

# THE POLITICS OF THE RULE OF LAW

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*In March 2009, Chief Justice Iftikhar Chaudhry and several other deposed judges were restored to the Supreme Court of Pakistan as a result of a populist movement for the restoration of an independent judiciary. The Supreme Court of Pakistan has since engaged in judicial activism that has resulted in a clash between the judiciary and the elected executive and has brought the distinction between the Rule of Law and the judicialization of politics into contestation. This Paper deconstructs the philosophical debates over the meaning and relevance of the Rule of Law in order to show that the claims to universal applicability, neutrality and inherent value implicit in the dominant modes of theorizing about the Rule of Law are hollow. The deeper concern animating these debates is not the desire to draw hard lines between “law” and “politics.” However, abstract Rule of Law contestations have limited value and relevance, when divorced from the political, constitutional, and sociological context. Only a sharper understanding of the nature of the special politics of law and the specific contexts (of constitutional law, state structure, social, and economic life-forms) shall enable a better understanding of the ever-increasing resonance of the Rule of Law, especially in the Global South.*

INTRODUCTION .....	450
I. A TOPOGRAPHY OF THE TERRAIN OF CONTESTATIONS .....	453
II. DECONSTRUCTING THE RULE OF LAW DISCOURSES .....	458

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□ This Paper is dedicated to Momina Cheema (1985-2011), University of Virginia School of Law Class of 2013, whose short life and remarkable achievements will always be an inspiration.

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A.	Formal <i>versus</i> Substantive Rule of Law: The Haunting Spectre of the Politics of Law? .....	458
B.	Rule of Law <i>versus</i> Instrumentalism: Rule of Law as Means to Ends? .....	463
C.	The Impossibility of the Rule of Law?: Liberal Ideology and the Indeterminacy of Law .....	468
III.	RECONCEPTUALIZING THE RULE OF LAW AND ITS POLITICS .....	473
A.	Rule of Law and Democracy: The Rule of Common Law or the Rule of Legislation? .....	474
B.	Rule of Law and the Administrative/Regulatory State: Rule of Administrative Law? .....	479
C.	Rule of Law in the Global South: Rule of Law-and-Development? .....	485
A	CONCLUSION ON THE POLITICIZATION OF LAW AND ITS RULE .....	490

## INTRODUCTION

A remarkable sequence of events in Pakistan caught the international legal community's imagination when the deposed Chief Justice of Pakistan, Iftikhar Muhammad Chaudhry, was reinstated as a result of a populist movement led by the country's lawyers in March 2009.<sup>1</sup> This "Lawyers' Movement" began in March 2007 when Justice Chaudhry was dismissed from office by the incumbent President and military chief, General Pervez Musharraf. The dismissal sparked spontaneous protests by the country's lawyers.<sup>2</sup> Images of lawyers clad in their signature black and white uniforms, braving barrages of tear gas shells and baton charges by the police, emerged as potent symbols of the struggles for the Rule of Law and liberal democracy in the Global South.<sup>3</sup> In July 2007, an

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1. See *Pakistan Reinstates Sacked Judge*, BBC (Mar. 16, 2009), [http://news.bbc.co.uk/2/hi/south\\_asia/7945294.stm](http://news.bbc.co.uk/2/hi/south_asia/7945294.stm).

2. Toby Berkman, *The Pakistani Lawyers' Movement and the Popular Currency of Judicial Power*, 123 HARV. L. REV. 1705, 1711-1714 (2010).

3. See *Lawyers Protest Against Musharraf*, BBC (Mar. 12, 2007),

emboldened Supreme Court restored Justice Chaudhry as the Chief Justice of Pakistan.<sup>4</sup> However, on November 3, 2007, Pakistan's military ruler declared an unconstitutional state of emergency and dismissed nearly sixty judges of the superior courts, including Justice Chaudhry.<sup>5</sup> It took a sustained movement by the lawyers, opposition political parties, and the Chief Justice's burgeoning supporters amongst the media, civil society, and the masses to override the resistance offered not only by the military regime, but also that of an elected government whose path through the democratic transition had been paved by the Lawyers' Movement. The military regime lost its grip on power in this struggle.

During the early stage of the movement, the lawyers' demands were couched in strictly legal and constitutional terms. However, as the need for broader public support arose, it became increasingly hard to maintain a strict separation between the lawyers' demands of formal constitutionalism and the more ambitious aspirations of democracy and social justice. The slogan of the Rule of Law began to emerge as the repository of expectations that went far beyond the independence of the judiciary. Upon the restoration of the Supreme Court to its pre-emergency composition, the judiciary began to articulate an understanding of the Rule of Law shaped through the experience of the Lawyers' Movement. It appeared that the court visualized itself, perhaps justifiably, as an institution with considerable democratic credentials and the mandate to give effect to the demands that had propelled public support for the court's independence and the judges' restoration. However, the court's aggressive judicial review actions, in particular, the resort to self-styled powers of initiating *suo motu* proceedings based on media reports of corruption, abuse of authority, and human rights

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[http://news.bbc.co.uk/2/hi/south\\_asia/6441133.stm](http://news.bbc.co.uk/2/hi/south_asia/6441133.stm); see also *In Pictures: Lawyers' Protest*, BBC (Mar. 12, 2007), [http://news.bbc.co.uk/2/hi/in\\_pictures/6442747.stm](http://news.bbc.co.uk/2/hi/in_pictures/6442747.stm).

4. See Chief Justice of Pakistan Iftikhar Muhammad Chaudhry v. President of Pakistan, (2007) PLD 2010 (SC) 61. See generally Mr. Justice Iftikhar Muhammad Chaudhry, Chief Justice of Pakistan v. President of Pakistan, (2007) PLD 2007 (SC) 578. The detailed judgment, authored nearly two and a half years after the issuance of the short order due to the imposition of emergency and the removal of most of the judges who sat on the bench, recounts in great detail the events surrounding the first removal of the Chief Justice. *Id.*

5. See Berkman, *supra* note 2, at 1715.

violations resulted in charges of judicial overreach.<sup>6</sup> Following a concerted campaign by the government to push back, the contours of the separation of powers, the distinction between the Rule of Law, and legitimate democratic politics thus emerged as central and divisive debates in the country.

Can the Supreme Court of Pakistan find a blueprint of the Rule of Law in legal and political theory that might enable it to do substantial justice to the expectations created by the Lawyers' Movement while avoiding the fallout of political contestability? Can we have recourse to established theories of the Rule of Law in order to find meaningful guidance on how to create an institutional balance of powers and incontrovertible distinctions between law, politics and policy in Pakistan? After all, it is precisely for cases such as Pakistan that universal and abstract theories of the Rule of Law are offered as vital cures. An entire global industry has developed for the implantation and/or promotion of the Rule of Law in such "underdeveloped" jurisdictions.<sup>7</sup> If the dominant theories of the Rule of Law are not relevant to Pakistan then their claims to universality, and the utility of Rule of Law interventions based on such theoretical foundations, must be questioned. An exploration of theoretical literature on the Rule of Law undertaken in this Paper reveals that such claims to universal applicability, neutrality and inherent value that are implicit in the dominant modes of theorizing about the meaning of the Rule of Law are indeed hollow. This is because the philosophical debates on the meaning, content and value of the Rule of Law anywhere are driven by the same tensions between law and politics, between the legitimacy of the judicial role and democratic politics that Pakistan's Supreme Court faces. The theoretical discourses on the Rule of Law, while undertaken in abstract and apolitical language, are in a deeper sense, arguments for specific constitutional and/or political structures that claim neutrality but are

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6. See generally Moeen Cheema, *The Chaudhry Court: 'Rule of Law' or 'Judicialization of Politics'?* in *THE POLITICS AND JURISPRUDENCE OF THE CHAUDHRY COURT 2005-2013* (Moeen Cheema & Ijaz Gilani eds., 2015).

7. See Brian Z. Tamanaha, *The Dark Side of the Relationship Between the Rule of Law and Liberalism*, 3 N.Y.U. J.L. & LIBERTY 516, 516 (2008).

essentially prejudiced towards the very conclusions that are sought from such supposedly neutral accounts.

As such, Pakistan is a central case which highlights that the rhetorical power of the Rule of Law and its value as a “political” ideal must be found in concrete contestations over the structures of the legal system and their contexts in the state and society. This argument will be advanced in two stages. The first half of the Paper will attempt to deconstruct the dominant debates on the Rule of Law as a struggle over the boundaries between law and politics. The second half of the Paper will then seek to reconstruct these very debates as extensions of particular commitments over constitutional and administrative structures, including an appropriate role of the judiciary. In addition to these state-centric contexts, another significant context to Rule of Law contestations will be unveiled: the complex, often deeply polarized and thoroughly politicized context of the society within which various understandings of the Rule of Law take shape. The difficulties inherent in abstract conceptualizations of the Rule of Law will be made evident when transplanted to the vastly different social environments in the Global South. Lastly, it will be argued as a tentative conclusion that an entirely new mode of theorizing the Rule of Law is demanded, which makes recourse to its specific socio-political and economic contexts.

## I. A TOPOGRAPHY OF THE TERRAIN OF CONTESTATIONS

The resonance of the rhetoric of the Rule of Law in Pakistan is not a unique or isolated phenomenon. The Rule of Law is increasingly being recognized as a universal value or a “global ideal.”<sup>8</sup> There is a near-universal “agreement, traversing all fault lines, on one point, and one point alone: that the ‘rule of law’ is good for everyone.”<sup>9</sup> And yet, the Rule of Law is simultaneously described as an “exceedingly elusive notion”<sup>10</sup> and “an essentially contested concept”<sup>11</sup>: it connotes so many

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8. See BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 3 (2004).

9. *Id.* at 1.

10. *Id.* at 3.

different things to different people that we may say that the disagreement about its meaning “extends to its core.”<sup>12</sup> However, the situation is not hopeless as there is only a relatively short list of plausible conceptions. Brian Z. Tamanaha charts a typology of theories of Rule of Law in a survey of the literature and finds that the various competing conceptions of the Rule of Law can be divided into distinct “formal” and “substantive” versions.<sup>13</sup> There are three shades of each kind of theory forming a continuum or a “progression that runs from thinner to thicker accounts” or “moving from formulations with fewer requirements to more requirements” (see Table 1).<sup>14</sup>

Thinner ----- Thicker ----- Thickest

<b>Rule-by-Law</b>	<b>Formal Legality</b>	<b>Democratic Legality</b>	<b>Individual Rights</b>	<b>Right of Dignity and/or Justice</b>	<b>Socio-economic Rights</b>
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Table 1: Graphic based on Brian Tamanaha’s “Alternative Rule of Law Formulations”<sup>15</sup>

The thinnest version of Rule of Law in the above graphic, characterized more aptly as “Rule *by* Law,” is the bare notion of governance according to law.<sup>16</sup> While Tamanaha considers it to be “an empty tautology,”<sup>17</sup> governance by law is the minimum necessary condition of the Rule of Law. Nonetheless, this minimalist sense of Rule of Law is meaningless when tyrannical or dictatorial regimes retain the power to declare what the law is and alter it at their convenience. The second, more robust, version of formal Rule of Law is that based upon

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11. Randall Peerenboom, *Varieties of Rule of Law: An Introduction and Provisional Conclusion 1* (Asian Discourses of Rule of Law, Working Paper No. 03-16, 2004); see also Leighton McDonald, *The Rule of Law in the ‘New Regulatory State’*, 33 COMM. L. WORLD REV. 197, 203-08 (2004).

