The Rule of Law in mainstream development: an inflated concept?

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Contents

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Abstract

The Rule of Law is taken to express a straightforward idea: societies should be governed by laws rather than the whims of humans. More precisely, the Rule of Law expresses the idea that the State or sovereign exercises its power within the scope of limiting public norms, namely laws. However, its usage has been taken well beyond its traditional role of curtailing the power of the State or sovereign; it is inserted as a response to virtually every demand of the mainstream development agenda. Indeed, the Rule of Law has been overexpanded by an ever-growing list of development demands and inflated with features to address all of these demands. Under this framing, it is a concept that is overworked, overdetermined, and devoid of analytical promise. In this thesis, I undertake to explain how and why the Rule-of-Law concept has been expanded to match the demands of mainstream development. I argue that the enlargement of the mainstream development agenda has led to the concomitant enlargement of the Rule of Law's place in development, resulting in the overexpansion and inflation of the Rule-of-Law concept. I illustrate how development agencies have, in an overlapping yet not necessarily coordinated manner, treated the Rule of Law as an idea to be continuously repurposed to align with the development-related ends of these agencies. By tracing the historical lineage of the Rule of Law, I broaden discussions on the concept beyond its modern-day uses to find what is core to and enduring about it. Moreover, by deconstructing the Rule of Law's intersection with the Law and Development Movement, I pinpoint where the overexpansion and inflation of the Rule of Law lift off. I argue that what has led to this overexpansion and inflation, specifically, is the fusing of Law and Development's focus on the *role* of law as an instrument of development with the Rule of Law as an effective check against arbitrary political power. Finally, I identify and critically analyze the consequences of the

Rule of Law's overexpansion and inflation in mainstream development, which confuse, rather than clarify, the connections between the Rule of Law and development.

Sommaire

La règle de droit est considérée comme l'expression d'une idée simple : les sociétés devraient être régies par des lois plutôt que par les caprices des humains. Plus précisément, l'État de droit exprime l'idée que l'État exerce son pouvoir dans le cadre de normes publiques contraignantes, à savoir les lois. Cependant, son utilisation a été poussée bien au-delà de son rôle traditionnel de limitation du pouvoir de l'État ; elle est insérée comme réponse à pratiquement toutes les demandes du programme de développement général. En effet, l'État de droit a été hypertrophié par une liste toujours plus longue de demandes de développement et gonflé de caractéristiques pour répondre à toutes ces demandes. Dans ce cadre, c'est un concept qui est surchargé, surdéterminé et dépourvu de promesses analytiques. Dans cette thèse, j'entreprends d'expliquer comment et pourquoi le concept d'État de droit a été élargi pour répondre aux exigences du développement général. Je soutiens que l'élargissement de l'agenda du développement général a conduit à l'élargissement concomitant de la place de l'État de droit dans le développement, ce qui a entraîné la surexpansion et l'inflation du concept d'État de droit. Je montre comment les agences de développement ont, d'une manière qui se chevauche mais qui n'est pas nécessairement coordonnée, traité l'État de droit comme une idée qu'il faut continuellement repenser pour l'aligner sur les objectifs de développement de ces agences. En retraçant la lignée historique de l'État de droit, j'élargis les discussions sur le concept au-delà de ses utilisations modernes pour trouver ce qui est essentiel et durable dans ce concept. En outre, en déconstruisant l'intersection de l'État de droit et le mouvement Droit et Développement, j'identifie le point de départ de la surexpansion et de l'inflation de l'État de droit. Je soutiens que ce qui a conduit à cette surexpansion et à cette inflation, en particulier, c'est la fusion de l'accent mis par le mouvement Droit et Développement sur le le *rôle* du droit en tant qu'instrument du développement avec l'État de droit comme un

contrôle efficace contre le pouvoir politique arbitraire. Enfin, j'identifie et analyse de manière critique les conséquences de la surexpansion et de l'inflation de l'État de droit dans le courant dominant du développement, qui brouillent les liens entre l'État de droit et le développement au lieu de les clarifier.

Introduction

The Rule of Law is taken to express a straightforward idea: societies should be governed by laws rather than the whims of humans.[1] More precisely, the Rule of Law expresses the idea that the sovereign or State exercises its power within the scope of limiting public norms, namely laws.[2] To help ensure that laws are a constraint on political power rather than just a tool that furthers it, the Rule of Law places, at minimum, some requirements on the form laws take, known as requirements of formal legality.[3] These requirements may include, for example, that laws be promulgated and thus knowable to citizens, framed generally to govern a society rather than target one or a few individuals, or applicable prospectively rather than retrospectively. However, there is substantial debate on whether formal legality is sufficient to address serious excesses of political power.[4] Indeed, the requirements of formal legality could, in principle, co-exist with unjust laws, since formal legality is concerned with the form of the norm that governs State conduct rather than with

[1] The use of the phrase *the* Rule of Law is not meant to imply that there is but one instantiation of the Rule of Law. Indeed, there are different ways to "instantiate a society in which government officials and citizens are bound by and abide by the law." Rather, the phrase *the* Rule of Law is purposefully used to avoid confusion with *a* rule of law. See Brian Z Tamanaha, "The History and Elements of the Rule of Law" (2012) Singap J Leg Stud 232–247 at 247.

[2] The Rule of Law need not be understood exclusively in the context of the State. For example, René Provost has considered the concept of a "rebel rule of law" as administered by the courts of non-State armed insurgents. See René Provost, "Rebel Rule of Law and FARC Justice" in *Rebel Courts: The Administration of Justice by Armed Insurgents* (Oxford, New York: Oxford University Press, 2021). Throughout the thesis, I often refer to the Rule of Law's role in overseeing State conduct largely for the sake of simplicity. As I will demonstrate in the thesis, the Rule of Law can incorporate different institutions and institutional demands to deal with absolute or unruly political power across different forms of political organization. For an encyclopedic overview of the Rule-of-Law concept, see Jeremy Waldron, "The Rule of Law" in Edward N Zalta, ed, Stanf Encycl Philos, Summer 2020 ed (Metaphysics Research Lab, Stanford University, 2020).

[3] The requirements of formal legality are perhaps most famously expressed by Lon Fuller in *The Morality of Law*. He describes eight principles of legality: generality, promulgation, no retroactive laws, clarity, no contradictions, no laws requiring the impossible, constancy of the law through time, and congruence between the official action and declared rule. See Lon Fuller, *The Morality of Law*, Yaakov Elman & Israel Gershoni, eds, Storrs lectures on jurisprudence 1963 (New Haven, CT: Yale University Press, 2000) at 33-94.

[4] Formal legality requires a government to exercise power in conformity with laws and, moreover, that it respects certain conditions regarding the form that laws should take (e.g., laws should be knowable to the public, framed generally, operate prospectively, etc.). Such formal requirements grant citizens protection against absolute or unruly power but not necessarily against "bad" laws. For a deeper discussion on this issue, see Martin Krygier & Adam Winchester, "Arbitrary power and the ideal of the rule of law" in Christopher May & Adam Winchester, eds, *Handb Rule Law* (Edward Elgar Publishing, 2018); see also Jørgen Møller, "The advantages of a thin view" in Christopher May & Adam Winchester, eds, *Handb Rule Law* (Edward Elgar Publishing, 2018).

the aims or values that the norm promotes per se.[5] Accordingly, some theorists have argued the need for "thicker" definitions of the Rule of Law that may include guarantees of procedural justice[6] and even substantive ideals such as human rights[7] or respect for private property.[8]

To better understand the form and basic purpose of the Rule of Law, it is important to consider why *law* is a norm that is worth being ruled by; why not the rule of *unlaw*?[9] As will be demonstrated, a common thread throughout the history and evolution of the concept of the Rule of Law has been that a State governed by laws would administer power more predictably, allowing citizens[10] to know the range of activity that is not prohibited. There may be no escaping the involvement of government in our lives, particularly given the continued expansion of the administrative state.[11] However, maintaining spheres of individual freedom is possible if State power is channeled through laws and citizens know in advance how these laws will operate, so that they know what to expect in their dealings with the State and fellow citizens.[12]

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[5] See Jeremy Waldron, "The Concept and the Rule of Law" (2008) 43:1 Ga Law Rev 1–62 at 7-8; see also Waldron, *supra* note 2.

[6] According to Jeremy Waldron, formal legality fails to account for the role of courts in applying laws and upholding the procedural guarantees that are integral to, *inter alia*, a fair trial. See Waldron, "The Concept and the Rule of Law", *supra* note 5 at 20-24.

[7] See Irene Kahn, "Shifting the Paradigm: Rule of Law and the 2030 Agenda for Sustainable Development" in Irene Kahn et al, eds, *World Bank Leg Rev Vol 7 Financ Implement Post-2015 Dev Agenda Role Law Justice Syst* (The World Bank, 2016).

[8] See Cass Sunstein, "Property Rights Systems and the Rule of Law" in Enrico Colombatto, ed, *The Elgar Companion to the Economics of Property Rights*, (Oxford: Edward Elgar Publications, 2004).

[9] Many thanks to Professor Frédéric Mégret for raising these questions as part of his commentary on my thesis presentation to the 2020-2021 LL.M. cohort.

[10] The phrase "citizen" need not imply citizenship status. Its use in this thesis is to refer to a person who is subject to the laws and other norms of a particular society.

[11] See Susan E Dudley, "Milestones in the Evolution of the Administrative State" (2021) 150:3 Daedalus 33–48.

[12] While discourse on the Rule of Law has often focused on the vertical relationship between the State and citizens, some have argued that the Rule of Law may require that relations among citizens also adhere to laws and legal norms. See, for example, Martin Kwan, "China's Rule of Law Development: The Increasing Emphasis on Internationalization of Legal Standards and the Horizontal Rule of Law – NYU JILP", online: <https://www.nyujilp.org/chinas-rule-of-law-development-the-increasing-emphasis-on-internationalization-of-legal-standards-and-the-horizontal-rule-of-law/>. See also Brian Z Tamanaha, "A Concise Guide to the Rule of Law" (2007) St. John's Univ. Sch. L. Legal Stud. Rsch. Paper Series, Paper No. 07-0082.

Indeed, the Rule of Law is one of the few ideals to achieve global acceptance.[13] As a result, its usage has been taken well beyond its traditional role of channeling and curbing State power.

In international relations, "[t]he rule of law is a major source of legitimation for governments."[14] Virtually every government proclaims to be a proponent of the Rule of Law and touts its own practices or ideological stances as Rule of Law-abiding. In the global finance realm, the Rule of Law is a key indicator in indexes on ease of doing business across countries, given the Rule of Law's purported link to the effective administration of property rights, credit, commercial contracts, and other financial tools.[15] It has been argued that such indexes reduce the Rule of Law to a guiding principle for investment.[16] Traditionally, the Rule of Law has been treated as an ideal to be promoted in the interests of those who must live under the control of *their* government.[17] Yet, economic globalization may be mutating this traditional Rule-of-Law imperative in order to bolster the economic interests of outsiders seeking to make predictable investments and steady profits.[18]

The Rule of Law is also often used to frame general discussions on the controversial use of State power, albeit in contradictory ways. During the 2020 pipeline and railway protests in

[13] See Brian Z Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge, United Kingdom: Cambridge University Press, 2004) at 2; see also Dani Rodrik, "Order in the jungle" *The Economist* (13 March 2008), online: <http://www.economist.com/briefing/2008/03/13/order-in-the-jungle>.
[14] See Tamanaha, *supra* note 1 at 232.
[15] According to Robert Barro, the overall point of these indexes is to reward high rankings to jurisdictions where investment is well facilitated and effectively protected. See Robert J Barro, "Determinants of Democracy" (1999) 107:S6 J Polit Econ at S173.
[16] See Jeremy Waldron, *The Rule of Law and the Measure of Property*, The Hamlyn Lectures (Cambridge: Cambridge University Press, 2012) at 11-12.
[17] *Ibid*.
[18] *Ibid*.

Canada—stoked by a gas pipeline project through the Wet'suwet'en traditional territory—the Rule of Law was a linchpin in how people expressed support for or criticism of the Wet'suwet'en cause. Some called Canada's use of force to enforce a British Columbia court injunction by removing Wet'suwet'en blockades as necessary to uphold the Rule of Law.[19] Others saw this appeal to the Rule of Law as providing a veneer of legitimacy to paramilitary action against protesters, and performing an overstretch of Canadian law over Indigenous law and legal traditions.[20]

While the Rule-of-Law concept has been overextended and has sustained inconsistent use in many areas of thought and practice, it has become a totalizing orthodoxy in the field of international development. Its usage has been taken well beyond its traditional role of curbing State power; it is inserted as a response to virtually every demand of the mainstream or prevailing development agenda, as advanced by international development organizations. Indeed, the Rule of Law has been referred to as the "*sine qua non* to development."[21] The United Nations General Assembly officially declared the Rule of Law essential to virtually every aspect of social protection, including "sustained and inclusive economic growth, sustainable development, the eradication of poverty and hunger and the full realization of all human rights and fundamental

[19] In response to this conflict, British Columbia Premier John Horgan publicly stated that "the rule of law applies in British Columbia" and that the gas pipeline project would proceed despite the longstanding opposition of Wet'suwet'en Hereditary Chiefs. See "Wet'suwet'en protests and arrests: Here's a look at what's happening now | Globalnews.ca", online: *Global News* <https://globalnews.ca/news/6517089/wetsuweten-bc-pipeline-protests/>.
[20] See, for example, Jaskiran Dhillon & Will Parrish, "Exclusive: Canada police prepared to shoot Indigenous activists, documents show", *The Guardian* (20 December 2019), online: <https://www.theguardian.com/world/2019/dec/20/canada-indigenous-land-defenders-police-documents>; see also Katie Hyslop, "Wet'suwet'en Crisis: Whose Rule of Law?", (14 February 2020), online: *The Tyee* <https://thetyee.ca/News/2020/02/14/Wetsuweten-Crisis-Whose-Rule-Law/>.
[21] See Kerry Rittich, "The Future of Law and Development: Second-Generation Reforms and the Incorporation of the Social" in David M Trubek & Alvaro Santos, eds, *New Law Econ Dev* (Cambridge: Cambridge University Press, 2006) 203–252 at 219.

freedoms …"[22] For the IDLO,[23] the Rule of Law is a culture and daily practice "inseparable from equality, from access to justice and education, from access to health and the protection of the most vulnerable."[24] The Government of Canada affirms that the Rule of Law can cater to social interests and private businesses in step: "[t]he rule of law promotes social development by strengthening the voices of individuals and communities. It also promotes economic development by establishing a level playing field where businesses can thrive, encouraging foreign investment, and combatting corruption."[25] Finally, for the OSCE,[26] the Rule of Law is seemingly a full picture of justice: it "not only encompasses formal legal frameworks, but also aims at justice based on the full acceptance of human dignity."[27]

How did the Rule of Law—a concept that proposes law as an answer to arbitrary political power—come to be defined by myriad development goals, let alone capture a full picture of justice? Despite these grand aspirations for the Rule of Law, "[it] continues to be one of the least defined concepts or principles in legal theory."[28]

In this thesis, I undertake to explain how and why the Rule-of-Law concept has been expanded to match the ever-expanding mainstream development agenda. This agenda has gone

[22] See "Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels" (2012), online (pdf): *United Nations General Assembly* <https://www.un.org/ruleoflaw/files/37839_A-RES-67-1.pdf> [UN Doc A/RES/67/1] at 2.
[23] International Development Law Organization.
[24] See IDLO, "Rule of Law", (24 February 2014), online: *IDLO - Int Dev Law Organ* <https://www.idlo.int/what-we-do/rule-law>.
[25] See Global Affairs Canada, "Rule of law", (8 June 2017), online: *Government of Canada* <https://www.international.gc.ca/world-monde/issues_development-enjeux_developpement/human_rights-droits_homme/rule_law-primaute_droit.aspx?lang=eng>.
[26] Organization for Security and Co-operation in Europe.
[27] See OSCE, "Rule of law", online: <https://www.osce.org/rule-of-law>.
[28] See Peer Zumbansen, "The rule of law, legal pluralism, and challenges to a Western-centric view: Some very preliminary observations" in *Handb Rule Law* (Edward Elgar Publishing, 2018) at 58-59.

from a narrow focus on economic growth and industrialization post-World War II[29] to the incorporation of progressively more people-centred goals such as basic social protection and other welfarist measures;[30] securing people's dignity and rights alongside the enlargement of their valuable capabilities and functionings;[31] and, since 2015, the promotion of an international "plan of action for people, planet and prosperity."[32]

Throughout this thesis, I will be engaging with an understanding of development that is shifting and enlarging in this way. I argue that the enlargement of the mainstream development agenda has led to the concomitant enlargement of the Rule of Law's place in development, resulting in the overexpansion and inflation of the Rule-of-Law concept. The Rule of Law is overexpanded in the sense that it is taken to span over more than it has the conceptual heft to effectuate change over—it is stretched thin as a concept. The Rule of Law is inflated in the sense that it is overdetermined or overstuffed with features, in part due to the problem of overexpansion.

What has led to this overexpansion and inflation is the fusing of the *role* of law as an instrument of development with the Rule of Law, a concept that advances law as the norm that is best suited to constrain State power. That is to say, development agencies have employed the Rule of Law as a proxy for legal reform more generally, often endowing the Rule of Law with the

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[29] See Nandini Ramanujam et al, *Rule of law and economic development: A Comparative Analysis of Approaches to Economic Development across the BRIC Countries*, Rule of Law and Economic Development Research Group – ROLED (Faculty of Law, McGill University, 2012) at 1-6.
[30] See ILO, *Social security and the rule of law, General Survey concerning social security instruments in light of the 2008 Declaration on Social Justice for a Fair Globalization*, Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1B), International Labour Conference, 100th Session, Geneva, 2011 at paras 161-168.
[31] See Ingrid Robeyns, "The Capability Approach: a theoretical survey" (2005) 6:1 Journal of Human Development 93-117.
[32] See "Transforming our world: the 2030 Agenda for Sustainable Development" (2015) *United Nations General Assembly* [UN Doc A/RES/70/1] at Preamble.

development-enabling capabilities of legal reform. The fusing of the *role* of law in development with the Rule of Law needs to be closely scrutinized as these two ideas have had separate trajectories given their different ends. Distinguishing between them and keeping them separate is especially important as law's role in development seems to continuously evolve and grow alongside the ever-expanding mainstream development agenda. This problem is beyond a penchant for conceptual tidiness. Overexpansion and inflation have made it difficult to employ the Rule of Law as an analytical concept that can break down aspects of unruly or absolute political power and identify features of law that can address these aspects.[33]

The thesis will take the following structure.

