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BETWEEN LEGALITY AND ANARCHY: A COMMENT ON LARRY ALEXANDER'S ESSAY ON LAW AND POLITICS

ENTRE A LEGALIDADE E A ANARQUIA: COMENTÁRIO AO ENSAIO DE LARRY ALEXANDER SOBRE DIREITO E POLÍTICA

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Abstract: Larry Alexander argues that first-order reasoning tells us both that we need rules to be followed and that we should not follow rules. Herein lies 'the gap', a problem that he finds intractable. I argue that the problem is real but also manageable, and offer reasons to resist an extreme form of legal skepticism.

Keywords: Rules. Legal indeterminacy. First-order reasoning. Second-order reasoning. Regularity.

Resumo: Larry Alexander defende que as razões de primeiro grau determinam simultaneamente que precisamos de regras e que não devemos observar as regras. No seu juízo, esta "clivagem" é incontornável. Neste comentário, reconheço que o problema é real, mas pode ser mitigado, e adianto razões que depõem contra uma forma extrema de cepticismo jurídico.

Palavras-Passe: Regras. Indeterminação jurídica. Razões de primeiro grau. Razões de Segundo grau. Regularidade.

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I cannot think of more befitting a way of celebrating Larry Alexander's career as a legal theorist than to discuss his ideas. Larry is one of only a handful of scholars in jurisprudence that command unqualified admiration and appreciation from the people working in the field. He deserves to be considered one of the all-time greats.

The title of this comment on 'Law and Politics: What is their Relation?' could be 'Larry Alexander Goes Crit'. 'Crit' is short for Critical Legal Studies, a movement in legal education that flourished in the elite North-American law school environment in the 1970's. Its leading protagonists were *soixante-huitard* law professors, loosely influenced by the Frankfurt School, cultural Marxism, semiotic structuralism, and later post-modernism in its various guises.[2]

Larry was not a member of the movement and, to the best of my knowledge, never carried the banners of critical legal theory. In fact, I imagine he would be surprised – shocked might be a better choice of a word – by my devious association between his work and CLS. But I mean it at least half-seriously. Although Larry was not affiliated with the movement – and, in any case, the movement has faded away decades ago – his paper has an uncanny affinity with one of the main theses of CLS as a school of thought or intellectual tradition: the so-called *indeterminacy thesis*.

For what Larry tells us is that law is ineradicably trapped in a paradox: it is both necessary and impossible. On the one hand, law is necessary because it is the only political remedy to the anarchy of politics. On the other hand, law is impossible because it is inevitably undermined by the very politics it is supposed to contain. Law is how politics saves us from itself but law is ultimately politics in disguise. Echoing Clausewitz, we may say that law is a continuation of politics by other means.[3] In a similar spirit, a prominent critical legal theorist, this time echoing Horkheimer, writes that 'legal reasoning dies by its own hand'.[4] It is politics all the way down, albeit in different forms or through a variety of means, each with its own distinctive grammar.

There are, to be sure, two important differences between Larry's stance and that of your typical Crit theorist. First, Larry comes to these conclusions from the sober standpoint of analytical jurisprudence as opposed to theoretical eclecticism and aesthetic avant-gardism. Second, unlike CLSers, Larry does not celebrate but laments law's failure to keep politics at bay; his agonizing legal skepticism reminds me of Tocqueville's remarks in the preface to the first volume of *Democracy in America*, awestruck but also pained by the demise of aristocracy and the irresistible march of history towards equality and democracy.[5]

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2. For an overview, see Mark Kelman, *A Guide to Critical Legal Studies*, Cambridge Mass, 1987; Duncan Kennedy, *A Critique of Adjudication*, Cambridge Mass, 1997.

3. Claus von Clausewitz, *Vom Kriege*, I, §24, available at: https://www.clausewitz.com/readings/VomKriege1832/Book1.htm#1-1.

