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The Procedural Aspect of the Rule of Law: India as a Case Study for Distinguishing Concept from Conception

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The Procedural Aspect of the Rule of Law: India as a Case Study for Distinguishing Concept from Conception

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ABSTRACT

In this thesis, the concept of the procedural aspect of the Rule of Law will be distinguished from what I argue are conceptions that are falsely promulgated as concept. The different aspects of the Rule of Law—form, substance, and procedure—are helpful in making the distinction between concept and conception. Examining procedure within the Rule of Law is particularly important, and I define a broader set of requirements of the concept of the procedural aspect of the Rule of Law. This concept is applied to understand the Indian conception of the Rule of Law, a particularly interesting case that brings out questions about culture and economic capacity. Ultimately, I argue that this broader set of requirements is better suited to evaluate the realization of the Rule of Law in all contexts.

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INTRODUCTION

The Rule of Law is a crucial component in a list of items that make up contemporary political ideals; other items in this list include democracy, human rights, and the principles of free market economy.[1] The Rule of Law, the legal principle that laws rather than individuals should govern a nation, is promoted throughout the world as an ideal that countries, developed and developing alike, should strive to achieve. However, the Rule of Law is a broad concept, and it is called upon in varying contexts. The following mark some of the diverse examples in which the Rule of Law is invoked:

- Since 2002, the United States has detained 22 members of China's oppressed Uighur Muslim minority. In 2008, the Bush administration fought a Supreme Court ruling ordering that these detainees be freed from Guantánamo Bay and let into the United States.[2] The detainees are neither enemy combatants nor terrorists and have been held without charges or hearings. Their detention, along with the detention of others who have been deprived of proper hearings,

[1] Jeremy Waldron, "The Concept and the Rule of Law," *Georgia Law Review,* Vol. 43, No. 1, Fall 2008, 3.
[2] "The Rule of Law in Guantánamo," *The New York Times,* 11 Oct. 2008, http://www.nytimes.com/2008/10/12/opinion/12sun2.html.

has stained the United States' reputation for upholding due process. Today, President Obama dances around the issue of closing Guantánamo Bay, having called the base "a symbol around the world for an America that flouts the rule of law."[3]

- Established as a homeland for India's Muslims, Pakistan has had a turbulent history. Regional strife as well as tension between forces of religious extremism and military authoritarianism have become defining qualities of Pakistan. While observers often blame the Pakistani army for the failing condition of the state, political thinkers have pointed to violations of the Rule of Law committed by Pakistani politicians.[4] Dr. Khalil Ahmad, of the free market think tank Alternate Solutions Institute, claims that Pakistan has become "a government of the criminals, by the criminals, for the criminals."[5]
- In China, in an attempt to temper corruption, President Xi Jinping heralds a new slogan: "Socialist Rule of Law with Chinese characteristics."[6] In October of 2014, the Central Committee of the Communist Party of China promised that this campaign would be fully implemented by 2020 and would result in an "extensive and profound revolution."[7] This revolution includes the instatement of the Rule of Law and renewed emphasis of the Chinese Constitution. This

[3] "Obama Vows to Close Guantanamo Detention Facility," *DoD News,* U.S. Department of Defense, 23 May 2013, http://www.defense.gov/news/newsarticle.aspx?id=120130.
[4] "It's Time Rule of Law Becomes an Established Norm in Pakistan," Atlas Economic Research Foundation, 14 May 2014, http://www.atlasnetwork.org/news/article/its-time-rule-of-law-becomes-an-established-norm-in-pakistan.
[5] Ibid.
[6] "China with legal characteristics," *The Economist,* 1 Nov. 2014, http://www.economist.com/news/leaders/21629383-xi-jinping-invoking-rule-law-thats-risky-him-and-good-china-china-legal.
[7] "Rules of the party," *The Economist,* 1 Nov. 2014, http://www.economist.com/news/china/21629528-call-revive-countrys-constitution-will-not-necessarily-establish-rule-law-rules.

campaign marks the first time that the Central Committee has given a place of honor to the Constitution as "the fundamental guideline of their activities."[8]

These are just three of the endless examples of the idea of the Rule of Law being invoked throughout the world. On March 28th, 2015, a Google search of "Rule of Law" came up with 368,000 results in 0.33 seconds, a large number that reflects the variety of takes that exist on the Rule of Law. In this thesis, I strive to clarify the concept of the Rule of Law in order to ease tensions that arise in conversations about it as well as to improve the way the concept is used to evaluate legal systems throughout the world.

An example of the tension that arises from the differences in understanding the Rule of Law is the example of China. At the same time that government officials strengthen their support for the Rule of Law, they have emphasized that their stance against Western democratic values connected with constitutionalism has not changed. Chinese officials have stated that they "absolutely cannot indiscriminately copy foreign rule-of-law concepts and models," and that the party will "strengthen internal propaganda and education" to prevent any misunderstanding that the Chinese Constitution holds any semblance to the idea of a Western constitution. Xi and other Chinese officials shy away from associating with general lists that delineate Western ideals of the Rule of Law, but it is intuitive that the concept of Rule of Law still applies to them. This call for the Rule of Law, though risky for Chinese politicians because it associates them with a concept recognized by contemporary Western political minds, demonstrates some universal pull towards the concept. However, Xi's

[8] Ibid.

skepticism for applying the Rule of Law to the Chinese case is also valid. Since it is a country with far different ideals, goals, history, and culture from others that uphold the Rule of Law, it is natural for Chinese officials to question the widely recognized ideas of the Rule of Law.

This tension between the universal pull to the Rule of Law and the rejection of its foreign interpretations can be explained by the distinction between concept and conception, a distinction made by John Rawls.[9] While a conception is an understanding of a set of principles, this understanding is distinct from the concept, which "is specified by the *role* which these different sets of principles, these different conceptions, have in common."[10] The concept, which is the core of the idea, is "a kind of plateau on which further thought and argument are built."[11]

I argue that the Rule of Law can be better understood in terms of concept and conception. The concept of the Rule of Law is the core idea behind the claims made in Guantánamo Bay, Pakistan, and China. It is the idea that pulls the Chinese and Westerners towards enforcing their respective constitutions. However, the difference between varying conceptions, or understandings, of the Rule of Law are what cause disquiet among Chinese officials and people when Xi claims to uphold the Rule of Law.

Various conceptions of the Rule of Law are legitimized by differences in history, culture, and circumstance that exist surrounding legal systems. Charles Beitz writes that it is reasonable to expect conceptions "at the level of institutions, laws, and

[9] John Rawls. *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), 5-6.
[10] Rawls, 5. Emphasis added.
[11] Ronald Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986), 70.

policies, to vary across societies in ways that respond to differences in the economic, social, and cultural background."[12] Beitz's argument particularly applies to the procedural aspect of the Rule of Law, which centers on the structure of the institutions, laws, and policies that he claims vary across societies. Judgments about the Rule of Law on this level depend on "complex assessments of the significance of the pertinent background facts."[13] Countries differ in culture, history, and circumstance; thus, various manifestations of legal systems that abide by the Rule of Law exist. Therefore, deep understanding of cultural context is necessary to satisfactorily evaluate a legal system and understand a different conception of the Rule of Law.

The Indian legal system is an interesting case to apply the concept of the Rule of Law because (1) of its history and how India's culture and context has shaped its contemporary legal system, and (2) of the demands of its population. India's legal system serves the second largest population in the world of 1.2 billion people.[14] From the outside, its legal system, hindered by its history of colonialism and internal discord, is messy and ineffective. It is riddled with backlog of pending cases, corruption in the judiciary, and lack of transparency. However, closer examination of India's legal system brings to light a legal system that has evolved to its current state due to culture, history, and circumstance. Of particular interest is India's budding mediation movement, which is rooted in its people's culture of collaborative problem-solving. When placed within the context of India's legal system and the culture of the

[12] Charles Beitz, *The Idea of Human Rights* (Oxford: Oxford University Press, 2009), 143.
[13] Ibid.
[14] "India," *The World Factbook,* The Central Intelligence Agency, https://www.cia.gov/library/publications/the-world-factbook/geos/in.html.

people it serves, mediation holds a key in understanding India's conception of Rule of Law. Illustrating this conception of the Rule of Law will demonstrate the kind of analysis of the Rule of Law concept and conceptions that should be conducted throughout the world.

