical legal studies stems largely from the location of critical legal studies within the development of American legal thought.[4] Critical legal theory in the United States is best understood as a way of thinking affected by two features of the historical circumstances in the late 1960s. The first is political. The

[2] The ABA itself has a "rule of law initiative," which is less transparently ideological than the Rule of Law Index.

[3] E. P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (New York: Pantheon, 1975).

[4] "American legal thought" is a category for historical and sociological analysis, and is distinct from systematic jurisprudence. Situating critical legal studies in American legal thought is another way of explaining why critical legal studies gave relatively little attention to jurisprudential ideas about the rule of law.

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early critical legal theorists were participants in the civil rights movement and the movement against US involvement in war in Vietnam. They attributed the limitations of the legal response to the former, and essentially all of the latter, to self-described political liberals. One component of the liberal worldview was that the rule of law was a permanent achievement of liberal society. Yet, for critical legal scholars, if that were true, the liberal rule of law had to have some connection to – "responsibility for" – what they saw as the political landscape they confronted. And, because they found that landscape unattractive, they were interested not in examining the rule of law on its own terms, but only in examining it as an ideological project.

The second feature of critical legal theory's historical setting was the strong influence American Legal Realism had on legal thought in the United States.[5] Critical legal theorists saw legal theory as dialogic, with each intervention responding to a prior one and then generating dialectical responses. They saw Fuller's defense of the rule of law as a response to claims by American Legal Realists about the fact, as those Realists saw it, that legal materials were insufficient to generate determinate results in interesting cases. The dialogic response to Fuller was the restatement and elaboration of the Legal Realist claims, bolstered by references to contemporary social theory. In short, critical legal theorists had little interest in responding to liberal proponents of the rule of law on their own terms.

Notably, the critical legal studies perspective on the rule of law focuses on purely procedural versions of the rule of law. Infused with substantive content, the rule of law would become transparently an ideological project. The common inclusion of property rights within the rule of law, for example, makes its ideological content obvious. So would the inclusion of social welfare rights in the rule of law, though of course the ideological content would be different.

The most prominent portrayal of the rule of law in canonical critical legal studies works is a relatively brief discussion by Morton Horwitz of E. P. Thompson's claim quoted earlier. Horwitz found it impossible for "a man of the Left" to write what Thompson did. Taking the rule of law in the same way that the World Justice Project does, Horwitz wrote that the rule of law "undoubtedly restrains power, but it also prevents power's

[5] I refer to American Legal Realism throughout to ensure that referent not be confused with the Legal Realism associated with Alf Ross.

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benevolent exercise." He agreed that it "creates formal equality . . . but it *promotes* substantive inequality by creating a consciousness that radically separates law from politics," and "[b]y promoting procedural justice it enables the shrewd, the calculating, and the wealthy to manipulate its forms to their own advantage. And it ratifies and legitimates an adversarial, competitive, and atomistic conception of human relations."[6]

We should disentangle two themes here. One deals with the substantive implications of the rule of law understood in purely procedural terms. Formal equality and mere procedural justice are said to promote undesirable outcomes by making it difficult for power to be exercised – presumably by governments representing the people – benevolently. This theme is consistent with those views of the rule of law that take property rights as a substantive component.

As already noted, though, a conception of the rule of law committed to substantive equality and social democracy seems entirely available – unless substantive equality is inconsistent with the rule of law. Friedrich Hayek may have believed that it was, at least at some points in his thinking about the rule of law. Substantive equality, Hayek may have thought, required arbitrary adjustments of previously acquired entitlements. Robert Nozick later offered a variant in his objection to patterned accounts of justice, that sustaining substantive equality would inevitably require essentially retrospective adjustments of entitlements. Yet, once the rule of law includes rules of change (as discussed below), it becomes difficult to see how those adjustments are in any interesting sense retrospective. Once a law of progressive taxation is in place, for example, adjustments in entitlements to achieve substantive equality do not seem to be either arbitrary or retrospective in a "rule of law" sense.