12. TAMANAHA, *supra* note 8, at 3.

13. *Id.* at 91-113.

14. *Id.* at 91.

15. *Id.*

16. *Id.* at 91-93.

17. *Id.* at 92 (quoting Joseph Raz, *The Rule of Law and Its Virtue*, in THE AUTHORITY OF LAW 210, 212-13 (1979) [hereinafter *The Rule of Law and Its Virtue*]).

the principles of “legality.”<sup>18</sup> This conception of Rule of Law gained prominence with its elaboration by Lon Fuller as a kind of procedural natural law or “inner morality of law” that enumerated desired qualities in law.<sup>19</sup> Fuller even argued that a legal system would not really exist if, as in most of the time, these principles of legality were grossly violated.<sup>20</sup> Fuller’s desiderata included generality, clarity, public promulgation, temporal stability, substantive consistency, absence of retroactive application, a substantial degree of adherence by officials and subjects, and the reasonable possibility of compliance by the subjects with the promulgated rules.<sup>21</sup> Joseph Raz added to an avowedly “incomplete” list the requirements of the independence of the judiciary, principles of natural justice, judicial review, access to justice, and limits on the discretion of crime preventing agencies.<sup>22</sup> Robert Summers appended further layers of essentials including the existence of rule-making bodies, independent tribunals and other redress mechanisms, civic education of citizens, an independent legal profession, and legal academia.<sup>23</sup> The forms and processes of modern Western legal systems and their underlying policies (or their “axiological core”)<sup>24</sup> accordingly emerge as the existing ideal of formal legality.<sup>25</sup> This brand of formal, or rather procedural, legality has thus evolved into an articulation of faith in the structures and processes of modern Western legal systems as they have come to exist, of course with room for reforms at the margins.<sup>26</sup>

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18. See generally LON L. FULLER, *THE MORALITY OF LAW* 39 (2d ed. 1969).

19. *Id.* at 42-46.

20. *Id.* at 39.

21. *Id.* at 33-44.

22. Joseph Raz, *The Rule of Law and Its Virtue*, 93 L. Q. REV. 195, 200-202 (1977).

23. See Robert S. Summers, *A Formal Theory of the Rule of Law*, 6 RATIO JURIS 127, 129-30 (1993).

24. *Id.* at 131.

25. For an elaboration of the systemic nature of his formal Rule of Law theory, see generally Robert S. Summers, *The Principles of the Rule of Law*, 74 NOTRE DAME L. REV. 1691, 1691 (1999).

26. However, while the existence of the structures of a modern legal system are integral to this view, the specific shapes and forms of legal mechanisms and processes, and “the institutional and cultural struts supporting the [R]ule of [L]aw are recognized by most as being empirically contingent.” Leighton McDonald, *Positivism and the Formal*

The third version of formal theory incorporates the prerequisite of democracy. It is democracy which imbues legal rules and processes with legitimacy in pluralistic polities where disagreement on fundamental values is pervasive.<sup>27</sup> This brand of formal Rule of Law then not only requires the conformity of governmental action to a valid law but also requires such law itself to be democratically legitimate. For Habermas, “legitimate” law in this “proceduralist paradigm” is the residual cement of society: “if all other mechanisms of social integration are exhausted, law yet provides some means for keeping together complex and centrifugal societies that otherwise would fall into pieces.”<sup>28</sup> Sunstein advances the idea of “incompletely theorized agreements” to explicate how law functions in liberal societies to develop a core of agreement about the mechanisms, processes, and principles for the resolution of disputes amongst myriad and even fundamental disagreements about values.<sup>29</sup> The relationship between law and democracy is that of mutual reinforcement: law derives its legitimacy from democratic processes; democratic processes may in turn derive their legitimacy from widely accepted rules for structuring politics and for dispute resolution mechanisms, which law provides.

Substantive theories of Rule of Law incorporate the idea of rights or various “content specifications” to the elements of formal legality.<sup>30</sup> The thinnest substantive version is one that incorporates individual rights

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*Rule of Law: Questioning the Connection*, 26 AUSTL. J. LEG. PHIL. 93, 105 (2001) [hereinafter *Positivism and the Formal Rule of Law*]. Judicial review of executive action, for example, is one such strut contingent on the legal culture of the specific jurisdiction under study. *Id.* at 106. See also Timothy Endicott, *The Impossibility of the Rule of Law*, 19 O.J.L.S. 1, 10 (1999).

27. By some accounts the right to democratic governance is in itself a fundamental right. See Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 46 (1992).

28. Jürgen Habermas, *Between Facts and Norms: An Author's Reflections*, 76 DENV. U. L. REV. 937, 942 (1999). See generally Kaarlo Tuori, *Discourse Ethics and the Legitimacy of Law*, 2 RATIO JURIS 125, 128-131 (1989); Jürgen Habermas, *Towards a Communication-Concept of Rational Collective Will-Formation. A Thought Experiment*, 2 RATIO JURIS 144, 144 (1989).

29. See generally Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1735-36 (1995).

30. TAMANAHA, *supra* note 8, at 102.

such as the rights to property, contract, privacy, autonomy, *etc.* into the concept of democratic legality.<sup>31</sup> The second substantive brand of Rule of Law adds civil and political rights, rendering this theory even thicker.<sup>32</sup> The thickest substantive version includes socio-economic or social welfare rights in addition to individual and political rights.<sup>33</sup> The three shades of substantive theory correspond to the three generations of fundamental or human rights. Such are the contours of the Rule of Law terrain. “While formal legality is the dominant understanding of rule of law among legal theorists,” the thinnest substantive version “likely approximates the common sense of the rule of law within Western societies (assuming a common understanding exists).”<sup>34</sup> Tamanaha argues that the thickest version of Rule of Law theory, in contrast, is overburdened and “throws up severe difficulties” and, though tempting, “should not be indulged” for it would render the Rule of Law a “proxy battleground for disputes about broader social issues.”<sup>35</sup> Thus, we are essentially left with a choice between two credible versions of formal legality and two reasonable theories of substantive Rule of Law (see Table 2).

Formal Legality	Democratic Legality	Individual Rights	Individual and Political Rights
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Table 2: Graphic based on Brian Tamanaha’s “Alternative Rule of Law Formulations”<sup>36</sup>

The above graphic clarifies at least the range of possibilities, and perhaps, we may begin to discern what the various debates are really about. Note, however, that the linear progression—from formal legality to inclusion of democracy to protection of individual rights to the incorporation of civil and political rights—thus appears to coincide with

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31. *Id.* at 102.

32. *Id.* at 109.

33. *Id.* at 112-13.

34. *Id.* at 111.

35. *Id.* at 113.

36. TAMANAHA, *supra* note 8, at 91. *See also* Table 1, *supra* note 15.

the development of Western political-legal thought. However, the Rule of Law is not presented as a product exclusively of Western thinking, but rather as a universal ideal that is at the heart of the Law and Development movement the world over.

## II. DECONSTRUCTING THE RULE OF LAW DISCOURSES

### A. Formal *versus* Substantive Rule of Law: The Haunting Spectre of the Politics of Law?

The classification of formal and substantive theories raises some pertinent questions. Are there philosophical or pragmatic criteria on which these distinctions may meaningfully be drawn? What are the bases for recommending one kind of theory in preference to another? These questions may be better addressed by visualizing the relationship between the various theories of Rule of Law in a different way: in the form of concentric circles rather than along a linear spectrum (see Table 3).<sup>37</sup>

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37. See Peerenboom, *supra* note 11, at 5-6.

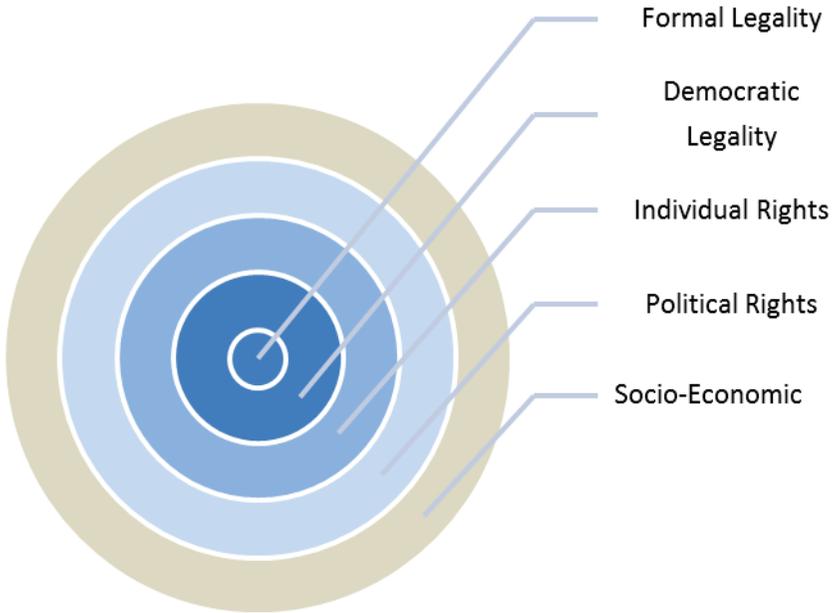


Table 3: Graphic based on author's reconceptualization of the Rule of Law<sup>38</sup>

The advantage of this formulation is arguably that it enables a better appreciation of the fact that the core of Rule of Law theory is provided by formal legality and that Rule of Law includes at least that.<sup>39</sup> The debate then is about what else it includes, if anything at all. Another advantage is that we can see what lies beyond the Rule of Law and what is definitely not part of any reasonable formulation of this political ideal: the realm of pure politics as well as of culture, tradition, religion, and other sources of norms for socio-political and economic regulation.<sup>40</sup> This helps us better understand the true nature of the choice between the various formal and substantive theories. The further one retreats inwards

38. *See generally id.*

39. *See McDonald, supra* note 11, at 205.

40. *See Peerenboom, supra* note 11, at 6.

from the thickest version bordering the realm beyond, the less politically-contested the theory of Rule of Law appears to be.

It is in terms of a concern with the seepage of politics into law that the debate between formal and substantive versions of the Rule of Law may then be understood. The formalists fear that the incorporation of politically-contested notions such as the various kinds of rights may overburden the concept and hence render it devoid of any independent value. Paul Craig, for example, concludes that “the adoption of a fully substantive conception of the rule of law has the consequence of robbing the concept of any function which is independent of the theory of justice which imbues such an account of law.”<sup>41</sup> A key passage by Raz is frequently quoted as the quintessential representation of this point of view:

If the rule of law is the rule of the good law then to explain its nature is to propound a complete social philosophy. But if so the term lacks any useful function. We have no need to be converted to the [R]ule of [L]aw just in order to discover that to believe in it is to believe that good should triumph. . . . It is also to be insisted that the [R]ule of [L]aw . . . is not to be confused with democracy, justice, equality (before the law or otherwise), human rights of any kind or respect for persons or for the dignity of man.<sup>42</sup>

It is not immediately clear, however, in what sense the substantive versions threaten to rob the Rule of Law of any independent function. What, after all, is the ‘function’ of Rule of Law, or rather of theorizing over its meanings? One argument, that Raz seems to espouse, is that the over-arching purpose of theorizing the meaning of the Rule of Law is to attain analytical clarity. In this ‘philosophical’ mode of theorizing, conceptual neatness is a worthy end as it may enable the articulation of diverse demands in multiple vocabularies—of Rule of Law, justice, rights, constitutionalism, *etc.*—so that all of the various justifications of these demands may be better investigated and distinctly evaluated.