In this thesis, the concept of the procedural aspect of the Rule of Law will be distinguished from what I argue are conceptions that are falsely promulgated as concept. The different aspects of the Rule of Law—form, substance, and procedure—are helpful in making the distinction between concept and conception. Examining procedure within the Rule of Law is particularly important, and I define a broader set of requirements of the concept of the procedural aspect of the Rule of Law. This concept is applied to understand the Indian conception of the Rule of Law, a particularly interesting case that brings out questions about culture and economic capacity. Ultimately, I argue that this broader set of requirements is better suited to evaluate the realization of the Rule of Law in all contexts.

SECTION 1:
THE CONCEPT OF THE RULE OF LAW

Jeremy Waldron notes, "The Rule of Law is seen as a fragile but crucial idea."[15] The concept of the Rule of Law is crucial, for, as shown in the Introduction, it is invoked whenever people challenge governments. However, it is fragile in that it is easily moldable and construed differently in varying contexts. Though the Rule of Law may be understood differently by various individuals, it is crucial to set out a clear and consistent understanding of its role.

The concept of the Rule of Law is the core idea from which conceptions, or manifestations of the concept within different contexts, spawn. Ronald Dworkin describes this distinction using a metaphor of the trunk and the branches of a tree.[16] People agree about what the trunk, which consists of the most general and abstract propositions about the Rule of Law, is. This trunk represents the concept of the Rule of Law, which is consistent and uncontroversial throughout the world and within varying legal systems. Where people disagree are the details of the branches, the refinements and interpretations of these propositions. These are the conceptions, and

[15] Waldron, 2008, 5.
[16] Dworkin, 70.

there exist various conceptions that are true within their specific contexts. To refine understanding of the Rule of Law, the concept must be drawn out from the conceptions.

The distinction is also clarified by Dworkin via a comparison to understandings about courtesy.[17] People agree that courtesy described abstractly is a matter of respect. However, divisions arise about more specific interpretations about respect. While some believe respect should be shown to people of a certain rank or group, others believe respect is deserved person by person. In this case, respect establishes the concept of courtesy and the various ways respect can play out are conceptions of this concept. As Dworkin puts it, the concept is the plateau on which further thought and argument are built.

The concept of the Rule of Law is not only crucial for evaluating legal systems but is also necessary for recognizing legitimate systems of law. Waldron claims that "not every system of command and control that calls itself a legal system *is* a legal system. We need to scrutinize it a little—to see how it works—before we bestow this term."[18] The concept of the Rule of Law plays the role of helping recognize the bare minimum that must be present in order to recognize a legitimate legal system as such. For example, there are some systems of rules that do not fulfill the roles that the Rule of Law must play—the Mafia and Nazi Germany, for example—and therefore fail the requirements of legitimate legal systems. The Rule of Law concept is instrumental in making this determination.

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[17] Dworkin, 70-72.
[18] Waldron, 2008, 14. Emphasis in original.

When people invoke the Rule of Law, they sometimes claim to be talking about the concept when they are actually referring to a particular conception. In the example of China mentioned in the Introduction, the Communist Party puts the Rule of Law at the center of its anti-corruption campaign. However, the Party adamantly distinguishes its campaign for the Rule of Law from Western models of the Rule of Law. In this case, the Communist Party is referring to the difference in the varying conceptions of the Rule of Law. The Communist Party is calling for the concept of the Rule of Law to be instated in order to create an appropriate Chinese conception of the Rule of Law. Chinese officials are opposed to the Western conception of the Rule of Law, which is a manifestation of the concept in a different context. Thus, it is natural for Chinese officials to associate with the concept of the Rule of Law while also disassociating with the Western conception of the Rule of Law.

In the example of Pakistan, a violation of the concept of the Rule of Law seems to be occurring. The concern in Pakistan circles around people's demand for an independent judiciary from an unelected administration. This concern seems to violate an inherent aspect of the concept of the Rule of Law, rather than represent a misunderstanding about the application of the concept. Regardless of culture and context, consistent application of norms—which is compromised by a corrupt judiciary—is crucial to the concept of the procedural Rule of Law.

In order to make accurate and fitting assessments of the Rule of Law, it is important to distinguish the concept of the Rule of Law from its conceptions. In the next section, I introduce the three aspects of the Rule of Law, for understanding each of them is crucial for understanding the concept of the Rule of Law.

SECTION 2:
THE ASPECTS OF THE RULE OF LAW

The concept of the Rule of Law is specified by the roles that a legal system plays. Theorists of the Rule of Law have produced lists of these roles, and these lists can be subsequently categorized in terms of focus on form, substance, and procedure.[19] Understanding these three aspects helps us in focusing our search for the broad concept of the Rule of Law.

Lon Fuller advocates that people need to live within a framework of predictability.[20] Therefore, the form of a lawmaking is crucial determining its legitimacy. For example, imagine a system in which laws are only created *ex post facto* and apply to actions after the fact. Certainly, it is illegitimate to punish individuals for actions that have occurred in the past before a law was in place. Alternatively, imagine a case in which the lawmaker changes the law each day. It is similarly ludicrous that individuals be held liable for laws that change every day, or hour, or even minute. These two formal characteristics of legal systems, prospectivity

[19] Ibid.
[20] Lon Fuller, "Eight Ways to Fail to Make Law," *Philosophy of Law* (Boston, MA: Wadsworth, 2014), 11.

and stability, are two of eight characteristics laid forth by Lon Fuller.[21] The full list includes:

1. generality, for laws must exist in general, rather than on an ad hoc basis;
2. publicity, for laws must be publicized, particularly to those parties affected;
3. prospectivity, for lawmakers must not abuse retroactive legislation;
4. intelligibility, for laws must be understandable;
5. consistency, for laws must not be contradictory;
6. practicability, for laws must require conduct within the scope of the powers of the affected party;
7. stability, for laws must be consistent in order to be followed; and
8. congruence, for laws must be administered in the way that they are announced.

Fuller argues that laws must fulfill all of these formal characteristics to be legitimate. He, like Waldron, claims that understanding the concept of the Rule of Law is crucial in bestowing legitimacy of a legal system; however, he places particular emphasis on these formal characteristics. Fuller claims that "a total failure in any one of these eight directions does not simply result in a bad system of law; it results in something that is not properly called a legal system at all."[22] These criteria are not simply suggestions, but requirements for a legal system's legitimacy in the eyes of its subjects.

On the substantive aspect of the Rule of Law, Paul Craig agrees that laws are expected to follow the requirements of the formal aspect but presses that they should go further in setting a foundation for certain rights.[23] The Rule of Law substantivists agree with formalists that characteristics such as generality and publicity are necessary to create legitimate law, but they hold that there is a relationship between the Rule of Law and substantive rights that must be preserved. The Rule of Law is seen as a

[21] Fuller, 2014, 8-11.
[22] Fuller, 2014, 11.
[23] Paul Craig, "Formal and substantive conceptions of the rule of law: an analytical framework," *Public Law*, 1997, 1.

foundation for certain substantive rights, which then allows people to distinguish "good" laws that comply with these rights from "bad" laws that do not.[24] A list of substantive requirements laid out by Waldron consists of:[25]

(α) respect for private property;
(β) prohibitions on torture and brutality;
(γ) a presumption of liberty; and
(δ) democratic enfranchisement.