The second theme deals with consciousness. Here, Horwitz asserts, the very idea of the rule of law entails an "atomistic conception of human relations." This claim was rather clearly influenced by C. B. Macpherson's *Political Theory of Possessive Liberalism*.[7] Macpherson's claim, though, was historically specific; in the present context, we would say that it was about the conception of the rule of law associated with the liberal tradition.

[6] Morton J. Horwitz, "The Rule of Law: An Unqualified Human Good?" *Yale Law Journal*, 86 (1977), 561–566.

[7] C. B. Macpherson, *The Political Theory of Possessive Liberalism: From Hobbes to Locke* (Oxford: Oxford University Press, 1962).

To the extent that critical legal scholars were either embedded within or responding to that tradition, Horwitz's claim about the consciousness associated with the (liberal conception of) the rule of law was well-grounded and probably accurate. It was an interpretive claim about the consciousness then (and perhaps still) prevailing in liberal societies, and supporting the claim with what then (and probably now) counts as empirical evidence is difficult.[8]

## 2 A Critical Legal Studies Perspective on the Rule of Law

Earlier the World Justice Project's conception of the rule of law was described as liberal and ideological, but also as only one version of the rule of law. For, from a critical legal studies point of view, there is no "rule of law" in the singular. Rather, there are versions of the rule of law, each serving different ideological goals – a "rule of law with liberal characteristics," a "rule of law with Chinese characteristics," and so on through one's preferred list of ideological projects. The reason for this proliferation lies in the critical legal studies proposition known as the indeterminacy thesis – that all legal rules are either stated in such abstract terms that they can be given whatever content their interpreter prefers or are accompanied in the set of legal rules by other rules with which they can be combined to generate, once again, whatever content one prefers.[9]

The liberal version of the rule of law is captured in Fuller's familiar list and even better in Hayek's 1944 version: "government in all its action is bound by rules fixed and announced beforehand – rules which make it possible to foresee with fair certainty how the authority will use its coercive power in given circumstances."[10] The link between this formulation and the World Justice Project's attention to business planning is clear. Hayek's version compresses Fuller's items of generality, publicity, and prospectivity. Yet, that version omits an important item on Fuller's list – that the law be "relatively

[8] That difficulty might account for the attraction some critical legal scholars felt to the approach taken by the Frankfurt School, which they took to be committed to interpretive social science.

[9] For a discussion, see Mark Tushnet, "Defending the Indeterminacy Thesis," *Quinnipiac Law Review*, 16 (1996), 339–356. It may be worth noting that the indeterminacy thesis was either a restatement of an important American Legal Realist claim, or a stronger version of that claim.

[10] Friedrich A. Hayek, *The Road to Serfdom* (Chicago: University of Chicago Press, 1944), p. 72.

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constant."[11] For Fuller, the rule of law requires – or at least is consistent with – a set of rules of legal change, as any sensible account must be.

Of course, the rules of change must be consistent with the rule of law itself – general, announced in advance, and down through the list. This is the leverage point for the critical legal perspective. That perspective directs attention not to the abstract and general terms Fuller and Hayek use, but to the institutional arrangements by which the rule of law is actually implemented – that is, to legislatures and courts.

With respect to legislatures, a strong theme in the US-focused discussions that generated critical legal studies was the claim that legislatures were vehicles for the expression of (mere) preferences. If they are, their output might not be reasonably stable but, instead, might be arbitrary. As parliamentary majorities shift from liberal to conservative, wild shifts in policy might ensue. When Hayek returned to consideration of the rule of law in 1973, that was his position.[12] Legislation, for him, tended to be troublingly retrospective. The implication for the modern administrative and social welfare state, pervaded by important statutes, was strongly libertarian, again demonstrating how the rule of law was ideologically structured. And yet, for many, not only those associated with critical legal studies, something must have gone awry with the argument if Hayek's conclusion followed from his premises. The simple fact is that social democracy has not led to serfdom or anything remotely like it.