In Part 1, I illustrate how development agencies have, in an overlapping yet not necessarily coordinated manner, treated the Rule of Law as an idea to be continuously repurposed to align with the development-related ends of these agencies. As the range of development concerns expands, the Rule of Law's presupposed importance to these concerns is a justification for expanding an agency's mandate into even the political affairs of donor countries, such as through domestic law reform. Correspondingly, indexes that measure the Rule of Law have tended to build out the Rule-of-Law concept to cover or encompass an almost full picture of development.

Part 2 will make the case that the treatment of the Rule-of-Law concept elucidated in Part 1 is clear evidence of its overexpansion and inflation in development work. By tracing the

[33] Simona Draghici writes: "Part of the methodological functions of the analytical concept are attributed to the frame of reference to the extent it is held to serve as a model for the selection of those aspects of the empirical phenomena that are characteristic of it from the mass of empirical observations." See Simona Draghici, "The Analytical Concept and Academic Sociology" (1981) 19:54/55 Rev Eur Sci Soc 305–316 at 313.

historical lineage of the Rule of Law, I broaden discussions on the concept beyond its modern-day uses to find what is core to and enduring about it. I uncover that the Rule of Law is a *teleological* concept: one guided by the *telos* (or end) to provide a solution to the problem of absolute or unruly political power by ensuring that laws guide and constrain political power. Moreover, this telos may determine the anatomy of the Rule-of-Law concept but without presupposing that any specific institution or form of political organization is constitutive of the concept. Indeed, the solution that the Rule of Law proposes might, in principle, be implemented in a variety of ways without reducing the Rule of Law to "a specific or necessary set of institutional arrangements."[34]

With the basic character of the Rule of Law in mind, it will become more obvious why theories of the Rule of Law that assimilate specific institutions or political orderings before ascertaining the *telos* of the Rule of Law put the cart before the horse.[35] When the Rule of Law is oriented around different sets of institutional arrangements, it tends to be redefined and reiterated in relation to the mission or objectives of such arrangements.[36] This has greatly contributed to the treatment of the Rule of Law as "another one of those self-congratulatory rhetorical devices"[37] or

[34] Brian Tamanaha resists the characterization of the Rule of Law as just a specific combination of institutions. He argues that "[o]perating around the world today are many variations of the rule of law, coexisting with individualist-oriented as well as with communitarian-oriented cultures. It has always consisted more of a bundle of ideals than a specific or necessary set of institutional arrangements." See Brian Z Tamanaha, "The Lessons of Law-and-Development Studies" (1995) 89:2 Am J Int Law 470–486 at 476.

[35] However, this argument is not meant to imply that the concept of the Rule of Law cannot contribute to substantive aims such as the protection of rights or the promotion of human development objectives. Indeed, the promulgation of a consistent system of rules is generally more likely to promote basic rights and fair access to public goods than rules that are hard to know or contradict each other. But this is quite a different claim from the claim that the Rule of Law is synonymous with human rights or human development, or the claim that the Rule of Law is not obtained unless these substantive aims are also obtained.

[36] Rachel Kleinfeld pithily explains: "When the rule of law is implicitly defined by its institutions, rather than its ends, the latter tend to be assumed." See Rachel Kleinfeld, "Competing Definitions of the Rule of Law" in Thomas Carothers, ed, *Promot Rule Law Abroad Search Knowl* (Brookings Institution Press, 2010) at 50-51.

[37] See Judith Shklar, "Political Theory and the Rule of Law" in Allan Hutchinson and Patrick Monahan, eds. *The Rule of Law: Ideal or Ideology* (Toronto: Carswell, 1987) at 1.

"an empty vessel to be filled as desired,"[38] rather than a concept that is meant to break down aspects of a specific problem and identify elements of the concept that could provide a solution.[39] In the end, the choice of a development-centric or development-enabling Rule-of-Law concept over a formal one should ultimately be based on the basic purpose of the Rule of Law, and not the aims and values one would like to see incorporated into the concept.[40]

Having made the case for the Rule of Law's overexpansion and inflation, Part 3 will pinpoint where the overexpansion and inflation of the Rule of Law lift off. By deconstructing the Rule of Law's intersection with the Law and Development Movement, I find that Law and Development's emphasis on the *role* of law as an instrument of development has been confused and merged with the Rule of Law. This is a conceptual misstep that has contributed to the overexpansion and inflation of the Rule of Law. It confuses legal reform efforts with a concept that advances law as the norm that is best suited to constrain political power. Finally, I identify and critically analyze the consequences of the Rule of Law's overexpansion and inflation in mainstream development, which confuse, rather than clarify, the connections between the Rule of Law and development.

To be sure, this thesis is not about pinning down the "right" or "true" definition of the Rule of Law. Rather, it urges readers who seek to define the Rule of Law and its basic features to do so in relation to its basic purpose as a concept. Moreover, this thesis does not intend to directly address

[38] See Brian Z Tamanaha, *Law as a means to an end: threat to the rule of law* (Cambridge: Cambridge University Press, 2006) at 1.
[39] See Draghici, *supra* note 33.
[40] See Adriaan Bedner, "The promise of a thick view" in Christopher May & Adam Winchester, eds, *Handb Rule Law* (Edward Elgar Publishing, 2018).

the question of whether the Rule of Law promotes development. The literature on this point is quite mixed as results diverge significantly depending on how the Rule of Law is measured and what conception of development is taken as the benchmark.[41] As my thesis will demonstrate, at the root of these divergences lies confusion about the purpose of the Rule-of-Law concept and how the concept is invoked by this question.

1. The overexpansion and inflation of the Rule of Law at the hands of development agencies

International development agencies have ventured into an array of projects in the name of the Rule of Law—some of a politically sensitive nature—without much critical attention to what the Rule of Law is for and what it could suitably supply to these projects. In Part 1, I closely survey how this treatment of the Rule of Law reflects the perpetuation of unsystematic, fragmentary, and, ultimately, overexpanded and inflated views of the Rule-of-Law concept. The concept's contested nature has made it possible to ascribe to it many features that may appear conducive or amenable to development aims. Notably, the World Bank Worldwide Governance Indicators (WGI) proposes certain development outcomes, such as "access to water for agriculture" and "gender,"

[41] This issue is expertly described by Elliot M Burg: "The first point to note is the difficulty of comparing or contrasting studies with substantially different orientations. Article A, for instance, may construct a highly theoretical model of how law fosters development. Article B, on the other hand, discusses the success of land reform in central Kenya. Both works deal with law, with some concept of development and with developing countries. However, the first is very explicit in expressing what constitutes law, what kinds of goals are developmental, and what relationships exist between the two. The second piece, on the other hand, leaves its assumptions unstated and refrains from generalizing its findings to other geographic settings and other fields of law." See Elliot M Burg, "Law and Development: A Review of the Literature & a Critique of 'Scholars in Self-Estrangement'" (1977) 25:3 Am J Comp Law 492–530 at 499; see also Kevin Davis & Michael J Trebilcock, *What role do legal institutions play in development?* (Washington, DC: International Monetary Fund, 1999); finally, see Kevin Davis & Michael Trebilcock, "The Relationship between Law and Development: Optimists versus Skeptics" (2008) 56:4 Am J Comp Law 895–946.

as a direct measure of the Rule of Law but without spelling out the link between these outcomes and the Rule of Law's basic idea.[42]

The survey below is by no means an exhaustive account of the overexpansion and inflation of the Rule-of-Law concept across the work of development agencies. There are insightful articles on the evolution of legal policy on the Rule of Law in development agencies—I consult these works. However, these moves are not easy to uncover because most of the internal administration of international development agencies, including the development of legal policy, is not done in the public eye. Nevertheless, overexpansion and inflation can still be identified because these agencies put out public-facing, authoritative statements on the Rule of Law. One can observe changes made to the Rule-of-Law concept through iterations of these statements, and one can also observe discrepancies between the definition of the Rule of Law that these agencies promote and the development-related functions they (claim to) carry out under the auspices of the Rule of Law.

It is important to note that the overexpansion and inflation of the Rule of Law that I point to and posit is not a bare fact. Nor is it an assessment made by picking a preferred definition of the Rule of Law (e.g., a "thin" or formal definition rather than a "thick" or more value-driven one) and then using that as a benchmark for assessing whether conceptual overexpansion and inflation have taken place. This would be a question-begging line of argumentation that would fail to satisfy those who do not share the same definition of the Rule of Law as the one being put forward. I aim to demonstrate how the overexpansion and inflation of the Rule of Law are the results of

[42] See The World Bank, "The Worldwide Governance Indicators: Documentation - Rule of Law" [available online: <info.worldbank.org/governance/wgi/Home/downLoadFile?fileName=rl.pdf>].

overlapping, but not necessarily coordinated, efforts by international development agencies to employ the Rule of Law as a driving force behind the mainstream development agenda.

1A. World Bank

The World Bank's embracement of Rule-of-Law building in the 1990s paved the way for the Bank's explicit involvement in legal and institutional development.[43] This took place through the legal reinterpretation of the World Bank's Articles of Agreement that govern the Bank's operations. The Articles restricted Bank loans to discrete projects of "reconstruction or development" (e.g., infrastructure projects), excluding open-ended projects that could require a system-wide or whole-of-government approach or broach sensitive political issues (e.g., overhauling the criminal justice system):

> Loans made or guaranteed by the Bank shall, except in special circumstances, be for the purpose of *specific* projects of reconstruction or development … *The Bank and its officers shall not interfere in the political affairs of any member*; nor shall they be influenced in their decisions by the political character of the member or members concerned. *Only economic considerations shall be relevant to their decisions* … [emphasis added].[44]

In the early 1990s, World Bank General Counsel Ibrahim Shihata reinterpreted these limits and allowed financing for non-specific projects based on considerations that were not just economic.[45] This paved the way for broadscale institutional development. In one of his legal opinions, Shihata writes:

> Under normal circumstances, Bank loans and guarantees are to finance specific projects in the broad sense of this term, which, in my view, includes all well-defined productive purposes whether these are served

[43] See Brian Z Tamanaha, "The Primacy of Society and the Failures of Law and Development" (2011) 44:2 Cornell Int Law J 209–248.
[44] See International Bank for Reconstruction and Development [IRBD] Articles of Agreement, art. III, §4(vii) and art. IV, §10.
[45] See Tamanaha, *supra* note 43; see also Alvaro Santos, "The World Bank's Uses of the 'Rule of Law' Promise in Economic Development" in Alvaro Santos & David M Trubek, eds, *New Law Econ Dev Crit Apprais* (Cambridge: Cambridge University Press, 2006) 253.

> directly (such as in industry and agriculture) or indirectly (such as in infrastructure, *institution building*, social services, etc.) [emphasis added].[46]

Institution building is hardly a "well-defined productive purpose[]" of financing.[47] To justify including "institution building," Shihata noted that "[t]he World Bank has long been concerned with issues of institutional development and public sector management in its borrowing member countries."[48] In another opinion, Shihata tried to narrow down the aspects of institution building that would fall within the limits of the World Bank's mandate:

> … having a system, based on abstract rules which are actually applied and on functioning institutions which ensure the appropriate application of such rules. This system of rules and institutions is reflected in the concept of the "rule of law," generally known in different legal systems and often expressed in the familiar phrase of a "government of laws and not of men"… The existence of such a system is a basic requirement for a stable business environment; indeed for a modern state.[49]

Despite Shihata's attempt to narrow institution building to Rule of Law-building, the Rule of Law hardly served as an effective narrowing device. Indeed, "[o]nce the door was opened for rule of law reform, initially with a narrow concentration on property rights, commercial law, and judicial reform, it was gradually pushed wider to include aspects of the progressive development package."[50]

Shihata went even further to suggest that the Bank could assist countries in designing laws that served the aims of economy and efficiency, with the member's consent.[51] This was, no doubt,

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[46] See Robert C Effros, "The World Bank in a Changing World: The Role of Legal Construction" (2001) 35:4 Int Lawyer ABA 1341–1348 at 1345.
[47] For instance, Douglass C North construed "institutions" broadly to "include any form of constraint that human beings devise to shape human interaction." See Douglass C North, *Institutions, Institutional Change and Economic Performance*, Political Economy of Institutions and Decisions (Cambridge: Cambridge University Press, 1990) at 3-4.
[48] See Effros, *supra* note 46 at 1345, citing Ibrahim F. I. Shihata, *The World Bank in a Changing World* 53 (1991).
[49] See *Ibid* at 1345.
[50] See Tamanaha, *supra* note 43 at 236.
[51] See Effros, *supra* note 46 at 1346.

a considerable shift that is deserving of closer scrutiny. From the outset, the World Bank Articles of Agreement stipulated an explicit prohibition on interfering with the political affairs of any member; this was an almost absolute requirement.[52] There was also a clear requirement in the Articles to limit efforts to specific, well-defined projects. Yet, institution-building efforts under the Articles and the Rule-of-Law banner appear wide-ranging and ever-expanding. Shihata's reinterpretation of the Articles may have pressed on a weak distinction between "economic" and "political" affairs, or it may have highlighted the degree to which "economic" and "political" considerations are difficult to separate in the first place. In attempting to address the potential for such scoping problems through his reinterpretation of the Bank Articles, Shihata appears to have made the Rule of Law *the* channel for building legal infrastructure to support economic development.

Shihata may have genuinely regarded the Rule of Law as an admirable ideal that went hand-in-hand with economic growth and prosperity. Insofar as the World Bank was committed to making people better off through economic means, the Rule of Law, then, should be realized by almost any means necessary—*almost* any means because it appears that he deemed the promotion of human rights too far beyond the scope of the Bank's mandate.[53] However, the World Bank's reticence on incorporating human rights as an element of its work has changed since Roberto Dañino served as General Counsel of The World Bank after Shihata. Dañino argued that the promotion of human rights has become indispensable to the Bank's work and can be justified

[52] *Ibid* at 1346.
[53] See Santos, *supra* note 45 at 272-273, citing Ibrahim Shihata, "The World Bank and Human Rights" in *The World Bank in a Changing World* (M. Nijhoff Publishers, 1991).

within the scope of the Bank's Articles of Agreement.[54] He argued that while "[t]he Articles provide that only economic considerations of economy and efficiency shall be relevant to the decisions of the Bank and its officers," it is now widely understood that there are numerous political and institutional considerations that may have a direct and significant impact on economic growth.[55] And so it is compatible with the Articles of Agreement, on his view, "that the decision making processes of the Bank incorporate social, political, and any other relevant input that may have an impact on its economic decisions."[56] Dañino continues:

> Some assert that economic rights are relevant, but that political rights are not. In my view, there is no stark distinction between economic and political considerations; rather, there is a similar connection between economic, social, and cultural rights on the one hand, and civil and political rights on the other. Indeed, it is generally accepted at the political level that all human rights are universal, indivisible, interdependent, and interrelated.[57]

To ground and justify this further expanded mandate, Dañino asserts that "[a]ll of these principles are clearly linked to the rule of law and its inherent notions of fairness and justice."[58] Between Shihata and Dañino, it is these kinds of broad, sweeping gestures toward the Rule of Law that have foregone a critical treatment of the discrete purpose of the Rule-of-Law concept. Due to its widespread appeal, it appears the Rule of Law has become a convenient place to couch and justify politically contentious aims or big picture ideals.

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[54] See Roberto Dañino, "The Legal Aspects of the World Bank's Work on Human Rights" (2007) 41:1 Int Lawyer 21–25.
[55] *Ibid* at 22-23.
[56] *Ibid* at 23.
[57] *Ibid* at 23, citing the Proclamation of Teheran, Final Act of the International Conference on Human Rights, U.N. Doc. A/Conf. 32/41 (May 13, 1968) and the Vienna Declaration and Programme of Action, World Conference on Human Rights, U.N. Doc A/Conf. 157/23 (June 25, 1993).
[58] *Ibid* at 24.

1B. United Nations

Development agencies may also expand their definition of the Rule of Law, stretching it to the point where it is no longer of any meaningful use as an analytical concept. The United Nations' (UN) iterative definition of the Rule of Law is an example of this problem. This definition tacks an array of values, institutions, and aims onto the Rule-of-Law concept, making the concept's parameters fuzzy or practically non-existent and, in turn, contributing to the uncertainty surrounding the analytical strength of the concept.

Notably, the concept of the Rule of Law appeared in the Preamble to the Universal Declaration of Human Rights (UDHR), adopted by the UN General Assembly (UNGA) in 1948. In this milestone document, the Rule of Law was regarded as protecting human rights, which are an important check against the "tyranny and oppression" of the State:

> Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.[59]

Since then, the UN's legal policy on the Rule-of-Law concept has been reframed in reports of the Secretary-General. A comparison between the Preamble of the UDHR and two reports of the Secretary-General drafted in short succession (2002 and 2004) demonstrates that the Rule of Law has been subject to considerable expansion as a result of this reframing.

The 2002 report "Strengthening of the rule of law" insists, in the spirit of the Preamble of the UDHR, on the crucial link between the Rule of Law and human rights and the need for certain government institutions and organs to promote these ideals in tandem:

[59] See *Universal Declaration of Human Rights* at Preamble.

