The Rule of Law as the Rule of Reasons

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Abstract: This paper argues that in contemporary legal thinking, the concept of the rule of law has become inseparable from the idea that legal decision-makers should give reasons to justify their decisions. Yet, how far can the concept of the rule the law be understood as establishing a rule of reasons? I examine whether reason giving is necessarily connected with the rule of law in the sense that a legal system would not conform to the rule of law if its decisions were not supported by publicly articulated reasons. I proceed by arguing that the focus on reason giving vindicates both procedural and substantive conceptions of the rule of law. In my view, reason giving is an essential component of the procedural conception because all the procedural account seems to require is that the state does whatever it does in a predictable and consistent way and justify it by reasons. Likewise, reason giving can serve to characterize the core of the substantive proposal. Substantive conceptions of the rule of law claim that the rule of law's central purpose is to ensure certain just outcomes. In that perspective, requiring that legal decision-makers give reasons is more apt to protect us against abuse than other forms of decision-making. In line with this reframing, I conclude that theoretical reflections on the rule of law should pay more attention to the legal duty to give reasons than has been done in the past, thereby leading to a context-sensitive assessment of the rule of law and its virtue(s).

Introduction

Consider the following exchange, which occurred a few years ago in an American court, between a district judge and the attorney for one of the parties involved in a dispute:

JUDGE REAL: Defendants’ motion to dismiss is denied, and the motion for lifting of the stay is denied – I’m sorry. The motion to dismiss is granted with ten days to amend.
MR. KATZ: And the motion to lift the stay is denied?
JUDGE REAL: Denied; that’s right.
MR. KATZ: May I ask the reasons, your Honor?
JUDGE REAL: Just because I said it, Counsel.1

This short dialogue might strike most of us who live in regimes which we think respect the rule of law as unusual. In fact, a complaint of judicial misconduct was brought against Judge Real.2 In his dissent, Judge Kozinski, one of the judges in charge of adjudicating

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1 As cited in In Re Complaint of Judicial Misconduct, No. 03-89037, Order at 13805 (9th Cir. – Sept. 29, 2005).

2 The actual complaint was not based on the fact that Judge Real had failed to give reasons, but on the allegation that he had “acted inappropriately to benefit an attractive female.” However, Real’s failure to give reasons did become a central point of contention among members of the panel in charge of adjudicating the complaint.
the complaint, expressed his bewilderment in the following terms: “no one knew why the district judge had done what he did – the order gave no reasons, cited no authority, made no reference to a motion or other petition, imposed no bond, balanced no equities. The two orders were a raw exercise of judicial power…”3

Kozinski, I submit, put his finger on an essential attribute of contemporary understandings of the ideal of the rule of law: we ordinarily expect public officials making decisions that will affect our lives to justify their choices. Judges, we assume, are always required to give reasons for their decisions. More generally, we think that all public officials, be they administrators, elected representatives or members of the executive, are supposed to offer some form of reason to justify their action. And when they do not give their reasons, we certainly do not anticipate that they will acknowledge and state so bluntly that they are exercising raw power and deciding arbitrarily. In other words, we assume that our legal system is constructed on the rejection of raw power. What is troublesome is that Judge Real used the language of despotism. His statement is reminiscent of the absolute monarch’s maxim: *sic volo sic jubeo, stat pro ratione voluntas*, which can be translated as “Thus I will, thus I command, my will shall stand for a reason.”4 The Baroque king does not give reasons for his decisions because his will is his reason. Being the ultimate sovereign, all he needs is to want something for his will to become the law. There are no legal limits on his powers that could require that he justify his decisions in any way.

In this paper, I argue that in contemporary legal thinking, the concept of the rule of law has become inseparable from the idea that legal decision-makers should give reasons to justify their decisions. In doing so, I draw on Neil MacCormick, who has recently revisited the idea that law is an argumentative discipline.5 According to him, “the issue [is] whether there can be a ‘Rule of Law’, if ‘law’ is a matter of what is arguable in this sense.”6 His account suggests that no theory of the rule of law and of what distinguishes rule by law from other systems of governance can disregard this aspect of the legal practice. I intend to take this suggestion one step further by arguing that the rule of law cannot obtain without reason giving. In other words, my claim is that legal reason giving is one of the essential properties of the concept of the rule of law, if not the essential one. I ask whether reason giving is necessarily connected with the rule of law in the sense that a legal system would not be considered as satisfying the rule of law if its decisions were not supported by publicly articulated reasons.