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41. Paul Craig, *Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework*, 1997 PUB. L. 466, 487.

42. Raz, *supra* note 22, at 196.

However, this philosophical approach presents a number of problems. The first is a methodological one. The Rule of Law is not just a theoretical construct but rather a real world or social phenomenon.<sup>43</sup> Different people attach different meanings and demands to the Rule of Law not just in theoretical discourses but also in contested political debates.<sup>44</sup> As such, it is questionable whether a theoretical account laying out the “essential” characteristics of the Rule of Law that does not fit with political practices and rhetorical usages has much value.

Summers perceived this methodological difficulty inherent in philosophically conceptualizing the Rule of Law. In support of his insistence on conceptual clarity he argued that the Rule of Law would lose traction, mass appeal, and ability to obtain compliance from officials or allegiance from citizens if its meanings become contested or obscure:

A major explanation for the uncertain advance of the rule of law in the world and for relapses even where it has generally prevailed, is that the requisites of its implementation and the values it serves are not sufficiently well understood. The capacity of any ideal to be realized within a society depends on how far social attitudes are well focused in its support, and on whether its clientele within the society are duly organized behind it.<sup>45</sup>

However, the assumption that ordinary citizens or the specific clientele (practitioners, judges, academics and students) will rally in support of Rule of Law only if it is conceptually neat is problematic. There are several historical examples, including that of Pakistan, where social and

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43. For the methodological difficulties inherent in philosophical approaches to legal theory, see generally D.J. Galligan, *Legal Theory and Empirical Research*, in THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH 976 (Peter Cane & Herbert Kritzer eds., 2012).

44. Perhaps that is not such a bad thing after all if the Rule of Law is essentially, and not just endlessly, contested. See Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (In Florida)?*, 21 L. & PHIL. 137, 151 (2002). A very important consequence of the essential contestedness of the Rule of Law being a “marked raising of the level of quality of arguments in the disputes of the contestant parties.” W. B. Gallie, *Essentially Contested Concepts*, in 56 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 167, 193 (1956).

45. Summers, *supra* note 23, at 128.

political movements have been built around ideas and aspirations that do not satisfy the exactitude of political and social theorists.<sup>46</sup> Thus, the hope that conceptual clarity will lead to popular backing for Rule of Law may be an empty justification for a theorist's obsession with tidiness rather than a valid sociological supposition.

Another question must then arise: who is the audience of Rule of Law discourse? When theorists talk of the Rule of Law, who are they trying to convince? Is Rule of Law talk designed to rally public support (or focus "social attitudes" in Summer's terms) behind the precepts advocated by particular versions of legality? Or, is the Rule of Law's special "clientele" within society (the participants in the legal enterprise) the target audience? Allegiance to formal theory may reinforce the Rule of Law if a bulk of the lawyers, judges, academics, and others involved in the business of law converge on a settled narrow meaning of the concept. However, such clarity, and such loyalty, may not be an unquestionable good particularly if the popular understandings of the meaning of the Rule of Law diverge substantially from the clear, precise, and apolitical definitions that formal theorists advocate. We may legitimately entertain the fears that the society which tolerated the emergence of such hyper-professionalized and insular discourses on the meanings of the Rule of Law "might be deplorably sheeplike" and the "sheep might end in the slaughter-house"<sup>47</sup>:

Those who make and can recognize enacted law may use that capacity and that specialist knowledge for their own benefit, and to the detriment of the rest, who find they know less and less about the detailed basis on which their society is organized. The specialization of normative authority may thus exacerbate whatever exploitation and hierarchy exist in a given society apart from its legalization.<sup>48</sup>

If formal Rule of Law theory were to dominate the legal discourse, especially in university classrooms, we may end up with a situation

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46. In South Asia for example, the reasons for the traction and mass appeal of political ideals demand a deeper scrutiny. See AYESHA JALAL, *DEMOCRACY AND AUTHORITARIANISM IN SOUTH ASIA* 66-67 (1995).

47. H. L. A. HART, *THE CONCEPT OF LAW* 117 (1994).

48. Jeremy Waldron, *All We Like Sheep*, 12 *CAN. J. L. & JURIS.* 169, 181 (1999).

where decades down the path powerful legal actors, especially judges and seasoned lawyers, are constantly being asked to enforce populist and more substantive understandings of the Rule of Law only to find themselves incapable of accommodating those demands. Law may then become a deeply conservative force in that society, exercising considerable normative and institutional drags on movements for social change, on account of its failure to take up new interests and expectations that it could logically and meaningfully incorporate. Perhaps this situation already exists in most jurisdictions.

B. Rule of Law *versus* Instrumentalism: Rule of Law as Means to Ends?

The hopes for constructing a conceptually neat and de-politicized account of formal legality are further complicated by concerns that politics is not only brought to the frontiers of formal theory by the substantive rights-bearing accounts, but permeates all the way to its very core. Such is the outcome of another historical debate over the value of the Rule of Law: whether formal legality has intrinsic value or is it merely means to (political, social and economic) ends? Tamanaha has highlighted a more recent form of this debate, the tension between “two core ideas”: (1) “the classical rule of law ideal that there are independent legal limits on law itself” and (2) “legal instrumentalism, . . . that law (and hence the Rule of Law) is a means to an end or an instrument for the social good.”<sup>49</sup> The thinner (formal) conceptions appear to be associated with the core liberal idea that the Rule of Law secures the liberty of individual citizens through the restraint of arbitrary governmental power.<sup>50</sup> The formalists disavow the instrumental usage of Rule of Law for broader socio-political and economic agendas and resist calls for these to be incorporated in the very notion of the Rule of Law for fear that it may overburden the concept, as discussed in the previous section.<sup>51</sup>

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49. See Brian Z. Tamanah, *How an Instrumental View of Law Corrodes the Rule of Law*, 56 DEPAUL L. REV. 469, 469-70 (2007).

50. For an elaboration of the liberal conception of the Rule of Law, see Jeremy Waldron, *The Rule of Law in Contemporary Liberal Theory*, 2 RATIO JURIS 79 (1989).

51. See Part II.A.

The thicker theories of Rule of Law appear, in contrast, to be concerned primarily with its utility for redistributions of political, social, and increasingly economic, power. From the perspective of substantive accounts, the Rule of Law is meaningful only because, and to the extent that, it helps secure such ends.

The formalist argument for incontestable value inherent in formal legality was advanced most forcefully by Fuller who argued that formal legality invariably imposes such meaningful restrictions on oppressive regimes that, presumably, they would rather achieve their tyrannical goals through administrative rather than legal means.<sup>52</sup> For Fuller, the failure of the Nazi regime to even minimally adhere to the basic requirement of formal legality was *prima facie* evidence of the constraints inherent in formal legality.<sup>53</sup> There appears to be some internal disagreement amongst proponents of formal legality on this point. For Hart, however, the Rule of Law, defined as the fusion of the principles of legality and the principles of natural justice,<sup>54</sup> is nothing more than a set of “principles of good legal craftsmanship” or merely principles of the inner efficiency of law that lacks any inherent value or morality.<sup>55</sup> Likewise for Raz, formal legality is essentially a set of principles of the inner efficiency of law that lacks any inherent value or morality. The higher a legal system sits on a formal legality index, the more efficient that legal system is in achieving whatever aims are assigned to law in that polity. Formal legality is thus essentially a negative value: “conformity to it does not cause good except through

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52. FULLER, *supra* note 18, at 41-44; *see also* Noel B. Reynolds, *Grounding the Rule of Law*, 2 *RATIO JURIS* 1, 12 (1989).

53. *See* Lon L. Fuller, *Positivism and Fidelity to Law – A Reply to Professor Hart*, 71 *HARV. L. REV.* 630, 652 (1957). Fuller was arguably on a weaker footing as he was drawn into a debate with H.L.A. Hart over the strict separation of law and morals on the wrong terms. *See id.* Fuller was thus compelled to argue that formal legality was the inner morality of law and, hence, necessarily moral. *See id.*

54. H.L.A. Hart, *Problems of Philosophy of Law*, in 6 *THE ENCYCLOPEDIA OF PHILOSOPHY* 273-74 (Paul Edwards ed., 1967).

55. Lon L. Fuller, *The Morality of Law*, 78 *HARV. L. REV.* 1281, 1286 (1965) (book review). *See also* Leslie Green, *The Concept of Law Revisited*, 94 *MICH. L. REV.* 1687, 1710-11 (1996). For a description of Hart’s position, *see* Jeremy Waldron, *Positivism and Legality: Hart’s Equivocal Response to Fuller*, 83 *N.Y.U. L. REV.* 1135 (2008). *See also* Raz, *supra* note 22, at 208.

avoiding evil and the evil which is avoided is evil which could only have been caused by the law itself.”<sup>56</sup> As such, formal legality is compatible with many forms of injustice.<sup>57</sup> Therefore, the most that can be said for formal legality is that it is morally ambiguous or ambivalent.<sup>58</sup>

Nonetheless, even formalists, such as Raz, contend that formal legality achieves the valuable social goal of ensuring a minimal level of liberty by constraining the exercise of governmental powers. Firstly, it is argued that formal legality speaks to the governors and places a demand that “government shall be ruled by the law and subject to it.”<sup>59</sup> Secondly, formal legality speaks to the governed and promises that, regardless of the content of laws, they will have notice of governmental designs, and hence, a limited ability to plan their actions amounting to a certain degree of freedom.<sup>60</sup> However, it is recognized that it is a limited form of “personal freedom” that does not equate to “political freedom” as normally understood.<sup>61</sup> Formal legality may also enhance the autonomy of the subjects and “provides the foundation for the legal respect for human dignity.”<sup>62</sup> These are all valuable liberal ends.

Nonetheless, an even stronger charge may be laid against the formal concept of the Rule of Law: that it is not merely a set of morally neutral principles of efficiency *despite* which law may be abused by the rulers, but instead that formal legality itself contains the potential for far-reaching, systemic abuse and is *particularly* amenable to such misuse. After all, as Hart alluded, “general rules clearly framed and publicly promulgated are the most efficient form of social control[,]”<sup>63</sup> and so long as Rule of Law contains no conception of how law is to be used (which conceptions have been relegated to the status of ‘external morality’ by formal theory), the internal efficiency of law makes it particularly useful for authoritarian social control. This intuition is

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56. Raz, *supra* note 22, at 206.

57. *The Rule of Law and Its Virtue*, *supra* note 17, at 211.

58. See Waldron, *supra* note 55, at 1162-63.

59. Raz, *supra* note 22, at 196.

60. *Id.* at 204.

