

The Concept of a Legal Order: An Overview and Critique

A legal order is a distinctive type of a rule-based system designed to structure human interactions, one that relies on transparent and formally institutionalized rules. Proponents of legal orders argue that key sets of relationships among a core set of actors (individuals, organizations, and government) are too important to be unnecessarily clouded by ambiguity and uncertainty. Societies could neither persist nor prosper without the type of social structure that legal orders make possible. The creation of a law-based order is not the only way to provide social structure and, within societies that create a law-based order, it is only one tool they use. This notwithstanding, proponents argue that legal orders clarify the status, obligations and rights of core actors – across a diverse set of spheres – in ways that other modes of social control cannot.

Despite the ambiguity that has long surrounded the notion of the rule of law, it is our contention that there is a core meaning to what we have defined as a legal order. This core meaning has been forged by historical settings and events that have unfolded, in a sporadic and disjointed manner, over two millennia. These historical developments have generated a series of intellectual epiphanies that have clarified the core components of a socially useful, rule-based mechanism for structuring human interactions. These epiphanies have been the subject of fierce political debates, captured in seminal works, and then refined and augmented by later works. In the wake of these intellectual developments are several well-developed, if disconnected, bodies of thought on legal orders. The integration of these bodies of thought provides the basis for dimensionalizing this concept, which is the first step in transforming it into a useful tool for social research.

This next section identifies what we believe to be the key dimensions to the concept of a legal order. This section outlines an admittedly idealized conception of a legal order. As such, while it does not purport to describe any particular legal order, it does provide the conceptual underpinnings for gauging the extent to which a given legal order matches up to this ideal. The second section outlines and assesses key critiques of the societal utility of legal orders. This review enriches our understanding of the concept of a legal order and contributes to its transformation into a social science construct that can be useful in cross-national studies of societal development.

Dimensionalizing the Concept of a Legal Order

Our assessment of the concept of a legal order's evolution suggests that there are three key dimensions to it (see Figure 1). The first is an *expressive dimension*. The key components of this dimension are a pair of ideals: equality before the law and the supremacy of law. These expressive ideals distinguish law-based orders from other governing mechanisms that could be used to provide social order, such as rule by patrimonialism, clans, warlords, dictators, etc. Because of these expressive ideals, the earliest political thinkers believed that legal orders were unique in their capacity to provide for a core set of social goods. Legal orders were distinctive because they could *simultaneously* provide for social order, curb the arbitrary discretion of avaricious rulers,

and provide for the liberty of citizens – if only the minimalist conception of liberty that Tamanaha (2004: 34) calls “legal liberty.”

The second component is an *instrumental dimension*. The centrality of this instrumental component derives from the realization that the expressive ideals of a legal order are not self-realizing. This realization came centuries after those expressive ideals were articulated and led to the development of a set of principles thought to be central to realizing those ideals. These principles include: procedural safeguards, legal reasoning, institutional independence and constitutionalism. The articulation of these principles unfolded over centuries, but they began with the English experience in the Middle Ages.

The third component is a *differential dimension*, which speaks to the differences between laws and other types of rules. A legal order, at its core, is a rule-based system. However, not all rules are laws and laws are a distinctive type of normative system. The distinction between rules and laws did not emerge clearly until well after a legal order’s expressive ideals and instrumental principles were established. But centuries of intellectual debate over the meaning of law led to refinements in positivist conceptions of law. Around the middle of the 20th century it became clear that “rules of recognition” were essential in differentiating laws from other normatively based rules. Also, the mid-twentieth century experience with fascism led to the realization that law had an “inner morality.” If lawmakers ignored the requirement of this inner morality, the rules they produced were not laws. And, without laws, a society could not have a legal order. Thus, the realization of expressive ideals depends every bit as much on the observance of these differential criteria as it does the implementation of instrumental principles.

-- Figure 1 about here --

It should be emphasized that both the concept of a legal order and its components should be viewed as continuous phenomena. None constitute a litmus test for the existence of a legal order. Rather, they speak to the extent to which a legal order has been institutionalized. Another indicator of the extent to which a legal order has been institutionalized is the state of its *legal infrastructure*: its system of legal education, bodies of legal publications, network of professional legal associations, etc. Legal infrastructures have received little attention in the bodies of literature reviewed here. But they are necessary accoutrements of a legal order. To be effective in realizing the expressive, instrumental and differential principles introduced above a nation must have the capacity to do things such as educate aspiring legal actors, regulate legal decision-makers (judges, lawyers, paraprofessionals, etc.), provide for on-going professional education, and conduct intellectual dialogues on legal matters. More will be said about legal infrastructures later in this work; the following subsections develop the concepts outlined in Figure 1.

Expressive Ideals

Perhaps the earliest extended commentary on legal orders is found in ancient Greece, reaching its apex in the work of Plato and Aristotle. Their ruminations on legal

orders were an integral part of their thinking about how to structure societies so as to optimize well-being. They both believed that investing wide discretion in the hands of wise and noble political leaders was the optimal design for a society. At the same time, both Plato and Aristotle were realists who were familiar with ancient political history. They understood both the rarity of benevolent guardians and the amount of harm that vile, abusive and self-serving rulers could do. This led them to embrace law-based orders as a worthy substitute for philosopher kings if not an optimal solution. Legal orders both provide the basis for social order and curb the capricious exercise of discretion by rulers. In their wake, these social goods generate a degree of individual liberty for Athenian citizens that Pericles and others celebrated as unique in the ancient world.

To Athenians, law-based orders were synonymous with rule by enlightened reason. As such, it was the antithesis of arbitrary rule of either powerful tyrants or popular demagogues, which were synonymous with rule by desire or passion:

It follows therefore that it is preferable that law should rule rather than any single one of the citizens.... he who asks the law to rule is asking God and intelligence and no others to rule; while he who asks for the rule of a human being is importing a wild beast too; for desire is like a wild beast, and anger perverts rulers and the very best of men. Hence, law is intelligence without appetite (Aristotle 1988: 1287 p226).

The high regard that classical thinkers had for legal orders was rooted in their reified conception of law. To them, and other classical thinkers such as Cicero, “true” law reflected a divine or natural order that served an enlightened view of the common good.¹ It was accessible by reason and was decidedly not equated with the will of a transient majority. Indeed, those who would change the law bore a heavy burden; Plato went so far as to advocate that the legal code he offered in *The Laws* be permanent.