> Key elements of the Rule of Law include an independent judiciary, independent national human rights institutions, defined and limited powers of Government, fair and open elections, a legal framework protecting human rights and guidelines governing the conduct of police and other security forces that are consistent with international standards.[60]

The 2002 report puts forward a definition of the Rule of Law that includes human rights institutions at the national level and democracy, or at least one of its procedural elements ("fair and open elections"). It is important to note that democracy is often taken to be a separate ideal from the Rule of Law: "[t]o say that a citizen is free within the open spaces allowed by the law says nothing about how wide (or narrow) those open spaces must be."[61] An autocratic State such as Singapore—known to jail legislators from the opposition and clamp down on even mild forms of public dissent against government action[62]—is still regarded as a strong Rule-of-Law society, at least according to the World Justice Project's Rule of Law Index.[63] In any event, from the UDHR to the 2002 report, the UN shifts from a definition that is about the purpose or function of the Rule of Law (i.e., a protector of human rights) to a definition that explicitly enumerates the features that make up the anatomy of the Rule of Law, which broadly encompasses legal or procedural aspects that uphold human rights and democracy, as well as some benchmark institutions needed for their fulfillment.

The 2004 report, "The rule of law and transitional justice in conflict and post-conflict societies," defines the Rule of Law as:

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[60] See Report of the Secretary-General, "Strengthening of the rule of law" [UN Doc A/57/275] (5 August 2002) at para 1 [available online: <https://digitallibrary.un.org/record/474329?ln=en>].
[61] See Tamanaha, *supra* note 13 at 37.
[62] See Carlton Tan, "Lee Kuan Yew leaves a legacy of authoritarian pragmatism", *The Guardian* (23 March 2015), online: <https://www.theguardian.com/world/2015/mar/23/lee-kuan-yews-legacy-of-authoritarian-pragmatism-will-serve-singapore-well>.
[63] See "WJP Rule of Law Index - Singapore", online: *World Justice Proj Rule Law Index* <https://worldjusticeproject.org//rule-of-law-index/>.

> A principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.[64]

This definition speaks to the basic purpose of the Rule of Law: ensuring government is accountable to laws that meet certain formal demands that make law an effective check on political power. But it also expands the anatomy of the Rule of Law in a way that further erodes the distinction between the Rule of Law, human rights, and democracy. For example, while the 2002 definition required "a legal framework protecting human rights," the insertion of "international human rights norms and standards" in the 2004 report definition indicates that the Rule-of-Law concept incorporates all rights provided for in human rights treaties and related international instruments. Moreover, with the inclusion of "participation in decision-making," the 2004 report introduces a more substantive requirement of democracy into the definition of the Rule of Law compared to the procedural requirement to hold "fair and open elections" in its 2002 predecessor.

More recently, a strong and direct link between the Rule of Law and development was drawn in the 2012 Declaration of the High-Level meeting of the UNGA on the rule of law at the national and international levels, endorsed by the UN Secretariat:[65]

> The rule of law and development are strongly interrelated and mutually reinforcing, that the advancement of the rule of law at the national and international levels is essential for sustained and inclusive economic growth, sustainable development, the eradication of poverty and hunger and the full realization of all human

[64] See Report of the Secretary-General, "The rule of law and transitional justice in conflict and post-conflict societies" [UN Doc S/2004/616] (23 August 2004) at para 6 [available online: <https://undocs.org/en/S/2004/616>].
[65] See Norul Mohamed Rashid, "Rule of Law and Development", online: *U N Rule Law* <https://www.un.org/ruleoflaw/rule-of-law-and-development/>.

> rights and fundamental freedoms, including the right to development, all of which in turn reinforce the rule of law.[66]

In the same document, UN members also added that "for this reason we are convinced that this interrelationship should be considered in the post-2015 international development agenda."[67]

Each iteration of the UN's definition of the Rule of Law (the UDHR 1948; the 2002 and 2004 Secretary-General Reports; the 2012 UNGA Declaration) appears to impose a different set of aims and demands on the Rule of Law or endow it with an ever-growing list of attributes and components. The Rule of Law goes from being essential to the protection of human rights (UDHR 1948); to incorporating human rights and human rights institutions at the national level and the procedural element of democracy (2002); to being essential to curbing excesses of political power while incorporating international human rights and a more substantive vision of democracy (2004); to being essential to virtually every dimension of development (2012). When these pieces are put together, the Rule of Law appears to be a concept that has been overexpanded by an ever-growing list of diverse demands and inflated with features to address all of these demands. Under this framing, it is a concept that is overworked, overdetermined, and devoid of analytical promise.

1C. Asian Development Bank

Other development agencies may settle on a "thinner" definition of the Rule of Law but extract far too much from that definition. In other words, the conclusions these organizations draw about what the Rule of Law can do extend well beyond the Rule-of-Law definition they advance.

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[66] See "Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels" (2012), online (pdf): *United Nations General Assembly* [UN Doc A/RES/67/1] at 2 [available online: <https://www.un.org/ruleoflaw/files/37839_A-RES-67-1.pdf>].
[67] *Ibid*.

The Asian Development Bank (ADB) has not advanced any official policy or declaration on the Rule of Law the way that the UN has, at least not one that is public-facing. However, a statement on ADB's vision of the Rule of Law was made in 2013 by the former president of the Bank, Takehiko Nakao, at a keynote address at the Annual Meeting of the Conference of Presidents of Law Associations in Asia:

> [T]he Rule of Law primarily refers to having a comprehensive and transparent framework of laws by which all persons and entities must abide - including the government itself. The Rule of Law also means competent, reliable and fair enforcement of those laws.[68]

This is a significantly "thinner" definition than what we have seen from the UN. It tracks the basic functions of the Rule of Law (e.g., laws bind the government) as well as some of the key aspects of formal legality (e.g., a transparent framework of laws entails that laws are publicly promulgated), along with some procedural requirements (e.g., the reliable, competent, and fair enforcement of laws).

However, the outcomes that Nakao draws from the Rule of Law vastly outstrip the Rule-of-Law definition he advances. Nakao continues:

> The Rule of Law provides the basic underpinnings of all economic activity, and thus of economic development. It secures property and contract rights - the fundamental building blocks of market economies. The *right to own property* encourages investments to enhance productivity. *Recognition of intellectual property rights* encourages activities in research and development. And a well-established framework for enforcing contracts assures entrepreneurs that contracting parties will comply with their obligations. Private parties need to feel secure from abuses of government and private crimes before investing their time and capital. Under the Rule of Law, people can trust that the benefits of their efforts will not be lost or stolen [emphasis added].[69]

[68] See Takehiko Nakao, *Economic Development in Asia and Rule of Law* (Tokyo, Japan, 2013) [available online: <https://www.adb.org/news/speeches/economic-development-asia-and-rule-law>].
[69] *Ibid*.

Nakao's definition of the Rule of Law does not address the content of laws that would give rise to a "right to own property" or a "recognition of intellectual property rights." The Rule-of-Law requirement that laws bind government says nothing about the content of those laws, such as whether they are amenable to the protection of property rights, for example. Linkage arguments are needed to show how the formal and procedural features in Nakao's/ADB's definition of the Rule of Law (i.e., laws that bind government, laws that are enforced in a reliable, competent, and fair manner) would give rise to or secure such rights.

1D. Measuring the Rule of Law

Why do we care about measuring the Rule of Law?[70] Echoed by former ADB President Nakao, the Rule of Law is regarded in the business world as one of the most important protections for investors and their business interests. Indeed, a country's high Rule of Law score is often seen to be indicative of a business climate where investors have mechanisms available to contest State intervention that unduly interferes with their business interests.[71] Accordingly, there are numerous measurement tools and data sources on the Rule of Law geared toward organizations that want to learn more about a country's "openness for doing business."[72]

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[70] In answering this question, I am deliberately setting aside difficulties with the identification and aggregation of indicators for measuring the Rule of Law, or related concerns with data collection or the quality of data to evaluate performance on these indicators. I am instead choosing to focus on what is being "counted" towards the measure of the Rule of Law.

[71] Max Weber recognized that when law lends itself to predictable or calculable economic exchanges among individuals, investments and other financial activities could be conducted without taking on unreasonable risk. The law's function of facilitating commerce in this way is said to have fueled capitalist development in Western Europe. This particular function of law has come to be seen by development indexes as synonymous with the Rule of Law. See Matthew Lange, "The Rule of Law and Development: A Weberian Framework of States and State-Society Relations" in Matthew Lange & Dietrich Rueschemeyer, eds, *States Dev Hist Antecedents Stagnation Adv* Political Evolution and Institutional Change (New York: Palgrave Macmillan US, 2005) 48–65, citing Max Weber, *Economy and Society* (New York: Bedminster Press, 1968).

[72] One well-known example is the suite of products offered by the Economist Intelligence Unit (EIU). The EIU claims to provide "[a]ctionable intelligence to win in the world's markets." See "The Economist Intelligence Unit", online: *Econ Intell Unit* <https://www.eiu.com/n/>.

Many of these Rule-of-Law measurement tools are based on indicators that are much broader and far beyond the conventional features of the legal system. The World Bank's Worldwide Governance Indicators (WGI) is a particularly interesting example of this. The WGI purports to measure the "strong development impact of good governance," with the Rule of Law being one of six core dimensions of good governance measured.[73] The WGI seeks to measure the prevalence of the Rule of Law in more than 200 jurisdictions, employing over 80 indicators ranging from "intellectual property rights protection," and the prevalence of crime, to "access to water for agriculture," and "gender."[74]

With a measurement project of this scope and ambition, methodological issues and cracks in the foundation are bound to appear. Indeed, the WGI has attracted written criticism that has largely focused on the quality of the indicators presented and their effectiveness in comparing levels of good governance across different jurisdictions.[75] A line of criticism I would prefer to follow regards the need for greater scrutiny of the methodology used to define these indicators. The indicators are presented without working definitions of the six dimensions of governance they purport to measure—including a lack of a definition for the Rule of Law. Instead, the WGI simply proposes indicators that together purportedly measure the relative presence or absence of the Rule

[73] See The World Bank, "The Worldwide Governance Indicators: General issues in measuring governance - two-page brochure" [available online: <info.worldbank.org/governance/wgi/Home/Documents#wgiAggMethodology>].
[74] See Daniel Kaufmann, Aart Kraay & Massimo Mastruzzi, "The Worldwide Governance Indicators: Methodology and Analytical Issues" (2010) World Bank Policy Res Work Pap No 5430 [available online: <https://papers.ssrn.com/abstract=1682130>]; see also The World Bank, "The Worldwide Governance Indicators: Documentation" [available online: <info.worldbank.org/governance/wgi/Home/Documents>].
[75] The WGI's authors have synthesized and addressed these criticisms in a recent working paper. See Daniel Kaufmann, Aart Kraay & Massimo Mastruzzi, "Worldwide Governance Indicators Project: Answering the Critics" (March 1, 2007). World Bank Policy Research Working Paper No. 4149 [available online: <https://ssrn.com/abstract=965077>].

of Law. The closest thing to a definition is Kauffman et al.'s explanation of how the Rule of Law was measured in their study in order to capture the Rule-of-Law dimension of governance:

> Rule of Law (RL) – capturing perceptions of the extent to which agents have confidence in and abide by the rules of society, and in particular the quality of contract enforcement, property rights, the police, and the courts, as well as the likelihood of crime and violence.[76]

The Rule of Law is taken as a composite of these listed indicators, among others. But the list of examples of indicators generated above is not representative of the many other indicators the WGI uses to measure the Rule of Law, which seem far more contentious and should certainly raise questions regarding Kauffman et al.'s methodology: "[a]ccess to water for agriculture," "gender," "business costs of crime and violence," "confiscation/expropriation" or "violent activities by criminal organizations," "have you been assaulted or mugged?," "[h]ave you had money [or] property stolen from you or another household member?," "organized crime," "violent crime," among others, on themes ranging from trust in police, public administrators and the judiciary.[77]

Without a baseline definition of the Rule of Law to provide a context for these indicators, an obvious methodological problem that arises is the difficulty in understanding the common thread that weaves through these indicators (e.g., how are "gender" and "access to water for agriculture" related to "the quality of contract enforcement?") and how this thread ties in with the Rule of Law. Indeed, one important question to ask is whether a good faith effort has been made to capture what is basic to, and less contested about, the Rule-of-Law concept. (This would include,

[76] See Daniel Kaufmann, Aart Kraay & Massimo Mastruzzi, "The Worldwide Governance Indicators: Methodology and Analytical Issues", *supra* note 74 at 4.
[77] See The World Bank, "The Worldwide Governance Indicators: Documentation - Rule of Law" [available online: <info.worldbank.org/governance/wgi/Home/downLoadFile?fileName=rl.pdf>].

at minimum, the formal features of legality that are meant to address absolute or unruly political power since these features are generally accepted, even by proponents of "thicker" or more substantive views of the Rule of Law). In reality, these features are barely recognizable in the WGI Rule-of-Law indicators. It seems likely that the WGI has inflated the Rule of Law with indicators that capture an expansive picture of development and speak to a wide range of development outcomes that, for the most part, seem tenuously tied to the norm that the Rule of Law takes as its subject: law.

1E. Key insights

These examples tap into a weaving narrative about the symbiotic relationship between the Rule of Law and international development, with development agencies and their officials playing an important role in shaping this narrative. This narrative has two discernable dimensions.

More explicitly, this narrative is about what development agencies hope the Rule of Law can bring to the table in terms of its capacity to effectuate strong development outcomes. How the Rule of Law gets defined has been labeled "a highly political choice."[78] When there are development successes to speak of, it is often not easy to determine what was particularly decisive in bringing about these outcomes. The absence of a commonly accepted baseline for the Rule of Law makes it susceptible to being interpreted in ways that suggest that the Rule of Law is conducive to development outcomes obtained or outcomes one is hoping to achieve.

[78] See Deval Desai & Louis-Alexandre Berg, *Overview on the Rule of Law and Sustainable Development for the Global Dialogue on Rule of Law and the Post-2015 Development Agenda* (2013) at 7.

More implicitly, this narrative is about the Rule-of-Law concept and the mainstream development agenda expanding side by side as a result of overlapping, but not necessarily coordinated, efforts to employ the Rule of Law to drive the mainstream development agenda forward. It would be a mistake, though, to think that these efforts are trending in the same direction by sheer coincidence. Alvaro Santos, formerly World Bank, admits the "'rule of law' idea has lent more credibility to international financial institutions, in their promotion of a specific set of economic policies in developing countries."[79] Santos' reference to the Rule of Law *idea* reveals a tendency of development agencies to treat the Rule of Law less as a concept in need of historicizing to understand its origin, purpose, and the analytical work it can do, and more often as an idea with enough goodwill behind it to green-light a range of policy interventions in development work. Critically examining this tendency will require an exploration of the history of the Rule of Law to better understand under what conditions the concept came about, the specific problem it is meant to address, and, on that basis, what its purpose and components should be.

2. The Rule of Law from classical antiquity to liberalism: an enduring concept

In Part 2, I trace the historical lineage of the Rule-of-Law concept to advance and defend two key claims.

First, I argue that the Rule of Law is not tied to any specific form of political organization or morality, be it the modern-day State, democracy, or the advancement of human rights and development. Indeed, the Rule of Law has been reoriented to account for significant shifts in the nature of ruling authority over time. As will be shown, a key contribution of writings on the Rule

[79] Santos, *supra* note 45 at 255.

of Law during classical antiquity was the insistence that the State must be ruled by laws for the good of the *community*. This idea bears little connection to the modern liberal preoccupation with making the exercise of political power more predictable so that *individuals* can carve out spheres of activity that do not trigger State interference.

Second, I argue that although the liberal orientation of the Rule of Law differs markedly from pre-liberal sources, the Rule of Law's fundamental purpose in curbing absolute or unruly political power has endured. The fact that the core purpose of the Rule-of-Law concept has been preserved amid significant shifts in the nature of political authority is a strong indication that any conception of the Rule of Law that assimilates other ideals and their associated aims is overexpanded and inflated. With the basic character of the Rule of Law in mind, the onus rests on those who hold such views to show how other ideals can be included in its ambit without overextending or overdetermining the concept.

This historical exploration makes two key contributions to this discussion on the potential connections between the Rule of Law and development. First, the historical trajectory spanning ancient Greek, feudal, and modern liberal conceptions of the Rule of Law shows that the concept is compatible with a variety of institutional arrangements or forms of political organization. Indeed, tracing the lineage of the Rule-of-Law is an important way to question the concept's modern-day treatment in the mainstream development agenda as seen in Part 1.[80] What I uncover is that the Rule of Law is a *teleological* concept: it speaks to an enduring concern about being ruled

[80] For instance, in the face of ahistoricism about debates in philosophy, Charles Taylor has argued that "it is essential to an adequate understanding of certain problems, questions, issues, that one understand them genetically." See Charles Taylor, "Philosophy and its history" in Jerome B Schneewind, Quentin Skinner & Richard Rorty, eds, *Philos Hist Essays Hist Philos* Ideas in Context (Cambridge: Cambridge University Press, 1984) 17 at 17.

and it has been continually proposed as an answer to the problem of absolute or unruly political power.

Second, this historical exploration reveals that it is a mistake for development agencies to incorporate specific political orderings or institutions into the Rule of Law before ascertaining the Rule of Law's fundamental purpose or *telos*. When the Rule of Law is oriented around different sets of institutional arrangements, it tends to be redefined and reiterated in relation to the mission or objectives of such arrangements.[81] The choice of a Rule-of-Law concept that aligns with the objectives of the mainstream development agenda should depend on the basic purpose of the Rule of Law, and not the institutions or values one would like to see incorporated into the concept. Accordingly, it should not be assumed outright that the Rule of Law is a development-enabling device. Such an assumption demonstrates a failure to explore the Rule of Law at its origins and on its proper terms, treating it instead as an "atemporal resource[]"[82] to be directed at the concerns of the mainstream development agenda. As I will show, from classical antiquity (Aristotle and Plato) to the liberal tradition (John Locke and Immanuel Kant), the Rule of Law has been treated as a concept that is distinct from—even adverse to—the main contemporary ideals and aims that are typically associated with liberalism, such as democracy and human rights and development.