61. *Id.*

62. *Id.* at 205.

63. H. L. A. HART, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 115 (1983).

validated by the reality of 'legal' repression around the world. For example, unlike the Nazi regime, which had little patience for oppression through law, colonial rule in India demonstrated the 'value' of law, for the rulers, in enacting more subtly coercive and disciplinary regimes.<sup>64</sup>

It may be argued in defense of formal theories that the ideal of the Rule of Law "can only be given a contingent, as opposed to necessary, value."<sup>65</sup> Further, it is argued that "[the Rule of Law] is a necessary condition for justice or democracy[.]" but "this claim is simply not the same as claiming that compliance with the rule of law necessarily promotes justice or democracy."<sup>66</sup> It may also be argued that the ideal is a "partial" one and its inner morality is contingent on the external morality in whose support it is wielded.<sup>67</sup> One such overarching *telos* of formal legality is the restraint of arbitrary exercise of power.<sup>68</sup> Arguably, this is a rather uncontroversial basis for justifying the Rule of Law and curbing arbitrary power is an incontestable good. E. P. Thompson's oft-quoted statement, which scandalized fellow Marxists and other leftist critics of formal legality, evidences the emerging consensus on this one point: that "the imposing of effective inhibitions upon power and the defen[s]e of the citizen from power's all-intrusive claims, seems . . . to be an unqualified human good."<sup>69</sup>

Even if it is acknowledged, however, that formal legality is an unqualified human good if, and to the extent that, it imposes meaningful limitations on the exercise of arbitrary power, what is the basis for restricting the *telos* to such restraint of governmental power? More significantly, what is the basis for excluding other equally valid aims, such as, the protection of rights particularly if it is manifest that state power will not be meaningfully challenged or constrained until such time as civil and political rights are safeguarded, and opportunities for

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64. See generally NASSER HUSSAIN, *THE JURISPRUDENCE OF EMERGENCY: COLONIALISM AND THE RULE OF LAW* (2003).

65. *Positivism and the Formal Rule of Law*, *supra* note 26, at 103.

66. *Id.*

67. *Id.* at 104.

68. Martin Krygier, *Ethical Positivism and the Liberalism of Fear*, 24 *AUSTL. J. LEGAL PHIL.* 65, 66-75 (1999).

69. E.P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT 266* (1975).

democratic participation are made accessible and meaningful? It is difficult to find convincing philosophical arguments, which may defend formal theories from the demands of substantive conceptions of the Rule of Law that also seek to advance the core liberal aims of enhancing the autonomy of the citizen and safeguarding basic liberties from the state's intrusion. This is more so the case when certain beliefs in fundamental or human rights come to be so widely shared that we may refer to them as the 'public morality' of (at least a majority) of the republic. It is on these terms that we can explain the increasing salience of substantive theories of the Rule of Law in the Anglo-American Common Law tradition, such as those advanced by T.R.S. Allan and Ronald Dworkin.<sup>70</sup> For the latter, the Rule of Law is "the ideal of rule by an accurate public conception of individual rights."<sup>71</sup>

Nonetheless, substantive theories of the Rule of Law suffer from the same critique which has been made of formal legality when they acquire universalist pretensions and claim to have descriptive and prescriptive potential far beyond the specific constitutional and political climes in which they are rooted. Such substantive theories, which rely on abstract and universalist conceptions of human rights, must also answer to the charge of arbitrarily confining the ends of the Rule of Law. Leaving aside general critiques of rights and their usage such as those made by

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70. T.R.S. Allan, for example, has formulated his theory of Rule of Law with specific reference to the practice of UK courts. See T.R.S. Allan, *LAW, LIBERTY, AND JUSTICE: THE LEGAL FOUNDATIONS OF BRITISH CONSTITUTIONALISM* 20-47 (Clarendon Press Oxford 1993).

71. See RONALD DWORKIN, *A MATTER OF PRINCIPLE* 11-12 (1985). Even Raz begins to sound eerily like Dworkin when he addressed judicial role in the specific constitutional context of the UK:

In insisting that judicial decisions should be not only faithful but also principled, I am suggesting that the function of the Rule of Law is to facilitate the integration of particular pieces of legislation with the underlying doctrines of the legal system . . . A particular [legislation] . . . should be applied in a manner which is both faithful to the legislative purpose and principled in integrating it with traditional doctrines of the liberties of the citizen.

Craig, *supra* note 41, at 484 (citing Joseph Raz, *ETHICS IN THE PUBLIC DOMAIN, ESSAYS ON THE MORALITY OF LAW AND POLITICS* 375 (1994)).

communitarians and critical legal scholars<sup>72</sup>—an extensive subject in its own right—we may highlight one specific aspect: the privileging of individual and political rights over socio-economic rights. In an influential work from within the liberal tradition, Amartya Sen has made a compelling argument that human freedom depends as much on “social and economic arrangements (for example, facilities for education and health care) as well as political and civil rights.”<sup>73</sup> Sen thus argues that five distinct kinds of rights—political freedoms, economic facilities, social opportunities, transparency guarantees, and protective security—are deeply interconnected and integral to both human freedom and economic development.<sup>74</sup> As such, substantive conceptions of the Rule of Law, which privilege some of these sets of rights (individual and political rights) over others (economic and social opportunities), are drawing lines in the sand as much as formal conceptions. Therefore, to the extent that both formal and substantive conceptions arbitrarily limit the ends which the Rule of Law may serve, they become arguments for maintaining *status quo* particularly in societies where law is relatively efficient.<sup>75</sup>

### C. The Impossibility of the Rule of Law?: Liberal Ideology and the Indeterminacy of Law

The critics of formal legality can generally be classified in two distinct camps. Those who espouse thicker theories of Rule of Law take the stance that Rule of Law has relevance and value as a politico-legal

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72. See generally, e.g., Michael J. Sandel, *The Political Theory of the Procedural Republic*, in *THE RULE OF LAW: IDEAL OR IDEOLOGY* (Allan Hutchinson & Patrick Monahan eds., 1987); MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991); Duncan Kennedy, *The Critique of Rights in Critical Legal Studies*, in *LEFT LEGALISM/LEFT CRITIQUE* 178, 178 (Janet Halley & Wendy Brown eds., 2002).

73. AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 3 (2000).

74. *Id.* at 10.

75. See PHILIP SELZNICK, *THE MORAL COMMONWEALTH* 437 (1992). For another canonical statement on the limitations of formal legality and formal equality, see Morton J. Horwitz, *The Rule of Law: An Unqualified Human Good?*, 86 *YALE L. J.* 561, 566 (1977) (book review).

discourse because it incorporates rights, conceptions, and other political ends. The contest is over the meaning of Rule of Law. Another kind of challenge has come from the radical left, most notably Critical Legal Scholars in the U.S.A., who have accepted the formalist definition of Rule of Law but have then denounced it for there is, according to them, always an ideology and an agenda (of a liberal ilk) behind formal legality that remains unarticulated. As such, (formal) Rule of Law is seen as a mask for power and an attempt at legitimating the existing imbalances in society.<sup>76</sup>

Roberto Unger, for example, argues that the problems inherent in formal Rule of Law can be traced to the liberal politics in which it is embedded.<sup>77</sup> The paradox of liberalism is that while it strengthens the demand for equality, the attendant skepticism of state authority simultaneously disables challenges to existing social inequalities.<sup>78</sup> Formal legality, characterized by “its commitment to generality and autonomy” and “defined by the interrelated notions of neutrality, uniformity, and predictability” exacerbates the paradox of liberalism by masking the power imbalances existing in society and by making the exercise of power appear impersonal.<sup>79</sup> It achieves this because of two faulty assumptions. First, it is assumed that the most significant power rests in the government. This results in an undue focus on the exercise of public power and limited attention to private orderings which “affect most directly and deeply the individual’s situation. . . . These inequalities are neither undone nor effectively redressed by the commitment to formal equality before the law.”<sup>80</sup> Rather, a commitment to formal legality becomes an argument against state interventions designed to redress these substantive inequalities.

The second foundational assumption of formal equality “is that power can be constrained by rules.”<sup>81</sup> This second “critical premise . . . that

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76. See Peerenboom, *supra* note 11, at 36.

77. See ROBERTO MANGABEIRA UNGER, *LAW IN MODERN SOCIETY* 166-181, 192-223 (Macmillan ed., 1976).

78. *Id.* at 173-75.

79. *Id.* at 176.

80. *Id.* at 179-180.

81. *Id.* at 179.

rules can make power impersonal and impartial—is just as shaky” as the first assumption that power resides primarily in the state and hence the state ought to be the focus of concerns with the unequal and tyrannical exercise of power.<sup>82</sup> For Unger and other critical scholars, formality is impossible as rules neither dictate outcomes independent of purposes and values nor do they significantly constrain the discretion inherent in legislative, administrative, and judicial functions. As such, the Critical Legal Studies movement embroiled the formal conception of Rule of Law in bigger battles over the value of liberalism as a political philosophy and the nature of law. With sustained assaults on atomistic liberalism and critiques of the inherent indeterminacy of law, the Rule of Law became politicized and contested to its formal core.<sup>83</sup> The sustained assault from the Left undermined the claim that law, especially public law adjudication, could be separated from politics and could be undertaken in a largely formal manner. More significantly, critical scholars opened up even private law to unprecedented scrutiny and sought to identify the deep politicization of law and adjudication.<sup>84</sup>

The CLS critique of the indeterminacy of law undermined formal theory to the extent that the formalists claim that the Rule of Law is the rule of rules.<sup>85</sup> The critique is essentially based on four broad arguments. First, rules are framed in language and cannot fully determine outcomes since language itself is indeterminate. Second, rules cannot be given any concrete meanings in specific cases until and unless the purposes behind the rules are determined. Since the rules themselves often do not incorporate a definitive indication of the underlying purpose(s) or policy(ies), the process of interpreting and applying rules invariably involves discretion and policy choices. Third, the legal system often incorporates rules that may justify multiple outcomes at the same time with the result that “legal” justifications can often be found for different

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82. *Id.* at 180.

83. *See generally* Sandel, *supra* note 72, at 57-61; Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1685 (1976).

84. *See generally* Kennedy, *supra* note 72.

85. *See* Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 792 (1989); *see also* Frederick Schauer, *Formalism*, 1997 YALE L. J. 509, 510 (1988).

and even conflicting positions.<sup>86</sup> Fourth, the legal system is not composed exclusively of rules but also of broader and vaguer standards and principles which do not, and cannot apply, in an either-or fashion. Standards and principles may, and often do, conflict with other standards and principles, or even with rules, with the result that adjudication demands a balancing of various competing considerations. The balancing of these competing principles, standards and rules involves considerations that are external to law.