Unlike the reified conception of law that buttressed classical conceptions of law-based orders, two themes of classical thought have endured: *equality before the law* and *the supremacy of law*. Because of their close association with the distinctive nature of a legal order, we view these as its expressive ideals. No conception of a legal order that is consistent with the historical development of law-based orders can fail to view them as defining traits.

Equality before the law is the notion that laws are to be applied equally to all, according to its terms. Thus, while laws can make distinctions, those distinctions must be applied similarly across individuals. This is a key expressive ideal because it is central to the societal utility of legal orders, their ability to provide for social order. Few things are more detrimental to domestic tranquility than blatant and systematic favoritism by legal

¹ Despite their conception of “true” law as divine and natural, none of the classical thinkers reviewed here (Plato, Aristotle, and Cicero) advocated the disobedience of flawed, “untrue” laws. Aristotle argued that “There is nothing which should be more jealously maintained than the spirit of obedience to law (Aristotle 1988: 1307 p68). The reason that even unjust laws should be obeyed is that, in addition to being a vehicle for furthering communal happiness, it was essential to the maintenance of social order.

actors. This was clear to the ancient Greeks and it has become even clearer over the past two millennia.

Equality before the law emerges as a key component of classical conceptions of law-based orders as early as the rule of Solon. It was captured by the Greek term *isonomia*; Hayek succinctly chronicles its development:

“Isonomia” was imported into England from Italy in the sixteenth century as a word meaning the ‘equality of laws to all manner of persons;’ shortly thereafter it was freely used ... to describe a state of equal laws for all and responsibility of the magistrates... When it first appeared, it described a state which Solon had earlier established in Athens when he gave the people ‘equal laws for the noble and the base...

The famous Laws of the Twelve Tables, reputedly drawn up in conscious imitation of Solon’s laws, form the foundation of [the Roman Republic’s] liberty. The first of the public laws in them provides that ‘no privileges, or statutes shall be enacted in favour of private persons, and which individuals, no matter of what rank, have a right to make use of. (Hayek 1960: 164, 166)

The supremacy of law is the notion that law binds a society’s rulers as well as its citizens. It is an expressive ideal because, without it, legal orders could not curb the abusive discretion of rulers. Plato could not be more explicit about the importance of the supremacy of law for realizing the societal benefits of legal orders.

... the highest office in the service of the gods must be allocated to the man who is best at obeying the established laws ... Such people are usually referred to as ‘rulers’, and if I have called them ‘servants of the law’ ... [it is] because I believe that the success or failure of a state hinges on this point more than anything else. Where the law is subject to some other authority and has none of its own, the collapse of the state, in my view, is not far off; but if the law is the master of the government and the government is its slave, then the situation is full of promise (1970: 128).

Cicero is equally clear on this point

... a magistrate’s function is to take charge and to issue directives which are right, beneficial, and in accordance with the laws. *As magistrates are subject to the laws* (emphasis added), the people are subject to the magistrates. In fact it is true to say that a magistrate is a speaking law, and a law a silent magistrate. Nothing is so closely bound up with the decrees and terms of nature. Without that, no house or state or clan can survive – no, nor the human race, nor the whole of nature, nor the very universe itself. (1998).

The supremacy of law as an expressive ideal is lost briefly during the Roman Empire. But it reemerges with the rise of the Church as a social force in the Middle Ages, one that could counter monarchical power and authority. While it is difficult to argue that kings were subject to positive law, which they promulgated and enforced, it was widely believed that monarchs were subject to divine law. The balance of power between popes and kings ebbed and flowed throughout the Middle Ages. But oath-taking on the part of kings during coronations became established and contributed to the

widespread view that they were subordinate to higher law. The supremacy of law has been an integral part of the concept of a legal order continuously since then. National constitutions routinely establish the supremacy of law as part of the social compact and contemporary leaders routinely swear allegiance to the law upon taking office.

Instrumental Principles

While classical thinkers devoted a great deal of thought to the expressive ideals of a legal order, they gave much less thought to how these ideals would be achieved. The rise of absolutism in the West underscored the fact that these ideals were not self-realizing. Indeed, perhaps the key theme in A. V. Dicey's seminal 19th century treatise is the importance of institutionalized mechanisms for realizing expressive ideals. In contrasting the England's legal system with France's he disparagingly notes that

The Declaration of the Rights of Man proclaimed the right of every citizen to publish and print his opinions, and the language has been cited in which the Constitution of 1791 guaranteed to every man the natural right of speaking, printing, and publishing his thoughts without having his writings submitted to any censorship or inspection prior to publication. But the Declaration of Rights and this guarantee were practically worthless. They enounced a theory which for many years was utterly opposed to the practice of every French government (1896: 159).

What made England different from France, according to Dicey, was

... there runs through the English constitution that inseparable connection between the means of enforcing a right and the right to be enforced ... The saw *ubi jus ibi remedium* [where there is a right there is a remedy], becomes from this point of view something much more important than a mere tautologous proposition. In its bearing upon constitutional law it means that the Englishmen whose labors gradually framed the complicated set of laws and institutions which we call the Constitution, fixed their minds more intently on providing remedies for the enforcement of particular rights...than upon any declaration of the Rights of Man (p. 118)

The institutionalized mechanisms that Dicey equates with the English Constitution began with festering concerns that produced the Magna Carta, evolved with the development of the English common law system, were crystallized in the aftermath of the English Civil War, and were advanced by the American founding experience. These institutionalized mechanisms can be expressed succinctly in terms of four instrumental principles that are central to any historically faithful conception of a legal order: *procedural safeguards, legal reasoning, institutional independence and constitutionalism.*

The first two instrumental principles, procedural safeguards and legal reasoning, are essential to the capacity of legal orders to curb the arbitrary exercise of governmental authority. Their centrality was underscored as society and governments became more complex and specialized. Arbitrary rule was not restricted to monarchs; it could also be engaged in by magistrates (and later administrative agencies) who were unfaithfully applying otherwise sound laws. Thus, developing procedures to govern the actions of

legal actors, and establishing principles of legal reasoning to use in applying legal principles, came to be seen as crucial to realizing the societal benefits of legal orders.