One place where the argument might have gone wrong was in the premise that legislation was merely preference-based. Some critical legal scholars joined others not associated with that perspective in claiming that legislatures could be, and in many places were, instruments for a politics guided by principles that were consistent with the rule of law. The critical legal studies formulations, though, suggested that even on the view that politics could be principled and for that reason consistent with the rule of law, specific versions of the rule of law would remain ideological.

The difficulty critical legal scholars identified was that, Dworkin and similar scholars to the contrary notwithstanding, disputes over principles were irreducible, in a way similar to but significantly different from the

[11] Perhaps Hayek's "fair certainty" can be understood as a version of Fuller's idea of reasonable constancy.

[12] Friedrich A. Hayek, *Law, Legislation, and Liberty*, vol. 1: *Rules and Order* (Chicago: University of Chicago Press, 1973).

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way in which disputes over mere preferences were irreducible. Mere preferences might have no deep structure; there are no reasons to think that people who like chocolate ice cream dislike modern art, for example. In contrast, principled politics in real world settings are believed to have a structure – there are liberals, conservatives, reactionaries, social democrats, and many more. These structures need not have some trans-historical content: at some times and places, social democrats might promote market-oriented reforms, and reactionaries support a robust social safety net. But in the critical legal studies view, at any one time and place the belief that disputes over principles were structured meant that they were ideological – and that that ideology seeped into the versions of the rule of law that were available then and there.

Another strand in critical legal studies accepted, at least provisionally, the critique that legislatures were preference-driven and turned attention to the courts. Drawing on their experience with the common law, they began with the point, obvious within a common law world, that the general rules to which Fuller and Hayek directed attention were not self-applying "in given circumstances," to repeat Hayek's words. Here critical legal studies was a direct descendant of one important component of American Legal Realism. It argued (or, as its proponents would have said, pointed out) that the common law taken as a whole contained rules that, at least on their face, contradicted each other, even if each could in some sense be given precise content. Contracts had to be honored, for example, but not if circumstances had changed, and judicial disagreement was pervasive over when circumstances had changed enough to relieve someone of the duty to honor a contract. That disagreement was not resolvable within the framework made available by the common law itself.

Yet, for some critical legal scholars disagreements among judges were not arbitrary or random. Rather, they had a structure, just as disagreements about political principle did. This argument was associated with the term "tilt."[13] It preserved the ideal of the rule of law, but at the "cost" of treating each version of the rule of law as ideological.

Another line of argument found the concept of "tilt" unnecessary and to some extent mistaken. The "indeterminacy thesis" held that the corpus of legal materials on which judges could properly rely always provided (at least) two answers, pointing in different directions, to any legal question.

[13] Wythe Holt, "Tilt," *George Washington Law Review*, 52 (1983), 280–288.

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There were no resources within law to determine which answer was legally "correct" or even "better." This line of argument supported the proposition that the rule of law, understood as a way to constrain arbitrary exercises of power, was impossible: that X and not-X were equally available would seem to be the essence of arbitrariness.

Many scholars committed to the liberal version of the rule of law were skeptical about the claim that judges when applying the law in good faith would reach the one right answer, but were deeply uncomfortable with the possibility of pervasive arbitrariness, especially when attributed to judges. Some responded by shifting attention away from law-application "in given circumstances" and toward the overall set of institutional arrangements for determining the law. The argument, associated with Legal Process scholars such as Henry Hart and Al Sacks, had several components. First, Hart and Sacks and their followers accepted both the proposition that judges would inevitably have good faith disagreements about law-application and the proposition that those disagreements could not be resolved within the corpus of law that judges administered. Secondly, they argued that people in an organized society had a strong interest in accepting the resolution of their disagreements but (from the first argument) that the resources judges had were not in themselves sufficient to persuade dissenters to accept the judges' resolution. Thirdly, they argued that, in light of their interest in resolving disagreement, people *could* accept an overall set of institutional arrangements that allocated authoritative decision-making to different institutions.