Evaluating the CLS critique of formalism generally, and formal Rule of Law specifically, it has been argued that mainstream or centrist legal theory has withstood the assault with a degree of equanimity.<sup>87</sup> It has also been contended that the indeterminacy critique, though substantially valid, was overdone and that while indeterminacy does exist in the legal system, it is neither as endemic nor as radical as alleged.<sup>88</sup> In the vast majority of cases, the potential or actual litigants, their lawyers, and the judges can confidently assert what rule-dictated outcome will be reached. Most of these cases are never litigated, are settled at an early stage, or are resolved with relative ease at the lower judicial rungs.<sup>89</sup> Radical indeterminacy thus appears to be a characteristic of the hardest of hard cases that are litigated in the appellate courts, and which are miniscule in number relative to the sum total of the applications of legal rules. As

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86. The CLS critique builds upon the earlier work of the Realists. *See generally* Brian Z. Tamanaha, *Understanding Legal Realism*, 87 TEX. L. REV. 731 (2008). Karl Llewellyn, for example, famously argued that for most rules of statutory interpretation, there are counter-rules that may enable judges to justify contrary arguments. *See* Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes are to be Construed*, 3 VAND. L. REV. 395, 396-99 (1950). Likewise, Julius Stone argued that judges in subsequent cases had considerable scope to (re-)interpret the *ratio decidendi* of precedent cases given the options in identifying material facts and stating them at multiple levels of generality. *See* Julius Stone, *The Ratio of the Ratio Decidendi*, 22 MODERN L. REV. 597, 599 (1959).

87. *See* ANDREW ALTMAN, CRITICAL LEGAL STUDIES: A LIBERAL CRITIQUE 90-103 (1993).

88. *See* L.B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 473 (1987) (distinguishing between indeterminacy and underdeterminacy); *see also* Peter Ingram, *Maintaining the Rule of Law*, 35 THE PHIL. Q. 359, 373 (1985).

89. *See* Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 411 (1985).

such, it is deemed possible to reconstruct the Rule of Law after the deconstruction of the CLS in a manner which incorporates aspects of the CLS critique.<sup>90</sup>

Such assessments are arguably based upon a misunderstanding of the radical indeterminacy critique to begin with.<sup>91</sup> The indeterminacy critique is often misunderstood as a caricature of appellate adjudication in which judges are represented as routinely making choices from amongst a range of possible outcomes that the inherent indeterminacy of myriad legal tools—rules, standards, factors, presumptions, guidelines, principles, *etc.*—fail to foreclose. The CLS standpoint was not, for the most part, that law is *in fact* radically indeterminate and that judges act politically in the sense that they decide individual cases based largely upon their political leanings or affiliations. Rather, the argument that can be traced as far back as the Realists has been that the law is *logically* indeterminate while being in fact quite determinate.<sup>92</sup> While legal rules, precedents and statutes *may* be given different interpretations, in reality they *are* often interpreted in consistent ways with the result that the law changes very slowly.

The observation that the legal system is highly stable is, of course, correct, but it is a mistake to believe that this is because the law is determinate. The stability of the law derives not from any feature of the law itself, but from the overwhelming uniformity of ideological background among those empowered to make legal decisions.<sup>93</sup>

This includes not only the judges, but the elites of the legal profession taught at the top law schools.<sup>94</sup>

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90. See Neil MacCormick, *Reconstruction After Deconstruction: A Response to CLS*, 10 O.J.L.S. 539, 556 (1990).

91. See Robert Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 124-25 (1984).

92. See Llewellyn, *supra* note 86, at 396. Thus Llewellyn, for instance, stressed that while multiple interpretations of statutes are possible, “[t]he type of distinction or expansion which is always *technically* available may be psychologically or sociologically unavailable.” *Id.*

93. John Hasnas, *The Myth of the Rule of Law*, 1995 WIS. L. REV. 199, 215 (1995).

94. See Robert Gordon, *Law and Ideology*, 3 TIKKUN 14, 15-18 (1988).

This strain of argument, common to CLS, critical feminism, critical race theory and postcolonial studies, is much more forceful for it asserts that the content of law is contingent upon the institutional mechanisms and practices that assign meanings to legal rules, but this is done in a structurally political manner rather than in a superficially political way. The reality is that the law in most Western democracies is much more determinate, but the consolidation of agreement on the core meanings of rules is achieved not through any inherent capacity of promulgated legal directives to constrain judicial choice, but instead through legal practices that allow change only incrementally and at the margins.<sup>95</sup> All legal directives, as processed through the legal system, thus exhibit a substantive or an ideological tilt towards certain policies and social goals at the expense of other equally, more, or less plausible and desirable values. All legal directives, as processed through the legal system, thus exhibit a substantive or an ideological tilt towards certain policies and social goals at the expense of other equally, more, or less plausible and desirable values.<sup>96</sup> The lack of indeterminacy, in reality then, only adds to the frustration of those who perceive the ideological tilt of laws being masked by claims that no meaningful choice was available at any stage of the legal process, beyond the overtly political process of legislation. Thus, the lasting legacy and value of the CLS critique, building on the earlier work of the Realists, is that it has made it increasingly difficult to maintain hard and fast distinctions between law and politics (*qua* ideology), between means and ends, and between the form and substance of law.<sup>97</sup>

### III. RECONCEPTUALIZING THE RULE OF LAW AND ITS POLITICS

As is evident in the CLS critique of formal legality, there are two political contexts in which the debates over the meaning and value of the Rule of Law have largely been waged: the role of the judges in the constitutional-political system and the structures and powers of the

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95. See Hasnas, *supra* note 93, at 215.

96. See Wythe Holt, *Tilt*, 52 GEO. WASH. L. REV. 280, 281-82 (1984).

97. See generally Raymond A. Belliotti, *The Rule of Law and the Critical Legal Studies Movement*, 24 U. W. ONTARIO L. REV. 67, 70 (1986).

welfare state. Abstract theoretical argumentation over the Rule of Law often begins with unarticulated understandings of specific desired outcomes in these contexts and ends up circuitously and surreptitiously justifying them. De-contextualized theories of the Rule of Law thus become covert arguments for certain constitutional and political positions—concerning issues such as the role of the judiciary and the structures of the administrative state—that claim neutrality but are essentially prejudiced towards the very conclusions that are derived from such supposedly neutral accounts.<sup>98</sup> In addition to these state-centric contexts, there is arguably another significant context to Rule of Law contestations. It is the one which is most easily elided as the vast, complex, often deeply polarized, and thoroughly politicized context of the society within which various understandings of the Rule of Law take shape and which they are designed to sustain or reconfigure. While the social context is equally significant to the liberal-democratic understandings of the Rule of Law in Western jurisdictions, it becomes acutely critical when such conceptions of Rule of Law are universalized and projected to the vastly different social environments in the Global South.

The following section of the Paper will attempt to reconstruct the diverse debates on the meanings and value of the Rule of Law as extensions of particular commitments over governance structures and across social planes. It is hoped that the resulting concretization of the various conceptions of the Rule of Law will enable a deeper understanding of its nature and potential value.

#### A. Rule of Law and Democracy: The Rule of Common Law or the Rule of Legislation?

It is rather easy to see how Rule of Law contestations, particularly the formal versus substantive debates, are shaped by underlying constitutional struggles with regard to the role of the judges. Proceduralist theory frequently betrays a concern with judicial powers

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98. See, e.g., Richard H. Fallon, Jr., “*The Rule of Law*” as a Concept in *Constitutional Discourse*, 97 COLUM. L. REV. 1, 3-4 (1997).

and seeks to counter expansive judicial review by adopting a legislative paradigm of legality demanding a greater focus on rule-following.<sup>99</sup> This usually implicates a certain brand of democratic theory (democratic legal positivism), which sees the ascendancy of the legislature as the essence of democracy and finds rights-based judicial review to be troubling to the extent it undermines majoritarian decision-making.<sup>100</sup> Formal legality thus becomes a prescription for restrained adjudication in accordance with rules laid down by the legislature and a demand that the judges cede the determination of value judgments to democratic institutions. Judiciaries are, after all, notoriously undemocratic, if not necessarily anti-democratic. Entrusting them with decisions on socio-political values and economic policies risks the creation of a situation wherein power is exercised in the absence of requisite competence and/or democratic control.<sup>101</sup> In this mode of analysis, Rule of Law is the rule of rules, and formal Rule of Law theory equates with “rulism.”<sup>102</sup>

But is rulism or formalism of this kind even possible? Have we not come to accept that a certain degree of indeterminacy inheres in rules and, as a result, in adjudication? As Schauer illuminatingly explains, a certain kind of formalism *qua* rulism is plausible.<sup>103</sup> He distinguishes between two kinds of formalism.<sup>104</sup> The negative kind involves the denial of choice *by* the judges, for example, in cases such as *Lochner v. New York* where they claim that they are merely applying established neutral principles.<sup>105</sup> Such decisions justifiably earn formalism a bad name. In contrast, a positive kind of formalism is possible, which involves the denial of choice *to* the judges.<sup>106</sup> Following Hart, Schauer argues that

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99. See generally Schauer, *supra* note 85.

100. See Tom Campbell, *Blaming Legal Positivism: A Reply to David Dyzenhaus*, 28 AUSTL. J. LEG. PHIL. 31, 34 (2003). Waldron notes that while legal positivism is philosophically oriented towards the centrality of legislation, positivists have veered away from that position and have increasingly become court-centric. See JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* 15-16 (1999).

101. See Campbell, *supra* note 100, at 37.

102. See Schauer, *supra* note 85, at 535.

103. *Id.*

104. *Id.* at 511-19.

105. *Id.* at 511-14.

106. *Id.* at 520.

more often than not indeterminacy exists only at the margins, or the penumbra of meanings of rules.<sup>107</sup> Therefore, it is possible for a judge to stay within the core meanings of applicable rules and leave the explication of the penumbra to other, more democratic, decision-makers. Even if rulism of the kind that he describes is possible, there is yet the normative question of its desirability. For Schauer, formalism *qua* rulism has the advantages of stability and predictability.<sup>108</sup> Furthermore, it restrains the arbitrary exercise of power (by the judges), which is good “for those who have jurisdiction to improve on yesterday also have jurisdiction to make things worse.”<sup>109</sup>

Two questions, and fairly big ones, remain however. First, if rulism and restraint of judicial decision-making exist in a social terrain of inequality then is it desirable to advocate stability and conservatism of the kind that he demands? What if a segment of the people demand a kind of Rule of Law that expects judges to make things more equitable than they historically were? As even Schauer concedes, these questions have precedence. Formalism has value only “when it is thought desirable to narrow the decisional opportunities and the decisional range of a [particular] class of decisionmakers. . . . Judgments about when to employ formalism are contextual and not inexorable, political and not logical, psychological and economic rather than conceptual.”<sup>110</sup>

Second, do legal systems of the kind that he describes exist in fact? Note that a formalist legal system has to be a “closed” one in which the judges have neither the discretion to refuse to apply a clear rule on the basis that it would not serve the rule’s purpose nor the capacity to modify the existing rule or create a new one.<sup>111</sup> Such a description fails in the face of the lived reality of Common Law systems the world over wherein, to varying degrees, judges do appear to have the power to adopt a purposive approach towards the application of rules as well as the

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107. *Id.* at 514.

108. *Id.* at 540-42.

109. *Id.* at 542.

110. *Id.* at 544.