The importance of *procedural safeguards* was first articulated and acknowledged formally in chapter 39 of the Magna Carta, its most famous provision. It stipulates that:

No freeman shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land.

The essence of chapter 39 is that people's persons, property, and liberty cannot be infringed upon in an arbitrary way. Our understanding of procedural safeguards has changed considerably since 1215 and continues to evolve today. There remains, however, a widespread consensus among legalists that the rules governing legal proceedings be publicly known, clearly expressed, and fairly applied. Within these general strictures there are many approaches to designing procedures and many values that can be manifested in them. Examples of procedural safeguards include: public hearings, written rules of procedure, the right to participate meaningfully in proceedings affecting one's interests, appropriate notice as to the time and location of proceedings, the right to appeal, etc.

Legal reasoning is the notion that applications of the law to specific cases be expressed in reasoned explanations and based on applicable legal provisions. In other words, it requires that legal reasons be offered that articulate why a particular decision is being made in a specific case. Legal reasoning is a *key* instrumental principle because the notion of "a government of laws not men" is a political slogan, not an apt depiction of reality. Individuals are an indispensable component of legal orders because laws do not implement themselves. Nor do they fill in gaps that inevitably emerge in laws that are designed to be general in nature. Legal reasoning is an *independent* instrumental principle because, even if written, pre-existing procedural safeguards are invoked in the handling of a case, the idiosyncratic application of irrelevant principles could undermine the societal benefits proponents associate with legal orders.

The insistence that legal decisions be reasoned decisions based on law is rooted in the English common law system. But the logic underlying it can be found in classical thought, particularly Aristotle's assertion that "law is intelligence without appetite." Raz (1979) argues that legal reasoning is one of the key features that distinguish law-based orders from other mechanisms for settling disputes:

Legal systems ... contain laws determining the rights and duties of individuals. These are laws which the courts are bound to apply in settling disputes and it is because of this that they also provide an indication to individuals as to their rights and duties in litigation before the court... (1979: 112).

Raz draws two consequences from the fact that judges are bound to apply the law:

In the first place, law contains both norms guiding behavior and institutions for evaluating and judging behaviour. This evaluation is based on the very same norms which guide behaviour... Thus, the law can be said to possess its own internal system of evaluation...

The second important consequence of the difference between law and a system of absolute discretion ... is that legal systems contain, indeed consist of, laws which the courts are bound to apply regardless of their view of their merit. A more accurate formulation would be that legal systems consist of laws which the courts are bound to apply and are not at liberty to disregard whenever they find their application undesirable ... Because of vagueness, open texture, and incompleteness of all legal systems there are many disputes for which the system does not provide a correct answer. Even if it rules out certain solutions as wrong, there are others which are neither wrong nor right in the law... even in such cases their discretion can be limited by general legal principles (1979: 112-114).

The abuse of official discretion is curtailed when legal actors faithfully and ably integrate the law into their decisions, but the societal utility legal reasoning goes beyond this. To illustrate, contrast a legal order with a system in which well-intentioned, well-trained arbitrators are given license to take into account any and all considerations that may seem relevant to them in a particular case. Many argue that this type of forum may provide a more appropriate resolution of a particular situation. What it would not do as well as a law-based order, however, is to provide individuals with a priori guidance as to their behavior. This could both jeopardize individual liberty and undermine societal stability, thereby impeding progress.

An important corollary to procedural safeguards and legal reasoning is fidelity to legal dictates. Considered jointly, these two instrumental principles impose an affirmative obligation on government officials to act in accordance with law and legal procedures. Thus, such things as bribes, graft, corruption, partisanship, etc., are incompatible with the basic tenets of a legal order. While they may serve to grease the creaky wheels of government, they undermine the salutary effects that procedural safeguards and legal reasoning were designed to generate. Without fidelity to law there can be no assurance that the expressive ideals of a legal order will be achieved.

Constitutionalism is the notion that a state is governed by a set of fundamental written principles, a social compact. Implicit in this notion is the existence of a hierarchy of laws. The law at the top of this hierarchy, the nation's founding document, cannot be modified by ordinary law-making procedures. Rather, changes to this body of higher, positive law can only be effectuated with some sort of extraordinary set of predetermined procedures. Consequently, these fundamental principles define the framework of ordinary government actions and constrain the actions of government officials. Dunham asserts that the genesis of constitutionalism precedes the Magna Carta and dates at least to King Alfred's reign in the ninth century (1965). But it was not until the 1680's that the term "constitution" was used to convey the idea of a set of fundamental principals that governed the operation of a state. Indeed, Hayek notes that, as late as the 18th century, the higher law foundations of constitutionalism were:

... usually conceived as the law of God, or that of Nature, or that of Reason. But the idea of making this higher law explicit and enforceable by putting it on paper, though not entirely new, was for the first time put into practice by the Revolutionary colonists. The individual colonies, in fact, made the first experiments in codifying this higher law with a wider popular basis than ordinary legislation. But the model that was profoundly to influence the rest of the world was the federal Constitution. (1960: 179)

Constitutionalism is essential to contemporary conceptions of a legal order because it performs the role that higher law performed in constraining the actions of absolutist monarchs in the Middle Ages. Indeed, without constitutionalism it is difficult to imagine a meaningful conception of the supremacy of law. Raz, for example, asserts that, without constitutionalism, a law-based order is a tautology (1979: 212). Hayek views constitutionalism as essential to a law-based order because a legislature “will be more reluctant to take certain measures for an important immediate aim if this requires the explicit repudiation of principles formally announced (Hayek, 1960: 179).” However, the behavioral impact of constitutionalism will be significant only if “another body has the power to modify these basic principles, especially if the procedure of this body is lengthy and thus allows time for the importance of the particular objective that has given rise to the demand for modification to be seen in the proper proportion (Hayek, 1960: 179-180).” Thus, for constitutionalism to be effective instrumental principle there must be some type of implementation mechanism.

Judicial review is one such mechanism. McIlwain (1939) notes that judicial review “is as old as constitutional law itself, and without it constitutionalism would never have been attained” (pg 278). Corwin adds that “The history of judicial review is, in other words, the history of constitutional limitations” (Corwin 1914). This principle was first articulated by Coke in *Bonham’s Case* and later established in U.S. law by Chief Justice Marshall in the equally famous case of *Marbury vs. Madison*. However, despite the attention devoted to judicial review, Ginsburg (2003) notes that it is not the only mechanism that uses constitutional principles and provisions for restraining governmental action. He prefers the term “constitutional review” which encompasses a number of mechanisms that check the sovereignty of governmental actors.