4. Duncan Kennedy, Preface to *The Rise and Fall of Classical Legal Thought*, New York, xxxv.

5. Alexis de Tocqueville, *Democracy in America*, edited by J. P. Mayer and translated by

Law's tragic fate, according to Larry, is to be blamed on what he calls 'the gap'. An important thing to bear in mind is the concept of a rule that Larry appears to have in mind. A rule, for his purposes, is understood as the outcome of a first-order practical judgement issued by a rule-making authority taking the form of a determinate permission, prohibition, command, or authorization to perform an action in a range of circumstances. The rule expresses a balancing of the relevant first-order reasons and purports to be the definitive norm of action within the scope of its application.

True, this account of rules is legislation-centered. It is not an accurate description of rules that are not intentionally made, such as precedents in a system of case law, and it is seemingly unsuitable to account for rules that are not posited by an *authority* but embedded in a practice, such as customary law.[6] These may, however, be understood by analogy with the legislative model: case law and social practice generate rules that, to the extent that we have *good reasons* to have and to follow rules, constitute determinate and definitive norms of action.

This is where 'the gap' comes into the picture. On the one hand, first-order practical reasoning dictates that we should have rules: they are indispensable to avert the moral costs of disagreement, uncertainty, and lack of coordination implicated in action determined by the balance of reasons. On the other hand, first-order practical reasoning dictates that we should not follow rules: to act rationally is to act on the balance of reasons, and the whole point of rules is to prevent or exclude such balancing. In other words, first-order reasoning tells us *both* that we need rules to be followed *and* that we should not follow rules; herein lies the gap. This is – to employ another CLS slogan – a 'fundamental contradiction'.[7]

Larry lays out and tears apart a number of strategies to close or at least narrow down the gap. The first is *presumptive positivism*: rules make a difference by increasing the weight of the reasons on which they are based. Larry says this is nonsense: we cannot give greater weight to the relevant reasons than the weight first-order practical reasoning tells us we should give them. The second strategy is *exclusionary reasons*: rules are reasons excluding any consideration of the reasons on which they depend. Larry says this begs the question of how we can rationally act on the basis of something other than our first-order practical reasons. The third strategy is *sanctioning*: as a rule-maker you should use as many carrots and sticks as you need to make sure the rules are normally followed. Larry says this is a blind alley: it deprives sanctions of moral justification and it does not close the gap as it applies to sanction-enforcing officials. The fourth strategy is *deception*: make the mass of people believe that first-order reasoning dictates that they should follow the rules. Larry says this is problematic: it does not close the gap as it applies to the deceivers and it hangs on a thin thread as it applies

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George Lawrence, New York, 12.

6. See John Gardner, 'Some Types of Law', in *Common Law Theory* (Douglas Edlin ed.), Cambridge, 2007, 60-75.

7. Duncan Kennedy, The Structure of Blackstone's Commentaries, *Buffalo Law Review*, 28, 1979, pp. 211-23.

to the deceived. The fifth strategy appeals to *fairness*: it is unfair for individuals to flout the rules by which the community is supposed to live. Larry says this is irrational: if first-order reasoning instructs individuals to flout the rules, it cannot be unfair for them to do so. The final strategy is *rule-sensitive particularism*: act on first-order reasoning but taking into account the first-order reasons for having rules in the first place. Larry is skeptic: he says this only works if most others are rule fetishists themselves, for otherwise rules are up for grabs in every case; which will weaken the effectiveness of the rules; which will weaken the first-order reasons to follow them; which means that rule-sensitive particularism drags us into a spiral of decisionism that eventually ends in anarchy.

Larry thinks that 'the gap' is the main problem of legal theory – and that it is intractable. Hence, he has surrendered to legal skepticism. I agree with him about the centrality of the problem. It seems to me that a great deal of the work in jurisprudence since the last quarter of the 20th c. revolves *implicitly* around the problem formulated by Larry. That is certainly true of scholars such as Ronald Dworkin,[8] Joseph Raz,[9] and Robert Alexy,[10] to name but a few giants in the field. Critical Legal Studies in its best jurisprudential form – epitomized by the work of Duncan Kennedy – is essentially the gap running wild.[11] One could claim that much of the intellectual history of contemporary jurisprudence is an increasing consciousness of something like Larry's problem.[12] Only Larry's legendary modesty can explain the opening statement that his only forte is taxonomy, in a tone suggesting that he is a housekeeper for others of greater intellectual stature, ambition, and creativity. In fact, taxonomy and analysis are foundational to intellectual work, and they are surely one among Larry's many talents. His paper presents us one of the main problems in legal theory on a silver platter.