Finally, Waldron argues that formal and substantive characteristics alone do not guarantee the Rule of Law. In the creation of laws, specific procedures are crucial to be set out. Waldron argues that in the creation and application of norms, there are necessary procedural characteristics that must be met. He sets forth this procedural list[26]:

A. a hearing by an impartial tribunal that is required to act on the basis of evidence and argument presented formally before it in relation to legal norms that govern the imposition of penalty, stigma, loss, etc.;
B. a legally trained judicial officer, whose independence of other agencies of government is assured;
C. a right to representation by counsel and to the time and opportunity required to prepare a case;
D. a right to be present at all critical stages of the proceeding;
E. a right to confront witnesses against the detainee;
F. a right to an assurance that the evidence presented by the government has been gathered in a properly supervised way;
G. a right to present evidence in one's own behalf;
H. a right to make legal argument about the bearing of the evidence and about the bearing of the various legal norms relevant to the case;
I. a right to hear reasons from the tribunal when it reaches its decision, which are responsive to the evidence and arguments presented before it;
J. some right of appeal to a higher tribunal of a similar character.

[24] Craig, 1.
[25] Jeremy Waldron, "The Rule of Law and the Importance of Procedure," *Philosophy of Law* (Boston, MA: Wadsworth, 2014), 14.
[26] Ibid.

From the lists mentioned above, Waldron's emphasis on the procedural aspect of the Rule of Law is most relevant to our discussion of the concept of the Rule of Law. The substantive aspect of the Rule of Law, which in Waldron's discussion consists of characteristics such as "respect for private property" and "presumption of liberty," is too controversial to be a part of the broader concept. Western theorists are divided between thin and thick interpretations of the Rule of Law. Positivists like H.L.A. Hart, who hold the thin view, spurn the substantive aspect of the Rule of Law on the basis that "law is a matter of what has been posited (ordered, decided, practiced, tolerated, etc.)," irrelevant of what is reasonably seen as just or unjust.[27] Positivists disregard the substance of law and tend to adhere strictly to the formal view. However, natural law theorists such as Paul Craig, who hold the thick view, argue that there is a relationship between formal and substantive aspects of the Rule of Law. Formal requirements alone, according to this view, do not guarantee that a system is a legitimate legal system. Therefore, it is difficult to make the bold claim that substance is part of the universally applicable concept of the Rule of Law when it is difficult to make this claim within the scope of Western, democratic nations.

Furthermore, it seems that the substantive aspect is not a part of the concept because there are places where some substantive rights are not upheld but the Rule of Law still holds a place of regard. In China, the Communist Party has launched the campaign for a "Socialist Rule of Law with Chinese characteristics." In Singapore, scholars proudly claim that the nation-state has achieved the Rule of Law, among "the seven pillars of Western wisdom namely: free market economics, science and

[27] Leslie Green, "Legal Positivism," *Stanford Encyclopedia of Philosophy*, 3 Jan. 2003, http://plato.stanford.edu/entries/legal-positivism/. Emphasis added

technology, meritocracy, pragmatism, a culture of peace, *the rule of law,* and education."[28] Both of these conceptions uphold the Rule of Law without democratic enfranchisement, one of Waldron's substantive characteristics. The existence of regimes like those of China and Singapore that do not uphold substantive rights but still uphold the Rule of Law shows that the substantive aspect may be a part of some Western, democratic conception but not of the universal concept of the Rule of Law. There may exist kinds of conceptions, such as authoritarian and democratic conceptions, but it is not the aim of this thesis to seek out these distinct conceptions. Therefore, we turn to the other two aspects, formal and procedural, in our search for a universal concept of the Rule of Law.

In contrast to the substantive aspect, the formal aspect is most easily agreed to be a part of the concept of the Rule of Law. Fuller writes extensively on this subject, using the example of Rex the King in order to describe a lawless world in which an authoritarian ruler cannot abide by the formal requirements.[29] In Fuller's anecdote, King Rex's violations of each of the formal requirements listed above in 1-8 result in a chaotic system not resembling a legitimate legal system. For example, at some point Rex creates a legal system that is "honeycombed with contradictions," violating the characteristic of consistency, which results in protests at his regal residence.[30] Eventually, Rex's unwise and illegitimate governance, which ignores all of the requirements of the formal Rule of Law, results in his bitter and untimely death. It is uncontroversial that laws need to be general, public, prospective, etc., so it follows

[28] Gabriele Giovannini and Emanuele Schibotto, "Singapore and the Asian Century," *The Diplomat*, 19 Feb. 2015, http://thediplomat.com/2015/02/singapore-and-the-asian-century/.
[29] Fuller, 2014, 8.
[30] Fuller, 2014, 9.

that the concept of the Rule of Law definitely involves the formal aspect as is described by Fuller in items 1-8.

The procedural aspect of the Rule of Law calls for more careful consideration. To begin, it is important to clarify the usage of the word "procedure." Waldron shows how some legal philosophers have misused the word "procedure," consequently muddling understanding about the procedural aspect. Fuller's case is illustrative of this misuse.[31] When he speaks of the procedural aspect of laws, Fuller is referring to the aspects of laws that are simply not substantive.[32] He refers to the "ways in which a system of rules for governing human conduct must be constructed and administered if it is to be efficacious and at the same time remain what it purports to be."[33] This statement points more to form rather than to procedures. Fuller does not address the procedures regarding how legal systems achieve their goals in his writing. In contrast, the term "procedure," as we are using it, refers to specific requirements in institutional procedures that make up a legal system.

Procedure is important for fulfilling the Rule of Law. Albert Venn Dicey illustrates the importance of procedure by pointing to the distinction between law and discretion. According to Dicey, a person cannot "be made to suffer except pursuant to a decision of a court arrived at in the ordinary manner observing ordinary legal process."[34] Procedure, thus, plays a key role in legitimizing punishment. If a legal system's treatment of an individual does not meet the legitimate requirements of

[31] Fuller's use of the word "procedure" interchangeably with "form" is not an oversight—he implies that procedural considerations are built into formal considerations. However, Waldron argues that formal characteristics alone do not secure the Rule of Law without the specific procedures he sets out.
[32] Ibid.
[33] Lon Fuller, *Morality of Law* (New Haven: Yale University Press, 1964), 96-97.
[34] Waldron, 2014, 16.

procedure, punishment cannot be legitimately enforced on that individual. When punishment is enforced by the state but lacks a framework of procedure, it is an exercise of discretion rather than law. In places where there is discretion, Dicey claims, there is room for arbitrariness.

The preceding discussion shows that procedure holds the key to uncovering the concept of the Rule of Law. The other two aspects, substance and procedure, are not a central part of this discussion. The substantive aspect is not a part of this concept, and the formal aspect can be easily accepted as a part of it. Thus, the procedural aspect is the focus of the rest of our discussion. However, Waldron's procedural laundry list in items A-J above outlines very specifically a Western legal system. Specifically, it outlines adversarial systems that work well in highly individualistic societies like the United States. Therefore, it seems that while Waldron's discussion of the importance of procedure is valid, the laundry list he produces refers to a specific conception of the Rule of Law rather than to the concept. In the next section, we look more carefully into these procedural requirements, how they apply to legal systems throughout the world, and what may be a more universal list of procedural requirements.

SECTION 3:
THE PROCEDURAL ASPECT

In many activities, procedures play a key role in establishing legitimacy. For example, when playing any competitive sport, a fair system of keeping track of points, functioning equipment, a court or other constrained area of some sort, and an appropriate number of players are all very important. Without each of these procedural characteristics or some well-reasoned solution in case of their absence, it is difficult to play a fair game. In a way, sports such as basketball and baseball are specific conceptions of this larger concept of competitive sports. For these sports, institutions such as the National Basketball Association (NBA) and Major League Baseball (MLB) enforce norms to ensure fair play. In all competitive sports, procedure—a system or set of guidelines, often related to institutions, outlining how things are to be done—is crucial. Similarly, procedure and institutions are important in establishing legal systems, and they are particularly relevant to our development of the concept of the Rule of Law.