2A. Classical antiquity

The basic idea underlying the Rule-of-Law concept can be traced back to classical antiquity.[83] The Rule of Law was regarded as vital to the "self-definition of the political community

[81] See Kleinfeld, *supra* note 36 at 50-51.
[82] See Taylor, *supra* note 80 at 17.
[83] See Matthieu Burnay, *The rule of law: origins, prospects and challenges* (Edward Elgar Publishing, 2018).

of the City" as it addressed how a community should be governed: with law as the ultimate check on the absolute or unruly use of political power.[84] Aristotle and Plato were among the first to write on the significance of laws for protecting political decision-making from the mere whims of rulers; their writings appear to regard the Rule of Law as an imperfect yet necessary solution to unruly or abuse power in a world where omniscient and incorruptible rulers likely do not exist.[85] In *Politics*, Aristotle famously asks "whether it is more advantageous to be ruled by the best men or by the best laws."[86] Aristotle saw laws as an important means of governing a community as they were typically established after careful consideration of the legislator and set out in advance of their application to particular cases.[87] Aristotle acknowledged, though, that some cases could only be properly addressed by a decision made on the basis of *epieikeia* or "equity," a virtue often embodied in judges that allowed them to square conventional, pre-set laws with the particularities of novel or "hard cases."[88] But altogether, Aristotle thought that conventional laws should prevail for the most part, given the risk of corruption and abuse that pervades when lawmaking and other expressions of political power are vested in one or the few: "the multitude is more incorruptible—just as the larger stream of water is purer, so the mass of citizens is less corruptible than the few."[89]

[84] *Ibid*; see also Christopher May, "The Rule of Law: Athenian Antecedents to Contemporary Debates" (2012) 4:2 Hague J Rule Law 235–251 at 238, citing Edward M. Harris, "Antigone the Lawyer, or the Ambiguities of *Nomos*" in Edward Harris and Lene Rubinstein (eds), *The Law and Courts in Ancient Greece* (2004) at 1.
[85] See May, *supra* note 84 at 241 and 250; see also Tamanaha, *supra* note 1; finally, see Waldron, *supra* note 2.
[86] See Aristotle, *Politics* 1286a.
[87] See Aristotle, *Rhetoric* 1354a–b; see also Waldron, *supra* note 2.
[88] See Aristotle, *Politics* 1286a; see also Eric G Zahnd, "The Application of Universal Laws to Particular Cases: A Defense of Equity in Aristotelianism and Anglo-American Law" (1996) 59:1 Law Contemp Probl 263–295; see also Ronald Dworkin, "Hard Cases" (1975) 88:6 Harv Law Rev 1057–1109; see also Annie Hewitt, "Universal Justice and Epieikeia in Aristotle" (2008) 25:1 Polis J Anc Greek Roman Polit Thought 115–130; finally, see Waldron, *supra* note 2.
[89] See Aristotle, *Politics* 1286a; see also Waldron, *supra* note 2.

While Aristotle and Plato recognized that the Rule of Law is an imperfect way to govern a community, Plato was particularly scathing in his criticism of the Rule-of-Law concept:

> [L]ike a stubborn and ignorant man who allows no one to do anything contrary to his command, or even to ask a question, not even if something new occurs to some one, which is better than the rule he has himself ordained.[90]

For Plato, the ideal government for the community would instead depend on the superior wisdom of "philosopher kings" to overcome the rigidity and limited outlook of conventional laws.[91] This bears a striking similarity to Confucius' idea of "virtuous leadership," which "exemplifies the ideal that 'the best and the brightest' should exert more influence in order to build a good society."[92] Nevertheless, in *Laws*, Plato recognized that the Rule of Law is vital to the good order of a community where mere mortals rule:

> Where the law is subject to some other authority and has none of its own, the collapse of the state, in my view, is not far off; but if law is the master of the government and the government is its slave, then the situation is full of promise and men enjoy all the blessings that the gods shower on a state.[93]

A key contribution of these writings on the Rule of Law was the insistence that laws must be for the good of a *community*; it bore little to no connection to the liberal ideal of laws sheltering *individuals* from undue interference from government. Moreover, this emphasis on the flourishment of a *community* under law, rather than the *common good*, made it clear that the beneficiaries of the Rule of Law were defined in relation to active membership of the *polis*, to the exclusion of women, those rendered slaves, and the disabled.[94] From this, it is apparent that the

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[90] See Plato, *Statesman* 294b–c; see also Tamanaha, *supra* note 1; finally, see Waldron, *supra* note 2.
[91] See Plato, *Republic* at Book VII, 540; see also Tamanaha, *supra* note 1; finally, see Waldron, *supra* note 2.
[92] See Chenyang Li, "Where Does Confucian Virtuous Leadership Stand?" (2009) 59:4 Philos East West 531–536.
[93] See Plato, *Laws* 715a–d.
[94] Fred Miller writes: "Although full citizenship tended to be restricted in the Greek city-states (with women, slaves, foreigners, and some others excluded), the citizens were more deeply enfranchised than in modern representative democracies because they were more directly involved in governing." See Fred Miller, "Aristotle's Political

roots of the Rule-of-Law concept laid down in antiquity are in tension with ideals commonly associated with the Rule of Law in the modern liberal framework, particularly popular democracy and human rights. The term "demokratia" in the Constitution of the Athenians was seen to refer to rule by the "lower classes" or the "mob."[95] In classical antiquity, governance under the Rule of Law was understood as upholding the supremacy of laws to shelter the community from the bias, error, or ignorance of the ruler or the mob.[96]

2B. Middle Ages

While the Catholic Church in medieval Europe viewed reason and deliberation as a danger to ecclesiastic rule and doctrine, it deemed Aristotle's writings permissible by virtue of Thomas Aquinas' demonstration of the congeniality of reason and divine law.[97] For Aristotle, law is the product of a human legislator guided by reason.[98] Similarly, Aquinas affirmed that law is "something appointed by reason."[99] But unlike Aristotle, who grounded law in the realm of mortals,[100] Aquinas argued that law must always be subject to the divine order, thus placing laws made by the sovereign beneath and subject to divine and natural law.[101]

Theory" in Edward N Zalta, ed, *Stanf Encycl Philos*, Winter 2017 ed (Metaphysics Research Lab, Stanford University, 2017).

[95] See Mirko Canevaro, "The Rule of Law as the Measure of Political Legitimacy in the Greek City States" (2017) 9:2 Hague J Rule Law 211–236 at 225-226.

[96] See Tamanaha, *supra* note 1 at 243.

[97] See Tamanaha, *supra* note 13 at 18-19.

[98] See Fred D Miller & Carrie-Ann Biondi, *A history of the philosophy of law from the ancient Greeks to the scholastics* (2015) at 82; see also Aristotle, *Nicomachean Ethics* 1180a21–2; and, finally, see Aristotle, *Politics* 1273b32–3.

[99] See Thomas Aquinas, *Summa Theologiae* I-II, Question 94, First Article.

[100] See Miller & Biondi, *supra* note 98 at 83, citing *Rhetoric to Alexander*, wherein Aristotle writes: "Law, simply described, is reason [lo-gos] defined according to the common agreement [homologia] of the city-state, regulating action of every kind" (1.1420a25; cf. 1422a2–3, 2.1424a9–12).

[101] See Tamanaha, *supra* note 13 at 19.

Correspondingly, popes—earthly custodians of divine and natural law—asserted their authority over monarchs; indeed, the power struggle between monarchs and papal authority was a defining feature of the feudal system in medieval Europe: the Dictates of the Pope (1073) proclaimed that "papal authority alone was universal and plenary, while all other powers in the world, whether emperors, Kings, or bishops, were particular and dependant."[102] Given the incredible influence of the medieval Catholic Church and its role in legitimating the rule of kings, monarchs often acknowledged their duty—through "coronation ceremonies" performed by the Church—to uphold and obey divine and positive law.[103] These ceremonies were meant to impose limits on the sovereign's lawmaking power by transforming "a self-imposed obligation into a settled general expectation."[104] The sovereign's non-observance of the law did not diminish the fact that the limits of law did factor into their decisions and condition their conduct.[105] If the sovereign's obligation to the law was not realized, neither was it totally dismissed.[106]

2C. Beginnings of liberalism

The winding down of the feudal system, beginning in the 12th through to the 17th century, coincided with the end of the religious and nobility classes' stranglehold on landownership and commerce, and the emergence of the middle classes.[107] Constitutional monarchies began to develop and progressively displace absolute monarchies.[108] Moreover, the Peace of Westphalia, marking the end of the European wars of religion of the 16th and 17th centuries, ushered in a new

[102] *Ibid* at 19-20, citing Johan Huizinga, The Waning of the Middle Ages (Mineola, NY: Dover Pub. 1999) at 57.
[103] *Ibid* at 21-22.
[104] *Ibid*.
[105] See Tamanaha, *supra* note 1 at 239.
[106] *Ibid*.
[107] See Tamanaha, *supra* note 13 at 29ff; see also John Rawls, *Lectures on the History of Political Philosophy*, Samuel Freeman, ed, (Cambridge, MA: Harvard University Press, 2007) at 11.
[108] See Rawls, *supra* note 107 at 11.

political order based on tolerance and liberty of conscience—given that "[n]o single claim to truth or universal rule had prevailed in Europe's contests"[109]—which laid the foundation for the modern international system of sovereign States.[110]

Over this time, tensions emerged between the sovereign State—having ultimate authority over its territory—and citizens of sovereign States—free, independent, and equal by nature but subject to the authority of the sovereign State by virtue of being within the State's territory.[111] It can be argued that this tension underscores the Rule-of-Law dilemma of the modern liberal State.

There is a "range of related but sometimes competing visions" of liberalism and therefore some disagreement about what constitutes liberty or what liberties one should ascribe to.[112] Nevertheless, liberal thinkers have generally insisted that liberalism takes the freedom of the individual as its normative starting point.[113] In his *Two Treatises of Government*, John Locke argued that individuals are, by nature, free and their freedom cannot be conditioned or limited without their consent:

> Men being, as has been said, by nature, all free, equal and independent, no one can be put out of this estate, and subjected to the political power of another, without his own consent, which is done by agreeing with other men, to join and unite into a community for their comfortable, safe, and peaceable living, one amongst another, in a secure enjoyment of their properties, and a greater security against any that are not of it.[114]

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[109] See Henry Kissinger, *World Order* (New York: Penguin Press, 2014) at 3.
[110] See Rawls, *supra* note 107.
[111] *Ibid*.
[112] See Gerald Gaus, Shane D Courtland & David Schmidtz, "Liberalism" in Edward N Zalta, ed, *Stanf Encycl Philos*, Fall 2020 ed (Metaphysics Research Lab, Stanford University, 2020).
[113] *Ibid*; see also Ian Carter, "Positive and Negative Liberty" in Edward N Zalta, ed, *Stanf Encycl Philos*, Winter 2021 ed (Metaphysics Research Lab, Stanford University, 2021).
[114] See John Locke, *Two Treatises of Government: In the Former, The False Principles and Foundation of Sir Robert Filmer, and His Followers, Are Detected and Overthrown: The Latter, Is an Essay Concerning the Original, Extent, and End, of Civil Government*, The Works of John Locke (London, 1823) at Chapter VIII (Of the Beginning of Political Societies) § 95; see also See Alex Tuckness, "Locke's Political Philosophy" in Edward N Zalta, ed, *Stanf Encycl Philos*, Winter 2020 ed (Metaphysics Research Lab, Stanford University, 2020).

In Locke's view, the legitimacy of any limits to individual freedom imposed by government stems from the common will of free, equal, and independent people to opt for a government under law over a life without government, in the state of nature, which may be unstable and uncertain:

> [F]reedom of men under government is, to have a standing rule to live by, common to every one of that society, and made by the legislative power erected in it. A liberty to follow my own will in all things … not to be subject to the inconstant, uncertain, unknown, arbitrary will of another man.[115]

For Locke and other social contract theorists, naturally independent, free, and equal individuals choose (or would rationally choose)[116] to enter a mutually binding covenant (a social contract) "where people in the state of nature conditionally transfer some of their rights to the government in order to better ensure the stable, comfortable enjoyment of their lives, liberty, and property."[117] On this account, an individual gives or would give their consent to the State to promulgate and enforce a body of laws in the interest of avoiding undue imposition by others and achieving the stable enjoyment of their remaining freedoms.

To be sure, the law's role in carving this arrangement and circumscribing the power of the modern liberal State does not mean that the Rule of Law now encompasses liberalism. Historically, the Rule of Law has not been particularly concerned with the primacy or promotion of individual

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[115] See Locke, *supra* note 114 at Chapter IV (Of Slavery) at § 21; see also Tuckness, *supra* note 114.

[116] In the quote above, Locke appears to be suggesting that consent of this sort is carried out by citizens ("no one can be put out of this estate, and subjected to the political power of another, without *his own consent*") [emphasis added]. By contrast, Immanuel Kant regards the social contract as a hypothetical viewpoint and "an *idea* of reason" because determining what "a coalition of the wills of all private individuals of a nation" would have consented to is a question answered by way of ex-post reasoning rather than fact-finding. Immanuel Kant, *Kant: Political Writings*, 2nd edition ed, translated by H. B. Nisbet, H. S. Reiss, ed (Cambridge England ; New York: Cambridge University Press, 1991) at 79. See also Rawls, *supra* note 107 at 1-22.

[117] See Tuckness, *supra* note 114.

liberty. As observed, in classical antiquity and the Middle Ages, the Rule of Law accorded primacy to the *community*, not the *individual*. In hierarchical societies oriented toward the good of the community, placing limits on a ruler's power was not done to enhance the liberty of individuals so that they could "follow [their] own will in all things."[118]

2D. The modern liberal State

Although the liberal orientation of the Rule of Law differs markedly from pre-liberal sources, one cannot ignore that the Rule of Law and liberalism are two ideals that have intersected. Although its distinct purpose in curbing absolute or unruly political power has endured, the Rule of Law's framing has changed to account for shifts in the nature of ruling authority. The Rule of Law's liberal emphasis on rendering political power more predictable is to allow *individuals* to ascertain the range of activity that does not trigger State interference or punishment. This individualistic lens on the Rule of Law is in large part due to liberalism's fear of imposing on the individual, particularly by the State.[119]

But perhaps the most important aspect of this meeting of the Rule of Law and liberalism is the fact that the shift from classical antiquity and the Medieval feudal order to liberalism meant that the *source* of law and political authority had changed. In antiquity, the authority of law was couched in the faculty of reason. The most intelligent or wise were to discover or endeavour to understand the Forms or essence that underpinned law[120] or to study politics and law "as a rational

[118] See Locke, *supra* note 114 at Chapter IV (Of Slavery) § 21.
[119] See Tamanaha, *supra* note 13 at 33.
[120] See John Daniel Wild, *Plato's modern enemies and the theory of natural law* (Chicago: University of Chicago Press, 1953).

activity—a 'master science' of the human good."[121] In the Medieval period, "God had made all people naturally subject to a monarch"; government authority (i.e., all decrees and laws made by the monarch) was subject and secondary to the will of God.[122] In the era of the modern liberal State, the sovereign is revealed as the ultimate lawmaker and wielder of political authority.[123] In effect, the Rule of Law intersecting with liberalism re-engages an age-old dilemma that justifies the existence of the rule of Law as an analytical concept: if law is made, applied, and enforced by humans, who or what is the final arbiter: humans or law?[124]

In this way, the modern liberal State adds new wrinkles to this age-old problem of constraining the power of the sovereign. How has the Rule of Law been reframed—that is, what new demands or functions of the Rule of Law have been proposed—so that the concept can effectively respond to absolute or unruly power in the context of the modern liberal State? I have organized my thinking on this question in terms of features attributed to the Rule of Law by classical liberals, and their potential to curb State interference and its direct coercive impact or indirect chilling effect on individual liberty. The insights I have gathered reinforce the idea that, despite the shifting nature of political authority, the Rule of Law is an ideal whose scope remains defined by and confined to the purpose of constraining political power.

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[121] See Miller & Biondi, *supra* note 98 at 82.
[122] See Tuckness, *supra* note 114.
[123] This idea bears close similarity to Robert von Mohl's interpretation of the German concept of *Rechtsstaat*—a correlate concept to the Rule of Law. Mohl's interpretation of *Rechtsstaat* "rejected the idea that political order is divinely ordained: governmental order was the product of earthly aims of free, equal, and rational individuals." See Martin Loughlin, "Rechtsstaat, Rule of Law, l'Etat de droit" in *Found Public Law* (Oxford: Oxford University Press, 2010) at 318, citing Robert von Mohl, Das Staatsrecht des Königsreichs Württemberg (Tübingen: Laupp, 1829); Robert von Mohl, Die Polizeiwissenschaft nach den Grundsätzen des Rechtsstaates [1832] (Tübingen: Laupp, 3rd edn, 1866).
[124] Jeremy Waldron has pithily captured this dilemma in summing up Thomas Hobbes' views on the unlikelihood that a sovereign could truly be bound by the law: "There must always be somebody – not some text but some *body* – who has the final word." See Jeremy Waldron, "Is the Rule of Law an Essentially Contested Concept (In Florida)?" (2002) 21:2 Law Philos 137–164 at 143.

The modern liberal preoccupation with government imposition on the life, liberty, or property rights of the individual has generated features of the Rule of Law that promote limited government and individual legal liberties. Indeed, the promotion of legal liberty has become the dominant way of understanding the Rule of Law's place in modern liberal States.[125] The State makes laws that circumscribe or grant the sphere of an individual's liberty as a consensual exchange for the protection and other benefits provided to the individual by the State.[126] Accordingly, legal liberty requires formal features of the Rule of Law that condition political power and make it less unruly. The Rule of Law's role in constraining political power is resolutely about law acting as a system of public norms that channel and constrain power so that individuals can infer the duties imposed on them and the liberties they retain. As I will demonstrate, the modern liberal vision of the Rule of Law does not engage other elements of the modern liberal program, such as democracy, human rights, and international development. Rather, the Rule of Law directs its focus to extemporary power wielding that makes political power less predictable and threatens to erode individual liberty.