I endorse a good deal of Larry's skepticism. The relationship between law and politics is nothing short of promiscuous, and legal reasoning is always already politics even in its denial of politics. Yet I do not believe that 'the gap'– the idea that rules are every bit as necessary as they are *impossible* – is as intractable a problem and certainly not as tragic a problem as he wants us to think it is. Let me explain.[13]

Larry contrasts first-order reasoning with rule-following. Nevertheless, I think it

8. See, e.g., Ronald Dworkin, *Law's Empire*, Cambridge Mass, 1986, pp. 1-44, 87-113, 225-75, 400-16.

9. See, e.g., Joseph Raz, *Practical Reason and Norms*, Oxford, 2002, pp. 35-48, 58-73, 178-99.

10. See, e.g., Robert Alexy, *Theorie der juristischen Argumentation: Die Theorie des rationalen Diskurses als Theorie der juristischen Begründung*, Frankfurt, 1978.

11. See Duncan Kennedy, Freedom and Constraint in Adjudication. A Critical Phenomenology, *Journal of Legal Education*, 36, 1986, pp. 518.

12. See Gonçalo de Almeida Ribeiro, *The Decline of Private Law: A Philosophical History of Liberal Legalism*, Hart, 2019, pp. 245-74.

13. I follow to some extent what I wrote in Gonçalo de Almeida Ribeiro, Judicial Activism and Fidelity to Law, in L. P. Coutinho, Massimo La Torre and Steven D. Smith (eds.), *Judicial Activism: An Interdisciplinary Approach to the American and European Experiences*, Springer, 2015, pp. 31-46.

is useful to embrace the familiar distinction, within practical reasoning at large, between first-order and second-order reasons.[14] First-order reasons are reasons for (or against) action yielded by ordinary practical reasoning. Second-order reasons are reasons to act (or to refrain from acting) for a first-order reason other than the strength (or lack thereof) of that reason. What Larry calls the 'virtues of rules' – the reasons to have rules in the first place – are in fact second-order reasons. They are reasons to act for the first-order reasons that the rule-maker considered prevalent within the scope of application of a rule; in other words, they are reasons to follow the rules laid down by an authority. In the case of precedent and custom, we may say that rules furnish reasons for action other than the merit of their substance in the eyes of the agent. The key point is that a rule properly so-called cannot be defeated by first-order reasoning.[15]

It seems to me that these virtues of rules or second-order reasons fall under four main umbrellas. First, we should follow rules instead of our first-order judgments because and to the extent that the rules were laid down by a *legitimate authority*; for instance, in a community of free and equal persons that disagree reasonably as well as persistently about justice and the public interest, we have good reason to defer to the judgements of a democratic lawmaker.[16] Second, we should follow rules instead of our first-order judgements because and to the extent that the rules were laid down by an *expert authority*; if the rule-making authority is in a better position than the agent to weigh in all the relevant reasons, following the rules laid down makes it more likely for the agent that he or she will act on the balance of reasons than it does following his or her own first-order judgment.[17] Third, we should follow rules instead of our first-order judgements because and to the extent that rules, if followed by most of their addressees, generate massive *coordination benefits*; some rules play a pure coordination function in that they do not balance any pre-existent reasons but *create* reasons for action (this is true of most traffic rules, to give an obvious example), while others coordinate action by means of settling issues of first-order reasoning (think about most rules of substantive criminal or tort law).[18] Perhaps a final reason to follow rules is *equality of treatment*: by virtue of their generality, rules enable treating 'like cases alike'; on the contrary, if everyone follows his or her first-order judgment, including judges with ultimate authority to settle disputes, similar cases will inevitably and recurrently receive different treatment.[19] (It is not clear to me, though, that this is an independent reason to have and to follow rules).