In contrast to procedure, the other two aspects of the Rule of Law, substance and form, are not as central to this discussion. As was discussed in Section 2, the role

of substance is controversial; even within the Western world thin and thick substantivists cannot find agreement. Even among Western philosophers there is no sense of a common concept of the substantive aspect of the Rule of Law. Therefore, it is unlikely that the substantive aspect is a key component of the universal concept of the Rule of Law. Form, on the other hand, is easily agreed upon as an important piece of lawmaking. Formal characteristics such as generality and prospectivity are widely accepted as requirements for laws. Form is a part of the concept of the Rule of Law, but it is uncontroversial and not the focus of this thesis. Thus, it is not in the scope of this thesis to further discuss the substantial and formal aspects of the Rule of Law.

We turn to procedure because it holds the most tangible aspects of legal systems, which are the rules and the institutions that are involved in creating, enforcing, and interpreting those rules. As was clarified in Section 2, the procedural aspect of the Rule of Law deals with the institutional procedures that make up a legal system. These institutions may include the courts; in Waldron's account of the Rule of Law the procedural aspect exclusively refers to the courts. In addition to the courts, these institutions may include any institutions that embody any of the elements of legal procedure. By emphasizing the recognition of rules surrounding the legal framework, we establish the basis for a much richer understanding of the Rule of Law in contrast to an understanding that only emphasizes the basic formal requirements of the Rule of Law.[35]

Waldron points out that, most often, public appeals to the Rule of Law are appeals to scrutiny of the procedural Rule of Law. In the cases regarding Guantánamo

[35] Waldron, 2008, 5.

Bay and Pakistan mentioned in the Introduction, Waldron claims that when people appeal to the Rule for Law "it is the procedural elements they have in mind, much more than the traditional virtues of clarity, prospectivity, determinacy, and knowing where you stand."[36] People are concerned about the due process provided to detainees in Guantánamo and about the independence of the Pakistani courts from lawmakers and administrators. In the case regarding China mentioned in the Introduction, Chinese officials' call for a "Socialist Rule of Law with Chinese characteristics" is, in part, calling for the development of Chinese procedural characteristics of the Rule of Law. These observations circle back to the idea that since the formal Rule of Law is widely accepted, criticisms that call attention to the Rule of Law tend not to focus on form. Characteristics of procedure, which are more visible in rules and institutions, are more often called attention.

One reason why procedure must be carefully considered is due to its close connection to human dignity. Originally, Fuller argues that observing the formal aspects of the Rule of Law is a way of respecting human dignity, claiming that "to judge [a person's] actions by unpublished or retrospective laws, or to order him to do an act that is impossible is to convey … your indifference to his powers of self-determination."[37] Waldron, in turn, claims that the connection Fuller makes between form and dignity is even stronger between procedure and dignity.[38] That is, observing the procedural aspects of the Rule of Law is a way of respecting human beings' dignity and power of self-determination. Functionally, procedure involves applying

[36] Waldron, 2008, 9.
[37] Fuller, 1964, 162.
[38] Waldron, 2008, 19.

norms to individual cases.[39] Procedures inform the enforcers of a legal system how to apply these norms. However, applying norms to human beings is not like everyday judgments, but rather, it involves "paying attention to a point of view and respecting the personality of the entity one is dealing with."[40] Therefore, careful attention to procedure, since it encompasses the rules and institutions that govern how norms are enforced within a legal system, is a result of having respect for a legal systems' subjects' dignity. Waldron is acutely aware of the sensitivity necessary in building the procedural aspect of the Rule of Law, but I will show in this section that he fails in achieving sensitivity in regards to culture, history, and circumstance in his delineation of the procedural Rule of Law.

Procedure is also interesting because it is closely tied to culture, history, and circumstance. Regardless of the substantive and formal requirements of lawmaking, it is in procedure that the administration of law becomes tangible. In contrast, the formal aspect of the Rule of Law is interpreted similarly across contexts. These formal requirements are necessary to establish coherent systems of law regardless of context. However, procedure plays out differently according to varying contexts. Institutions and the procedures that govern them are a reflection of culture, history, and circumstance. Interactions between citizens and administrators are touched by culture, the creation of institutions is a part of history, and the resources available to the legal system is a matter of circumstance. In this way, the procedural aspect of the Rule of Law "helps bring our conceptual thinking about law to life."[41]

[39] Waldron, 2008, 20.
[40] Ibid.
[41] Waldron, 2008, 5.

Waldron, who among the Rule of Law theorists puts the greatest emphasis on procedure within the Rule of Law, begins his explanation of the requirements for a legal system in the following way:

> First and foremost, I do not think we should regard something as a legal system absent the existence and operation of the sort of institutions we call courts. By courts I mean institutions that apply norms and directives established in the name of the whole society to individual cases, that settle disputes about the application of those norms, and that do so through the medium of hearings—formal events that are tightly structured to enable an impartial body to fairly and effectively determine the rights and responsibilities of particular persons after hearing evidence and argument from both sides.[42]

Waldron is adamant about the need for procedural rules and institutions to be in place, but he conflates the idea of concept and conception when he specifies what these rules and institutions look like in all settings. He claims to be laying out the concept of the procedural Rule of Law but ends up describing a particular conception. In his conception of the procedural Rule of Law, he restricts the "institutions that apply norms and directives established in the name of society to individual cases, that settle disputes about the application of those norms" to those that achieve this through the medium of hearings with strict procedural requirements, or in other words, courts.

In addition to the existence of courts, in a different piece on the procedural aspect of the Rule of Law, Waldron sets forth this list of procedural requirements,[43] which was also reproduced in Section 2:

> A. a hearing by an impartial tribunal that is required to act on the basis of evidence and argument presented formally before it in relation to legal norms that govern the imposition of penalty, stigma, loss, etc.;
> B. a legally trained judicial officer, whose independence of other agencies of government is assured;

[42] Waldron, 2008, 20.
[43] Waldron, 2014, 14.

C. a right to representation by counsel and to the time and opportunity required to prepare a case;
D. a right to be present at all critical stages of the proceeding;
E. a right to confront witnesses against the detainee;
F. a right to an assurance that the evidence presented by the government has been gathered in a properly supervised way;
G. a right to present evidence in one's own behalf;
H. a right to make legal argument about the bearing of the evidence and about the bearing of the various legal norms relevant to the case;
I. a right to hear reasons from the tribunal when it reaches its decision, which are responsive to the evidence and arguments presented before it;
J. some right of appeal to a higher tribunal of a similar character.

Though he is well-intentioned in his goal of establishing a specific outline of the procedural aspect of the Rule of Law, Waldron outlines a conception of the procedural Rule of Law that centers on the adversarial court system in this list, rather than delineating the general concept of the procedural aspect of the Rule of Law. Underlying Waldron's list are specific understandings of culture, history, and circumstance that are not common in all countries with legal systems that uphold the Rule of Law. For one, Waldron's list presupposes a regard for individualistic values, particularly the idea that offenses should be determined on a one-on-one basis. This kind of individualistic view is ill-suited for more collectivist societies, such as India and Japan.

There are three considerations that help draw the line between concept and conception. The first involves being aware of the relationship between values and procedure. Values underlie procedure; that is, the way in which things are done is shaped by values. In the search for the broad concept of the Rule of Law, it is important to be aware of the values at play. While there may be certain values common in all countries trying to create legal systems, culturally-specific values must

be avoided. The concept of the procedural Rule of Law should be universal and should hold regardless of cultural values; it is in the varying conceptions that values come into play and law comes to life.