The importance of *institutional independence* as an instrumental principle, judicial independence in particular, was highlighted in the English Civil War.

The great event that became for later generations the symbol of the permanent achievements of the Civil War was the abolition in 1641 of the prerogative courts and especially the Star Chamber which had become in F.W. Maitland’s often quoted words, “a court of politicians enforcing a policy, not a court of judges administering the law.” At almost the same time an effort was made for the first time to secure the independence of judges (Hayek, 1960: 169).

The importance of institutional independence is underscored by William Paley, who Hayek characterizes as “the great codifier of thought in an age of codification.” Paley contends that

The first maxim of a free state is, that the laws be made by one set of men, and administered by another; in other words, that the legislative and the judicial character be kept separate (1785: quoted in Hayek 1960).

There are a number of ways to provide for institutional independence of those entities charged with applying the laws. These include lifetime tenure, civil service protections, prohibitions on salary reductions, etc.

It is important to emphasize that institutional independence and the other instrumental principles are both highly interdependent and mutually reinforcing. If legal institutions are not independent, then their commitment to procedural safeguards, legal reasoning, and constitutionalism cannot be assured. However, if legal institutions are independent, then they must be constrained by other instrumental principles. The failure of these instrumental principles to constrain independent legal actors will make it possible for them to act on their own predispositions. This will undermine the legitimacy of legal institutions, which draws from the widespread belief that they act in accord with the law. Thus, the societal utility of legal orders will be greatest when, in Cicero's words, "a magistrate is a speaking law, and a law a silent magistrate."

Differential Criteria

The nature and sources of law have been debated endlessly over the centuries and we cannot, and need not, delve deeply into this debate. At its core, however, is a positivist conception of law (where law is essentially equated with "law on the books") and a natural law conception (where law is seen as springing from a non-corporeal source: God, nature, reason, etc). There are two key aspects of natural law that are relevant here: positive law that is inconsistent with natural law is invalid; there is no temporal arbiter of what natural law is. This second point is problematic because there are frequently a number of compelling versions of natural law. As Kelsen (1946) notes, "none of the numerous natural law theories has so far succeeded in defining the content of this just order in a way even approaching the exactness and objectivity with which natural science can determine the content of the laws of nature, or legal science the content of positive legal order" (pg 9).

The inability of natural law advocates to clearly identify what law is at a given time and place makes it impossible to use a natural law approach as a basis for transforming the concept of a legal order into a useful social science construct.

[T]he literal sense of "the rule of law" ... has two aspects: (1) that people should be ruled by the law and obey it, and (2) that the law should be such that people will be able to be guided by it... it is with the second aspect that we are concerned: the law must be capable of being obeyed. A person conforms with the law to the extent that he does not break the law. But he obeys the law only if part of his reason for conforming is his knowledge of the law. Therefore, if the law is to be obeyed *it must be capable of guiding the behaviour of its subjects* (Raz 1979: 213-140).

Raz's points are particularly important if we consider them in light of the societal utility of legal orders: maintaining social order, curbing the behavior of rulers, and providing for individual liberty. These objectives become much more difficult to attain if the dictates of law are contestable.

For the reasons that Kelsen, Raz and others note, we rest our conception of a legal order on a positivist conception of law. In doing so it is important to understand that positivist approaches to law have evolved over time and positivists have had extended debates among themselves, as well as with natural law proponents. These debates have been conducted over such matters as: the nature of the judicial process, legal reasoning, legal concepts and standards, the distinctiveness of legal systems among normative systems, etc. While most of these debates are not relevant for understanding differential criteria, those that address the distinctiveness of legal systems as normative orders are. By the middle part of the 20th century these debates produced some key insights into the concept of a legal order.

Some of these insights were intellectual developments stimulated by debates within the positivist tradition; others were a result of the sobering effects of fascism. The seminal contributions here are Kelsen's classic work (1945), Hart (1961), Fuller (1969), and Raz (1979). Two of these insights are of particular importance for our efforts to dimensionalize the concept of a legal order. The first is the importance of clear rules of recognition; the second is a set of requirements derived from what Fuller terms "the inner morality of law."

Rules of recognition speak to the clarity of law that makes positivist conceptions of law the foundation upon which the notion of a legal order rests. From Hart's perspective (1961), the need for rules of recognition flows from the inadequacy of Austin's initial articulation of positive law as "the command of the sovereign." Hart argues that law is more complicated and that it must be viewed as the union of primary and secondary rules. Primary rules are laws about the conduct, obligations and powers of individuals; secondary rules are laws that specify how primary rules can be: (1) ascertained, (2) established, (3) clarified, and (4) changed. They are central to the concept of a legal order because they differentiate laws from other normative rules and are essential to identifying the bodies of rules that must be observed in daily life. Without the clarity and distinctiveness that rules of recognition provide law, legal orders would not have the certainty that is crucial to their societal utility.

Rules of recognition are so fundamental to contemporary conceptions of a law-based order that Hart says they can "be considered a step from the pre-legal into the legal world" (Hart, 1961: 91). The criteria embodied in rules of recognition can include such things as "reference to an authoritative text, to legislative enactment, to customary practice, to general declarations of specified persons, or to past judicial decisions (Hart, 1961: 97)." It should also be noted that there may be more than one way to have a primary rule authoritatively established as a law. Moreover, rules of recognition are often complex in that they can incorporate independent sets of criteria that must be fulfilled before something can be authoritatively established as a law.