My thesis is that reason giving by public institutions is the kind of practice the absence of which would decisively disqualify a system of rules from being regarded as abiding by the rule of law. More specifically I proceed by arguing that the focus on reason

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3 In Re Complaint of Judicial Misconduct, No. 03-89037, Order at 13805 (9th Cir. – Sept. 29, 2005).
4 See Leibniz, *Discourse on Metaphysics*, 1682, §II. Leibniz, who was a fervent opponent of the maxim, whether applied to human kings or to God, thus argues: “In saying, therefore, that things are not good according to any standard of goodness, but simply by the will of God, it seems to me that one destroys, without realizing it, all the love of God and all his glory; for why praise him for what he has done, if he would be equally praiseworthy in doing the contrary? Where will be his justice and his wisdom if he has only a certain despotic power, if arbitrary will takes the place of reasonableness, and if in accord with the definition of tyrants, justice consists in that which is pleasing to the most powerful? Besides it seems that every act of willing supposes some reason for the willing and this reason, of course, must precede the act.”
giving vindicates both procedural and substantive conceptions of the rule of law. On procedural or formal conceptions of the rule of law, the rule of law does not require anything substantive, for example, it does not require any specific liberty. Formal approaches address the manner in which the law is created and applied, not its content. By contrast, on substantive conceptions, the rule of law is deemed valuable because of the specific outcomes it yields, e.g., the specific rights it guarantees. The rule of law includes reference to criteria of justice or right. According to this approach, for us to recognize a legal system as respecting the rule of law means that the system has to satisfy certain substantive criteria. We should not consider a legal system as complying with the rule of law if it does not produce certain just outcomes.

On my analysis, reason giving is an essential component of the procedural approach to the rule of law because according to this view all the rule of law requires is that the state does whatever it does in a predictable and consistent way and justify it by reasons. Likewise, reason giving can serve to characterize the core of the substantive proposal. The substantive conception of the rule of law aims at producing certain just outcomes by governance through law. Requiring that legal decision-makers give reasons is thought more apt to protect us against abuse than other forms of decision-making.

The paper will proceed as follows: I begin by briefly developing a thought experiment which I will use throughout the paper as a touchstone for my analysis (1). Next I show that reason giving is what best characterizes procedural conceptions of the rule of law (2), before turning to substantive conceptions of the rule of law and arguing that here too reason giving is really what makes the rule of law what it is (3).

I. A Thought Experiment: What if Legal Decision-Makers Gave No Reasons?

For a given regime to be faithful to the rule of law, there must be, I submit, some form of reason giving somewhere within the legal system. By this I mean that at least some, but not all of the public institutions composing the institutional structure of a given regime should be required to justify their decisions publicly. The fact that a number of public institutions are not required to give reasons for their decisions (e.g., legislatures), or even, are altogether prohibited from giving reasons (e.g., juries), is usually not a cause for concern because they exist along with other institutions that are under such an obligation (e.g., courts or administrative agencies). One explanation for this assurance may be that what really matters for the rule of law to obtain is not that all institutional actors give reasons for every single decision they make, but only that there be sufficient reasons available within the system taken as a whole for citizens to understand and evaluate the state’s action.

7 The division I have in mind is similar to that advanced by Paul Craig, who distinguishes between formal and substantial conceptions of the rule of law. See Paul P. Craig, “Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework,” Public Law (1997), 467–87.
8 For instance, Fuller’s conception of the rule of law can be characterized as procedural. See Lon Fuller, The Morality of Law, (New Haven; London: Yale University Press, rev. ed. 1969), 36 and 46–91.
9 Dworkin’s conception of the rule of law illustrates the substantive approach: central to his analysis is the question what rights citizens have. On his own avowal, he favors the “rights conception” of the rule of law. See Ronald Dworkin, A Matter of Principle, (Cambridge, Mass.: Harvard University Press, 1985), 11.
10 Of course these are rough generalizations and I am very much aware of the fact that in many legal systems legislators are required to produce reasons in certain contexts (e.g., for certain types of statutes such as organic statutes or when legislating on specific topics) and, symmetrically, that courts and administrative agencies are sometimes released from the obligation to give reasons.
What if nobody gave reasons to anybody else? What would be social and political life without any reason giving? To answer this question, it might help, to begin with, if we were to imagine a legal world without reason giving at all. Suppose we had a legal system governed by rules, with law-applying and law-creating institutions in charge of enforcing those rules and nothing else. All political decisions are made by majority vote of all citizens; governmental agents are elected and subjected to traditional checks and balances, etc. This regime, though, has one distinctive feature: there is no reason giving whatsoever at any level of the decision-making.

We might have statutes, administrative regulations and a Constitution as well as administrators and judges appointed to apply them and resolve disputes arising under them, but these public officials would never give reasons explaining why and justifying their determinations. Legislators would not debate (at least not publicly and without leaving any record) or make any statement explaining their votes. There would be an institutionalized, independent judiciary holding government officials to the law and resolving disputes between citizens according to the law, but without providing any form of justification for their determinations. All legal decision-makers would simply enact rules, issue orders and decide cases but never explain or justify their decisions. In short, in that system, all the institutional bodies through which the state operates function according to pre-established rules of law, but they are strictly prohibited from giving any reason to justify their decisions.