111. *Id.* at 520.

capacity to modify the rules in the process of their instantiation.<sup>112</sup> There are strong arguments to be made for the proposition, which may only be empirically verified, that many ordinary people living in societies with Common Law legal systems consider the exercise of such purposive and context-oriented decisional jurisdiction to be the legitimate function of the courts. Common Law adjudication and rule-making have considerable democratic legitimacy then in the sense that the modes of reasoning employed in Common Law and its institutional practices are backed by widespread acceptance. Common Law adjudication can also be democracy-fostering in another way: by investigating the underlying policy rationales and purposes of legislative and executive action the courts can force the rulers to make their premises and goals explicit.<sup>113</sup> It is largely on the foundations of the perceived legitimacy of the Common Law, particularly where the courts have gained enhanced capacity to engage in rights-based decision-making, that substantive Rule of Law theory has built its edifice.

The arguments supporting the proto-democratic legitimacy of Common Law adjudication may, however, be pushed to the point where they begin to sound like claims of the necessary and inherent value of Common Law methodology, and even of its superiority *vis a vis* democratic institutions.<sup>114</sup> Such arguments are frequently rooted in a distrust of the democratic processes and betray a concern with elite or interest-group capture of lawmaking institutions.<sup>115</sup> In such a political calculus the courts appear as the only institution capable of countering the excesses of the political executive and the legislature. This, however, raises the spectre of a counter-majoritarian difficulty, and in Western liberal democracies the justification for judicial review processes which over-ride legislation or policymaking by elected executives must be

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112. *See generally* Stone, *supra* note 86, at 616-19; *see also* MELVIN EISENBERG, *THE NATURE OF THE COMMON LAW* 4-5 (1988).

113. *See, e.g.*, DAVID DYZENHAUS, *HARD CASES IN WICKED LEGAL SYSTEMS: SOUTH AFRICAN LAW IN THE PERSPECTIVE OF LEGAL PHILOSOPHY* 248-70 (1991).

114. *See generally* Thomas Poole, *Back to the Future? Unearthing the Theory of Common Law Constitutionalism*, 23 *OXFORD J. LEGAL STUD.* 435, 438-39 (2003); WALDRON, *supra* note 100, at 7-25.

115. *See* JEREMY WALDRON, *LAW AND DISAGREEMENT* 8-10 (1999).

found in democracy itself.<sup>116</sup> Such exaggerated claims concerning the nature of the Common Law are liable to be challenged with considerable success.<sup>117</sup>

It must also be stressed that not only the Rule of Law but democracy too is a contingent concept; a means to ends rather than an absolute end in itself.<sup>118</sup> Further, democracy is a relative concept and an ideal: at any given time in a society there may be more or less of it; some institutions may be more democratic and others less; and some institutions may be more responsive to certain segments of the population and certain kinds of demands while others may be attuned to audiences and demands of a different kind.<sup>119</sup> It is, therefore, problematic to issue categorical pronouncements of the kind that equate democracy exclusively with majoritarianism and the ascendancy of the representative institutions.<sup>120</sup> It may even be legitimate to see democracy as a vision of communicative discourse in which not only the legislatures but also the courts, the

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116. See generally CHRISTOPHER EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 3 (2001).

117. See Peter Cane, *Taking Disagreement Seriously: Courts, Legislatures and the Reform of Tort Law*, 25 OXFORD J. LEGAL STUD. 393, 393 (2005); see also Jeremy Waldron, *A Right-Based Critique of Constitutional Rights*, 13 OXFORD J. LEGAL STUD. 18, 18-20 (1993).

118. Recent events in Egypt have brought the contingent and relative nature of democracy sharply into focus. See, e.g., Khaled M. Abou El Fadl, *The Perils of a 'People's Coup'*, N.Y. TIMES (July 7, 2013), <http://www.nytimes.com/2013/07/08/opinion/the-perils-of-a-peoples-coup.html?r=0>. When the military command deposed and detained former President Morsi, elected only a year earlier, in the aftermath of widespread protests the definitions of democracy and dictatorship became deeply contested. *Id.*

119. For example, it could be argued in the heyday of judicial activism in India, the Supreme Court emerged as a “forum for redemocratization of Indian governance and polity” by giving voice and bringing into political play interests that would otherwise remain marginalized. Upendra Baxi, *Rule of Law in India*, in ASIAN DISCOURSES OF RULE OF LAW: THEORIES AND IMPLEMENTATION OF RULE OF LAW IN TWELVE ASIAN COUNTRIES, FRANCE AND THE U.S. 324, 339 (Randall Peerenboom ed., 2004).

120. See BRIAN Z. TAMANAHA, A GENERAL JURISPRUDENCE OF LAW AND SOCIETY 102-03 (2001).

bureaucracy, the political parties, the civil society, the media, interest groups and various social organizations are participants.<sup>121</sup>

It is in this light that we must see the relative success in recent times of substantive Rule of Law theory, which relies upon the veneration of the Common Law. The advances in Common Law jurisprudence concerning the judicial review of legislative and executive action have been largely welcomed in political environments where politicians and politics have come to be mistrusted as being susceptible to special interests, and/or where the administrative state has been perceived to be the new Leviathan unaccountable to the electorate and their representatives. Common Law constitutionalism and rights-based judicial review are increasingly seen as the bulwark of liberties and the essence of the Rule of Law. This does not mean that the Common Law paradigm of Rule of Law is invariably the reform-oriented version. Historically, in fact, the relationship between Common Law and *laissez faire* liberalism formed the “dark side” of the Rule of Law.<sup>122</sup> Such a dramatic turnaround in such a short time, from the beginning to the end of the 20<sup>th</sup> Century, in the constitutional position and the public perception of the Common Law’s institutions and practices highlights, again, the contextual contingency of the legitimacy of judicial role and of the various conceptions of the Rule of Law that are built around it.

#### B. Rule of Law and the Administrative/Regulatory State: Rule of Administrative Law?

Another political context which has shaped the debates over the Rule of Law is that of the modern administrative state and the challenges it poses for the democratic legitimacy of the state and its law. The growth of much of Rule of Law theory appears to have occurred in the shadow of the welfare state—in opposition to it (e.g., Hayek and, arguably, Dicey) or in justification or demand for it (e.g., Unger and the CLS).<sup>123</sup> A

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121. See generally JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY xxiv-xxv (1996); Habermas, *supra* note 28, at 938.

122. See Tamanaha, *supra* note 7, at 544-47.

123. See *infra* Part III.B; see *supra* Part II.C.

theory of the Rule of Law is thus, in vital measure, a theory of the role of law in a particular administrative state.<sup>124</sup> However, despite such historic relevance, the bulk of Rule of Law theory has lost its grounding in an accurate conceptualization of the challenges of the administrative-regulatory state and is impoverished on that account.

For Hayek, the primary virtue of formal legality was that it rendered government by decree untenable. The value of governance through clear, general, publicly promulgated, and stable rules was that it constrained discretionary exercise of powers.<sup>125</sup> The decision-makers whose discretion Hayek thus sought to constrain through formal legality were not so much the appellate judges who have found themselves at the centre of most of recent contestations over the meanings of the Rule of Law but rather executive officials.<sup>126</sup> For Hayek, the looming welfare state that heralded a transformation in the bureaucracy was a disaster in the making.<sup>127</sup> The pedantry of the stereotypical bureaucrat was a virtue for him and the prospects of these same officials exercising vast discretionary powers in post-war administrative states in liberal Western democracies was a change for the worse.<sup>128</sup> The concern, however, was not limited to the exercise of these discretionary powers arbitrarily but also encompassed a broader libertarian anxiety with the expansion of governmental apparatuses that would unduly interfere with the historically vast domains of private autonomy.<sup>129</sup>

For Unger and other critical scholars, the rise of the welfare-oriented state was an inevitable development. The welfare state would necessarily be one characterized by expanding state regulation of socio-economic spheres and the erosion of the traditional boundaries between public and private domains. For Unger, the emergent welfare state in “postliberal”

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124. See Jeffrey Jowell, *The Rule of Law Today*, in *THE CHANGING CONSTITUTION* 5, 5-25 (Jeffrey Jowell & Dawn Oliver eds., 2000).

125. Friedrich A. Hayek, *The Road to Serfdom: Text and Documents*, in *THE COLLECTED WORKS OF F. A. HAYEK VOLUME II* 112-14, 119-20 (Bruce Caldwell ed., 2014).

126. *Id.* at 50-51.

127. *Id.* at 115-21.

128. *Id.* at 50-51.

129. D. Neil MacCormick, *Spontaneous Order and the Rule of Law: Some Problems*, 2 *RATIO JURIS* 41, 41-47 (1989).

societies demonstrated the inherent tension between formal equality and substantive justice as well as undermined procedural legality.<sup>130</sup> As governments in these societies have progressively intervened in areas previously left to private ordering, they have had to deal with entrenched inequalities resulting in a move away from formal equality towards substantive justice.<sup>131</sup> This shift has resulted in a “turn from formalistic to purposive or policy-oriented styles of legal reasoning,” stripping “the state of every pretence to impartiality” and leaving a discredited conception of formal legality in its wake.<sup>132</sup> He predicted that legislation would become increasingly open-textured vesting significant discretion in administrative agencies and the courts so that such legislation could be implemented and interpreted with regard to the particularities of individual cases.<sup>133</sup> As a result, legal reasoning would become purposive rather than formalistic, and formal Rule of Law notions would become progressively irrelevant.<sup>134</sup>

The welfare state came (in many places in the Global North). Generalist bureaucrats transformed into policy specialists and expert administrators. Rule-bound bureaucracies spawned specialized, independent agencies and public corporations with impressive arrays of rule-making, enforcement and adjudicatory powers. Overburdened legislatures increasingly lost the capacity to specify jurisdictional limits and meaningful guidelines in the governing statutes that might constrain the broad governmental powers entrusted to the new administrative agencies and corporations. The elected higher executive progressively lost the capacity to effectively supervise the operations of the traditional departments as well as agencies and corporations. In the context of this modern administrative state—due in part to the dramatic expansion of discretionary powers, commingling of function, deep pockets of democratic deficit, and lack of political accountability—the rhetorical pull of Rule of Law ideal has increased rather than having been

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130. See UNGER, *supra* note 77, at 193-200.

131. *Id.* at 198-200.

132. *Id.* at 194, 197-98.

133. *Id.* at 197-98.

134. *Id.* at 200.

diminished.<sup>135</sup> Older ideological and philosophical contestations have to be reshaped in this evolving context. Liberalism itself has faced a split between its neo-classical libertarian strain and the more recent social liberalism camp.<sup>136</sup>

Neo-classical liberalism has sought the remedy for the perceived excesses of the welfare state in a move towards the creation of the “regulatory state”: “a shift in the style of governance away from the direct provision of public services, associated with the welfare state, and towards oversight of provision of public services by others.”<sup>137</sup> The failures or weaknesses attributable to the “total control” models of the welfare state, which the regulatory state paradigm is designed to obviate, include “the limited capacity of central-state institutions to know what is best provided by state intervention . . . [and] the risk that state actors will be diverted from pursuit of public interest outcomes to the exercise of public power for the pursuit of narrower private interests.”<sup>138</sup> The remedies built into the regulatory state model are the privatization of a vast array of operations and the creation of apex regulatory institutions mandated to regulate these privatized functions.<sup>139</sup> New regulatory methods are thus emerging which involve a reliance on regulator-stakeholder networks that develop flexible, negotiated, and cooperative arrangements to provide regulatory outcomes.<sup>140</sup> With a net decrease in governmental powers due to privatization, the place of the Rule of Law in this framework is necessarily limited to procedural legality and

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135. For an account of the challenge posed by the rise of the administrative state to democracy (and hence formal Rule of Law theory), see Henry S. Richardson, *Administrative Policy-making: Rule of Law or Bureaucracy?*, in RECRAFTING THE RULE OF LAW: THE LIMITS OF THE LEGAL ORDER 309, 309 (David Dyzenhaus ed., 1999). For an analysis of the failure of the Rule of Law theory to incorporate the role of non-public actors in regulation and policy-making, see Jody Freeman, *Private Parties, Public Functions and the New Administrative State*, in RECRAFTING THE RULE OF LAW: THE LIMITS OF THE LEGAL ORDER 331, 331 (David Dyzenhaus ed., 1999).