The second and third considerations are related in that they both constrain the effectiveness of a legal system. The second consideration involves the constraints of capacity. Procedures must be general enough to allow leeway according to a legal system's capacity. In cases in which ideal procedures cannot be executed effectively, the concept of the procedural Rule of Law must have room for relevant adjustments to be made. Therefore, a concept of the Rule of Law should be flexible enough to allow varying conceptions to espouse depending on the capacity of a country. Third, timeliness is important to consider. A certain country may be able to establish any set of procedures to enforce its norms but fail in completing actions in a timely manner. However, a law is not a legitimate law if it is not enforced within a reasonable time period. Therefore, the concept of the Rule of Law must include the timely enforcement of the laws within the institutional framework.

The first consideration is what raises the red flag in Waldron's account of the procedural Rule of Law. His account speaks too closely to a particular set of values that do not apply to all countries. The second and third considerations, regarding capacity and timeliness, are considerations that we must build into our requirements of the concept of the procedural Rule of Law as safe-holds for effectiveness.

Though Waldron's delineation of the procedural aspect outlines a conception of the procedural Rule of Law, his discussion contains the key of what may help us in delineating the broad concept of the procedural Rule of Law. While courts are not, as

Waldron claims, the only "institutions that apply norms and directives established in the name of the whole society to individual cases, that settle disputes about the application of those norms," this description outline the basic sense of what is required institutionally, and therefore procedurally, in a legal system. The functional purpose of institutions in a legal system is to apply norms and settle disputes according to these norms. Therefore, Waldron provides us with the starting block for our requirements of the procedural Rule of Law:

DEFINITION OF REQUIREMENTS A: *A legal system must include institutions that apply norms and directives established in the name of the whole society to individual cases, that settle disputes about the application of those norms.*

However, this stipulation is not enough. While the requirement of norm-applying and dispute-setting institutions is a start, the sole existence of such institutions does not guarantee a legitimate legal system. In addition to this stipulation, we must also consider the second and third considerations of capacity and timeliness. Additionally, the concept of the procedural Rule of Law also needs to include a provision about the systematic application of the norms.

The considerations of capacity and timeliness are captured by what I refer to as effectiveness. By effectiveness, I mean the ability of a legal system to have the desired result of applying norms, ensuring enforcement of these norms, and settling disputes about these norms. Effectiveness is constrained on two ends: on one hand, evaluation of effectiveness should consider the capacity and resources available, and on the other, timeliness must not be compromised. On the capacity constraint side, evaluation of a legal system should take into consideration the capacity of the legal system. Capacity

is affected by the resources available, the number of people served, and the nature of disputes that arise within a culture. Sensitivity to culture, history, and circumstance is particularly important in evaluating the capacity of a legal system. However, this sensitivity to capacity must not compromise timeliness of enforcement. Without timely enforcement, the existence of institutions applying and enforcing norms is inconsequential. Therefore, while effectiveness should be evaluated with due attention to context, timeliness is an aspect of effectiveness that cannot be compromised. If we encompass the considerations of capacity constraint and timeliness in the word effectiveness, our concept of the procedural Rule of Law becomes:

DEFINITION OF REQUIREMENTS B: *A legal system must include institutions that apply norms and directives established in the name of the whole society to individual cases, that settle disputes about the application of those norms. These norms must be enforced in an effective fashion.*

Finally, consistency is vital to a legal system. Under the procedural Rule of Law, consistency of how procedures are applied to individual cases is imperative. Inconsistency of the application of procedure, which can occur in corrupt judicial systems or in systems that do not provide access to all of their constituents, fail in realizing the Rule of Law. Though consistency of outcome is not required, similar cases must be treated under the same procedures. Taking this final thought into consideration, our final description of the procedural Rule of Law is:

FINAL REQUIREMENTS OF THE PROCEDURAL RULE OF LAW: *A legal system must include institutions that apply norms and directives established in the name of the whole society to individual cases, that settle disputes about the application of those norms. These norms must be enforced in an effective and consistent fashion.*

Thus, the broader concept of the procedural aspect of the Rule of Law calls for the development of institutions that apply norms and settle disputes effectively and consistently. In the next section, we will see how this concept is developed into a conception in the Indian case.

SECTION 4:
THE INDIAN CONCEPTION

The Rule of Law is invoked throughout the world as a basis for calling to attention the flaws of a legal system. This use of the idea was previously shown in the cases of Guantánamo Bay, Pakistan, and China. Similarly, in India, the Rule of Law is also used as an idea to draw attention to the flaws of the Indian justice system. For example, in December of 2012, *The Times of India* reported that, "The rule of law has repeatedly come in for question in India in recent times after anti-corruption campaigns seized public imagination."[44] A report by *Newsweek* in 2014 blamed "the weak rule of law in India" for the lack of support for untouchables that are prone to be trafficked into slavery.[45] Increasingly, opinion editorials in India's national newspapers target the concept of Rule of Law, addressing the question of whether India is a country where the Rule of Law can be expected to prevail.[46]

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[44] Madhavi Rajadhyaksha, "Global report ranks India poorly on rule of law," *The Times of India*, 1 December 2012, http://timesofindia.indiatimes.com/city/mumbai/Global-report-ranks-India-poorly-on-rule-of-law/articleshow/17441137.cms.

[45] Nick Grono, "India: Time to Put an End to Slavery," *Newsweek*, 25 November 2014, http://www.newsweek.com/india-time-put-end-slavery-286962.

[46] See: Peter Ronald Desouza, "The question of the sealed envelope," *The Hindu*, 11 November 2015, http://www.thehindu.com/opinion/lead/opinion-on-black-money-case/article6584159.ece. Also see: Manoj Mitta, "1984 riots: Thirty years of impunity," *The Times of India,* 1 October 2014, http://blogs.timesofindia.indiatimes.com/Legalairs/1984-riots-thirty-years-of-impunity/.

According to the Rule of Law Index, a report published annually by the World Justice Project (WJP), India ranks lowly, at 66th overall out of 99 countries.[47] The 47 indicators used by the Rule of Law Index circle around nine themes: constraints on government powers, absence of corruption, open government, fundamental rights, order and security, regulatory enforcement, civil justice, criminal justice, and informal justice.[48] The Rule of Law Index reports that, though India has a robust system of checks and balances, an independent judiciary, strong protections for freedom of speech, and an open government, its institutions and procedures hinder its effectiveness.[49] India's administrative agencies, which are lowly ranked at 81st, are slow and ineffective. The civil court system ranks even more poorly at 90th, primarily due to court congestion, ineffective enforcement, and delays in case processing.

Newspaper pundits and foreign agencies are not the only ones paying close attention to the Rule of Law in India. India's Supreme Court and High Court judges refer to the concept in rulings as well. The following three cases, for example, touch on some of the ideas that have been discussed so far:

- In *Binani Zinc Limited v. Kerala State Electricity Board and Others,*[50] the Supreme Court handled a case in which constant changes in a law made it unclear whether the Kerala State Electricity Board (KSEB) had the power to raise a local tariff on energy. In the decision, Justice S.B. Sinha affirms the KSEB's ability to raise the tariff by referring to the uncontroversial nature of

[47] "Introduction and Key Findings," *WJP Rule of Law Index 2014,* The World Justice Project, http://worldjusticeproject.org/rule-of-law-index, 105.
[48] "Introduction and Key Findings," 1.
[49] "Introduction and Key Findings," 54.
[50] S.B. Sinha, *Binani Zinc Limited v. Kerala State Electricity Board and Ors.,* Indian Supreme Court, 19 March 2009, http://indiankanoon.org/doc/1350255/.

the formal aspect of the Rule of Law. The constant changes in the law, Sinha claims in the judgment, violate the requirements of form under the Rule of Law. He writes, "It is now a well settled principle of law that the rule of law inter alia postulates that all laws would be prospective subject of course to enactment an express provision or intendment to the contrary." Prospectivity, one of Fuller's formal characteristics, is, as we have assumed in previous sections, well-settled and uncontroversial in India as well as elsewhere.