In such a regime, people would have reasonable certainty concerning the rules and standards by which their conduct is assessed and the requirements they must satisfy to give legal validity to their transactions. They could challenge governmental actions and would be safe from arbitrary interference by the government and its agents. Yet, would this regime still count as one respecting the rule of law?

To answer this question, I will successively consider the various practical implications which may ensue from the total absence of reason giving at any level of the government. More specifically, in the following section, I argue that such a “non-reason-giving legal system,” as I will call it for the lack of a better term, would encounter at least three types of problems: (1) insufficient consistency in its decision-making, (2) an epistemic deficit in that the law would be hardly accessible to the public, and (3) an endemic difficulty in ensuring that citizens can effectively contest legal decisions they find objectionable.

II. Reason Giving as an Essential Component of Procedural Conceptions of the Rule of Law

The procedural conception of the rule of law does not impose any requirements with respect to the content of the law. It does not specify the kind of law a society must have, but I argue it does require that whatever the law that society chooses to enact must be justified by reasons. In other words, it demands that government officials and citizens are bound by and must act consistent with rules which are justified by reasons, whatever they require.

1. Reasons Foster Consistency

The procedural conception of the rule of law, at its most modest, amounts to a requirement of consistency in the sense that the law should not confront people with contradictory demands, such as rules requiring and prohibiting the same conduct at
the same time and under the same circumstances.\textsuperscript{11} Yet, the first problem our imaginary system would encounter is one of consistency. Considerations of coherence have an important role to play in the law, yet, in the absence of reasons at any level of the decision-making, it is to be expected that the legal system will lack consistency.\textsuperscript{12} In such a regime, public institutions are likely, in the long run, to let decisions emerge with no concern for whether they cohere with other decisions. The concern is not merely that public decisions would lack logical consistency amongst themselves, but more generally that no unity of principle will govern public institutions.

To understand why, consider the example of civil or criminal juries in contemporary legal systems. The distinctive feature of adjudication through juries is that jurors are prohibited from giving reasons for their decisions. Another typical trait is that juries have the power to nullify the law, that is to say, not only to decide without reference to any rule of law, but also to decide against the applicable rules themselves, in spite of the judges’ instructions.\textsuperscript{13} For example, a jury has the power to acquit, even if its verdict is contrary to law as given by the judge and contrary to evidence. There is a connection between the two traits: when jurors decide cases, the emphasis is laid on reaching a result rather than on a reasoned elaboration of cases. Jurors are summoned to solve one particular dispute, not to lay precedents or to shed light on the existing law. In other words, they are asked to agree on an outcome not on reasons in favor of that outcome.

By contrast, other decision-makers, such as judges or administrators, are usually not only entrusted with the task of resolving particular disputes, but also, and sometimes most importantly, with that of interpreting the governing law, of clarifying it when it is obscure and, occasionally, of announcing rules to govern future cases. As Neil MacCormick has argued while analyzing the notion of coherence in adjudication, in deciding a given case according to law, decision-makers should begin by interpreting the existing law in order to establish a coherent view of the relevant branch of the law.\textsuperscript{14} Once they have established what the settled law is, they should then interpret law in applying it to a new case such that their decision is in accord with the most coherent account which justifies that settled law. But nothing similar to this can occur in a non-reason-giving legal system.

In our hypothetical legal system, all public decisions seem to follow the model of jury decision-making. Public officials decide on single cases rather than on general categories of cases. Since they are prohibited from giving reasons, their decisions take the form of orders that cannot extend to the interpretation and assessment of the legal system itself. In such a system, institutions only declare outcomes. Accordingly, it would be extremely difficult for them to articulate commitments to act in conformity with their past decisions and to confer any form of precedential effect upon them. When

\textsuperscript{11} This is how Lon Fuller understands the requirement of consistency in \textit{The Morality of Law} (New Haven: Yale University Press, rev. ed. 1969), 65–70.


one gives a reason for one’s decision, one commits oneself, in a more or less strong
way, to deciding those cases within the scope of the reason in accordance with that
reason. Of course, giving a reason does not amount to making a promise, but it does
impose some lesser form of commitment. Such commitments, however weak, would
disappear in a regime in which reasons are prohibited.

As a result, it is to be feared that non-reason-giving systems will wind up comprising a
series of seemingly decentralized decision-makers who are more or less unconstrained
by precedent or hierarchy. Since decision-makers never refer to reasons, when an-
nouncing their decrees, they cannot explain whether and how their conclusions cohere
with some part of the established law. It seems to follow that characteristic features of
rule of law abiding legal systems as we know them, such as the doctrine of precedent,
arguments from analogy, or the requirement that like cases be treated alike, would be
compromised. Non-reason-giving legal systems, however, raise another, perhaps more
urgent question for our purposes. On the hypothesis that decision-makers seek to make
decisions which are consistent with that of their colleagues, past and present, how are
they to know what would be a coherent pronouncement, considering the fact that they
have no access to the past and current reasons justifying public decisions?