136. See Tamanaha, *supra* note 7, at 519-523.

137. Colin Scott, *Accountability in the Regulatory State*, 27 J.L. & Soc’y 38, 44 (2000).

138. *Id.*

139. *Id.* at 45.

140. See Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437, 448-51 (2003).

minimalist *ultra vires* review. Rule of Law thus becomes a demand for less judicial power that ties in neatly with the reduction in executive power at the heart of the regulatory state.

However, the regulatory state, the privatization and fragmentation of governmental functions, has in turn created new problems of accountability.<sup>141</sup> These problems are addressed through a reliance on market forces, consumer-citizen action, the construction of dense and complicated webs of accountability-inducing procedural mechanisms—such as quasi-legislative notice and hearing requirements for rule-making, transparency, and disclosure obligations<sup>142</sup>—and institutions such as ombudsmen and specialized tribunals.<sup>143</sup> However, the spectre of special interest dominance and capture of regulatory processes by powerful private interests continuously haunts the regulatory state and its public-private partnership arrangements. “As important decisions are shifted to informal processes involving nongovernmental actors, how is the law to prevent factional abuse of power, curb the tyranny of expertise, and ensure public-regarding outcomes, including distributional equity?”<sup>144</sup>

Unlike neo-classical liberalism, social liberalism has come to accept the welfare state and the need for some state interference in the private domain to counter deeply-entrenched inequalities. The problem for social liberalism then is how to reconcile “*both* the rule of law *and* a reconstructed, more emancipatory welfare state.”<sup>145</sup> For social liberalism, the continued failures of accountability in the regulatory state demand the regulation of the regulators. Traditional judicial review of executive

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141. See generally Scott, *supra* note 137.

142. See Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2129-30 (2005). Edward Rubin argues that it is misleading to describe such measures as accountability procedures. *Id.* Accountability inherently involves hierarchical structures, supervision and control of subordinates by their superiors, and evaluative standards that vary according to administrative needs. *Id.* Due to a range of practical constraints, these evaluative standards of accountability are generally procedural. *Id.*

143. Stewart, *supra* note 140, at 441-42.

144. *Id.* at 451-52.

145. Bill Scheuerman, *The Rule of Law and the Welfare State: Toward a New Synthesis*, 22 POL. & SOC'Y 195, 195 (1994).

action, the policing of jurisdictional boundaries and legislative mandates, and the insistence upon fair decision-making procedures by the courts have emerged in recent decades as the central accountability mechanisms and as the “last resort” that gives bite to the entire network of formal and informal accountability networks.<sup>146</sup> For social liberalism *ultra vires* review and procedural legality have thus acquired a new relevance in the regulatory state. However, since the aspirations of social liberalism are not confined to the control of governmental power in order to ensure the maximum possible autonomy of private action, as in neo-classical liberalism, something more than formal legality and traditional judicial review is needed. Since the aspirations of social liberalism include some measure of substantive equality, then a conception of the Rule of Law rooted in such ideological terrain is in deep tension with the regulatory state. Such a conception demands that the state should interfere to some extent in the private ordering to counter embedded inequalities. This is the “[tragic] ‘paradox of politics’” faced by social liberalism and its engagement with the Rule of Law.<sup>147</sup>

While the fears of social liberalism are catered for by formal legality and traditional judicial review, its hopes and aspirations call out for a new kind of administrative law that not only constrains the arbitrary exercise of powers but also “ensures that regulatory agencies exercise their policymaking discretion in a manner that is reasoned and responsive to the wide range of social and economic interests affected by their decisions.”<sup>148</sup> This kind of administrative law is much more intrusive and substantive as compared to the traditional *ultra vires* model of administrative law rooted in formal legality. Such administrative law is amenable to judicial review of executive action based on rights, on legitimate expectations, and maybe even occasional review of executive policy based upon the requirement of proportionality. Neo-classical liberalism may know where to draw the line but social liberalism certainly fails to make a coherent case for a meaningful distinction between formal and substantive Rule of Law, between administrative law

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146. Jan Freigang, *Is Responsive Regulation Compatible with the Rule of Law?*, 8 EUR. P. L. 463, 471 (2002).

147. Krygier, *supra* note 68, at 75.

148. Stewart, *supra* note 140, at 439.

and the judicialization of administrative policy. The administrative-regulatory state, and the phenomena associated with the corresponding significance of the judicial review of administrative action, thus provides the terrain upon which Rule of Law contestations have to be increasingly resolved. The continuing rhetorical pull of the Rule of Law ideal and the expanding role of the courts in the review of the actions of the regulatory state (or the regulation of the regulators), demands a reconciliation. This requires a re-conceptualization of Rule of Law in such a fashion that the traditional boundaries between law, politics, policy and rights are meaningfully redrawn, and re-contextualized.

### C. Rule of Law in the Global South: Rule of Law-and-Development?

In addition to the contexts of state structures, Rule of Law theorists are also becoming increasingly mindful of the social context, at least to the extent of acknowledging that an important prerequisite for the implantation of Rule of Law is that law possesses significant traction as a matter of social fact.<sup>149</sup> However, even such mindfulness of the relevance of the sociological dimensions has not opened up many to the bigger, more significant and much more interesting questions about the relation between (rule of) law and society. The most important issue is not whether a particular society is ripe for the implantation of the Rule of Law. That issue can never be meaningfully addressed unless we answer the prior and more significant questions: what conceptions of the Rule of Law has that society germinated? Why have some conceptions been more successful? Whether the dominant ideas about the Rule of Law are also the most legitimate? The problem with conceptualizing the Rule of Law apart from the political, economic, and cultural contexts is that it obscures these vital questions.

One of the great ironies, and a tragic one at that, of the universalization of the Rule of Law is that the dominant formal and substantive versions have come to dominate the discourse even in the

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149. See Martyn Krygier, *The Rule of Law: Legality, Teleology, Sociology*, in RELOCATING THE RULE OF LAW 1-3 (Gianluigi Palombella & Neil Walker eds., 2009).

Global South where the political, constitutional, economic, and social contexts are fundamentally different from those in the North where most of the speculation over the meaning and relevance of abstract-universal Rule of Law theory has historically been situated. In much of the Global South constitutionalism is weak and democracy is thin or procedural.<sup>150</sup> And yet, the usage of law to further coercive state power is pervasive.<sup>151</sup> While a core concern of formal Rule of Law theory, the prevention of arbitrary exercise of power, is especially relevant, formal legality is distinctly unable to perform a useful function in this respect. At the same time the bureaucratic-administrative state has failed to transform in many places in the Global South into a welfare state,<sup>152</sup> and some of the core concerns of critical scholars (that formal legality inhibits the development of a welfare-oriented state) is also simultaneously relevant. A powerful state is understandably feared for it is dominated by the elites, but it is at the same time acknowledged that only the state can command the sort of power and resources that are arguably necessary to resolve entrenched problems of social and economic inequality. The concern for democracy is not that of the tyranny of the majority but often that of the tyranny of the minority. Even judges have historically been part of the elites,<sup>153</sup> and where occasionally they have stood up to the state, the masses have looked on with simultaneous amazement and indifference at internecine conflicts (presumably of interest) amongst the entrenched classes.

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150. See generally, e.g., JALAL, *supra* note 46; Meghnad Desai, *Why is India a Democracy?* in *DIVIDED BY DEMOCRACY: CROSS BOARDER TALKS* (Meghnad Desai & Aitzaz Ahsan eds., David Page series ed., 2005); John T. Sidel, *Bossism and Democracy in the Philippines, Thailand and Indonesia: Towards an Alternative Framework for the Study of 'Local Strongmen'*, in *POLITICISING DEMOCRACY: THE NEW LOCAL POLITICS AND DEMOCRATISATION* 51 (John Harris, Kristian Stokke & Olle Törnquist eds., 2005).

151. See generally, e.g., NICK CHEESMAN, *OPPOSING THE RULE OF LAW: HOW MYANMAR'S COURTS MAKE LAW AND ORDER* (2015); Jean Comaroff & John L. Comaroff, *Law and Disorder in the Postcolony: An Introduction*, in *LAW & DISORDER IN THE POSTCOLONY* 1 (Jean Comaroff & John L. Comaroff eds., 2006).

152. See, e.g., Björn Dressel, *Public Administration and the Rule of Law in Asia: Breadth without Depth?*, 36 *ASIA PAC. J. OF PUB. ADMIN.* 9, 9-10 (2014).

153. See, e.g., Balakrishnan Rajagopal, *Pro-Human Rights but Anti-Poor? A Critical Evaluation of the Indian Supreme Court from a Social Movement Perspective* 8 *HUM. RTS. REV.* 157, 157-59 (2007).

If the dominant conceptions of formal and substantive (liberal rights-oriented) legality are rooted in the political and socio-economic contexts of Western democracies, are these suitable models for postcolonial states and transitional democracies of the Global South? Yet, these are the versions of the Rule of Law that the international development and donor agencies have purveyed as the elixir to the ills of under-development and have crammed down the throats of recalcitrant states.<sup>154</sup> The impetus to define the Rule of Law in relatively thin terms of formal legality or basic rights even in the radically different contexts of the Global South is evident, for these are the only versions that can be marketed in standardized packages. The inadequacy of the dominant conceptions is also particularly obvious here: the failure to counter the worst excesses, the refusal to challenge the *status quo*, and the silence on matters that are most relevant to those who need protection. There is another clear ideological tilt as well, as not only formal legality but property-oriented individual rights regimes inherently favor a certain brand of capitalism suitable to multinational corporations and significant players in the global trade.<sup>155</sup>

In response, the critics of the elitist and liberal-capitalist economic agenda at the heart of global trade are increasingly standing their ground and re-appropriating the Rule of Law against these old and new forms of hegemony. Such reconceptualization of the Rule of Law is proceeding in three related dimensions. Firstly, participants of the Rule of Law enterprises are being asked to fully appreciate its “new discursivity” which “reveals that the rule of law . . . means different things to different peoples, in ways that render any general theory about it inchoate/impossible. Its histories differ not just across legal and social cultures but also within same-law regions. Its prescriptive bases also remain contested sites.”<sup>156</sup> There are thus many conceptions of the Rule of Law, the role of law, and its institutions in any given society. Any de-contextualized theory of the Rule of Law which obscures its contestedness in a society and refuses to acknowledge who it privileges,

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154. See Tamanaha, *supra* note 7, at 537-541, 546-47.