These are the main reasons to take rules seriously. But are these reasons absolute,

14. See Joseph Raz, *The Authority of Law*, Oxford, 2.nd ed., 2009, pp. 16-19.

15. A rule that can be so defeated is really but a generalization of past decisions or an anticipation of future decisions. It is descriptive of judgements instead of a *norm* of judgement – or it is, at most, a heuristic device or a rule of thumb. John Rawls, Two Concepts of Rules, *The Philosophical Review*, 64, 1995, p. 3, 1955, calls that 'the summary view' of rules.

16. See Jeremy Waldron, *Law and Disagreement*, Oxford, 1999, pp. 88-118.

17. This is what Joseph Raz, *The Morality of Freedom*, Oxford, 1986, pp. 53-57, regards as the 'normal justification' of authority.

18. See David Gautier, *Morals by Agreement*, Oxford, 1986.

19. For an account of precedent along these lines, see Michael Zander, *The Law-Making Process*, 6.th ed., Cambridge, 2004, p. 215.

meaning that we have second-order reasons to follow the rules in each and every case? It is obvious that they are not. Even Joseph Raz's theory of exclusionary reasons grounded in the service conception of authority rejects the proposition that rules are absolute. Raz recognizes that a clear mistake by the rule-making authority furnishes a sufficient reason to not follow or apply the rule it laid down.[20] And of course this begs the questions of what makes a mistake 'clear', of why it takes a 'clear' mistake (as opposed to *some* mistake) to justify defying a rule, and – perhaps more fundamentally – how such justification is to be understood and ascertained.

It should be noted that Robert Alexy's theory of principles does not fare much better in this regard. Alexy argues that when a principle (his term for a first-order moral reason) collides with a rule that gives precedence to a competing principle, the rule can only be set aside if the weight of the colliding principle(s) is greater, in the relevant circumstances, than the weight of the principle(s) to which the rule gives precedence on top of the *formal* principles in which the authority of rules is generally grounded.[21] But how can we balance formal with substantive principles – say, democratic legitimacy with substantive justice? Since the very point of democratic authority is to exclude acting on one's sense of justice, *regarded* as subjective in the circumstances of reasonable pluralism in which we live together, it is absurd to flout a rule issued by a democratic authority on account of its injustice.[22] Moreover, the commensurability of the formal and substantive principles is hardly evident.

So rules are not absolute but once we take the road of relativizing them we end up falling off the cliff, as Larry warned us we would. Let us nonetheless examine the nature of the second-order reasons that, in my brief account, justify rule-following. They fall into two categories.

The first two – legitimacy and expertise – are exclusionary reasons in the Razian sense: they are reasons to disregard the reasons on which the rules are based, that is, reasons to follow the judgement of the rule-making authority. But these reasons are *conditional*. An authority is legitimate if, and only if, it meets certain criteria of legitimacy, spelled-out in some conception of democracy. And it is to be regarded as an expert if, and only if, it meets certain criteria of expertise, spelled out in some conception of functional adequacy. This means that a rule is only binding on account of legitimacy-based and expertise-based reasons to the extent that the rule-making authority meets the relevant criteria of legitimacy and expertise. When the issue is whether a rule should be applied to a wildly counterfactual fact pattern – a good example is *Riggs v. Palmer*[23] – it is completely intelligible and justified for a court to question the legitimacy and

20. Joseph Raz, *The Morality of Freedom*, cit., 62.

21. Robert Alexy, *A Theory of Fundamental Rights*, translated by Julien Rivers, Oxford, 2002, pp. 57-59.

22. See Jeremy Waldron, *Law and Disagreement*, cit., 195-98. The account provided in Gonçalo de Almeida Ribeiro, 'Judicial Activism and Fidelity to Law', cit., is lacking in this respect.

23. *Riggs v. Palmer*, 115 N.Y. 506 (1889).

the expertise of the legislature. The legislature, after all, tends to have the run of the mill case in mind when it enacts a rule-like law to settle the issues within its scope of application.