2. The Absence of Reasons Leads to an Epistemic Deficit

Here we run into the second problem posed by non-reason-giving legal systems, which
concerns the knowledge of law. According to procedural conceptions of the rule of law,
one of the basic requirements for a legal system is to allow citizens to know in advance
and in stable and general terms what is required by the law so that they can organize
their life accordingly. If law is to bind people, they must be able, without undue difficulty,
to find out what it is.15 Citizens need to know the rules, and they cannot plan their lives
unless they know the law in advance. Yet, if the law is composed by a series of directives
unaccompanied by reasons, it is unclear how citizens are to identify its precise content.
In a non-reason-giving system, it would be tricky to establish what the law is.

Of course this conclusion is contingent upon our current historical situation. It is not
always the case that where no reasons are given people cannot know what the law is.
It is probably true in today’s large-scale mass societies: considering the complexity and
number of law-creating and law-applying institutions, we do need reasons to know what
the law is. Preferably, we even need written reasons, this is why we impose requirements
to keep records, to write opinions, to publish decisions, and so on. By contrast, in an
imaginary small, homogeneous society with only twelve judges and twenty lawyers,
there would be no such need for reason giving. In fact, this is more or less how things
worked in the early Roman Republic: for adjudication, Romans turned for decisions to
the College of Pontiffs. Roman pontiffs were required only to render decisions.16 They
did not have to give reasons, to commit themselves to future cases or to cite rules as
justifying their adjudications. Their task was not to argue: it was to pontificate. In such

15 A number of positivists argue that law’s function is to guide action. Thus Joseph Raz points out that
"if the law is to be obeyed it must be capable of guiding the behaviour of its subjects. It must be such
that they can find out what it is and act on it. This is the basic intuition from which the doctrine of the
Rule of Law derives: the law must be capable of guiding the behaviour of its subjects…" See Joseph
1979), 214.

16 I am relying on Peter Stein’s description on the Roman pontiffs’ role in Regulae Iuris. From Juristic
The Rule of Law as the Rule of Reasons

In a society, face-to-face interactions are the norm. Those who make the law and those who need to know it interact so closely on an everyday basis that each one of them knows what the law is even though no reasons are given.

To go back to large modern societies, we cannot evaluate a legal system by reference only to outcomes because outcomes do not fully reflect what goes on behind most legal decisions. The trouble with studying only outcomes is that they give us a skewed view of institutions and their decisions. Outcomes, taken alone, give us little information on crucial features of a decision such as the debates concerning the applicable rules of law, their interpretation, the policy implications of choosing one interpretation over another, and so forth. In the absence of any statement of reasons, we would have to rely on educated guesses and extrapolations. We would need to assume that these guesses control what actually goes on in governmental offices. But because we would be missing on quite a bit, we would be left with a distorted and artificial picture of what the law is. This situation raises a predictability problem for the citizens at large, but also for public institutions themselves, considering that institutional actors are also governed by other institutions for the purpose of organizing their tasks and planning their behavior in conformity with the law.

Still these difficulties could leave a proceduralist theorist unconvinced. She could object that the fact that it is not easy to ascertain what the law is does not, in and of itself, compromise the rule of law structure of the regime. The values of certainty, predictability and uniformity, she could claim, are not essential to the rule of law. While law’s consistency and predictability are certainly traditional attributes of the rule of law, she could continue, they are not necessary. The advocate of reason giving could grant both points and respond by pointing out a third problem encountered by non-reason-giving systems, which, this time, jeopardizes the system’s adherence to the rule of law beyond doubt.

3. Reasons Allow for Contestation

If the rule of law is to be actually a protection against arbitrary intervention in people’s lives, in practice, it is insufficient to demand that there be rules of laws and public institutions applying them. It is also necessary that some reasons be given to individuals threatened with action making legal decisions challengeable. Citizens must be able to contest each justification and offer counter-arguments if they so desire to the effect that whatever may be the official rationale for the decision, it becomes possible to argue that it does not warrant the resulting decision. This should be the case in virtue of the indeterminacy of law: rules are subject to reasonably arguable interpretations and citizens should be able to contest not only public officials’ reading of the law, but also the relevance of the legal material cited as a justification, their way of drawing inferences from the rules and the facts as well as their evaluation of the evidence.

Critics of approaches to the ideal of the rule of law which ignore the importance of reason giving (and I for one) may endorse some form of “contestatory democracy”

argument to maintain that the major problem with non-reason-giving systems is that its public officials are hardly accountable to the public.\textsuperscript{18} Citizens cannot hold themselves or their leaders accountable, the argument goes, unless they are given reasons. This argument is one of institutional design. It relies on the idea that properly designed institutions should give citizens the effective opportunity to contest their representatives’ decisions. A non-reason-giving legal system does not provide this opportunity. Its conformity to the rule of law is therefore compromised.