2E. Rule of Law for the promotion of legal liberty

In social contract theory, individuals are regarded as free, equal, and independent by nature and have rights or entitlements by virtue of this nature.[127] As free, equal, and independent individuals, they have collectively chosen to have their freedom conditioned or limited by a

[125] See Tamanaha, *supra* note 13 at 34-35.
[126] See Glanville Williams, "The Concept of Legal Liberty" (1956) 56:8 Columbia Law Rev 1129–1150.
[127] See Ellen Frankel Paul, Fred D Miller & Jeffrey Paul, eds, *Natural Rights Liberalism from Locke to Nozick*, Social Philosophy and Policy (Cambridge: Cambridge University Press, 2004); see also Tuckness, *supra* note 114.

government under laws to achieve the stable enjoyment of their remaining freedoms.[128] Under this social contract, a government limited by laws should respect the natural freedom of individuals by leaving or demarcating space for individual liberty.[129] Glanville Williams describes legal liberty as being either carved out by laws or incorporated in laws, depending on one's interpretation or manner of speaking:

> If law is conceived as a system of rights and duties, liberties lie outside it; they are an "extra-legal phenomenon," representing what is left of possible conduct after deducting the part regulated by rules of duty. However, it is often convenient to think and speak of liberties as being included in the law. The law, in this sense, includes rules denying duties as well as rules affirming duties. Considerable portions of law books are taken up with the denial of duties, that is to say the affirmation of liberties.[130]

Under the first interpretation of legal liberty (i.e., carved out by laws), laws serve to outline the scope of liberty by specifying what individuals are not permitted to do by law—the balance of which they are free to do as naturally free beings. As such, laws give individuals an indication of what or to what extent certain activities are in excess of law, and thus forbidden or beyond the pale. Under the second interpretation (i.e., incorporated in laws), legal liberties are conferred by conventional rules of law that "represent in reality the limits of legal duty."[131] Generally, the promotion of legal liberty has become the dominant way of understanding the Rule of Law in modern liberal States.[132] The connection between legal liberty and the Rule of Law, and the specific demands that this connection makes on the Rule of Law, are captured in influential contributions by Albert Venn Dicey and Friedrich Hayek.

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[128] See Locke, *supra* note 114 at Chapter VIII (Of the Beginning of Political Societies) § 95; see also Kant, *supra* note 116 at 79; see also Tuckness, *supra* note 114.
[129] See Locke, *supra* note 114 at Chapter VIII (Of the Beginning of Political Societies) § 95; see also Tuckness, *supra* note 114.
[130] See Williams, *supra* note 126 at 1130.
[131] *Ibid* at 1130.
[132] See Tamanaha, *supra* note 13 at 34-35.

The features of the Rule of Law

Dicey placed particular importance on three features of the Rule of Law (legality, certainty, and equality), and it could be argued that they may combine to minimize the potential of the State to use unlawful, wide, discretionary, unequal, and, ultimately, arbitrary powers that would undermine individual liberty.[133]

Legality is captured by the principle that a person should not be held liable or punished for an act that is not a clear violation of law—*nulla poena sine lege* or "no penalty without law."[134] It follows from this principle that legal liberty does not obtain if, for example, individuals are routinely punished for failing to observe a rule of duty that is not delineated in law—that is, if laws do not spell out or reflect the sphere of permissible activity in actuality. *Certainty* demands that laws should be publicly promulgated, reasonably free of ambiguity, prospective, and not retrospective, so that they are an effective way of knowing what one is free to do without being held liable or punished by the State:

> When we say that the supremacy or the rule of law is a characteristic of the English constitution … [w]e mean in the first place, that *no man is punishable* or can be lawfully made to suffer in body or goods *except for a distinct breach of law* established in the ordinary legal manner before the ordinary courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint [emphasis added].[135]

Legality could be described as the normative starting point of the Rule of Law in that it proposes law as the norm for demarcating and upholding the limits of government authority. Dicey's view of legality, in particular, expresses the idea that official action must be grounded in and conform to a declared legal rule, as confirmed by a court. The confirmation of a distinct breach

[133] See Albert V Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed (London: Macmillan, 1915).
[134] *Ibid* at 110.
[135] *Ibid* at 110.

of a legal rule by a public court contributes to certainty by making law a public endeavour; law can only be followed by the public if the public is reasonably certain about what laws are in operation and how they will be interpreted and applied by a court.

However, Dicey's particular conception of certainty has not been widely accepted or put into practice due to its inflexibility. Waldron has argued that Dicey's association of legal certainty with no "discretionary powers of constraint" speaks to his inclination to "disparage all administrative discretion, particularly where it seemed to be superseding what had traditionally been regarded as judicial functions."[136] Basic legislation, regulations, codes, and policies may require discretion for their proper interpretation and application, and they govern innumerable administrative decisions of government that often apply to the very ordinary affairs of individuals (e.g., granting a residential building permit, approving a request for affordable housing, etc.). It would not be feasible to require that judicial discretion enters into all (or even most) of these types of discretionary decisions, as Dicey envisioned—although the judicial review of administrative decision-making is indeed possible.

It should also be noted that the use of discretion in administrative decision-making is not boundless and should not be automatically cast in the same negative light as exercises of authority that are in excess of law or extra-legal, which are by definition not justified in law. Often, laws or policies specify clear limits on discretion in administrative decision-making. While discretion is not law, it is not necessarily antithetical to legal certainty, as Dicey held, but can be made more

[136] See Waldron, *supra* note 2.

certain or predictable if its parameters and scope of application are clearly circumscribed and outlined in law.

Equality, in the context of the Rule of Law, requires that no one is exempt from the duty to obey the law.[137] This is different from the requirement of legality, which is a requirement on the State to not disregard, act *contra* to, or in excess of laws. Dicey saw equality as a requirement to ensure that everyone, even those in positions of high power, is subject to the legal limits they put on ordinary citizens.[138] He writes:

> [E]quality before the law or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts; the "rule of law" in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals ...[139]

Dicey's qualification that the laws of the land should apply equally to ordinary citizens, as well as those who make them, is a compelling one. It engages the egalitarian intuition that a person's status or rank should not make them above or exempt from laws—an intuition that has been regularly evoked these days amid reports of politicians and senior health officials skirting the same pandemic rules they craft or impose on others.[140] From the standpoint of liberalism and the guarantee of legal liberty, equality may speak to the fact that we are all equal and free by nature and thus should not have less liberty in law than others.

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[137] See Dicey, *supra* note 133 at xxii, 120, and 182.
[138] *Ibid*.
[139] *Ibid* at 120.
[140] See, for example, "Investigation into alleged gatherings on government premises during Covid restrictions: Update", online: *GOVUK* <https://www.gov.uk/government/publications/investigation-into-alleged-gatherings-on-government-premises-during-covid-restrictions-update>.

While influential, Dicey's approach to equality does not account for obvious efficiency or equity reasons that may justify differential treatment under law based on rank or condition. From an efficiency standpoint, governance needs to be carried out by a complex of public servants who may, by law, be delegated additional powers to carry out the business of government on a large scale. Moreover, exemptions from legal rules may be made on an equitable basis to account for people's different conditions, such as exemption from mandatory vaccination for those with contraindications. A more tenable interpretation of Dicey's equality requirement, then, is that everyone, regardless of rank or condition, should act with legal justification.[141]

Hayek also regards legality, certainty, and equality as core features of the Rule of Law and theorizes these features in an arguably less categorical, and more realistic and pragmatic way than Dicey.[142] *Generality* is another core feature raised by Hayek, which factors far less in Dicey's work on the Rule of Law.[143]

In *The Road to Serfdom*, Hayek offered a concise yet influential definition of the Rule of Law. It describes a State constrained and limited by fixed rules set out in advance of them coming into force and explains how this arrangement is vital for ascertaining the scope of one's liberty from the State so they can understand the range of activity that is not prohibited by the State and

[141] To take the first example, Jeremy Waldron has proposed that justifying the additional powers of State officials may require that they be explicitly and unambiguously conferred by law. See Waldron, *supra* note 2.
[142] See Friedrich A Hayek, *The Road to Serfdom* (London and New York: Routledge, 2001); see also Friedrich A Hayek, *The Constitution of Liberty: The Definitive Edition*, Ronald Hamowy, ed, (London: Routledge, 2020).
[143] See Hayek, *The Constitution of Liberty*, *supra* note 142.

plan accordingly. This argument is a version of what is now more generally referred to as "the planning argument":[144]

> Stripped of all technicalities, [Rule of Law] means that government in all its actions is bound by rules fixed and announced before-hand—rules which make it possible to foresee with *fair certainty* how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge [emphasis added].[145]

Similar to Dicey, Hayek defines legality as the idea that government is bound by and limited to actions that are in accordance with fixed rules. Fair certainty of how the government will use its coercive powers in given circumstances arises from advance notice of the fixed rules in effect. These two features serve to outline the purview of individual liberty: legality pertains to the legal rules that determine how the State may use its coercive power against the individual (i.e., in a manner governed and limited by law), while fair certainty relates to one's ability to know the legal rules so they can reasonably predict how they will operate and apply to one's affairs. Unlike Dicey's, Hayek's interpretation of certainty (*fair certainty*) makes room for the administrative discretion needed to render innumerable decisions about the allocation of public goods and services—on the condition that this discretion is reviewable by an independent court on the substance of the decision, and is consistent with legal rules that approximate certainty, as well as equality and generality.[146]

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[144] For other examples of the planning argument, see Joseph Raz, *The authority of law: Essays on law and morality* (Oxford: Oxford University Press, 1979) at 220; see also Steven Wall, "Freedom, Interference and Domination" (2001) 49:2 Polit Stud 216–230; finally, see Paul Gowder, *The Rule of Law in the Real World* (Cambridge: Cambridge University Press, 2016) at 68-70.
[145] See Hayek, *The Road to Serfdom*, *supra* note 142 at 75.
[146] See Hayek, *The Constitution of Liberty*, *supra* note 142 Part II, Chapter 14 (The Safeguards of Individual Liberty) at 332 and 334-336.

Equality, for Hayek, requires that laws apply to all persons without making *arbitrary* distinctions among them.[147] On its face, this seems more realistic than Dicey's requirement that laws apply to all in the same manner. However, Hayek's method of determining whether a distinction is arbitrary is where things become procedurally complicated; treatment under law is legitimate if approved by a majority of persons within and outside the group impacted by differential treatment: "[s]uch distinctions will not be arbitrary, will not subject one group to the will of others, if they are equally recognized as justified by those inside and those outside the group."[148] Rather than building into the requirement of equality the inevitable need to make distinctions among certain groups or individuals, Hayek appeals to a mechanism of majoritarian democracy as a legitimate way to override to the equality requirement.[149]

Generality requires that laws are devised and administered to form a system of publicly promulgated norms meant to govern a society, rather than be directed at any specific individual.[150] A legal system that is not based on general public norms is not a system that is ruled by laws: "[t]here simply would be no system of rules, for example, if public officials adjudicated all controversies on a case-by-case basis."[151] Though they may seem similar at first blush, generality and equality differ markedly. Equality specifies that everyone, regardless of rank or condition, must act in accordance with laws, while generality requires that laws refer to and be based on general norms that address a community. However, there is some overlap between these two requirements as laws need to be general to apply to officials and ordinary citizens alike; generality,

[147] *Ibid* at Part II, Chapter 10 (Law, Commands and Order).
[148] *Ibid* at Part II, Chapter 11 (The Origins of the Rule of Law) at 222-223.
[149] *Ibid*.
[150] See Gowder, *supra* note 144 at 42-57
[151] See Frank Lovett, "Lon Fuller, The Morality of Law", (10 December 2015), online: *Oxf Handb Class Contemp Polit Theory* <http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780198717133.001.0001/oxfordhb-9780198717133-e-10?mediaType=Article>.

it could be argued, is a precondition for equality. Dicey's views on generality are not explored in detail here because his writings were not interested in the importance of general rules as such. Rather, generality was important for Dicey because it contributed to a unified legal system where officials are not exempt from laws that apply to ordinary citizens—one could argue that this aspect is already well captured by equality.[152]

Hayek outlines specific ways in which generality is vital to the promotion of legal liberty:

> [W]hen we obey laws, in the sense of general abstract rules laid down irrespective of their application to us, we are not subject to another man's will and are therefore free. It is because the lawgiver does not know the particular cases to which his rules will apply, and it is because the judge who applies them has no choice in drawing the conclusions that follow from the existing body of rules and the particular facts of the case, that it can be said that laws and not men rule.[153]

When Hayek describes generality as a departure from being "subject to another man's will," one may recall Lon Fuller's allegory of the imaginary king named Rex, who chose to abolish all existing law and resolve disputes that may arise on a case-by-case basis.[154] Unsurprisingly, this approach left Rex's subjects exposed to his bare impulses and impressions and led to decisions that generated no general rules, principles, or discernable patterns that could predictably bear on his future decisions. Liberty, in Hayek's view, is captured by the idea of not being hostage to another's ideas, impressions, or impulses, which are often opaque, incalculable, and shifting. Liberty is more likely to be realized when the sovereign's actions and decisions are grounded in a system of rules that are general enough to provide citizens the ability to deduce, for example, what rules and procedures their case would fall under and what outcome(s) would likely result.

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[152] See Harry Arthurs, "Rethinking Administrative Law: A Slightly Dicey Business" (1979) 17:1 Osgoode Hall Law J 1–45; see also Dicey, *supra* note 133 at 121.
[153] See Hayek, *The Constitution of Liberty supra* note 142 Part II, Chapter 10 (Law, Commands and Order) at 221.
[154] See Fuller, *supra* note 3 at 33-38.

Moreover, this passage by Hayek depicts the separation between the successive stages of the work of lawmakers and judges as conducive to promoting generality and liberty in the way laws are made, and later interpreted and applied. That is, the lawmaker does not become the judge by personally deciding whether and how laws of a general nature will later apply to specific cases, and the judge does not become the lawmaker by deciding a particular case absent legislature law and the body of the common law. This separation of powers—commonly understood through Montesquieu's *trias politica* model—entails forging a balanced distribution of powers between the executive, legislative, and judicial functions of government.[155] As a result of this distribution, political power should only be used to exercise functions for which it is allocated, so that political power is wielded in a functionally specific manner, and is articulated, tractable, and not concentrated in any given entity:

> When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.[156]

To be sure, the separation of powers is not a feature of the Rule-of-Law concept, although it spells out a blueprint for channeling power through certain procedures and organs of government that may help advance the Rule of Law.[157] In sharp contrast to governance through undefined powers, the separation of powers insists on "articulated government through successive phases of governance each of which maintains its own integrity."[158]

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[155] See Charles de Secondat baron de Montesquieu, *The Spirit of Laws*, Thomas Nugent, ed, (Kitchener, Canada: Batoche Books, 2000).
[156] *Ibid* at 173.
[157] See Jeremy Waldron, "Separation of Powers in Thought and Practice" (2013) 54:2 Boston Coll Law Rev 433.
[158] *Ibid* at 467.

This discussion also reveals that realizing the Rule of Law in practice requires organizations of government to operate with a certain level of procedural sophistication. That is to say, the promotion of generality is not just attributable to the separation of powers as such, but also to the procedural complexities of the legislative process. As Jeremy Waldron importantly reminds us, "[b]icameralism, checks and balances (such as executive veto), the production of a text as the focus of deliberation, clause-by-clause consideration, the formality and solemnity of the treatment of bills in the chamber, the publicity of legislative debates, successive layers of deliberation inside and outside the chamber, and the sheer time for consideration" are "procedural virtues" meant to ensure that the activity of legislators does not merely amount to or collapse into "rule by decree."[159]

The principles of legality that underpin the features of the Rule of Law

The core features of the Rule of Law vital to legal liberty that I have just covered (i.e., legality, certainty, generality, and equality) can be understood as being supported by eight principles of legality, famously set forth by Lon Fuller as success conditions "to create and maintain a system of legal rules…"[160] They have been hinted at or mentioned in the thesis in passing: generality, promulgation, no retroactive laws, clarity, no contradictions, no laws requiring the impossible, constancy of the law through time, and congruence between the official action and declared rule.[161] Frank Lovett notes that "these eight principles bear a striking resemblance to the traditional concept of the rule of law, and Fuller's work is thus commonly read as an attempt to

[159] See Waldron, *supra* note 16 at 107-108. It should be noted that Hayek would have resisted this line of argument. He regarded legislating as an activity that unjustifiably interferes with and negatively affects the stability of the market process, property rights, or the rules surrounding investment and other financial activity. See Friedrich A Hayek, *Law, Legislation and Liberty, Volume 1: Rules and Order* (Chicago: University of Chicago Press, 1973) at 72-73 and 124-144.
[160] See Fuller, *supra* note 3 at 38-39.
[161] *Ibid* at 33-94; see also Lovett, *supra* note 151.

provide a deeper account of that ideal."[162] It is not surprising, then, that there are clear connections to draw—and even some overlap—between features of the Rule of Law and Fuller's principles of legality.