The thought here was that disagreements about decisions made at the level of law-application – "in given circumstance," again – could be subsumed into a category "decisions made by institutions authorized to make them," and that agreement could be reached about which institutions should make which decisions even among people who disagreed about law-application. As a notable passage in the handbook of the Legal Process school put it in connection with the overall perspective: "Are the positions which have been taken thus far in these materials conventional and generally acceptable? Might a representative chairman of the Republican National Committee . . . be expected to agree with them? . . . A representative president of the United States Chamber of Commerce? . . . A representative member of the Soviet Politburo?"[14]

[14] Henry M. Hart, Jr. and Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law*, eds. William N. Eskridge, Jr. and Philip P. Frickey (Westbury:

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The institutional allocation that Hart and Sacks favored had a highly technocratic aspect to it, which allowed them to trade on the idea that scientific-technocratic questions indeed did have right answers. The critical legal studies response was the assertion that moving to the institutional level replicated rather than avoided the question of ideology. The aggregate output of each institution, they argued, would have distinctive distributional consequences. So, for example, the outcomes in courts, taken as a whole, might favor relatively poorer (or richer) people, while legislative outcomes, also taken as a whole, might favor richer (or poorer) people. Those disadvantaged by the overall results of the allocations had no strong reason to accept the allocations: they could offer reasons, internal to the account of why specific institutions should make a category of decisions, explaining that courts should be preferred to legislatures (or vice versa) with respect to issues of interest to them. Institutional allocations no less than law-application, that is, had political content, and the defense of any specific allocation was supported by an ideology associated with that content.

As at every prior step in the critical legal studies argument defenders of the liberal version of the rule of law could refuse to go forward: they maintained that there were right answers discernible by legal reason, or correct allocations that good policy analysis could disclose. But even if these defenders went along with each step in the critical legal studies argument, they had one final defense. They contended that the strong version of the indeterminacy thesis implied that well-informed lawyers could not know what the outcome of law-application in given circumstances would be. That was belied by lawyers' daily experience. Lawyers readily identified strong and weak arguments, arguments that were likely to succeed and ones that were likely to fail – and, quite often, without regard to who the lawyers expected the judges to be. The weaker "tilt" version was also inconsistent with lawyers' experience. The answers to some, perhaps many, problems had no obvious ideological tilt, and lawyers knew of too many cases in which judges ruled in a way inconsistent with their presumed ideological inclinations for ideology to be doing much work.[15]

Foundation Press, 1994), p. 113. The work was circulated in mimeographed form for decades starting in 1958.

[15] A good presentation of these arguments is Owen M. Fiss, "Death of the Law?" *Cornell Law Review*, 72 (1986), 1–16.

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Sometimes critical legal scholars disputed these responses. Even cases with no ideological tilt on the surface, they argued, did have a deep structure with ideological content. Take an ordinary contract dispute between large businesses. The rules governing the resolution of that dispute rested, according to critical legal theory, on basic assumptions about individual choice. An ordinary contract dispute would not typically bring to the surface core questions about what "choice" meant. In the background, though, contract law always conditioned its analysis on the assumption that the case did not involve fraud, coercion, or incapacity. Yet, when those concepts came to the surface, the competing lines of analysis available within contract doctrine showed that the very concept of the "individual chooser" had important social – and ideological – dimensions: ideology determines when one party's concealment of private information from another counts as fraud, or whether refusal to accommodate a party's straitened economic circumstances counts as coercion.

Similarly, whether retrospective civil legislation – making tax laws applicable to transactions completed before the legislature completed its enactment, for example – is consistent with the rule of law receives an answer shaped in significant part by ideology. Classical liberals might find such legislation problematic in "rule of law" terms but perhaps permissible in narrow circumstances, while social democrats might find it consistent with the rule of law in a rather larger range. How much change pursuant to preannounced rules of legal change is consistent with "reasonable stability," in Fuller's terms, is also answered with reference to ideology. On this view, the ideological content of the rule of law would often be far in the background, but it was always there.