This argument relies on a very specific conception of political freedom. Political freedom has classically been described as the absence of external obstacles to a person’s agency. One is free, in this view, insofar as no one else actively interferes in one’s life.\textsuperscript{19} However, Philip Pettit has recently revisited an alternative notion of political freedom as non-domination. According to him, political freedom is primarily a matter of power relations. One is free to the extent that one is not dominated by others. And not being dominated by others consists in the fact that no one else is capable of exercising arbitrary power over oneself.\textsuperscript{20}

Given that premise, the main question for the advocates of the contestatory ideal is the following: how can the state’s power of interference in people’s lives be made non-arbitrary? The literature on the subject splits on this question. Pettit defines arbitrariness substantively: power is arbitrary, he claims when it fails to track the “welfare and world-views of those affected.”\textsuperscript{21} Other republicans, such as Frank Lovett, define arbitrariness procedurally, by the absence of rules of procedures established in advance and known to all parties.\textsuperscript{22} Reason giving might come into play as soon as one adopts a procedural understanding of arbitrariness.

If arbitrariness is characterized by a procedural, absence-of-rules condition, how can a government prevent arbitrary decision-making? Aside from traditional solutions such as the establishment of periodic democratic elections, of separation of powers or of checks and balances, one way is thought to lie in ensuring that people are able to contest the decisions made by the various governmental agencies. The underlying idea is that a government does not exercise arbitrary power insofar as it is effectively contestable. Power is arbitrary, on this view, to the extent that it is not constrained by reasons that are common knowledge to all persons or groups concerned.\textsuperscript{23} Effective contestability in the political domain requires a variety of institutions such as courts and appeal procedures, as well as rights to hearings.

This interpretation of the contestatory ideal establishes a connection between the contestability of government and reason giving. The idea is that if in theory I can

\begin{itemize}
  \item \textsuperscript{19} See, e.g., Isaiah Berlin, \textit{Four Essays on Liberty} (London and New York: Oxford University Press, 1969). Berlin describes this form of political freedom as a “negative” conception of liberty, according to which people are free simply to the extent that their choices are not interfered with.
  \item \textsuperscript{20} As Quentin Skinner has shown, this idea goes back to the classical republican tradition, as expressed, e.g., in the writings of Cicero, Machiavelli or Harrington. See Quentin Skinner, \textit{Liberty before Liberalism} (Cambridge: Cambridge University Press, 1998).
  \item \textsuperscript{21} Philip Pettit thus argues that an interference is non arbitrary “to the extent that it is forced to track the interest and ideas of the person suffering the interference,” \textit{Republicanism: A Theory of Freedom and Government} (Oxford: Clarendon Press, 1997), 55.
  \item \textsuperscript{23} Of course this argument is limited to public action, otherwise it would mean that the vast majority of our daily actions are arbitrary by virtue of the fact that we only exceptionally give reasons for them.
\end{itemize}
contest what you do without knowing your justificatory reasons for doing it, e.g., on the basis of moral principles; in practice, knowing your reasons enables me to criticize your actions much more efficiently. When we move to governmental action, the connection between contestability and reason giving is even stronger. This is because the government’s official reasons lay a legal basis for criticism. Certainly, if the government did not give reasons, people could still contest its actions by criticizing its hypothetical reasons. The problem is that the government could always dismiss such criticism by arguing that it never relied on those hypothetical reasons and that hence the criticism is unfounded.

In light of this possibility, people should have access to the reasons supporting public decisions and be given the opportunity of contesting the soundness of those reasons. If institutions that exercise state powers do not give any reason for their decisions, they can hardly be held to account for failing to act as reasons of the putative common good require. When public officials make a decision on the basis of a particular set of reasons, then the justificatory status of the decision is tied to the adequacy of those reasons. Yet, if those reasons are nowhere to be found within the legal system, the evaluation and criticism of the resulting decision becomes impracticable. Accordingly, there should be a source of contestability and, hence, of reason giving within the legal system. The requirement of contestability cannot be satisfied under a regime in which public officials are altogether prohibited from giving reasons. Institutions conforming to the rule of law must make it possible to scrutinize public decisions to reject those that do not answer to common recognizable interests. Philip Pettit calls these contestatory resources “editorial control,” as opposed to “authorial control.” The latter refers to institutions’ norm-creating power, while the former refers to the power possessed by the citizenry as a whole to contest those norms that have been created.

In this way of thinking, the reason-giving requirement constitutes the primary way for a state’s power not to be arbitrary. Reason giving is needed for enabling active criticism of public decisions. The value of giving reasons, therefore, is to impede arbitrariness from public institutions. To summarize, reason giving is an essential component of the rule of law ideal because in the absence of it, a regime in which the rule of law obtains would cease to conform to the rule of law. The contestatory democracy argument is convincing, I think, in showing that non-reason-giving legal systems cannot constitute anything resembling a rule of law-abiding regime. In other words, the need for contestation plausibly establishes an essential tie between reason giving and the rule of law.