The 20th century experience with fascism led to a great deal of soul-searching among legal scholars. The fact that Nazi Germany had many of the trappings of a legal order was unsettling. This stimulated a great deal of thinking about the difference between rules and laws as well as the difference between laws and other normative systems. Perhaps the most relevant contribution from these reflections is Fuller's analysis of the "*inner morality of law*."² Fuller describes his analysis as a procedural version of a natural law, and describes it as an effort to

... [D]iscern and articulate the natural laws of a particular kind of human undertaking ... "the enterprise of subjecting human conduct to the governance of rules." These natural laws have nothing to do with any "brooding omnipresence in the skies." ... They are not "higher law; if any metaphor of elevation is appropriate they should be called "lower" laws. They are like the natural laws of carpentry, or at least those laws respected by a carpenter who wants the house he builds to remain standing and serve the purposes of those who live in it. (Fuller, 1969: 96)

Fuller's analysis of what makes law-based orders unique leads him to identify seven unique requirements: (1) *generality* (laws should not be targeted to specific individuals or groups); (2) *publicity* (laws must be knowable by those subject to their provisions); (3) *prospectivity* (laws – especially criminal laws – should not be applied retroactively); (4) *clarity* (laws should be straightforward and understandable); (5) *logical consistency* (the provisions within a law should not impose incompatible obligations); (6) *feasibility* (laws should not be impossible to obey); (7) *stability* (laws should be constant enough for individuals to orient their action to them) (Fuller, 1969: 39).

The gist of Fuller's analysis is that simply having and following rules of recognition is insufficient for differentiating laws from other rules. Law makers must also comply with the set of *affirmative* obligations embodied in the inner morality of law; meeting these obligations is essential to making legal orders socially useful mechanisms. However, with the exception of the publicity requirement, Fuller does not consider any of these requirements to be a litmus test. Rather, he concedes that "the inner morality of law is condemned to remain largely a morality of aspiration and not of duty. Its primary appeal must be to a sense of trusteeship and to the pride of the craftsman (Fuller, 1969: 43)." By this he means that the morality embodied in these requirements is something to which we aspire even though we will never attain. Following his carpenter metaphor, it can be said that, while a house may have some structural deficiencies that make it lean or wobble, it may still be inhabitable and serviceable.

One of the reasons that these seven requirements should not be viewed litmus tests is that there are often tensions between them. There is, for example, often a tradeoff between enacting a general law that is still clear. Also, if the stability requirement is taken too seriously the law becomes stale and can fall into disrepute. Retroactivity may be justifiable in some cases to correct past wrongs, even though it should never be the

² A simplistic gauge of the relevance of the fascist experience on Fuller's reflections is that he makes references to Nazi Germany at seven different points in his book: p. 40, 54, 62, 107, 123, 155 and 158.

basis for confining individuals. These tensions notwithstanding, “A total failure in any one of these eight directions does not simply result in a bad system of law; it results in something that is not properly called a legal system at all” (Fuller, 1969: 39). This suggests that a society’s commitment to a legal order requires more than a sense of trusteeship and pride of craftsmanship: it requires an institutionalized commitment to these criteria. This would come in the form of constitutional provisions concerning such things as ex post facto laws, due process provisions, and bills of attainder.

Critical Perspectives on Legal Orders: An Overview and Evaluation

Affection for rule-based orders has ebbed and flowed over time and has varied across cultures. Indeed, the regard for legal orders was guarded almost from the beginning; both Plato and Aristotle regarded rule by benevolent guardians as preferable to rule by law. Plato observed that “where the good king rules, law is a hindrance standing in the way of justice like ‘an ignorant and obstinate old man’” (Jones 1956: quoting Plato). Aristotle notes:

We begin by asking whether it is more expedient to be ruled by the best man or by the best laws. Those who believe that to be ruled by a king is expedient think that the laws enunciate only general principle and do not give day-to-day instructions on matters as they arise; and so, they argue, in any skill it is foolish to be guided always by written rules... it is obvious that the constitution which goes by law and written rules is not the best (Aristotle p. 221 1285).

Though one would not know it from their enthusiastic contemporary embrace, critical assessments of legal orders have grown considerably over the centuries. Reviewing and assessing these critiques will facilitate our efforts to develop the notion of a legal order into a useful social science construct. By focusing on issues that its advocates have downplayed or ignored, this discussion will broaden our understanding of what legal orders are, how they operate, and why they are designed as they are. We will discuss six principal criticisms here; they can be summarized as follows:

- Law is a contested notion; hence, it cannot provide the foundation for an institutionalized framework that structures human relationships.
- Even if we can define what law is, the notion of a “government of laws” that constrains official behavior is an illusion.
- Even if law-based orders can constrain the behavior of legal actors, legal orders are tools of oppression by the ruling elites.
- Even if legal orders are not a tool of oppression, they are a flawed tool for structuring and managing social relationships, particularly dispute resolution.
- Even if legal orders are useful tools in some societies, they do not travel well outside Western cultures.
- Even if legal orders can be a broadly useful societal tool, they are undemocratic.

The first three critiques rest on the notion that law-based orders are, at best, an illusion and, at worst, a fraud. The second three criticisms admit to the possibility of a law-based order that can effectively structure human interactions. But, for these critics,

this is bad news -- because of the inherent shortcomings of legal orders. We briefly develop and assess these sets of criticisms in the next two subsections. Our aim in assessing these critiques is not to rebut them. Rather, it is to evaluate them in light of our effort to assess the role of legal orders in a cross-national analysis of societal development. Those with a different purpose may evaluate these critiques differently.

Legal Orders as Illusory or Fraudulent

We have already addressed the idea of law as a contested notion in our brief discussion of positivist and naturalist conceptions of law. The gist of this critique is that if we do not know what law is, then it cannot provide the framework for guiding and structuring human interactions. This led us to ground our approach on a positivist conception of law. This grounding in positive law is *largely* responsive to the “law is a contested notion critique,” particularly when clearly established rules of recognition are an integral part of our conception of a legal order. It is not a *wholly* responsive to this critique, however, because complex rules of recognition, particularly in transitional societies, can lead to some ambiguity as to what the law is. Widner (2001), for example, discusses the problems of introducing a modern system of law into traditional societies that have complex bodies of pre-existing customary and religious laws. This introduces a good deal of ambiguity into a legal order, especially for citizens unfamiliar with the customs of a particular region of a country.

The assertion that a “government of laws not men” is a delusion dates at least to the work of Thomas Hobbes. To him written rules were powerless and the distinction between “the rule of law” and “the rule of men” was without merit. *Someone* has to interpret and enforce the law and it is those individuals that rule, not the law. In response to this criticism legalists argue that an empowered and truly independent judiciary provides a check on those determined to see their will prevail over the clear dictates of law. The Hobbesian counter to this response is that such a system provides for “the rule of judges,” not “the rule of law.” Because judges are humans whose decisions are influenced by personal factors (values, social position, biases, etc.), individuals still rule. Moreover, the legalization of many disputes in societies that have embraced legal orders has an additional downside. Decisions by legal, as opposed to political, actors often provide a degree of legitimacy and closure to what are really contestable political issues.