Legality requires that official action aligns with a declared rule to ensure that State action is sanctioned by corresponding laws.[163] Legality may also entail the principle that laws should not contradict one another,[164] especially if the State can exploit a contradiction to avoid a legal restriction or requirement. Lastly, a law would fail to properly constrain an individual, and thus fail the legality requirement of the Rule of Law, if it requires the impossible.[165]

Certainty requires that laws be knowable to ordinary citizens. This knowledge requirement in turn entails that legal rules be publicly promulgated with advance notice that a rule will take effect.[166] It also requires that promulgated rules be relatively clear and understandable to whom these rules apply.[167] Moreover, certainty also requires that the body of legal rules remain fairly stable through time to avoid creating persistent doubt about its requirements.[168] The principle of no contradictory laws applies to certainty as well, since serious contradictions in the body of laws make it uncertain how contradictory rules will be applied to an individual's affairs.[169] Lastly,

[162] See Lovett, *supra* note 151.
[163] See Lovett, *supra* note 151.
[164] *Ibid.*
[165] It is also a well-established principle of ethics that "ought" implies "can:" "[t]he action to which the '*ought*' applies must indeed be possible under natural conditions." See Immanuel Kant, *Critique of Pure Reason* (A548/B576) at 473.
[166] See Lovett, *supra* note 151.
[167] *Ibid.*
[168] *Ibid.*
[169] *Ibid.*

certainty also requires that the body of legal rules be applied prospectively so that individuals have reasonable assurance that their conduct will not be impugned retroactively based on a future law.[170]

Generality is more difficult to characterize. It has been regarded as a principle of legality that supports a core feature of the Rule of Law (i.e., equality), and it is itself a core feature of the Rule of Law. As mentioned earlier, generality is a precondition for equality as equality cannot be met if legal rules are not general enough to apply to State officials and ordinary citizens alike. Generality, as I argued, is also a feature of the Rule of Law that is foundational to what it means to be ruled by a system of *laws* and not by case-by-case determinations made based on the impulses or impressions of another.[171] Additionally, generality is underscored by other principles of legality, since upholding a system of general public norms that can apply to future conduct means that this system needs to be prospective and stable throughout time, and not be plagued by ambiguity or contradiction.

It is important to bear in mind that the features of the Rule of Law and their underpinning principles are approximated or approached, rather than fully achieved.[172] One argument to this effect that is commonly raised is that the perfect achievement of the formal requirements of the Rule of Law is not a possible goal or realistic interpretation of the requirements of the Rule of Law because "legal systems necessarily contain vague laws" or commit other transgressions of the formal requirements.[173] Another argument to this effect is that governing a society may entail

[170] *Ibid.*
[171] *Ibid.*
[172] See Fuller, *supra* note 3 at 44-45; see also Lovett, *supra* note 151.
[173] See Timothy A O Endicott, "The Impossibility of the Rule of Law" (1999) 19:1 Oxf J Leg Stud 1–18 at 1.

trade-offs on the formal requirements of the Rule of Law.[174] For example, moments of judicial activism that swiftly overturn unjust laws may significantly affect the congruency of official action and declared rule or the constancy of law through time. Moreover, the Rule of Law is not valued for its formal requirements per se. Rather, the Rule of Law and its formal requirements are valued for their capacity to render government or State power more predictable and less *arbitrary*.

I have done my best to avoid using the term "arbitrary" until now—preferring the terms "absolute" or "unruly" power—because "arbitrary" is an undertheorized term that jumbles together different ideas. That is, arbitrary power may refer to a use of power that is absolute or unqualified, unruly, unaccountable, unmanageable or opaque, and it is not always clear in which of these senses the term is being employed. Given that the liberal fear of imposition is often formulated as a fear of the arbitrary power of the State against the individual, it is worth examining different attributes or characteristics of arbitrary power to better understand how the Rule of Law can attenuate or hopefully resolve arbitrary power in the modern liberal State. Arbitrary power by the State or sovereign has also been regarded as *the* issue that the Rule of Law is specifically tasked to address.[175] Therefore, theorizing what it means for political power to be arbitrary may also give one greater insight into the basic purpose of the Rule of Law.

The Rule of Law and arbitrary power

Arbitrary power is often seen as merely an outcome of power-wielding that does not respect the Rule of Law. In this way, arbitrariness is treated as a one-dimensional, relational fact: the

[174] See Fuller, *supra* note 3 at 44-45.
[175] See Paul Burgess, "Googling the equivalence of private arbitrary power and state arbitrary power: why the Rule of Law does not relate to private relationships" (2021) 17:1 Int J Law Context 154–159.

erosion or absence of a feature of the Rule of Law indicates arbitrary use of power. There are at least three candidate forms of arbitrariness, carefully elucidated by Martin Krygier and Adam Winchester, which help add texture to this discussion.[176]

In one sense, officials wield power arbitrarily if they are not constrained by anything other than their whims—power is not (adequately) constrained or channeled by the well-defined limits of law, and thus violates the basic premise of legality.[177] In this sense, power is wielded arbitrarily if, for example, a political decision is "subject just to the arbitrium, the decision or judgement of the agent; the agent was in a position to choose it or not choose it, at their pleasure."[178]

In another sense, "power is exercised arbitrarily when those it affects cannot know, predict, understand or comply with the ways power comes to be wielded."[179] While the first sense is about the *de jure* or *de facto* lack of rules to constrain the power-wielder, this second sense is about a lack of common knowledge or (fair) certainty about what rules exist and how they come to be interpreted or applied. On this view, power is arbitrary if there is no reasonable way of knowing how power is to be wielded because, for example, legal rules exist but are not publicly promulgated, the body of rules applicable to conduct is routinely upended, or conduct that is currently permissible is routinely punished retroactively by future laws.[180] So, even if State conduct is governed by a system of rules that meets the demands of legality, arbitrariness prevails if citizens cannot know what those rules are and whether they dependably govern conduct.[181]

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[176] See Krygier & Winchester, *supra* note 4.
[177] *Ibid* at 77.
[178] *Ibid*, citing Philip Pettit, *Republicanism: A Theory of Freedom and Government*, Oxford Political Theory (Oxford: Oxford University Press, 1999) at 55.
[179] See Krygier & Winchester, *supra* note 4 at 77.
[180] *Ibid*.
[181] *Ibid*.

A third sense in which power may be regarded as arbitrary, Krygier and Winchester write,

> [I]s when the exercise of power, even if tempered and/or predictable, allows no space or makes no means available for its targets to be heard, to question, to inform, or to affect the exercise of power over them and no requirement that their voices and interests be considered in the exercise of that power.[182]

This exercise of power described by Krygier and Winchester is a total affront to the dignity of an individual who is exposed to it as it makes them little more than a subject to a power-wielder—one who lacks a sense of responsibility to the public. However, I argue that it is not apt to call this an arbitrary *exercise* of power. If this power is indeed tempered and made predictable, it is due to being carried out based on a public and intelligible *system* of rules which guards against exercises of power based on haphazard, unsystematic means. Rather, it may be that the *purpose* for which the power is exercised may be arbitrary, since the purpose may have been founded on nothing more than the personal whims or random choice of the sovereign, who feels accountable to no one. The question, then, is whether this form of arbitrary power—arbitrariness as to the purpose for which power is exercised—is one the Rule of Law can or is meant to address.

On this question of whether this type of arbitrary power is within the purview of the Rule of Law, Roberto Unger, Joseph Raz, and Brian Tamanaha, among others, have taken the view that legal liberty and the Rule of Law (however defined by these authors) may obtain without avenues of public input and participation or democracy more generally:

> The mere commitments to generality and autonomy in law and to the distinction among legislation, administration and adjudication have no inherent democratic significance.[183]

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[182] *Ibid.*

[183] See Tamanaha, *supra* note 13 at 37, citing Roberto Mangabeira Unger, *Law in modern society: toward a criticism of social theory* (New York: Free Press, 1976) at 191.

> A non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies. This does not mean that it will be better than those Western democracies. It will be an immeasurably worse legal system, but it will excel in one respect: in its conformity to the rule of law.[184]
>
> To say that a citizen is free within the open spaces allowed by the law says nothing about how wide (or narrow) those open spaces must be.[185]

Resolving this third type of arbitrary power requires that a government supports effective and accessible mechanisms for contesting government action, so that its people may know and have a reasonable opportunity to challenge the basis for *why* and *how* power is exercised. This requirement is different and arguably more substantive than the Rule of Law's basic requirement that the government act with fidelity to a system of laws. More pointedly, it is a form of arbitrariness that may be best addressed by the separate ideal of democracy, as it is unclear what core features of the Rule of Law it engages.

This argument is well-supported by Locke's views on the Rule of Law and its bearing on arbitrary power, which accord with the first two notions of arbitrariness raised by Krygier and Winchester but not necessarily the third. In his *Second Treatise of Government*, Locke stressed that governance by "established standing laws, promulgated and known to the people" was vital to the promotion of an individual's natural rights, such as their freedom.[186] The breakdown of this form of governance would bring on governance by "extemporary Arbitrary Decrees."[187] Locke deemed these decrees to be arbitrary specifically because they are demonstrative of a power-

[184] See Joseph Raz, "The Rule of Law and its Virtue *" in *Auth Law* (Oxford: Oxford University Press, 1979) at 211.
[185] See Tamanaha, *supra* note 13 at 37.
[186] See Locke, *supra* note 114 at Chapter IX (Of the Ends of Political Society and Government) § 131-137; see also Waldron, *supra* note 2.
[187] See Locke, *supra* note 114 at Chapter XI (Of the Extent of the Legislative Power) § 131-137; see also Waldron, *supra* note 2.

wielder who makes decisions on the go, rather than being bound and guided by public and knowable laws:

> [F]or all the power the government has, being only for the good of the society, as it ought not to be arbitrary and at pleasure, so it ought to be exercised by established and promulgated laws; that both the people may know their duty, and be safe and secure within the limits of the law, and the rulers, too, kept within their bounds, and not be tempted by the power they have in their hands to employ it to purposes, and by such measures as they would not have known, and own not willingly.[188]

The Rule of Law's role in constraining arbitrary power is, at minimum, about law acting as a system of public norms or rules for effectively channeling power, so that individuals can infer duties imposed on them and the liberties they retain. What the Rule of Law takes primary aim at, then, is power wielding that is not governed and limited by laws, which would otherwise be wielded through extemporary or impromptu decisions that are difficult for the public to anticipate. I argue that these are the forms of arbitrariness that the Rule-of-Law concept is poised to address.

3. The Rule of Law meets development

In Part 1, I illustrated how development agencies have treated the Rule of Law as an idea to be continuously repurposed to align with the development-related ends of these agencies. In Part 2, I argued that problematizing this treatment necessitates a historical approach that broadens the outlook on the Rule of Law beyond the ever-expanding mainstream development agenda to find what is core to and enduring about the concept. What I uncovered is that the Rule-of-Law's basic purpose is to "make law rule" so it can act as an effective check against arbitrary political power.[189] We saw that translating the purpose of the Rule of Law to different political orderings

[188] See Locke, *supra* note 114 at Chapter XI (Of the Extent of the Legislative Power) § 137; see also Waldron, *supra* note 2.
[189] See Waldron, *supra* note 124 at 157; see also section 2E of the thesis for a discussion on the complexities of the term *arbitrary*.

has inevitably put different demands on the Rule of Law. Still, the Rule of Law has retained its core purpose, and this purpose has determined how the concept's anatomical features change to account for perceived shifts in political organization, from Athenian democracy to feudalism, and the modern liberal State. Thus, the Rule of Law is a far more precise and scoped concept than development agencies contend. The Rule of Law is specifically about curbing the potential for the arbitrary exercise of political power and can incorporate different institutions and institutional demands to address arbitrary power across different forms of political organization. But it should not be reduced to a set of institutions or indicators that are specific to development or development-related endeavours.

With this in mind, Part 3 turns to understand how the Rule-of-Law concept came to be seen as coextensive with the many demands and visions of the mainstream development agenda, despite the Rule of Law's specific and limited focus on curbing arbitrary political power. As I will show, the concepts of "Rule of Law" and "development" have evolved side by side in the backdrop of the Law and Development Movement and, in this process, have been mistakenly regarded as causally and conceptually unified.

The history of the Law and Development Movement—marked by a host of US-led state- and market-driven reforms that use law to try and change developing countries for the better—is characterized by the idea "that the legal system is a part or aspect of society; events that occur outside the legal system have legal consequences, and events that occur within the legal system may have social consequences."[190] James Wolfensohn's Comprehensive Development

[190] See John H Merryman, "Comparative Law and Social Change: On the Origins, Style, Decline and Revival of the Law and Development Movement" (1977) 25:3 Am J Comp Law 457–491 at 464 and 466.

Framework[191] and integrated views of freedom, such as Amartya Sen's capability approach,[192] give substance to this idea as they see the success of development efforts as dependent on supportive interconnections between different types of institutions, be they economic, social or legal.[193] They furthermore recognize that these institutions are causally interdependent and conceptually integral to development as a whole:

> The claim here is not so much that, say, legal development causally influences development tout court, but rather that development as a whole cannot be considered separately from legal development.[194]

The problems of conceptual overexpansion and inflation set in when the supposedly integral connections between legal development and other institutions are presumed to apply between the Rule of Law and development. The *role* of law as an instrument of development is confused with the Rule of Law as an effective check against arbitrary political power. This is how the Rule of Law came to be seen as coextensive with the *role* of law and legal institutions in supporting economic and other forms of development. As a result, the Rule of Law has been swept up in a sometimes unquestioned belief in a comprehensive and unified development package with a myriad of institutions that somehow all "hang together" to comprise the whole of development

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[191] See James D Wolfensohn, *The Comprehensive Development Framework*, (Washington, DC: World Bank, 2000) [available online: <https://openknowledge.worldbank.org/handle/10986/33432>].

[192] The beginnings of the capability approach can be traced back to the following works: see Amartya Sen, "Informational bases of alternative welfare approaches: Aggregation and income distribution" (1974) 3:4 J Public Econ 387–403; see also Amartya Sen, "Equality of What?" in Sterling McMurrin, ed, *Tanner Lectures on Human Values* Vol. 1 (Cambridge: Cambridge University Press, 1980); see Amartya Sen, "Issues in the Measurement of Poverty" (1979) 81:2 Scand J Econ 285–307. For an encyclopedic overview of the capability approach, see Ingrid Robeyns, "The Capability Approach" in Edward N Zalta, ed, *Stanf Encycl Philos*, winter 2021 ed (Metaphysics Research Lab, Stanford University, 2021).

[193] While the concept of *institution* is commonly thought to denote a government ministry, department, or other public agency, I ascribe to Douglass C North's broad(er) construal of the concept, which "include[s] any form of constraint that human beings devise to shape human interaction." In North's view, institutions can be formal (e.g., State laws) or informal (e.g., tribal customs). See North, *supra* note 47 at 3-4; see also Gérard Roland, "Understanding institutional change: Fast-moving and slow-moving institutions" (2004) 38:4 Stud Comp Int Dev 109–131.

[194] See Amartya Sen, *What is the role of legal and judicial reform in the development process?* (Washington DC: World Bank, 2000) at 8 [available online: <https://issat.dcaf.ch/Learn/Resource-Library/Policy-and-Research-Papers/What-is-the-role-of-legal-and-judicial-reform-in-the-development-process>].

and whose supportive interrelations go off in many directions.[195] This has been pointedly observed by Tamanaha, who argues that the Rule of Law has been regarded as the unifying thread in holistic or integrative approaches to development:

> There is an element of faith and an element of opportunism in the law and development package. The faith element is the belief or hope that the reform package hangs together. A mutually reinforcing circle exists, according to this faith, in which the rule of law begets democracy, which begets social welfare capitalism, which begets liberal rights, which begets women's rights. The causal arrows presumably go in all directions, each supporting the other, with the rule of law bearing substantial weight and responsibility for the whole.[196]

This element of faith and opportunism is well illustrated by the Rule of Law's inclusion in the 2030 Sustainable Development Goals Agenda by way of SDG Target 16.3. The 2030 Agenda envisages that the SDGs combine to form a "universal," "indivisible," and "integrative" whole.[197] The UN and its agencies claim that the SDGs must be pursued in full, as they are each essential to achieving sustainable development (universal), and in tandem (indivisible) to take advantage of the supportive interconnections between these goals (integrative), including those between the Rule of Law and other Goals.[198] The Rule of Law's inclusion in an integrated development agenda as such is based on a very optimistic and undertheorized assumption that there are an array of supportive interconnections between the Rule of Law and other SDGs (Gender Equality (Goal 5), Clean Water and Sanitation (Goal 6), Life Below Water (Goal 14), Life on Land (Goal 15), and so on) that would justify their conceptual unification in an international development agenda.[199]

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[195] See *Ibid* at 1-3.
[196] See Tamanaha, *supra* note 43 at 223.
[197] See "Transforming our world: the 2030 Agenda for Sustainable Development", *supra* note 32 at Preamble.
[198] For a detailed analysis and critique of this claim, see Alexander Agnello & Nandini Ramanujam, "Recalibration of the Sustainable Development Agenda: Insights from the Conflict in Yemen" (2020) 16:1 McGill J Sustain Dev Law 84–113.
[199] In fact, there is growing literature regarding difficulties with explicating the assumed connections between the SDGs. Moreover, some studies find that these connections may be negatively rather than positively reinforcing, undercutting the hope of an indivisible and fully integrated agenda. See, for example, Måns Nilsson et al, "Mapping interactions between the sustainable development goals: lessons learned and ways forward" (2018) 13:6 Sustain Sci 1489–1503; see also Christian Kroll, Anne Warchold & Prajal Pradhan, "Sustainable Development Goals (SDGs): Are we successful in turning trade-offs into synergies?" (2019) 5:1 Palgrave Commun 1–11.

Moreover, the SDGs take for granted that the Rule-of-Law concept incorporates the general aims of legal and judicial reform. According to SDG Target 16.3, the Rule of Law requires equal civil and criminal justice for all. Another possibility, however, is that it is not so much the features of the Rule of Law (e.g., legality, certainty, equality, generality) that have a decisive impact on ensuring aims such as access to justice but rather the character and content of laws themselves, along with the integrity and performance of the institutions that administer them. A system of laws that is Rule of Law abiding may be reform-oriented and tend toward social aims that lead to development. But a system of laws may also take on a conservative bend and a fixation on maintaining a highly stable body of laws that facilitates routine and predictable exchanges. In what follows, I investigate this conflation of the Rule of Law with the *role* of law in development, leading to the former's overexpansion and inflation.