But this should not be the end of our inquiry. Several proponents of a substantive definition of the rule of law go further. They argue that the value of reason giving does not only lie in its capacity for opening contestation channels to the public, but also, and most importantly, in securing certain rights for individuals. Public decisions that are justified by reasons are not only thought to constitute reasoned judgments that people are in a position to examine, assess and, if necessary, challenge. Reason

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24 I use the term “adequacy” here partly because I do not want, for the purposes of this paper at least, to discuss the controversial question of what constitutes a “good reason.” Of course, throughout the paper, I am not using the word “reason” in an unmodified way — there is always some implicit modifier like good, sufficient, adequate, and so forth. For the sake of the argument, I will simply assume that a good, adequate reason is a public reason in the Rawlsian sense.


giving makes for better public decisions. They yield better – more just – outcomes. According to substantive theorists, an important reason to be wary of the procedural conception of the rule of law is that it does not insure that the law or legal system is just or deserves obedience. Fidelity to procedural aspects of the rule of law might serve to enhance legally enforced oppression. This is why a number of scholars have urged that we should adopt a substantive conception of the rule of law. In what follows, therefore, I examine the validity of my thesis according to which the rule of law can be minimally defined as a reason-giving requirement, by assessing its application to substantive conceptions of the rule of law.

III. Reason Giving As an Essential Component of Substantive Conceptions of the Rule of Law

Proponents of substantive conception of the rule of law argue that formal, structural or procedural features of a legal system are insufficient to characterize it conforming to the rule of law. They stress the importance of securing certain (just) outcome and of ensuring that certain rights are complied with. In this section, I argue that the requirement to give reasons can be considered as a proxy for these substantive demands inasmuch as it aims at producing better decisions. In doing so, I will discuss a series of theses which have recently been developed by deliberative democrats.

To illustrate my argument, here is how a famous British judge, Lord Justice Bingham, has depicted the value of being under the duty to give one’s reasons in writing when making judicial decisions:

I cannot, I hope, be the only person who has sat down to write a judgment, having formed the view that \(A\) must win, only to find in the course of composition that there are no sustainable grounds for that conclusion and that on any rational analysis \(B\) must succeed.27

In making these remarks, Lord Justice Bingham assumes that we value reason giving because offering reasons for decisions, we think, is more likely to give us true or right or justified answers to our political or legal questions.28 Reason giving is valuable because it increases the quality of public decisions. In this perspective, the value of reason giving lies in its capacity to produce better (more just) outcomes in law and politics. Decisions are more likely to be justifiable, the argument goes, if decision-makers are required to offer reasons justifying their choices to other people, including those who will be most affected by the decisions. This capacity to produce better decisions has been described as an epistemic competence.

Suppose that there are better or worse, correct and incorrect public decisions, for instance, that the decision to decrease defense expenditure so as to increase public schools’ funding is a better decision than the converse one. Let us suppose, in other words, that some public decisions are better than others by standards that are in some way objective. If this is so, does requiring decision-makers to give reasons to justify their decisions makes it more likely that they will pick those better decisions? Do public officials have a better than even chance of getting the right answer when required to

28 This non-instrumental value of reason giving is discussed by Lon L. Fuller, “Positivism and Fidelity to Law – A Reply to Professor Hart,” *Harvard Law Review* 71 (1958): 630–672, who argues, p. 636, that “when men are compelled to explain and defend their decisions, the effect will generally be to pull those decisions toward goodness.”
give reasons? According to a number of deliberative democrats, the answer is yes. Giving reasons makes a difference. It is not that indifferent actions or decisions may become just in virtue of the fact that they are given reasons for, nor that injustices may become less unjust if they are justified by reasons. It is that the duty to give reasons pushes decision-makers to pick the just outcomes.

1. The Epistemic Value of Reason Giving

The first two arguments for the view that reasons make for better decisions are rather straightforward and I will not dwell on them. The first is that actual reason giving is necessary for public deliberation. This claim is plausible: evidently, citizens must know about justifications for public decisions before they can deliberate about them.

Second, the claim is that reason giving improves the quality of public argument. A full articulation of public officials’ reasons for their decisions is more likely to lead them to sound decisions than in the absence of it. There are several justifications for this claim. First, there is the idea that in a society where a substantive version of the rule of law obtains, the problems of public interest we need to address require that we bring into play information that is diverse and dispersed across the different branches of governments and other competent institutional actors. By requiring public officials to give reasons, it is claimed, information and expertise in the heads of many disparate actors will be brought to bear on the solution to the problem. In short, the demand for reasons is thought to facilitate the exchange of information and expertise and, more generally, to encourage institutional actors to be more reflective. Second, and most importantly, the fact that reasons are given in favor of public decisions gives evidence, we suppose, that the underlying choices are more just or correct. In other words, the requirement to give reasons is expected to have the epistemic virtue of helping participants discover the right decisions. But how does reason giving help?