155. *Id.* at 541.

156. Baxi, *supra* note 119, at 325-26.

and who it disadvantages, will not be neutral or de-politicized merely on account of such oblivion or denial.

Secondly, there is the demand to articulate visions of the Rule of Law that are tied in with concrete questions of constitutional politics. Western accounts of the Rule of Law, rooted in European history, further constitutional doctrines that leave the most important questions regarding constitutionalism, governance structures and the constraint of arbitrary exercise of governmental powers unaddressed:

Does the rule of law . . . privilege ‘good’ and ethically viable ways of structuring representation? . . . Does it favour *federalism* over *unitary*, *republican* over *monarchical*, *secular* over *theological*, *flexible* over *rigid* constitutional formats? Does it privilege plenary judicial review over forms of legislative, executive and administrative action? . . . How may hierarchies of administration of justice be devised, justices appointed and their autonomy and accountability be concretely defined? In what ways may the rule of law prescribe the structuration of legislative power: should this be accompanied by an integral ethical minimum, such that there may be said to exist critical ethical thresholds to ‘parliamentary sovereignty’?<sup>157</sup>

Without meaningful attempts to answer these and similar questions, Rule of Law theory is mere conceptual play that has little relevance even to the minimal concerns of the constraint of governmental powers and liberty subject to law. Worse still, plagiarizing universalist abstract answers to some of these questions from the North—such as the uncritical adoption of separation of powers—may become an obstacle to the quest for socio-economic justice that is increasingly at the heart of the Rule of Law in the Global South.<sup>158</sup>

Thirdly, the reconceptualization of the Rule of Law is taking place in tandem with the reorientation of democracy. Wherever formal democracy exists in the Global South, it is riven with elite control of

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157. *Id.* at 325-26.

158. See generally David Bilchitz, *Constitutionalism, the Global South and Economic Justice*, in CONSTITUTIONALISM OF THE GLOBAL SOUTH: THE ACTIVIST TRIBUNALS OF INDIA, SOUTH AFRICA AND COLOMBIA (Daniel Bonilla Maldonado ed., 2015).

politics and hence deep democratic deficits.<sup>159</sup> In response, there are myriad localized forms of resistance often involving understandings and interpretations of the Rule of Law that diverge from its ideation by the elite-state complex.<sup>160</sup> The Rule of Law is valued as a mode of challenging socio-economic and political inequality and legal institutions are only relevant as “a terrain of struggle of the multitudes against the rule of the miniscule.”<sup>161</sup> In such understandings, elected legislatures are not necessarily democratic and do not necessarily deserve the deference that dominant Rule of Law theory traditionally accords them. Occasionally it is a good thing, dependent always on specific outcomes, that courts refuse to acknowledge the supremacy of the legislatures in the name of rights protection.

In opposition to abstract theorization, a call is thus being made to envision the Rule of Law with the explicit ideological agenda of challenging deep-rooted inequalities in both the public and private domains, which includes *positive obligations of the state* to make law for the disadvantaged, deprived and the disempowered.<sup>162</sup> Given the anxieties generated by the old and de-contextualized accounts, nominally neutral but usually highly supportive of the *status quo*, reconstructed Rule of Law discourses in the Global South must be deeply contextualized and politicized. Rule of Law must be mindful of historical inequalities and simultaneously imbued with visions of more egalitarian futures. It must become the site of the most significant contestations over the structure of the legal system and of the value of law in redressing inequalities. To the extent that such situated and essentially contested accounts of the Rule of Law may lead to comparative insights, the South has much to learn from the South to the extent that contexts and the historical experiences with law are similar. In fact, the South has much to

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159. See, e.g., Jackie Dugard, *Courts and Structural Poverty in South Africa: To what Extent has the Constitutional Court Expanded Access and Remedies to the Poor?*, in CONSTITUTIONALISM OF THE GLOBAL SOUTH: THE ACTIVIST TRIBUNALS OF INDIA, SOUTH AFRICA, AND COLOMBIA 293, 299-304 (Daniel Bonilla Maldonado ed., 2013).

160. *Id.* at 301-304.

161. See Baxi, *supra* note 119, at 326.

162. *Id.* at 325. See also Albie Sachs, J., *Social and Economic Rights: Can they be Made Justiciable?* 53 SMU L. REV. 1381, 1381, 1388-89 (2000).

teach to the Global North as well. What the slow, glacier-like pace of legal change in the North masks—*i.e.*, the inherent contingency of law, its institutions and processes—the fluidity and the contestability of legal transformation in the South lay bare.

#### A CONCLUSION ON THE POLITICIZATION OF LAW AND ITS RULE

There is an increasing, if not widespread, acknowledgement of the essentially political nature of Rule of Law in the sense that the contestations over the meaning and relevance of the Rule of Law are essentially debates about the configuration of constitutional arrangements, state structures and complex state-society dynamics. As such, the politics of the Rule of Law are fully imbricated in the politics of law.<sup>163</sup> However, while law is no longer seen as a self-regulating, insulated or autopoietic system, there is at the same time recognition of the fact that the politics of the law (and of the Rule of Law) is a very specific form of institutionalized politics which operates within parameters accepted by at least a majority of the legal complex, and often even the public. Legal politics can be differentiated from other forms of politics in that “principles of coherence or consistency are more pronounced within law”<sup>164</sup> and it is characterized by a certain degree of inertia, incremental development, reasoned resolution, and either-or outcomes, amongst other characteristics—legal justice as opposed to both the compromise of electoral politics and the policy-driven discretion of administration.<sup>165</sup> Other characteristics of the politics of law include

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163. See generally Leslie Green, *The Political Content of Legal Theory*, 17 PHIL. SOC. SCI. 1 (1987).

164. Alan C. Hunt, *Law's Empire or Legal Imperialism?* in READING DWORKIN CRITICALLY 9, 41 (Alan Hunt ed., 1991).

165. Note that “law’s means are more important in identifying law as a social institution than law’s ends . . . what makes law special are the means by which it serves those ends.” Leslie Green, *Law as a Means*, in THE HART-FULLER DEBATE IN THE TWENTY-FIRST CENTURY 169, 173 (Peter Cane ed., 2010). Thus law may be distinguished from other functional kinds that serve similar purposes in the maintenance of order and regulation of society, such as custom, religion or tradition, by its “*technique*[.] Law is thus a *modal kind* and not a functional kind at all; it is distinguished by its means and not

the special and institutionalized forms of practical reasoning reflected, for example, in the principles of statutory interpretation; adversarial, inquisitorial or mixed litigation processes; burdens and standards of proof; the methods of Common Law, Civil Law or hybrid legal systems; varying degrees of adherence to precedents; the special nature of legal remedies, *etc.* All of these, collectively, the technology of law or the modes of doing law, are contingent in the sense that these could be different and are subject to change. All of these are also political in the sense that they are not ends in themselves but rather serve ends and policies external to them and the legitimacy of which ends is always open to contestation.

The politicization of law has politicized the Rule of Law to its core. Yet, the Rule of Law has emerged virtually unscathed, and by some accounts has attained an even more significant position in the catalogue of political ideals *on account of* (not *despite*) its' very politicization. The Marxists appear to have increasingly adopted the Rule of Law as a legitimate political philosophy.<sup>166</sup> Even Unger has reconsidered his position.<sup>167</sup> In the Global South the Rule of Law has begun to achieve the status of an over-arching political ideal that not only incorporates, but gives relevance and meaning to other political ideals including democracy, constitutionalism, and rights. How can we explain the supposedly ironic situation that the philosophical contestations over the meaning of the Rule of Law, its inherent or contingent value, its underlying ideology and political nature, have all reached stalemates and yet the resonance of the Rule of Law has only increased? If we were to encapsulate the equilibrium reached in the philosophical debates charted earlier it would, roughly, be along these lines. The Rule of Law has a formal core, which has value only to the extent that it enhances the efficiency of law in achieving those socio-politico-economic ends that

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its end[s]. The moral value of law depends primarily on the ends to which it means are put, and that is a contingent matter." Green, *supra* note 55, at 1711 (emphasis added).

166. See McDonald *supra* note 11, at 213; Olufemi Taiwo, *The Rule of Law: The New Leviathan?*, 12 CAN. J. L. & JURISPRUDENCE 151, 151-52 (1999).

167. See Peerenboom, *supra* note 11, at 53 n.41 (referring to UNGER, *supra* note 77, at 181 and ROBERTO M. UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? 64 (1996)).

may be ascribed to law. The ultimate value of the Rule of Law, however, is contingent on those very substantive ends that are external to formal legality. The value of formal or procedural legality, as the inner principles of the efficiency of law, and of the technology of law generally, is contingent on how well the law serves those socio-political ends. The Rule of Law then becomes a theory of justice according to law; a normative theory of the proper place of law in society and polity; a theory about the aims the law can effectively serve and the manner in which the technology of law may legitimately further collective social and political goals. It is also a normative account of legal change, for the technology of law is also subject to modification in accordance with the demands placed upon it.

Therefore, what we may discern from a myriad of situated, contextualized and contested—and in that sense politicized—accounts of the Rule of Law is that the following big questions cannot be answered in the abstract: How to draw the distinctions between formal and substantive Rule of Law? How to meaningfully discern the boundaries between law and politics, and law and policy? How to allocate governmental powers amongst state institutions? How to determine the legitimate bounds of judicial review? Every thin theory of the Rule of Law is embedded in a thick theory; every thick theory is in turn contingent upon theories of constitutionalism, of state structure, of democracy, and of justice, whether articulated or not. A theory of the Rule of Law is thus, in its broadest and most meaningful sense, an account of the place of law in society, in polity, in history; it is a socio-politico-economic account of what the technology of law is good for in a given state and society. It is a theory of the authority of legal institutions and the legitimacy of law. Thus, an explanation for the perpetual rise in the prominence of the Rule of Law as a political ideal and its increasing relevance in political rhetoric and practice has to be found in altogether different dimensions: that of the social-political-economic contexts.<sup>168</sup> A theory of the Rule of Law must accord with its social and political

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168. See *Philosophy, Political Morality, and History: Explaining the Enduring Legacy of Hart-Fuller Debate*, 83 N.Y.U. L. REV. 1059, 1072-78 (2008); Green, *supra* note 55, at 1687.

context. It must conform to the aspirations of those to whom it is addressed—not only its specific clientele within the legal complex but its' supposed beneficiaries in the society. Only then will it achieve theoretical soundness and also command fidelity.

The resonance of the Rule of Law in Pakistan, as in any other place, can be explained only in light of its' constitutional politics, state structure, and social orderings. It is not possible to evaluate the theory of Rule of Law that the superior courts of Pakistan have espoused in their recent jurisprudence except within the historical contexts of Pakistan's constitutional development, the transformation in its state structures, the evolution of its socio-cultural environments, and the distribution of its economic resources. It is only in the lived reality of the law in Pakistan's evolving state-society dialectics that the Supreme Court, and those seeking to critique its jurisprudence, might find meaningful ways to engage with the inherent politics of the Rule of Law.