3A. Three stages of the Law and Development Movement

Law and Development studies originated in the 1960s as an attempt to define and develop a field of study based on ongoing assistance efforts by US-based development agencies (the Ford Foundation and USAID primarily) under the heading of "law and development."[200] With money pouring in to finance this new and un(der)theorized field, the definition of "law and development" was continuously recast to include new projects under its ambit.[201] This lack of scope and

[200] See Merryman, *supra* note 190 at 458-459.
[201] *Ibid* at 459.

institutional memory has made it hard to conceptualize Law and Development as a firm field of study.[202]

One major historical precursor to the Law and Development Movement was the wave of decolonization underway in several States in Africa and Asia after 1945.[203] Law and Development carried the hope of democratizing and developing "Third World" countries following their independence.[204] Successive stages of the Movement in the decades to follow were influenced by a roaring optimism about law's potential to pave the path toward progress for "Third World" countries: "law can somehow lead society in progressive directions" if given a leading role in carrying out state- or market-driven reforms.[205]

This optimism has been tempered by the Law and Development Movement's history of mixed results. Rather than law leading successive stages of efforts to jumpstart and sustain economic and social growth in low- and middle-income countries (LMICs), it is perhaps more apt to say that law's role in the Movement has been to contend with roadblocks standing in the way of so-called "progressive directions." Each stage of the Movement can be seen as a pivot to another approach when efforts appear to have hit a wall.[206] When law fails to lead society in progressive

[202] David M. Trubek writes that "[w]hile the number of studies and publications grew exponentially there still is no association that brings law and development scholars and practitioners together; no agreement on canonical texts; no publication that is widely read and commands broad respect." See David M Trubek, "Law and Development 50 Years On" (2012) Paper No. 1212 Leg Stud Res Pap Ser, online: <https://papers.ssrn.com/abstract=2161899> at 4.
[203] See Peer Zumbansen & Ruth Buchanan, "Approximating Law and Development, Human Rights and Transitional Justice" (2013) Comp Res Law Polit Econ, online: <https://digitalcommons.osgoode.yorku.ca/clpe/283>; see generally Ruth Margaret Buchanan & Peer Zumbansen, *Law in transition: human rights, development and transitional justice*, Osgoode readers volume 3 (Oxford, United Kingdom; Hart Publishing, 2014).
[204] *Ibid*; see also Wolfgang Sachs, "Development : the rise and decline of an ideal" (2000) 108 Wupp Pap, online: <https://epub.wupperinst.org/frontdoor/index/index/docId/1078>.
[205] See Merryman, *supra* note 190 at 462.
[206] This argument is compatible with a more open-ended view of Law and Development put forward by Amanda Perry-Kessaris: "'Law and development' or, better, legal development' is a field of thinking and practice focusing

directions by way of state- (first stage) or market-centred (second stage) reforms, attention shifts from the *role* of law in development to the Rule of Law's purported contribution to the development of institutions of *good* governance (third stage). These institutions began to focus on a comprehensive development package—comprising "economic development, poverty reduction, democracy, human rights, due process, equity, etc."—to fill a vacuum left by previous stages of Law and Development that paid little attention to the role of society as a whole in the development process.[207] When the Rule of Law is taken to be an integral part of good governance, it is assumed to beget aims and values associated with more comprehensive visions of development.

Surveying the history of the Rule of Law in connection with that of the Law and Development Movement shows why this is based on a conceptual misstep. The Rule of Law is included in the good governance package due to a well-justified focus on legal institutions for good governance. Nevertheless, this is a fatal error that conflates the *role* of law as an instrument of development with the Rule of Law as a political idea that designates law as the norm best suited to curbing arbitrary political power. As a result of this error, the Rule of Law has undergone capacious expansion in trying to accommodate the demands of a comprehensive development package. A step towards correcting this error would be to disambiguate the Rule of Law from the *role* of law in development by showing that development agencies have committed a category error: what they claim the Rule of Law can do is generally accomplished under the auspices of the *role* of law in development.

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on the role of law as a means, end, obstacle, or irrelevance in securing 'improvements' to human welfare." See Amanda Perry-Kessaris, "Law and Development" in Peer Zumbansen, ed, *Oxf Handb Transnatl Law* (Oxford University Press, 2021) at 377.

[207] See Maria Dakolias, "Methods for Monitoring and Evaluating The Rule of Law" *Applying the "Sectoral Approach" to the Legal and Judicial Domain – CILC's 20th Anniversary Conference* (The Hague, 2005) at 10 [available online: <https://www.cilc.nl/cms/wp-content/uploads/2014/11/Conference_publication_2005.pdf>]; see also Tamanaha, *supra* note 43 at 233.

The first stage: *Law and Development* in the 1950s, 60s, and 70s

The first wave of the Law and Development Movement aimed to correct the so-called "formalism" of legal institutions abroad that purportedly treated law as a closed system, out of touch with the interests and needs of the State and its citizens.[208] First-stage reformers saw positive law as a tool that the State could exploit to facilitate large-scale economic and social change.[209] To bring formalist legal systems abroad in line with such ambitions, it was thought that law schools in the developing world needed to train lawyers to be "omnicompetent problem solvers" capable of promoting the various development goals of the State.[210]

This idealized view of lawyers and their diverse range of competencies was not shared by the legal community in most developing societies.[211] And not surprisingly, first-stage legal reforms were deemed "ethnocentric … having little application or relevance to many, perhaps most, developing countries," and were generally not put into action.[212] Law and Development soon fell on the defensive, and by the mid-1970s, a general disenchantment with it took hold.[213] This, however, did not bring an end to the Law and Development Movement, since legal development was still a necessary part of subsequent reform efforts.

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[208] See David M Trubek & Alvaro Santos, "Introduction: The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice" in Alvaro Santos & David M Trubek, eds, *New Law Econ Dev Crit Apprais* (Cambridge: Cambridge University Press, 2006).
[209] *Ibid* at 5.
[210] See Merryman, *supra* note 190 at 466; see also David M Trubek & Marc Galanter, "Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States" (1974) Wis Law Rev, online: <https://repository.law.wisc.edu/s/uwlaw/item/15835>.
[211] See Merryman, *supra* note 190 at 466.
[212] See Mariana Mota Prado, "The past and future of law and development" (2016) 66:3 Univ Tor Law J 297–300 at 297.
[213] See Trubek & Galanter, *supra* note 210.

The second stage: *Washington Consensus* in the 80s and 90s

The second stage of the Law and Development Movement, spanning the 1980s and 90s, was marked by a shift toward policies meant to support a market-oriented economy with minimal government interference.[214] The hope was that the general orientation toward markets would stem the debt crisis of the 1980s which acutely affected Latin America and Africa.[215] The market was to come to the rescue in these regions and others after the failures of State-led development led to stagflation, low growth rates, an ensuing debt crisis in the 1980s, and overall little progress in alleviating poverty in its many forms.[216] Trubek and Santos succinctly describe this shift:

> [I]n the First Moment … [t]he focus was on modernizing regulation and the legal profession. Emphasis was placed on public law and transplanting regulatory laws from advanced states. It was important to strengthen the legal capacity of state agencies and state corporations and modernize the legal profession by encouraging pragmatic, policy-oriented lawyering … The vision of law in the Second Moment was as an instrument to foster private transactions. In the Second Moment, law and development doctrine placed its emphasis on private law in order to protect property and facilitate contractual exchange. It sought to use the law to place strict limits on state intervention and ensure equal treatment for foreign capital.[217]

These second-stage reforms are perhaps best known by the ten "policy points" of the Washington Consensus Agenda.[218] Several of the Agenda's prescriptions required direct and leading legal interventions, such as widening the national tax base, or strengthening property rights protections, to name a few.[219] Legal reforms also played a part in implementing the Agenda's more seemingly benign recommendations, such as avoiding significant debt relative to GDP or

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[214] See Trubek & Santos, *supra* note 208 at 1-6.
[215] *Ibid*. For context, see "UN/DESA Policy Brief #53: Reflection on development policy in the 1970s and 1980s | Department of Economic and Social Affairs", online: <https://www.un.org/development/desa/dpad/publication/policy-brief-53-reflection-on-development-policy-in-the-1970s-and-1980s/>.
[216] *Ibid*; see also generally James Wunsch et al, *The Failure Of The Centralized State: Institutions And Self-Governance In Africa*, 1st edition ed (Routledge, 2019).
[217] See Trubek & Santos, *supra* note 208 at 5-6.
[218] For more context, see John Williamson, "The Strange History of the Washington Consensus" (2004) 27:2 J Post Keynes Econ 195–206; see also Clay Risen, "John Williamson, 83, Dies; Economist Defined the 'Washington Consensus'", *N Y Times* (15 April 2021), online: <https://www.nytimes.com/2021/04/15/business/economy/john-williamson-dead.html>.
[219] *Ibid*.

redirecting "indiscriminate subsidies" to healthcare and education, as well as its more contentious market-liberalizing moves such as the privatization of state enterprises and deregulation of market entry and competition.[220]

At the time, debt relief aid and technical assistance from international finance institutions commonly came with the condition to steadfastly implement the Consensus Agenda's policy points.[221] This generated criticism that the Consensus Agenda was too concentrated on debt repayment and promoting a business-friendly environment.[222] In sub-Saharan Africa, the findings forty years later are that the Consensus Agenda failed to improve economic conditions in the 1980s and 1990s, and there is no apparent link between Consensus implementation and improvements in economic growth in the region in the 2000s.[223] What is apparent is that Consensus loan conditionalities served to undermine "the role of local ownership in shaping domestic economic policy"; for example, blanket trade liberalization by way of the elimination of agricultural subsidies hit rural farmers in Africa particularly hard and made it difficult for them to compete against their well-subsidized counterparts in developed countries.[224] Meanwhile, a rapid, top-down transition from a command to a market economy in post-Soviet Russia (known colloquially as

[220] *Ibid*.
[221] See Naím Moises, "Fads and Fashion in Economic Reforms: Washington Consensus or Washington Confusion?", online: *Pap Prep IMF Conf Second Gener Reforms Wash DC* <https://www.imf.org/external/pubs/ft/seminar/1999/reforms/Naim.HTM>.
[222] See Rittich, *supra* note 21; see also Joseph E Stiglitz, *Globalization and its discontents* (New York: W.W. Norton, 2003); see Balakrishnan Rajagopal, "International Law and the Development Encounter: Violence and Resistance at the Margins" (1999) 93 Proc Annu Meet Am Soc Int Law 16–27; finally, see Gita Sen & Caren A Grown, *Development, crises and alternative visions: Third World women's perspectives* (London: Earthscan, 1988).
[223] See Belinda Archibong, Brahima Coulibaly & Ngozi Okonjo-Iweala, "Washington Consensus Reforms and Lessons for Economic Performance in Sub-Saharan Africa" (2021) 35:3 J Econ Perspect 133–156.
[224] *Ibid* at 136-137ff.

"shock therapy") was followed by a sharp rise in the poverty rate, income inequality, and death rate in the country.[225]

The third stage: *Good governance and the Rule of Law* from the 2000s onward

In the third stage, society "becomes the backdrop and context for our iterations of law."[226] The State reenters the fray as a pivotal player in promoting economic growth and social well-being, as it is clear from the failures of the second stage that markets cannot be left to their own devices to determine outcomes for all of society, especially for those who live on the margins.[227] Even so, "the state does not sit 'on top' of society (or the market), but is part of society."[228] Including all of society in the development process necessitates particular attention to the capacity, quality, and fitness of State institutions, often understood in terms of "good governance." Merilee S. Grindle argues that:

> Getting good governance calls for improvements that touch virtually all aspects of the public sector – from institutions that set the rules of the game for economic and political interaction, to decision-making structures that determine priorities among public problems and allocate resources to respond to them, to organizations that manage administrative systems and deliver goods and services to citizens, to human resources that staff government bureaucracies, to the interface of officials and citizens in political and bureaucratic arenas...Not surprisingly, advocating good governance raises a host of questions about what needs to be done, when it needs to be done, and how it needs to be done.[229]

[225] See Massimo Florio, "Economists, Privatization in Russia and the Waning of the 'Washington Consensus'" (2002) 9:2 Rev Int Polit Econ 359–400; see also European Bank for Reconstruction and Development, *Annual Report 1997* (1998) [available online: <https://www.ebrd.com/documents/comms-and-bis/pdf-annual-report-1997-english.pdf>].
[226] See Perry-Kessaris, *supra* note 206, citing Peer Zumbansen, "Transnational Law: Evolving," King's College London Dickson Poon School of Law Legal Studies Research Paper Series, Paper No. 2014–29 (2014) at 3.
[227] See *supra* note 222.
[228] See Perry-Kessaris, *supra* note 206, citing Peer Zumbansen, "Transnational Law: Evolving," King's College London Dickson Poon School of Law Legal Studies Research Paper Series, Paper No. 2014–29 (2014) at 3.
[229] See Merilee S Grindle, "Good Enough Governance: Poverty Reduction and Reform in Developing Countries" (2004) 17:4 Governance 525–548 at 525-526.

Law reform is taken to be an obvious part of this good governance picture as it concerns improvements to a system of institutions— formal and informal rules, procedures, and social conventions—that determine how public decisions are made.[230] Taking inspiration from Douglass North's influential definition, "institutions" can be understood broadly as "the rules of the game" and include unwritten rules, customs, and other aspects of informal governance, not just State organs or State-sanctioned entities.[231] When law fails to lead society in progressive directions through previous state- or market-centred reforms, attention shifts from the development of legal systems conducive to economic growth to the Rule of Law's purported contribution to the development of institutional arrangements that approximate *good* governance.[232] Good governance institutions as such are meant to deliver on poverty reduction through economic development and social inclusion measures targeting the poor(est) or by improving participation in State institutions by strengthening democracy and the human rights framework.[233]

A clear announcement of this moment came in the form of a World Bank Annual Report (2002) statement that tied the Rule of Law to broadening development ambitions meant to address the social side of development: "[t]he rule of law is essential to equitable economic development

[230] See Daniel Kaufmann, "Rethinking Governance: Empirical Lessons Challenge Orthodoxy" (2003) World Bank Discussion Draft, online: <https://papers.ssrn.com/abstract=386904>; see also Göran Hydén, Julius Court & Kenneth Mease, *Making Sense of Governance: Empirical Evidence from Sixteen Developing Countries* (Lynne Rienner Publishers, 2004); see Steven van de Walle, "The state of the world's bureaucracies" (2006) 8:4 J Comp Policy Anal Res Pract 437–448.
[231] See North, *supra* note 47 at 3-4.
[232] Merilee Grindle has criticized mantras for good governance that offer simplistic advice such as "getting the policies right" or doing "what the Nordics do." See Merilee S Grindle, "Governance Reform: The New Analytics of Next Steps" (2011) 24:3 Governance 415–418 at 415-416; see also Merilee S Grindle, "Good Enough Governance Revisited" (2007) 25:5 Dev Policy Rev 533–574; finally, see Dani Rodrik & Arvind Subramanian, "The Primacy of Institutions (and what this does and does not mean)" (2003) Finance & Development 31-34 [available online: <https://www.imf.org/external/pubs/ft/fandd/2003/06/pdf/rodrik.pdf>.
[233] See Dakolias, *supra* note 207 at 9-10; see Tamanaha, *supra* note 43 at 233.

and sustainable poverty reduction."[234] This moment also invited a conversation about the appropriate metric to measure development success. There was a growing realization that any such metric should strongly consider the development of individuals as members of society, influenced in big part by Amartya Sen's 1999 book, *Development as Freedom*.[235] This book espoused a normative commitment—well known in the terms of the "capability approach"—to promote individual freedom through visions of development that are not only concerned with income, other material resources, or social and political goods, but also what people can do, and actually do, with those goods.[236] In those terms, development is understood as the expansion of people's "real freedoms."[237]

A corollary to Sen's integrated view of freedom is the Comprehensive Development Framework (CDF), first proposed by James D. Wolfensohn, which aims to "respect[] both sides of the development coin" by bringing together macroeconomic policies for strong and stable economic growth with the social foundations essential to human development.[238] This Framework regards the different institutions of governance, be they economic, social or legal, as causally interdependent and conceptually integrated in the development process.[239] That is, development

[234] See Santos, *supra* note 45 at 276, citing "The World Bank Annual Report 2002 : Volume 1. Main report", online: <https://openknowledge.worldbank.org/handle/10986/13931> at 77.
[235] See Amartya Sen, *Development as Freedom* (New York: Alfred A. Knopf, 1999).
[236] *Ibid*; see also *supra* note 192; see generally John Rawls, *A Theory of Justice: Original Edition* (Harvard University Press, 1971).
[237] See Sen, *supra* note 235 at 3; see *supra* note 192; see also Martha C Nussbaum, *Creating capabilities: the human development approach* (Cambridge, Mass.: Belknap Press of Harvard University Press, 2011).
[238] See Amartya Sen & James D Wolfensohn, "Opinion | Let's Respect Both Sides of the Development Coin", *N Y Times* (5 May 1999), online: <https://www.nytimes.com/1999/05/05/opinion/IHT-lets-respect-both-sides-of-the-development-coin.html>; see also Wolfensohn, *supra* note 191.
[239] See Wolfensohn, *supra* note 191.

cannot be fully realized or fully appreciated as a concept if it is seen as siloed in one institution and isolated from the everyday interactions among institutions.[240]

These approaches are regarded as compatible as they both engage the need for a comprehensive or integrated view of the development, just from different ends of this process.[241] Integrated views of freedom take as their starting point "different aspects of human freedom and how they link with each other," while the CDF starts with the assumption that interactions among institutions are an obvious fact.[242] But both recognize that an integrated view of development indicators, whether different aspects of freedom or different institutions, is crucial to avoid "seeing development in an artificially narrow way."[243] These comprehensive or integrated visions of development are also reflected in the current mainstream international development agenda, the 2030 Agenda for Sustainable Development. The Agenda's foundational document requires that all its Goals be implemented in an integrated manner as it is expected that the full implementation of its interconnected dimensions—environmental, economic, and social—will be guided by the interlinkages between the Goals.[244]

Comprehensive development is now a widely accepted and important idea demonstrating that one cannot break certain aspects of development off from others as they are all essential and cohesively add up to comprise the development experience. However, when the Rule of Law is regarded as an integral part of good governance and is thus taken to promote comprehensive or

[240] See Sen, *supra* note 194 at 22ff.
[241] *Ibid*.
[242] *Ibid* at 23-24.
[243] *Ibid* at 23.
[244] See "Transforming our world: the 2030 Agenda for Sustainable Development", *supra* note 32.

integrated visions of development as such, the Rule of Law becomes entrenched in the development process. The problems of conceptual overexpansion and inflation for the Rule of Law set in when the supposedly integral connections between legal development and other institutions of development are presumed to apply between the Rule of Law and development. As an analytical concept—one that breaks down the facets of unruly or absolute power and identifies features of law that can address these facets—the Rule of Law has proven to be compatible with various institutional arrangements and different forms of political organization or morality. Nevertheless, the Rule of Law has a particular purpose that should not be equated with or regarded as co-extensive with the development of specific legal infrastructure to support economic or other forms of development.[245] This argument is compatible with—and possibly even bolstered by—the integrated or comprehensive view of development: in no way can the development process be reduced to the Rule of Law, legal development more broadly, or any other feature of development—but all of these features "hang other" to create a full picture of the development process.