Critical legal theorist Duncan Kennedy offered another account of why the ideological content of the rule of law might not come to the surface.[16] He referred to the "stakes" of a controversy, and the "work" needed to be done to reach outcomes. Where the ideological stakes were low, no lawyer or judge would do much work on the problem. Were the stakes to be elevated, or high from the outset, though, lawyers would do a great deal of work to ensure that the result they and their clients preferred ensued. The cases that critics of critical legal studies pointed to as showing that the rule

[16] Duncan Kennedy, *A Critique of Adjudication:* fin de siècle (Cambridge: Harvard University Press, 1998).

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of law was neither ideological nor tilted were typically low stakes ones and, for Kennedy, showed us little about the rule of law generally.

Other critical legal scholars approached the question of determinacy in practice from a different direction. Again drawing upon the American Legal Realist heritage, they pointed to Karl Llewellyn's idea that good lawyers and judges developed a "situation sense," a way of understanding cases and problems that was independent of the legal rules bearing on the cases. The practicing lawyer's ability to predict what a judge would do rested on that situation sense, not on calculations about the odds of having a liberal or conservative judge deal with the case, that is, without worrying about ideology. For Llewellyn, situation sense resulted from the ways lawyers were educated and from their experience in the practice of law.[17] In more modern and sociological terms, situation sense resulted from lawyers' socialization.

The sociological perspective explains why there are versions of the rule of law: in liberal societies lawyers are socialized into the liberal version of the rule of law, in social democratic ones into a social democratic version. If there is a process of legal socialization with Chinese characteristics, then there will be a rule of law with Chinese characteristics.

## 3 Ideology Critique Applied to the Rule of Law

As an ideology (or as ideologies), the rule of law capitalizes on the fact that nonarbitrariness is indeed an unqualified human good. From a critical legal studies perspective, every social order promotes the immediate interests (or values or desires or . . .) of some at the expense of the immediate interests, values, desires, or whatever of others. Those adversely affected by some policy need a reason to comply with it or, more broadly, to accede to assertions of power that harm them in the short run. One such reason is fear of direct physical coercion. But, from the powerholders' point of view, coercion may be not be effective enough unless it is deployed on a scale so large as to eat away at the benefits the powerholders get from the order overall. Narratives that explain why those who are adversely affected in the short run will actually benefit from the social order in the long run are

[17] Karl Llewellyn, *The Bramble Bush: The Classic Lectures on the Law and Law School*, ed. Steve Sheppard (New York: Oxford University Press, [1951] 2008). The lectures were initially delivered to students at Columbia Law School in 1930.

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sometimes more effective than coercion in securing compliance. Those narratives are the ideologies powerholders disseminate.

That a policy adversely affecting someone is not arbitrary can be one part of a narrative offering reasons for accepting the adverse effects. To adopt a term used in recent discussions of the role of proportionality in comparative constitutional law, the rule of law is (part of) a culture of justification: it requires that adverse effects be justified to the person affected. Typically, the form of justification will be that the action at issue is not arbitrary because it promotes the long-term interests, desires, values, or whatever of the person complaining. And, again, the requirement that action be justified in this sense does seem an unqualified good, at least when the justification is a "good" one in the sense that it provides a credible and reasonably accurate account of the long term.

Of course, different social orders will give varying content to the account of why the policy is beneficial in the long run. That is why there can be a rule of law with liberal characteristics or with Chinese characteristics or with social democratic characteristics. But within each of these orders the culture of justification – the rule of law's requirement that action not be arbitrary – reduces the order's need to coerce. That too is a human good, though not an unqualified one if the social order is seriously unjust.

Purely procedural accounts of the rule of law appear to be quite thin. The indeterminacy critique of some components of Fuller's list thins them down even more. And when the requirement of nonarbitrariness becomes only a requirement of justification according to some substantive ideological narrative, the rule of law is thinned down yet further – perhaps almost to the vanishing point. Yet, even in its weakest form, the rule of law, seen from a critical legal studies perspective, does express respect for people as reasoning (and reasonable) beings. That does seem an unqualified human good.

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