- In *Gadakh Yashwantrao Kankarrao v. Balasaheb Vikhe Patil,*[51] the Supreme Court adjudicated a case in which the results of an election for Lok Sabha, India's lower house of Parliament, were questioned. The election of Gadakh was questioned on the grounds that he and his supporters violated fair election practice requirements. In the judgment, Justice J.S. Vera opines on the relationship between the courts and the substance of the Rule of Law. He writes, "If the rule of law has to be preserved as the essence of the democracy of which purity of elections is a necessary concomitant, it is the duty of the courts to appreciate the evidence and construe the law in a manner which would subserve this higher purpose and not even imperceptibly facilitate acceptance, much less affirmance, of the falling electoral standards. For democracy to survive, rule of law must prevail…" In this ruling, Vera places high regard for the Rule of Law in making his decision, and he hints that he, similarly to thick substantivists such as Craig, believes that there is a relationship between law and substance that must be preserved.

[51] J.S. Vera, *Gadakh Yashwantrao Kankarrao v. Balasaheb Vikhe Patil,* Indian Supreme Court, 19 Nov 1993, http://indiankanoon.org/doc/1309136/.

- In *Satvir Singh v. Union of India and Others,*[52] the Delhi High Court handled a case that challenged hiring practices for a government post. In the judgment, Justice Mool Chand Garg echoes Dicey's warnings against arbitrariness. He writes, "Whatever be the concept of the rule of law…substantial agreement is in juristic thought that the great purpose of the rule of law notion is the protection of the individual against arbitrary exercise of power, wherever it is found."

These judgments provide some insight into how the Rule of Law is understood by those working within the Indian legal system. By the way that these Indian judges refer to the Rule of Law, it is evident that the concept of the Rule of Law resonates with the Indian people. In fact, these court decisions demonstrate that ideas that have been discussed in this thesis so far—such as the relevance of form, substance, and procedure in considering the Rule of Law—are as applicable in India as they are elsewhere.

However, as emphasized in earlier sections, deep cultural understanding is necessary in order to understand any conception of the Rule of Law. Any thorough analysis of the Rule of Law across varying cultural contexts should consider the cultural sensitivity necessary to make accurate assessments of the Rule of Law. The WJP takes this sort of cultural sensitivity into account in its Index, claiming that it "has been designed to be applied in countries with vastly differing social, cultural, economic, and political systems."[53] The requirements of the procedural Rule of Law laid out in this thesis, we will see in this section, achieve this cultural sensitivity more

[52] *Sukhdev v. Bhagatram,* Delhi High Court, 21 Feb 1975, http://indiankanoon.org/doc/426032/.
[53] "Introduction and Key Findings," 5.

effectively than does Waldron's account of the procedural Rule of Law. Even further, when these broader requirements of the procedural Rule of Law are applied, other possibilities that can make a legal system more effective and consistent become evident.

Therefore, before applying any version of the concept of the Rule of Law to the conception at play in India, it is crucial to understand the context that has formed the Indian legal system. The history of India begins with the beginning of humankind—the Indus Valley Civilization was the first society in South Asia[54]—and is the aggregate of the histories of the many kingdoms that form today's India. Ultimately, this unification was precipitated by British colonialism. Despite the fact that India is a unified country today, it is not a homogenous society of any sort: its people speak over 122 different languages, practice a diversity of religions, and celebrate distinct traditions. As a result of its long history of diversity, India is a patchwork of people and culture.

Examining the realization of the Rule of Law in India makes for an educational case of the procedural Rule of Law because of two reasons: (1) the way India's context has shaped its unique legal system, and (2) the demands of its population, the second largest in the world.[55] In order to make a precise assessment of India's Rule of Law, it is important to be familiar with the legal system's history. The history of the Indian legal system can be traced as far back as to India's Vedic period, circa 1750 B.C. to 500 B.C. The *Vedas*, which were crafted during this era, are the oldest hymns

[54] G. Bongard-Levin, *A History of India* (Progress Publishers: Moscow, 1979), 11.
[55] "India," *The World Factbook,* The Central Intelligence Agency, https://www.cia.gov/library/publications/the-world-factbook/geos/in.html.

of Hindu scripture. The influence of the *Vedas*, along with other traditions and texts from ancient, medieval, and modern India, are evident in today's legal system. The legal system is composed of three major components: common law, laws drawn from religion such as Hindu and Muslim law, and civil law. [56] The convergence of these three components is not an isolated result but bears the influence of British, who colonized India from 1612 to 1947. Raj Kumari Agrawala describes the effect colonization had on the Indian legal system:[57]

> A legal system is the meeting point of the past and the future of its locale. The past explains it, and it foretells the future. A slight variation, however, in the case of the Indian legal system is that its past is limited, stretching up to a particular milestone only. Accidents and incidents of history have been such that its present legal mechanics has virtually no link with the Hindu and Muslim period to which this source may be traced…

As Agrawala observes, the British have had a disproportionate influence on India's legal system. Despite the fact that the history of India dates back thousands of years, the sole largest influence on India's "present legal mechanics" is that of British colonialism. Though the British did not merely transplant their system into the Indian colony—the observance of Hindu and Muslim law is evidence of that—a significant amount of oversight failed to implement an effective system of justice that takes cultural context into consideration.

As was observed by an Indian historian, Indian society "is basically an agrarian society, not sophisticated enough to understand the technical and cumbersome

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[56] Joseph Minattur describes these three components as the "three streams [that] join together to form the Indian legal system." Minattur, xi.
[57] Raj Kumari Agrawala, "History of Courts and Legislatures," *The Indian Legal System* (Dobbs Ferry, NY: Oceana Publications, 1978), 103.

procedure followed by our courts."[58] Some scholars of Indian law claim that serious faults in the courts existed "almost from the establishment." From the beginning, they claim, it took "years for disputes to be resolved, and there were too many appeals from lower courts … The courts did not settle disputes, but were used either as form of gambling on the part of legal speculators … or as a threat in a dispute."[59] The British failed to implement an effective system of justice that honored the culture and traditions of the Indian people. By failing to preserve systems of dispute resolution in place and implementing their own adversarial court system in a society much different from theirs, the British colonialists established a highly ineffective legal system in India.[60]

Today, India's legal system continues facing challenges. India's courts are hindered by a lack of ability to fill posts—against the 900 seats available in different High Courts of the country, almost 250 are vacant.[61] Additionally, despite the large number of constituents that the courts must serve, Indian courts are constantly undermanned and underdeveloped—about 15,000 courts at the district and sub-

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[58] Cohn, cited by Chodosh et al., 2. Bernard C. Cohn, "Some Notes on Law and Change in North India," *Economic Development and Cultural Change,* Vol. 8, 1959, 79, 90.
[59] Cohn, cited by Chodosh et al., 2.
[60] One way in which the establishment of India's legal system has resulted in inefficiencies is by diminishing traditional methods of dispute resolution. For example, in establishing a legal system that mirrored that of the British, the British colonialists diminished the usage of the village *panchayats*. A *panchayat* court is a rural court, composed of "an elected body with extremely limited civil and criminal jurisdiction, and free from procedural technicalities." The simplicity of the *panchayat* court helps "bring justice speedily to one's door in the village." The use of the *panchayat* as a form of dispute resolution continues to some degree today. However, for the most part, the village *panchayats*, which were effective in aiding the resolution of rural disputes, have been replaced by more complex legal procedures that are harder for villagers to understand and use effectively.
[61] "Challenges Facing the Indian Judiciary—Identification and Resolution," speech delivered by Justice Rajan Gogoi, Judge, Supreme Court of India, on 12/7/2013 during the One Day Special Programme for District Judges, http://www.hcmadras.tn.nic.in/jacademy/Article/Challenges%20to%20the%20Indian%20Judiciary%20-%20Ranjan%20Gogoi.pdf.

divisional levels are functioning against the sanctioned number of about 18,000.[62] These failures to properly man and upkeep the courts, paired with the lack of cultural fit that makes litigation impracticable, have resulted in Indian legal system's greatest pain: its massive backlog.