3B. Symptoms of Rule of Law overexpansion and inflation

As a concept with significant goodwill behind it, referring to the Rule of Law in development, rather than the *role* of law as an instrument of development, has perhaps been a way to move beyond the chequered history of the Law and Development Movement. However, while under the new banner of "Rule of Law," legal development continues to be carried out using the same template. Tamanaha writes:

> [I]t is crucial to mark the distinction between "law and development" activities—the modernization project—and "legal development"—the ongoing construction of legal institutions that occurs in all societies ... The

[245] See Rodrik & Subramanian, *supra* note 232.

> failure of law and development efforts does not mean that legal development is not taking place. It means that the projects are not working and it tells us that imprudent application of the standard law and development template is a mistake.[246]

This problem has provided the backdrop for the thesis. The banner under which legal development is taking place—"Rule of Law"—is not, in itself or without qualification, determinative of any specific type of development, or the quality or suitability of such development. It is possible, in principle, to have a Rule of Law-abiding system that produces growth-negative outcomes if the system encompasses laws that are not tailored to achieve growth in a certain context or if the laws are patently growth-inhibiting. For example, a Rule-of-Law system could potentially be one in which there are many onerous regulations for businesses and their economic activity. These kinds of regulations and red tape may still be Rule of Law conforming if they observe the minimal requirements of the Rule of Law (e.g., they are promulgated and knowable, do not contain serious contradictions or ambiguities, are not impossible to follow, etc.). This point is important because it tests the assumption that the Rule of Law is conducive to development. It is not so much the features of the Rule of Law, but rather the character and content of the laws in operation, along with the integrity and performance of the institutions that administer them, that have an impact on development. Indeed, there is a tendency among development practitioners, often working under pressure to provide quick solutions, to vacuously apply the label "Rule of Law" to almost any challenge that may involve legal reform as part of its solution, as though the label is itself indicative of the quality or suitability of that reform for development. This tendency reflects a common view that the Rule of Law "in theory" and "in practice" are distinct concerns that have no bearing on one another—a view whose source has been traced by Rachel Kleinfeld:

[246] See Tamanaha, *supra* note 43 at 216.

> The new field of rule-of-law reform did not emerge slowly after years of academic discourse. It grew from action—action needed right away—as states tried to keep regions from falling into poverty and anarchy, organizations jockeyed with one another for primacy in a new and growing field, reformers tried to create new polities out of crumbling states, and the United States and Europe fought for influence over the newly unallied states of Eastern Europe through legal systems, as well as through NATO and the EU. Few, except perhaps practitioners on the ground, noticed that they were working for different goals under the rubric of rule-of-law reform—and that they were too busy acting to comment.[247]

In the interest of providing rapid action in situations of urgency, Rule-of-Law reform took off without careful conceptualization at the outset or well-crafted methods of data collection and empirical analysis to study the success of reform implementation in retrospect. Still today, referencing Rule-of-Law reform to speak of legal reform more generally is common in development practice, to the point where it has been argued that there exists a *development-enabling* Rule of Law.

The assumption that there is a development-enabling Rule of Law

An oft-cited argument in support of a development-enabling Rule of Law is that the Rule of Law must incorporate substantive aims or values, or else it would not be worth pursuing.[248] A common argument made to support this position is that "thin" or formal definitions of the Rule of Law are compatible with the establishment and maintenance of appalling legal regimes.[249] Arthur Chaskalson, former President of the Constitutional Court of South Africa, has observed that while

[247] See Rachel Kleinfeld, "Competing Definitions of the Rule of Law" in Thomas Carothers, ed, *Promot Rule Law Abroad Search Knowl* (Brookings Institution Press, 2010) at 64.
[248] See Thom Ringer, "Development, Reform, and the Rule of Law: Some Prescriptions for a Common Understanding of the 'Rule of Law' and its Place in Development Theory and Practice" (2007) 10:1 Yale Human Rights and Development Law Journal 100-158 at 134-135 and 137ff.
[249] See Tamanaha, *supra* note 1 at 241-242.

apartheid laws in South Africa met the formal and procedural requirements of the Rule of Law, these laws still prescribed and facilitated racial segregation and other oppressive practices.[250]

This is an understandable concern. It is important that the designation of "Rule-of-Law society" actually "stand" for something. The example of apartheid South Africa makes it importantly clear that the phrase "Rule of Law" is not, in itself, indicative or determinative of the quality or goodness of legal reform. Employing "Rule of Law" as a catchphrase to describe "good" or "just" laws or legal systems can conceal misguided or sinister legal reforms that may, in principle, take place in Rule of Law-abiding societies. Indeed,

> the Rule of Law is just one of the virtues which a legal system may possess and by which it is to be judged ... A non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies.[251]

This point only emphasizes how crucial it is to distinguish and separate the basic demands of the Rule of Law from the demands of a comprehensive development package or a full picture of justice, so one may determine what is needed in addition to the Rule of Law to achieve inclusive development or justice.

Moreover, distinguishing and separating the demands of the Rule of Law from the demands for achieving a "just" or "developed" society serves to clarify and highlight the Rule of Law's distinct contribution to the governance of a society. While the Rule of Law may not, in principle, pose requirements on laws that make them development enabling or just per se, the Rule of Law's role

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[250] See Mark D Agrast, Juan C Botero & Alejandro Ponce, "The World Justice Project Rule of Law Index 2011" (2011) at 9 [available online: <https://worldjusticeproject.org/sites/default/files/documents/WJP_Rule_of_Law_Index_2011_Report.pdf>].
[251] See Raz, *supra* note 184 at 211.

in ensuring that laws are a constraint on political power could promote development-related outcomes. The extremely poor face "various types of unfreedoms that leave [them] with little choice and little opportunity of exercising their reasoned agency."[252] Ensuring that people are not "subject just to the *arbitrium*"[253] is a way to alleviate some of these unfreedoms or at least stop the imposition of more indignities that reduce people's opportunities to pursue "what they have reason to value."[254] The capacity of the Rule of Law to keep political power in check can be conducive to development ends in this way.

The assumption that the Rule of Law requires a specific combination of institutions

Arguments for the existence of a development-enabling Rule of Law tend to presuppose that the Rule of Law is characterized by a specific combination of institutions that, in turn, make it development-enabling. The UN's iterations of the Rule of Law covered in Part 1 are a striking example of this tendency. The Preamble of the UDHR provides only a statement on the Rule of Law's role in protecting human rights.[255] A 2002 Secretary-General report built out this preambular statement by wholesale integrating human rights institutions and State organs responsible for upholding human rights into the Rule of Law.[256] As Kleinfeld argues, when the Rule of Law is oriented around a specific set of institutions, it tends to be absorbed by the mission or objectives of these institutions.[257] This is exactly what is observed in subsequent Secretary-General reports (2004 and 2012) that define the Rule of Law in relation to a growing list of

[252] See Sen, *supra* note 235 at xii.
[253] See Pettit, *supra* note 178 at 55.
[254] See Amartya Sen, *The Idea of Justice* (Cambridge, MA : Harvard University Press, 2022) at 276. I am grateful to my thesis supervisor, Professor Nandini Ramanujam, for encouraging me to engage with this point.
[255] See Preamble, *Universal Declaration of Human Rights*.
[256] See Report of the Secretary-General, "Strengthening of the rule of law" [UN Doc A/57/275] (5 August 2002) at para 1 [available online: <https://digitallibrary.un.org/record/474329?ln=en>].
[257] See Kleinfeld, *supra* note 36 at 50-51.

institutions that reflect the demands of liberal democracy,[258] and sustainable and inclusive development respectively.[259] These moves have collapsed important distinctions between the Rule of Law and human rights, democracy, and development.

Indeed, prescribing a certain configuration of institutions to the Rule of Law in this way "encourages practitioners to approach rule-of-law strengthening as a series of what often end up as mechanistic, unproductive efforts to make specific institutions in the target countries resemble their counterpart institutions in developed countries."[260] For example, definitions of the Rule of Law have commonly placed an overriding emphasis on the fitness, capacity, and quality of the legal infrastructure of the State, particularly the role of State courts in producing fair and timely resolutions to disputes.[261] There is a common, and often unquestioned, belief on the part of jurists in the Global North that "the state has a monopoly over law" the world over.[262] This point is pithily captured by Trubek and Galanter:

> The [American] model assumes that state institutions are the primary locus of social control, while in much of the Third World the grip of tribe, clan, and local community is far stronger than that of the nation-state. The model assumes that rules both reflect the interests of the vast majority of citizens and are normally internalized by them, while in many developing countries rules are imposed on the many by the few and are frequently honored more in the breach than in the observance. The model assumes that courts are central actors in social control, and that they are relatively autonomous from political, tribal, religious, or class interests. Yet in many nations courts are neither very independent nor very important."[263]

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[258] See Report of the Secretary-General, "The rule of law and transitional justice in conflict and post-conflict societies" [UN Doc S/2004/616] (23 August 2004) at para 6 [available online: <https://undocs.org/en/S/2004/616>].
[259] See "Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels" (2012), online (pdf): *United Nations General Assembly* <https://www.un.org/ruleoflaw/files/37839_A-RES-67-1.pdf> [UN Doc A/RES/67/1] at 2.
[260] See Thomas Carothers, *Promoting the Rule of Law Abroad: In Search of Knowledge* (Brookings Institution Press, 2010) at 303.
[261] See, for example, Wenfang Tang, "Rule of Law and Dispute Resolution in China: Evidence from Survey Data" (2009) 9:1 China Rev 73–96.
[262] See Laura Grenfell, ed, "A globalised view of the rule of law and legal pluralism" in *Promot Rule Law Post-Confl States* (Cambridge: Cambridge University Press, 2013) 14–58 at 14.
[263] See Trubek & Galanter, *supra* note 210 at 1080-1081.

Indeed, while the historical discussion on the core purpose of the Rule of Law focused heavily on conditioning government or State power, it reinforced the point that the Rule of Law is not tied to any particular form of political ordering; it can include within its ambit excessive exercises of non-State power. It follows that the demands of the Rule of Law may be met through a cooperative model of legal pluralism that has informal legal institutions working in parallel with or under the State.[264] This may help to address excesses of political power that do not stem from the State or are more appropriately handled by non-State institutions.[265] As for notable examples illustrating the importance of recognizing the place of informal justice mechanisms, in Timor-Leste "a largely respected jurisdictional divide between courts and local (suco) councils" was drawn, and this has generated greater cooperation between formal and informal justice mechanisms to deal with a significant logjam of cases against the State and informal authorities resulting from a previously fractured system of justice.[266] Seriously engaging with different sources of arbitrary political power—stemming from State or non-State authority—opens one to being more pluralistic about what a Rule-of-Law society requires so that it can properly account for the differences in the nature of political authority across the various legal orders of the world.

Conclusion

I began this thesis with the observation that the Rule of Law has been inserted as a response to virtually every demand of the mainstream development agenda. As a result, the progressive enlargement of the mainstream development agenda—going from a narrow focus on economic growth and industrialization to the promotion of an international "plan of action for people, planet

[264] See Geoffrey Swenson, "Legal Pluralism in Theory and Practice" (2018) 20:3 Int Stud Rev 438–462; see also John Griffiths, "What is Legal Pluralism?" (1986) 18:24 J Leg Plur Unoff Law 1–55.
[265] See Swenson, *supra* note 264 at 452.
[266] See Swenson, *supra* note 264 at 452.

and prosperity"[267]—has led to the concomitant enlargement of the Rule of Law's place in development. This has rendered the Rule of Law a concept that is overworked, overdetermined, and devoid of analytical promise. I uncovered that this overexpansion and inflation stems from the conflation of the *role* of law as an instrument of development with the Rule of Law as a political ideal that designates law as the norm best suited to curbing arbitrary political power. In illustrating the capacious expansion and inflation of the Rule of Law in mainstream development, I hope that this thesis has convinced the reader that it is high time to denaturalize and seriously question the unsystematic and fragmentary use of this concept that is "constantly on people's lips."[268]

Despite my hope, I am half anticipating an emphatic *so what?* So what if people use the Rule of Law inconsistently or uncarefully? This seems like a problem that legal philosophers would pore over, but it would hardly trouble those who see the concept as a catalyst for social progress despite the many disparate forms or shapes it takes on. If the Rule of Law is one of those rare anchor concepts that manage to unite many different and disparate views to rally societies and the international community behind important causes such as the mainstream development agenda, why should one care if deep misunderstandings lie beneath the concept's surface?

In this thesis, I aspired to conduct a rigorous theoretical treatment of the Rule of Law for its own sake, in part to push against the seemingly pervasive attitude in law schools that theory is important or valuable only to the extent that it helps solve so-called "real-world problems."[269] The

[267] See "Transforming our world: the 2030 Agenda for Sustainable Development", *supra* note 32 at Preamble.
[268] See Christopher May, "The Rule of Law: What is it and why is it 'Constantly on People's Lips'?" (2011) 9:3 Polit Stud Rev 357–365.
[269] Paul Kahn argued that "[t]he rule of law has, however, been peculiarly closed to the inquiries of modern cultural theory. Where such inquiries have appeared, they have all too quickly been turned toward the traditional issues of legal reform …" See Paul W Kahn, *The Cultural Study of Law: Reconstructing Legal Scholarship* (University of Chicago Press, 1999) at 1.

Rule of Law is a concept regarded by the legal profession as a sacred idol. From a more sober perspective, it has succumbed to treatment as an empty idol due to a common habit of reform-minded lawyers to confiscate the Rule of Law from theory, regarding it as "a matter of revealed truth" and a ready-made means for addressing social needs.[270] I have found it important to pay particular effort to theorize the Rule of Law to counter this widespread and largely untested assumption that the Rule of Law is, writ large, a reform-oriented ideal that can make society better off in innumerous ways. However, without contradicting my purpose, I feel the need to conclude the thesis by emphasizing the Rule of Law's practical implications in order to provide an answer to the skeptics.

First, I wish to draw on the importance of *conceptual transparency* in using the Rule of Law as a basis for development efforts. While the Rule of Law has achieved global appeal, it is not to be used as a catchphrase that is indicative or determinative of the goodness or suitability of legal reform projects. When development practitioners lean on the Rule of Law in this way—as a boilerplate statement that does not engage any deeper analysis or scrutiny and can relate to just about any legal endeavour—it can act as a disguise for misguided or sinister legal reforms.

This concern also speaks to the question of *conceptual accountability*: being accountable to the concepts one employs in coming to determinations that can impact the lives of people in very significant ways. In analogizing this question to the legal profession, consider that judges make life-changing decisions through the interpretation and application of concepts and, more basically, words: "Legal interpretive acts signal and occasion the imposition of violence upon

[270] *Ibid* at 1-6.

others: A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life."[271] This observation by Robert Cover powerfully demonstrates the potential stakes involved in interpreting and applying concepts to real-world situations. The trust society grants judges is due in part to the expectation that they act with fidelity to law, and that includes a reading and application of legal precepts, concepts, and language that have a reasoned basis and air of reality. By contrast, employing the Rule-of-Law concept in fragmentary, unsystematic ways demonstrates conceptual unaccountability and has serious real-world consequences: the squandering of precious development funding or the administration of projects in community-based settings that are intrusive and to no avail, because they take on misguided assumptions about what legal reform, under the guise of the Rule of Law, can do.

Second, and finally, this brings me to the question of what the Rule of Law *can* do for development. As I have made clear in the thesis, I do not take the position that the Rule of Law does not influence development. There is limited and inconclusive quantitative research and analysis on whether the Rule of Law is conducive to development. It is inconclusive mainly because "development" and "Rule of Law" have been so variably defined across the literature that it becomes difficult to establish a benchmark for making level comparisons between studies on their connection.[272] Intuitively though, the existence of public, reasonably clear, and legally binding rules to regulate government activity seem more conducive to fruitful economic exchanges, *ceteris paribus*, than rules that are hard to find or riddled with contradictions or other ambiguities.

[271] See Robert M Cover, "Violence and the Word" (1986) 95:8 Yale Law J 1601–1629 at 1601.
[272] See *supra* note 41.

Moreover, even if the Rule of Law should not be treated as synonymous with legal development, it likely may still make demands on institutions that play a role in development. What the Rule of Law could supply to institutions that play a role in development is, admittedly, not a question that could be answered in the abstract. If one were to take on a comprehensive or integrated view of development—as is the case with the UN 2030 Agenda for Sustainable Development—one would be unable to delineate or fully specify the Rule of Law's contribution to development-enabling institutions without considering how those institutions come together to give rise to the development experience.

The formal features of the Rule of Law (e.g., legality, clarity, equality, and generality) should serve as a starting point for conceptualizing the Rule of Law's role in development. It is not satisfactory to simply assert that the Rule of Law is determinative of development. For the Rule of Law to operate as a unified concept, rather than operating under the weight of a growing list of disparate aims and projects, the substantive objectives it takes on should flow from the formal contours of the Rule of Law that reflect its basic purpose.

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