The Hobbesian mantra was carried first by legal realists in the early part of the 20th century and, in the last third of the 20th century, by critical legal theorists. The issues they raise speak to fundamental questions concerning human nature, social and ethical philosophy, and legal science. Some of the differences between legalists and the legatees of Hobbes have been debated for centuries and are largely irresolvable. But those aspects of this debate that speak to the efficacy of legal orders are, in the end, subject to empirical assessment. Even the most ardent contemporary legalists would not assert that that judges “discover” law. Nor would they argue against the open texture of some legal provisions and concepts. Thus, there is wide agreement that there is some indeterminacy in the law and that legal actors enjoy a certain amount of discretion. The dispute is over how that discretion is exercised. Within the framework introduced above, the debate

centers on the ability of instrumental principles, particularly procedural safeguards and legal reasoning, to constrain the behavior of legal actors.

In subjecting this dispute to empirical examination it is important to avoid needlessly high expectations. No human mechanism designed to structure social interactions has ever perfectly realized the ideals it was created to achieve. Thus, for present purposes the question is not whether legal orders “dictate” the behavior of legal actors. Rather it is: Are legal orders effective in constraining the behavior of legal actors such that its expressive ideals are not a fraud perpetrated on a hapless citizenry? Are these expressive ideals more fully realized in highly institutionalized legal orders (i.e., those with well established procedural safeguards, highly independent legal actors, high degrees of professionalization, etc.)? Empirical assessment of these questions can shed useful light on the Hobbesian critique.

The final critique within this genre is that legal orders are a fraud. In contrast to the Hobbesian view, the gist of this critique is not that the expressive ideals of a legal order are unattainable; it is that they are meaningless. There are two different versions of this perspective. The more traditional Marxist critique asserts that, rather than being a useful societal tool that structures human interactions, legal orders are tools economic elites use to realize their personal interests. Maravall and Przeworski (2003) present a more sophisticated, positivist version of this argument, one that views law as nothing more (or less) than a reflection of the broad array of powerful interests in a society. This leads them to reject the legalist thesis that law has “autonomous causal efficacy.” In their view, law cannot be treated as an exogenous constraint on the actions of powerful social actors, including rulers. Thus, “The normative conception of the rule of law is a figment of the imagination of jurists.” Maravall and Przeworski (2003: 1).

The *Marxist version* of this argument is a broadly based and devastating critique. It raises a host of issues that a wide range of scholars have debated endlessly. These issues will not be resolved here and even introducing the debate’s key dimensions is beyond the scope of this limited review. What can be offered, however, is a legalist perspective on this argument, one that rests on the conceptualization of a legal order described above. This argument asserts the Marxist critique rests on a number of assumptions – the existence of a homogenous, omniscient, and all-powerful elite – that both limit its applicability and question its internal logic.

Homogeneity of elite interests is needed to provide the common ground needed by the Marxist thesis to make the legal order a tool of economic elites. Even the most basic type of heterogeneity (agrarian land owners vs. capitalists) would introduce barriers to consolidating elite interests in a legal system. Even if there were a common set of shared interests among powerful elites, say in a simple agrarian society, elites would have to be omniscient to understand the far reaching effects of laws. This is an important assumption because legal history is replete with examples of laws with unintended consequences and unforeseen effects. Finally, elites would have to be all-powerful in order to overwhelm opposition forces in transforming their interests into legal codes.

If the homogeneity assumption limits the applicability of the Marxist thesis to the most undifferentiated societies, the other two assumptions combine to raise questions about why powerful elites would choose to realize their interests through a legal order. Why would they embrace instrumental principles and differential criteria in order to realize expressive ideals that are of questionable importance to them? The choice by all-powerful elites to embrace a legal order would be all the more troubling when other tools, such as authoritarian “rule by law” orders, are an option for them. These counter arguments may suggest that “real” legal orders (i.e., those that comport with the conceptualization offered above) are rare phenomena. But that is an empirical question, one that can be subjected to rigorous comparative scrutiny.

The *positivist version* of this critique is more sophisticated and telling because it is consistent with a more pluralistic power structure and a more nuanced understanding of how these powerful interests are realized. It can best be understood by examining the factors they assert lead to the creation of a legal order:

Rule of law emerges when, following Machiavelli’s advice, self-interested rulers willingly restrain themselves and make their behavior predictable in order to obtain a sustained, voluntary cooperation of well-organized groups commanding valuable resources. In exchange for such cooperation, rulers will protect the interests of these groups by legal means. Rule of law can prevail only when ... law is the preferred tool of the powerful. (Maravall and Przeworski, 2003: 3).

Thus, while a legal order is not *necessarily* a tool of oppression within the positivist paradigm, it does reflect a society’s constellation of power and interests: “When power is monopolized, the law is at most an instrument of the rule of someone. (Maravall and Przeworski, 2003: 3). To develop the meaning this point it is important to understand the notion of an institutional equilibria, which is at the core of the positivist framework. Institutional equilibria are the result of a set of mutual adjustments by different actors using whatever resources they have (money, social position, votes, prior laws, etc.) to realize their interests. These institutional equilibria perform valuable functions for a society:

In any institutional equilibrium, actions are predictable, understandable, stable over time, and limited. Hence, individuals can anticipate the consequences of their own behavior; everyone can autonomously plan one’s life... (Maravall and Przeworski, 2003: 4).

Positivists acknowledge that having these equilibria codified within a legal order provides some societal utility. If powerful interests did not work through legal orders they would manifest their power in other ways that may be more harmful to the interests of the less powerful. Moreover, legal codes demarcate spheres of individual freedom and define the rules of the game, thereby providing individuals with clear guidelines as to how to engage the political system. This makes law a useful tool in coordinating expectations among diverse groups. Legal codes provide benchmarks against which the actions of others can be judged, making it easier to identify when key provisions of the social compact have been violated. This, in turn, facilitates collective action. Despite the utility of having institutional equilibria manifested in legal codes, Maravall and

Przeworski contend that the mere existence of these equilibria can “generate all the virtuous effects attributed to the rule of law” (Maravall and Przeworski, 2003: 7). This is why the notion of a legal order is viewed as a fraud by positivist critics: it adds nothing to the dynamics that structure social equilibria.