The greatest criticism of India's judicial system is the astonishing backlog of pending cases. In short, the "civil litigation process in India lacks discipline and thus manifests discontinuity, protraction, redundancy and fragmentation, all of which result in delays that are excessive by any standard."[63] India faces the largest backlog in the world[64]—today, the number of pending cases in India is as many as 30 million.[65] Though India is not the only country that faces a significant backlog of court cases, "[n]owhere, however, does backlog and delay appear to be more accentuated than in modern-day India."[66] This backlog has serious implications that affect how well the legal system achieves its purpose. Individual judges feel the strain of the backlog; rather than an ideal number of 30 cases pending for an individual judge, most judges have tens of thousands of cases pending.[67] Due to the large proportion of pending cases, most of India's prison population is made up of detainees awaiting trials, rather than individuals that have been charged with crimes. Outside of criminal cases, the courts in Mumbai, India's financial hub, are flooded with stagnant land disputes, hindering the city's industrial development. Finally, the slowness of the system makes

[62] Ibid.
[63] Chodosh et al., 31.
[64] Ram Mashru, "Justice Delayed is Justice Denied: India's 30 Million Case Judicial Backlog," *The Diplomat*, 25 Dec 2013, http://thediplomat.com/2013/12/justice-delayed-is-justice-denied-indias-30-million-case-judicial-backlog/.
[65] Press Trust of India.
[66] Chodosh et al., 5.
[67] Mashru.

lawsuits an inaccessible solution for most people, which has resulted in making India's legal system a concentration of the country's wealthy and well-connected. This concentration of the wealthy exacerbates the discrimination already faced by India's minority and low-caste individuals. These problems—the burden on judges, overpacking of prisons, and inaccessibility of the court system—are the symptoms that people point to when they question India's ability to achieve the Rule of Law.

The problems of India's legal system bring into question whether it is effective at all at realizing the Rule of Law. The backlog, the most crippling symptom of its broken legal system, discourages actual use of the Indian legal system as a means for resolving cases. Rather, the Indian legal system is used by those with access to it to prolong action, and very few cases are actually resolved via litigation. As a result, the Indian legal system fails to be a tool for realizing the Rule of Law in India.

Waldron's account of the procedural aspect of the Rule of Law outlines adversarial systems like those in place in the United States, in England, and, due to British colonial influence, in India. It calls for components that are characteristic of adversarial court systems: an impartial tribunal, right to representation by counsel in order to prepare a case, right to make legal argument about the bearing of evidence, etc. When effectiveness and consistency are not considered, India's legal system seemingly passes Waldron's procedural test; it contains each of these characteristics. However, despite the fact that the Indian legal system consists of tribunals and guarantees certain rights to its people, it is painfully ineffective. The large number of pending cases, which hinder the resolution of disputes, is evidence of this

ineffectiveness. When so many cases are left unresolved and people are discouraged from utilizing the justice system, a legal system cannot be deemed effective.

Ultimately, Waldron's account of the procedural Rule of Law leaves no space for India's legal system to improve. The costs of establishing an effective adversarial judicial system would be too large, especially considering the large demand of India's massive population. While an overhaul of the court system is necessary in order to make India's legal system more effective, other avenues that provide cost-effective and sustainable solutions would more easily ease pressure on the Indian courts. Departure from adversarial court systems like that outlined by Waldron would allow other forms of dispute resolution that are more appropriate for the Indian people's culture and values to take root and flourish.[68] However, these avenues are left unexplored when the procedural aspect of the Rule of Law is viewed through the narrow lens of Waldron's account.

The broader concept of the procedural Rule of Law, in contrast to Waldron's narrow account, allows more fitting procedures to take hold. This definition of the requirements of the procedural Rule of Law have been set forth in this thesis as:

REQUIREMENTS OF THE PROCEDURAL ASPECT OF THE RULE OF LAW: *A legal system must include institutions that apply norms and directives established in the name of the whole society to individual cases, that settle disputes about the application of those norms. These norms must be enforced in an effective and consistent fashion.*

[68] Not only does Waldron's account not establish the best form of a legal system in India nor give it space to improve, but it is inappropriate to apply it at all to any case. Waldron's account lays out a conception, rather than the concept of procedural Rule of Law. It is inappropriate to use a conception of the Rule of Law to evaluate a legal system because a conception is the application of the concept in a particular cultural and historical context. Therefore, using Waldron's delineation of the Rule of Law is not an appropriate conception that can be applied to the Indian legal system.

This definition is built on the idea that the concept of the Rule of Law is not a set of requirements, but rather, a set of guidelines for institution-building in a legal system. A useful definition does not, as Waldron's account does, list out the procedural characteristics necessary for legal systems. Because cultural context varies so greatly between legal systems, a list of specific details is inappropriate and unhelpful. Instead, a useful definition of the requirements Rule of Law is a broad statement that provides guidance for legal systems and their institutions. It lays out certain role that must be played by the institutions of legal systems and provides a framework for their procedures.

According to the broader concept of the procedural Rule of Law, we look to establish institutions that apply norms and settle disputes effectively and consistently. However, it is evident that India's court system is neither effective nor consistent. As evidenced by the backlog, most of the disputes that rise before India's legal system are unresolved by the system, so India's legal system is not effective. This backlog does not even include the number of cases that fail to reach the courts because people are discouraged from using the legal system. Furthermore, India's legal system is not consistent primarily because of its inaccessibility. Because not all individuals have equal access to litigation, it is inaccurate to say that the legal system achieves consistency in applying its norms.

Using the broader requirements of the procedural Rule of Law and looking for norm-applying institutions outside of the courts opens a space in the Indian legal system for practices that are more efficient and fitting in the Indian context. Traditionally, the Indian people have resolved problems as a community. For example,

village *panchayat* courts are a system of dispute resolution at the village level that is used to a reduced degree today. The *panchayat* courts, which consist of an assembly of five "wise persons," are recognized as a decision-making authority for resolving disputes between individuals and villages.[69] Another form of collaborative conflict resolution used in India involve *parishads*, or conferences, which hosted debates that aimed to "elicit[] truth."[70] The Indian people have used collaborative ways of resolving disputes throughout their history. Indian society is collectivist, and disputes involve the interconnectedness of people, which makes the nature of the adversarial court system ineffective and unsustainable when applied to many Indian disputes.

A practice that draws from this tradition of collaborative problem solving is mediation. Mediation is a form of alternative dispute resolution in which a neutral third-party mediator acts as a catalyst to help the parties come to an agreement. It recognizes that the main source of conflict stems from perceived differences in interest and from miscommunication rather than from actual differences. Thus, mediation focuses on effective communication just as much as it does on the actual settlement. In contrast to adversarial court systems, the mutually problem-solving nature of mediation fits more appropriately with Indian culture. While court cases only allow conflicts to be resolved between the two primary individuals, mediation allows the various players that are involved to be heard during the dispute resolution process, a practice more in tune with India's collectivist culture.

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[69] Niranjan Bhatt, "The Journey of Mediation," *Basic Course on the Theory and Practice of Mediation,* 2014, 6.
[70] Ibid.