One answer may be that decisions will be better thought through if decision-makers know that they must substantiate them with reasons. Requiring public officials to give reasons will presumably lead them to reflect on their choices and discuss them with their colleagues. In this process, the argument goes, they will be in a better position to recognize the reasons that should apply to the given instance they must decide upon. The demand for reasons forces decision-makers to revise indefensible claims and enables them to discern more easily weak arguments. In addition, by requiring decision-makers to give reasons, it is hoped that individual decision-makers will adjust their judgments in light of the reasons other decision-makers gave in the past. By the same token, the public at large is invited to form and modify its judgment on the basis of these reasons – past and present.

Public decisions should be tested under public scrutiny. Accordingly, by requiring that decision-makers give reasons for their decisions, a legal system provides the public with an opportunity to respond to public decisions by throwing evidence and criticism at them. The reasons officials present for their decisions become open to endorsement, criticism, rebuttal, complement, enhancement, and so on, by an unlimited number of persons. By enlisting the whole citizenry in this pooling of reasons, the idea is that the chances of improving the underlying decisions increase exponentially.

There are important objections to the suggestion that reason giving has epistemic value. Hilary Kornblith has thus emphasized that the public practice of giving and asking for reasons is not automatically an epistemic good. At times, the practice of requiring decision-makers to give reasons may be ill-intentioned and degenerate into an invitation to manipulate the discussion. In these situations, what passes as a reason in the public forum might be something preposterous. This is when, Kornblith argues, it might be best to opt out. To illustrate, he cites the Bush administration’s appeal to the threat of weapons of mass destruction as a reason for invading Iraq in 2003. This observation suggests that just because reasons are exchanged on the public forum does not mean that the decision they are reasons for is a really good decision.

This objection can be generalized. For instance, in societies where there is a general practice of deferring in a reverent way to socially recognized experts, multiplying opportunities for citizens to give and ask for reasons might be harmful. To illustrate, consider the recent decision to introduce jury trials in Japan. Since 2009 serious criminal trials in Japan are decided not by three-judge panels as they were until then, but by a group of six lay citizens and three judges deliberating together. With three judges – the ultimate “sensei” present, critics have suggested that it is unlikely that lay citizens will dare put forward a different point of view. As many commentators have argued, Japan must first overcome some deep-rooted cultural obstacles, in particular the so-called “omakase” syndrome, which can be translated as the “leave it to the person in charge” syndrome. The syndrome manifests itself as a reluctance to express opinions in public, to argue with one another and to question authority. In light of these circumstances, it is unclear whether or not establishing the practice of asking for and giving reasons through the creation of popular juries in Japan will have good epistemic consequences. Cultural norms may lead to undesirable epistemic results in this case.

Kornblith is certainly right to point out that in practice, far from being a panacea against arbitrariness and obscure power, the practice of giving reasons can yield artificiality and obstruct the original aims of the ideal of the rule of law. That said, in spite of cultural exceptions and the fact that a few decision-makers might exploit the reason giving practice for their own interest, reason giving remains, by and large, a

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32 See Norimitsu Onishi, “Japan Learns Dreaded Task of Jury Duty,” *NY Times*, July 16, 2007. A good source of information in English on the topic is Rob Precht’s blog, *Foley Square*. Rob Precht is a New York lawyer who has been working with lawyers in Japan to prepare for the new system.
33 The Japanese Diet enacted the Saiban-In law, the “Lay Assessors Act,” which takes effect in May 2009.
34 Sensei (先生) refers in Japanese to persons who enjoy respect and leadership. It is used to address teachers, professionals such as lawyers and doctors, and other authority figures.
35 Another potential source of bias in the practice of asking for and giving reasons is that such practices may be deleterious to epistemic endeavors because of people’s specific social situations in virtue of race, gender, sexual orientation, etc. The concern is that public discussion of certain topics is systematically biased, e.g., by implicit gender or racial prejudices.
The Rule of Law as the Rule of Reasons

desirable feature of legal systems committed to the rule of law. One could argue that even hypocritical or manipulative reasons are better than no reason at all because in the long run these less than candid reasons may have a “civilizing” effect on decision-makers. Similarly, in societies where deference to traditional authorities and hierarchy is widespread, developing the practice of giving and asking for reasons might have the pedagogical effect of educating the public to voice criticism and to systematically request explanations for governmental actions.