Sanchez-Cuenca (2003) succinctly articulates why law cannot be considered an “autonomous exogenous constraint” on behavior:

Brute power is independent of constitutive rules. Institutional power is created by constitutive rules (more concretely by power-conferring norms). Parliament’s power to remove the government by means of a vote of no confidence is clearly institutional: it depends on some rule that authorized the parliament to use this procedure. In terms of power, then, *there is a problem of compliance in politics when some outcomes that are produced institutionally can also be achieved through brute power*. This is why in politics the collapse of constitutive rules is not always an impossibility. Politics goes on even if the rules are not respected because in politics there is brute power as well as institutional power (2003: 78).

Maravall and Przeworski develop the implications of Sanchez-Cuenca’s argument for the efficacy of legal orders in noting that: “The rule of law is conceivable only if institutions tame or transform brute power” (Maravall and Przeworski, 2003: 8). To engage this assertion, legalists would turn Sanchez-Cuenca’s argument on its head. They would point to the existence of legal outcomes that are inconsistent with the distribution of “brute power.” These inconsistencies are most easily (but not only) found in the wake of rapid changes in the distribution of brute power. Just as politics is possible in “the collapse of constitutive power,” so the continuities associated with constitutive power can be observed in the face of rapid transitions in brute power.

The legalist position on the efficacy of legal orders rests on the basic tenet of neo-institutionalism: institutions “matter.” More specifically, it asserts that the embedding of individuals, resources and rules within institutions make them fibrous and durable. Thus, the process of institutionalization creates power that is distinct from, but co-exists with, brute power. This *institutional* power is manifested in the form of tools that skillful institutional actors can use to resist exogenous forces. This generates outcomes that are *inconsistent* with what might be expected if they were solely generated by the distribution of brute power. The main sources of institutional power within legal orders are the instrumental principles and differential criteria discussed earlier.

The existence of procedural safeguards – legal reasoning, institutional independence, and constitutionalism – creates barriers and path dependencies that make legal orders efficacious. Their effects impede the simple and timely translation of shifts in brute power into the workings and outputs of a legal order. Independent judges with lifetime tenure can undermine exogenous impulses for change by powerful new political actors. They can also derail new initiatives using skillful legal reasoning to demonstrate the inconsistency of those initiatives with revered procedural or constitutional principles. Rules of recognition as well as the requirements of the inner morality of law further limit the capacity of powerful societal actors to have their interests seamlessly reflected in the

legal order. Whatever changes new “players” want to initiate will have to be openly discussed, clear, prospectively applied, etc. Moreover, complex rules of recognition may favor the status quo, further limiting the capacity for new constellations of power to “have their way” with the legal order.

Legalists would underscore the efficacy of legal orders by contrasting them with a situation in which dominant social interests create an oligarchic structure to govern society. The oligarchy is run by a military junta that rules by decrees rather than laws. The decrees are enforced by military forces and special military tribunals that prize expediency and use ad hoc procedures. In this setting, changes in the makeup of the governing oligarchy could be seamlessly reflected in the junta’s governing apparatus – a classic example of rule by law. What distinguishes a legal order from this military junta – and provides legal orders with their efficacy – is the institutionalization of the expressive ideals, instrumental principles, and differential criteria discussed above.

Legal Orders as Inherently Deficient or Limited

Critics who argue that legal orders are inherently flawed focus on them as dispute resolution forums. Moreover, they contend that these inherent flaws derive from legalism, which provides the philosophical foundations for law-based orders. There are two key strands to this critique; both stem from Shklar’s seminal work (1964). The first is that legalism provides a poor foundation for managing social relations because it leads to an overly narrow and formal process for resolving disputes. The second is that the commitment to legalism leads to a mode of dispute resolution that is, according to these critics, conservative and incremental. This is lamentable because an ideal mechanism for dispute resolution would provide for boldness and creativity when needed. The irony of the Shklarist critique is that it turns into flaws many of the virtues used to disarm critics who assert that legal orders are either illusory or fraudulent.

According to Shklar, the narrowness and formality that characterize legal orders derive from the legalist belief that law is, and should be, separate from politics and morals. Indeed, these legalists are charged with assigning law an exalted status, one that derives from its ability to insulate dispute resolution from the expediency of politics and contested views of the public interest. What advocates of legalism fail to recognize, Shklarists argue, is that legalism itself is a moral and political choice; law is not an end in itself but a means for achieving moral and political values. Providing law with an exalted status leads to a fixation with clarifying rights and obligations and perfecting procedures. These fixations, in turn, blind legalists to a wide range of factors that are relevant to dispute resolution.

Shklar argues that the narrowness and formality that characterizes legalism are not inevitable: ideological alternatives exist.

Of these, Fascism and Nazism are the most obvious in their glorification of spontaneous violence as a fit replacement for the morality of rules. These are not, indeed, the only manifestations of that nihilism which simply wants revolution as a form of authentic self-expression, quite apart from any future ends that it might serve. There are also those

extreme versions of anarchism and communalism that rejects any ethics of rights and duties in favor of a communal life based on mutual service, fellowship, and self-abnegation. These are but a few of the ideological competitors of legalism. (p. 20).

These alternatives notwithstanding, Shklar prefers what she terms an educative ethos, one in which the decision-makers are free to (1) learn more about disputes than is legally relevant, and (2) consider a wider array of techniques to resolve them. In short, she would provide much more discretion to those in charge of the process, empowering them to be less constrained in resolving disputes.

Legalists would argue that Shklarists exaggerate the capacity of legal orders to insulate law from morality and politics. This is especially true when legal orders are joined with democracy. Within democracies contested views of the public interest manifest themselves in: the laws and procedures that structure legal orders; the recruitment process that staffs legal orders; and the openness that pervades the political environment within which legal actors operate. Legalists would also argue that, while dispute resolution is structured by a legal formalism, the vast majority of disputes are resolved informally. While the bargaining positions of litigants are determined, at least in part, by legalities, the informal dispute resolution process provides much more flexibility. One final counter argument is that the type of unstructured discretion that would be involved in implementing an educative ethos would undermine some of the expressive ideals that define a legal order's societal utility. This point is underscored by the discredited nature of some of legalism's ideological alternatives.