The second pair of reasons – certainty and equality – are what Stephen Perry calls 're-weighting reasons'.[24] They strengthen the weight of the first-order reasons to act as the rule prescribes because doing so creates additional value. They are reasons that can be balanced against other first-order reasons. And this is aligned with our intuition that certainty and equality (*hoc sensu*) are important but not absolute values, hence that they are commensurable with considerations of substantive justice. In fact, we have no trouble balancing considerations such as legitimate expectations against reasons of equity that count against applying the rule. The conflict between certainty and justice, captured by scores of ancient maxims, is all over the place in legal reasoning.

The conditional nature of one pair and the relative nature of the other pair of second-order reasons to follow rules explains why rules are binding and yet not absolute. But of course Larry is going to say that this does nothing to close the gap: once we are down the road of *relavizing* rules and of exercising *judgement* there is no undisputed end in sight. A defeasible rule is no rule at all. He would probably describe my position as a form of rule-sensitive particularism, and then proceed to attack it along the lines suggested in his paper. It is interesting to note that Larry's basic claim is strikingly similar to that of Carl Schmitt in his doctoral dissertation of 1912,[25] the first step towards the view that the 'rule of law' is a convoluted liberal concealment of the 'decisionist' basis of all legality.[26] Schmitt came eventually to the assertion that, since 'every norm requires a homogenous medium', '[a]ll law is situational law';[27] hence, 'the exception is more interesting than the rule' and 'sovereign is he who decides on the exception'.[28]

I find this critique immensely important. But it is overstated in the form of *global* rule-skepticism. It is true that the defeasible character of rules lends complexity to legal reasoning; indeed, legal reasoning is more complex than political judgement, understood as first-order reasoning, since it comprises the entire set of first-order reasons as well as the set of second-order reasons to follow rules. Yet complexity does not mean *unpredictability*. In fact, the second-order reasons make it possible, although not by any means certain, for human behavior governed by law to exhibit an important degree of *regularity* and for the legal system to 'stabilize expectations counterfactually'.[29] This is both accounted for

24. Stephen Perry, 'Second-Order Reasons, Uncertainty and Legal Theory', *Southern California Law Review*, 62, 1989, p. 913.

25. Carl Schmitt, *Gesetz und Urteil: Eine Untersuchung zum Problem der Rechtspraxis*, Munich, 1969.

26. Carl Schmitt, *The Crisis of Parliamentary Democracy*, translated by Ellen Kennedy, Boston, 1985.

27. Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, translated by George Schwab, Chicago, 2005, p. 13.

28. *Id.* at 15 and 5.

29. See Niklas Luhmann, *Law as Social System*, translated by Klaus A. Ziegert, Oxford, 2004, 149.

by the theory and corroborated in practice: the cases in which the rules run out or are defeated make up a tolerable fraction of the social phenomena governed by law.[30] Those are the cases 'doubtful enough to make litigation respectable'.[31] The gap is not closed but it is reduced to a manageable size.

Whatever else remains of it has to be embraced. Not as a gesture of resignation in the face of overwhelming complexity, but as a reminder that as humans we have an inescapable responsibility to submit the claims of authority to our independent judgment.[32] If the price to pay for that measure of enlightenment is a little less order, less system, less control, less legality, so be it. It is a price we can afford.

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30. That does not mean that the 'experience of necessity' of an outcome cannot be destabilized by 'legal work', as pointed out by Duncan Kennedy, 'A Left Phenomenological Alternative to the Hart/Kelsen Theory of Legal Interpretation', in Cáceres et al. (eds.), *Problemas Contemporáneos de la Filosofia del Derecho*, Universidade Nacional Autónoma de México, 2005. It matters, though, from the standpoint of the rule of law, that the work is directed towards displacing an 'initial apprehension' largely produced by the mass of rules and that the displacement through litigation is not cost-justified in cases with a low expected value.

31. Karl N. Llewellyn, 'Some Realism About Realism', *Harvard Law Review*, 44, 1931, p. 1222.

32. Immanuel Kant, 'An Answer to the Question: What is Enlightenment?', in *Towards Perpetual Peace and Other Writings on Politics, Peace, and History*, translated by David L. Colclasure and edited by Pauline Kleingeld, New Haven, 2006.