2. The Civilizing Force of Reason Giving

Let us turn to the implications of the view that reason giving increases the likelihood that public officials will make better decisions because reasons have a civilizing effect. This effect results from the fact that actual reason giving forces decision-makers to articulate their views publicly, be it orally or in writing. The requirement to give reasons pressures decision-makers to find convincing arguments for their position and refrain from using self-interested and immoral arguments. Ideally, in the process, they will change their preferences for the better. You cannot say publicly or put on record that you made a given decision “because it’s Monday.” Or perhaps you can, but there are good chances, as we saw in the introduction, that your decision and your competence will be challenged.

This “civilizing force” argument is modeled after Kant’s “unsocial sociability” argument in the *Idea for a Universal History from a Cosmopolitan Point of View*. In this essay, Kant argues that morality emerges from its opposite, namely antagonism among men. He defines this unsocial sociability as men’s “propensity to enter into society, bound together with a mutual opposition which constantly threatens to break up the society.” But this antagonism, which lacks any moral character, winds up inducing them into moral feelings. Kant describes this civilizing process as follows:

Thus are taken the first true steps from barbarism to culture, which consists in the social worth of man; thence gradually develop all talents, and taste is refined; through continued enlightenment the beginnings are laid for a way of thought which can in time convert the coarse, natural disposition for moral discrimination into definite practical principles, and thereby change a society of men driven together by their natural feelings into a moral whole.

Similarly, the requirement to give reasons, it is hoped, exerts psychological pressures on decision-makers toward self-censorship in anticipation of public disapproval and reproach in case they offer self-centered reasons. Because self-interested reasons carry no weight in the public setting, public officials are led to present other-regarding, rather than self-interested reasons, to justify their decision. For example, last year, when Italian Prime Minister Silvio Berlusconi argued in favor of a decree which would suspend all “non priority” trials for a year, he justified the measure on the ground that

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39 The decree, which has been approved by the Italian senate on June 24, 2008, would suspend all trials for offences committed before 2002 except in the case of crimes punishable by a prison sentence of ten years or more and those which involve violence, the Mafia or workplace accidents.
the suspension is aimed at overhauling Italy’s overburdened judiciary and clearing a trial backlog, rather than pointing out that he will personally benefit from it. The centre-left opposition, who dubbed the decree “Salva Premier” (Save the Prime Minister), retorted that the measure is in fact designed to halt a trial in Milan in which Berlusconi is accused of having given a $600,000 bribe to his former tax lawyer, David Mills.

This example suggests that even the less public-minded governmental agents must find considerations in favor of their decisions that take into account the good of others. Over time, it is hoped that public officials who strategically formulate justifications for their decisions might become convinced by them. This process is what Jon Elster describes as the “civilizing force of hypocrisy.” According to Elster, it tends to “on the average… yield more equitable outcomes.”40 This hope is based on an additional normative expectation: once governmental agents commit themselves in public to a given view, they are not supposed to switch to another view unless they can justify such a departure.41 As public officials usually cannot openly depart from the views they have articulated in previous cases, they may begin believing in what they initially simply pretended they believed in. The process can be described as a reduction of the “cognitive dissonance” between what public officials say and what they think.

This picture of the civilizing force of reason giving is attractive, of course, but it might prove too optimistic. It could be doubted that this portrayal is based on plausible factual and psychological assumptions about the potential for decision-makers to start believing reasons that they initially offered as a pure matter of strategy. Most importantly, for our purposes at least, there might be negative side effects related to public reason giving – such as those identified above by Kornblith – that outweigh the benefits identified by deliberative democrats. For instance, while insufficient reasons may harm the public, a surfeit of reasons, or reasons given in inaccessible jargon, can also derail the use of public reason and harm democratic societies. A full discussion of these troubling implications would, however, take us too far afield. For the sake of the present discussion, I shall simply emphasize, by way of conclusion, that if the legal duty to give reasons, inasmuch as it effectively leads to better public decisions does indeed vindicate substantive conceptions of the rule of law, it also opens the door for a situated understanding of the rule of law ideal.

Conclusion

I believe the views developed in the previous sections provide some tentative support for the idea that the legal duty to give reasons is a central component of the rule of law.


in contemporary legal systems. I will not attempt to sum up the argument of this essay. However, I take it that my discussion lays the basis for a contextual approach to the rule of law ideal. Understanding the rule of law from the point of view of reason giving enables us to view the rule of law not as an all-or-nothing matter, but rather as a matter of degree. The rule of law may obtain more or less and the extent to which a legal system provides reasons is a good indicator of this sensitivity to context. In this respect I agree with Jeremy Waldron’s recent suggestion that the requirements associated with the rule of law are matters of degree. This is in part due to the fact that the rule of law is a general normative principle that can be attained, in practice, to various degrees. It follows that the determination of whether a legal system respects the rule of law in such and such instance may perhaps be a matter of doubt and contestation, in part due to the interaction of several features. In short, I hope to have shown throughout this paper that reason giving is not only one such feature, but also, perhaps, the most important one.

**Bibliography**


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