Even if democracy is able to pierce the shield of legalism, Shklarists would argue that legal orders are flawed social mechanisms because they are designed to promote and protect the security of established expectations – thereby limiting the role of populist pulses. In support of this argument, Shklarists point to the well-documented preference of legalists for incremental decision-making. They are trained to proceed logically, provide reasoned explanations for their actions, decide no more than is necessary to resolve a case, and eschew vague generalities. This inherent conservatism causes a “drag” on the capacity of legal orders to be bold and creative in engaging social problems by engendering timidity among legal actors. This leads them to avoid actions that lead to confrontations with powerful social entities, makes them prisoners to the status quo, and undermines their capacity for enlightened, forward-looking decisions.

Legalists would respond by noting that these criticisms are a result of the role of the legal order in the larger societal division of labor. Judges have never been charged with the responsibility of creating law, even though the nature of some disputes requires that they do so. Other institutions are far better designed to forge creative solutions to social problems. Moreover, given the societal role of the legal order, they would argue that incrementalism is not always such a bad approach to decision-making. It allows legal actors to build on enduring insights and wisdom, adjusting to new conditions slowly over time. Indeed, this type of approach is central to the societal utility of legal orders. If judges were licensed to be creative in addressing the social problems *they* perceive to underlie disputes, and respond in ways *they* deem appropriate, the result would be greater

judicial discretion and arbitrariness. This arbitrariness would, at the very least, introduce uncertainties that would undermine individual freedom and, ultimately, social order.

Critics also argue that a second limitation of legal orders is that they do not “travel well” to non-Western cultures. The source of these cultural limitations is the liberal, individualist underpinnings of law-based orders (i.e., autonomous actors forming a non-interference pact within which individuals pursue their own interests). These underpinnings lead to dispute resolution being viewed in terms of *individual* claims and counterclaims, which makes legal orders “systematically privilege individual autonomy at the expense of community solidarity” (Tamanaha, 2004: 84). The failure of legal orders to provide communitarian considerations a more central role detracts from their appeal outside the West. Also, other cultures do not always place as high a value on individual liberty as Western cultures; nor are they as concerned with constraining authority figures. Yet these are two of the most distinctive hallmarks of legal orders.

Peerenboom’s (2002) discussion of a Confucian “take” on law-based orders provides a concrete example of a non-Western perspective. Confucius believed that governing through laws was far inferior to governing by virtuous example. Law could make people comply but it could not transform their inner character. This was important because Confucius’ goal was not a stable order of isolated, autonomous individuals. Rather, it was the creation of “a harmonious social order in which each person is able to realize his or her full potential as a human being through mutually beneficial relations with others” (Peerenboom, 2002: 28). A system of laws is still needed in a Confucian society because some individuals will not participate in creating a harmonious society. But a Confucian legal order will place less emphasis on procedural formalities and more emphasis on contextualized justice and personalized dispute resolution. This approach requires more deference to authority and official discretion, which curtails individual freedom. But this trade-off is of little consequence because the Confucian goal is to create a harmonious, benevolent society, not maximize liberty.

Those who dispute the cultural limitations of legal orders make two key points. The first is that culturalists draw too stark a contrast between cultures. There are many communitarians in Western societies and many individualists in non-Western societies. Moreover, critics overstate the case that communitarian concerns are absent in the day to day workings of legal orders; they play a key role in the informal discussions that lead to the resolution of the vast majority of cases. Thus, legal orders provide both a compelling and a flexible setting that can accommodate a wide range of cultural preferences. The second counterpoint is that the universality of legal orders is an empirical matter. Peerenboom’s accounting of the changes in China’s legal system is a good case in point. While the existence of Western influences is clear, it is equally clear that the type of legal order emerging in China will be distinctively Chinese. But this has been the case throughout the entire evolution of legal orders in the West. The notion of a legal order is flexible enough to include a wide variety of approaches to achieve its expressive ideals.

The final criticism of law-based orders is that they are undemocratic. The roots of this criticism can be traced to the biases of Plato and Aristotle, who feared populism more

than elite domination. But equally important to these critics are the instrumental principles that evolved long after Plato and Aristotle wrote, as well as the differential criteria discussed earlier. Constitutionalism certainly places constraints on the popular branches of government. The effects of procedural safeguards and legal reasoning can also be viewed as undemocratic. They impose limits on the types of factors that can be considered in the resolution of a case, even if that means excluding factors that are highly relevant to the burning social and political issues of the day. In addition, institutional independence insulates legal actors from popularly elected officials. Finally, complex rules of recognition and the dictates of the “inner morality of law” place another set of constraints on what majorities and their representatives can do.

If democracy is viewed in purely majoritarian terms, then the assertion that legal orders are undemocratic is well nigh irrefutable. But even those who support liberal democracy argue that legalism involves unacceptable tradeoffs. Critical legal theorists, whose circa 1970’s mantra was “law is politics,” decried the judicialization of politics and the role that unelected, elitist judges played in defending the status quo (Tamanaha, 2004: chapter six). More recently, Maravall and Przeworski (2003) have asserted that it is a myth that judicial decisions are determined wholly by legal factors. Moreover, they see the tension between law and democracy as an institutional conflict between the legislative and the judicial branches; Gargarella (2003) and Ferejohn and Pasquino (2003) develop these themes more thoroughly.

Legalists see the tension between legal orders and democracy to be less clear-cut. Hayek, for example, in speaking about constitutionalism, argues that it “does not involve an absolute limitation of the will of the people but merely a subordination of immediate objectives to long-term ones” (1960:180). Also, there are institutional mechanisms available to lessen the tension between legal orders and democracy. This includes juries, popularly elected judges, and the use of constitutional councils, which removes constitutional issues from the purview of the judiciary (Ginsburg, 2003). Finally, some would reject the argument that legal orders are undemocratic as disingenuous because, they argue, democracy is impossible without some type of a legal order. Highly institutionalized legal orders are essential to the performance of a variety of tasks that are essential to democracy. These include: protecting the political rights and liberties; insuring the efficacy and legitimacy of electoral processes; and protecting tomorrow’s majority from overreaching by today’s.

With a firmer grasp on the composition and origins of a legal order, as well as its strengths and weaknesses, it is now possible to introduce of the second component of our effort to reconceptualize the rule of law: the notion of a legal regime.

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Figure 2-1
Concept of a Legal Order