Long-term, mutually satisfactory agreements reached in mediation are more likely to be result in resolved cases as opposed to court-ordered decisions. The primary benefit for disputing parties in mediation is that they are involved in the creation of the final settlement, as opposed to as in litigation, in which a judge or another third-party decide the final settlement. Furthermore, the input from the disputing parties in the development of the settlement increases the likelihood of follow-through because people will more likely support their own decisions. Mediation clients also feel less victimized by mediators than by lawyers due to their participation in the decision making process, which relieves the mediators from being directed with dissatisfaction from their clients.[71] Furthermore, mediation is more cost-effective than litigation because it avoids court and lawyer fees. Finally, mediation avoids the time lag created by over packed courts and individual judges' capacity.[72]

In India, mediation was first established as an official method of alternative dispute resolution in the Industrial Disputes Act of 1947, which established the use of mediation in industrial disputes.[73] Since then, mediation and other forms of alternative dispute resolution such as arbitration have been instituted by subsequent legislation. Most recently, an amendment was added Section 89 to India's Code of Civil Procedure in 2002. Section 89 provides for "mandatory reference of cases pending in the Courts to ADR."[74] A promising form of mediation's progress is the establishment of the Delhi High Court Mediation and Conciliation Centre, also known as *Samadhan*,

[71] Howell Heflin, "Alternate Dispute Resolution," *Vital Speeches Of The Day*, 63, 23, 1997, 709.
[72] Edward T. Chang. *Ethnic Peace in the American City* (New York, NY: New York University Press, 1999), 131.
[73] Bhatt, 9.
[74] Bhatt, 10.

which is the lawyer-run court-annexed mediation center at the Delhi High Court. Today, *Samadhan* handles an average of 100 mediations every day, the largest number of mediations handled in India per day. The use of mediation is growing, but it is currently not a comparable replacement for litigation in India's legal system.

Especially in the Indian case, which is riddled with structural and economic restrictions, mediation plays a key role in helping the Indian legal system apply norms and resolve disputes effectively and consistently. In a paper outlining recommendations for Indian legal reform, Hiram Chodosh et al. write, "[Consensual Dispute Resolution (CDR)] is designed to provide a broader range of dispute resolution opportunities to extend beyond currently adversarial (to join and conciliatory) and formal (to informal) processes. CDR is also designed to expand currently narrow remedial possibilities beyond purely win/lose, finite judicial remedies."[75] Today's Indian legal system is disproportionately adversarial, and mediation provides an alternative form of dispute resolution that is more appropriate for the Indian context.

India has deep rooted reasons for supporting mediation. Traditional Indian forms of conflict resolution, such as *panchayat* courts and *parishads* have features familiar to mediation. The role of the assembly of five in the *panchayat*, for example, has similarities to the intermediary role of the mediator, as opposed to the decision-making role of the judge or adversary role of the lawyer in litigation. Participation in *parishads* were largely voluntary, and voluntariness is a key component of mediation. In addition, the use of mediation itself can be traced back to ancient Indian times. In

[75] Chodosh et al., 43.

ancient times, complicated cases were resolved not in the King's courts but by the King's mediator[76]—it has been recorded that the ancient Indian jurist Patanjali said, "Progress comes swiftly in mediation for those who try hardest, instead of deciding who was right and who was wrong."[77]

The revival of mediation and integration of its use into India's legal institutions would result in a more effective legal system. When the appropriate cases—those in which mutually agreed-upon solutions are desired—are funneled to mediation, cases that require a judge adjudicator—such as those involving criminal charges—are more likely to be resolved speedily. Cases that are appropriate for mediation, such as civil cases involving divorce or intellectual property, can be resolved in a collaborative manner via mediation. Resolving disputes in mediation promotes the preservation of relationships, which is a key concern in Indian culture. Opening up the avenues of problem-solving to alternative methods of dispute resolution such as mediation ease the pressure on the courts. Chodosh et al., in a paper presenting recommendations for justice reform in India, recommend, "preserv[ing] and support[ing] formal litigation as a last resort for those disputes that require it, while restoring and modernizing CDR processes well-utilized in pre-colonial society and under more recent legislation."[78] Such a balanced set of institutions would allow the Indian legal system to effectively achieve the Rule of Law.

In addition to improving the effectiveness of India's legal system, the implementation of mediation improves the consistency. When India's courts are

[76] Ibid.
[77] Bhatt, 7.
[78] Chodosh et al., 67.

supplemented with mediation centers, Indian people can consistently be funneled through the appropriate processes. Having the availability of institutions that can handle the demand of cases enhances the Indian legal system's ability to provide consistency of procedure its people.

As illustrated by the Indian case, using the broader requirements of the procedural Rule of Law opens the possibility for building legal systems that more effectively meet the needs of their constituents. In India, this opening up has allowed the adoption of alternative forms of dispute resolution such as mediation. The growth of the mediation has not only improved the efficiency of problem-solving in India, but, as the use of mediation grows, also can be expected to change the culture of dispute resolution completely. As people accept and adopt the practices of mediation, disputes that can be resolved collaboratively will more increasingly be dealt with independently of the legal system. This consequently will also free up the backlog in the courts and allow cases that require legal attention to be resolved more speedily. In conclusion, the broader requirements of the procedural Rule of Law we have set up establishes a more realistic and effective legal system that works to achieve the Rule of Law.

CONCLUSION

The broader concept of the procedural aspect of the Rule of Law improves the ability of legal systems to realize the Rule of Law. It does this by opening a space for creative solutions outside of the traditional adversarial court system. However, under the commonly accepted view, it is hard to see the value of alternative methods outside of the courts because the adversarial system is engrained in the work of Western legal philosophers. In this thesis, it has been shown that methods outside of the adversarial system play a key role in effectively and consistently realizing the Rule of Law.

The distinction between concept and conception helps recognize what the idea of the Rule of Law consists of and what actually are specific conceptions of it that work only in certain contexts. The adversarial system, for example, is not a concept of the procedural Rule of Law, but a conception of the Rule of Law that has dominated conversations about legal systems. Recognizing this as a conception of the Rule of Law and aiming to fulfill the broader concept of the procedural aspect of the Rule of Law frees up space in legal systems to implement other methods of dispute resolution that result in a more effective realization of the Rule of Law.

In cases like India, it is clear that the adversarial system is not achieving justice effectively nor consistently. Mediation presents an opportunity to achieve the two procedural goals of the Rule of Law—the application of norms and resolution of disputes regarding norms—outside of the adversarial system. The Indian case is a prime case study of the Rule of Law because it ties together these two concerns: the culture and history of its people have shaped its dispute resolution methods, and the economic constraints on the country substantially restrain the capacity of its legal system. We have seen how the legal system shaped by India's history has created a largely adversarial system that fails to effectively and consistently realize the Rule of Law due to constraints of capacity as well as a misalignment of culture. Mediation, a form of collaborative dispute resolution, plays a key role in reducing this ineffectiveness because it better fits the Indian problem-solving culture as well as requires fewer resources than litigation does. It addresses both of the concerns of culture and capacity to some degree, and it is evident that they are these concerns are inextricable from one another in the Indian context. Both of these concerns—of culture and capacity—are important in the realization of the Rule of Law. Therefore, when the broader requirements of the procedural aspect of the Rule of Law are applied to other contexts, considerations must involve some complex combination between the concerns of culture and capacity.

Though this thesis has primarily focused on the role of mediation in the particular context in India, there are endless avenues that provide opportunities to achieve the procedural role of the Rule of Law. Incentives, such as those used in Canada, where individuals are motivated by an obligation to pay the opposition's court

fees if they lose a case, may improve ease demands on a legal system. Other forms of dispute resolution, such as arbitration and conciliation, are also methods that can be explored. Whether we are looking at the legal system in India or anywhere else, viewing the Rule of Law through the lens of the broader concept allows us to discover creative forms of problem solving that allow the realization of the Rule of Law.

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