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The rule of law

Richard Bellamy

Introduction

Many political theorists view the rule of law with suspicion. On the one hand, it can appear mere political rhetoric. For example, politicians habitually invoke the doctrine to suggest that any failure to comply with decisions made within the current political system leads to anarchy and the end of law. Opponents must play by the rules of the game and, when they lose, obey the winners. So employed, it operates as a self-serving ideological device whereby governments assert the legitimacy of all their actions. As Judith Shklar has remarked, it seems unnecessary to waste intellectual effort 'on this bit of ruling-class chatter'.¹ On the other hand, certain critics of this rhetorical position identify the rule of law with some notion of good or just law. In this case, however, the doctrine risks becoming indistinguishable from a comprehensive political philosophy and better designated as such. No distinctive role appears to be allotted to law or legality per se.

To escape vacuity, therefore, a theory of the rule of law must avoid collapsing into either of these two interpretations. A standard approach associates the rule of law with those properties of legality and due process that allow people who disagree about the just society to peacefully coexist and, where necessary, to work through their differences. However, this thesis immediately confronts the original dilemma. If the rule of law merely requires that formal procedures exist and are followed, it will amount to little more than an endorsement of the prevailing formalities. All regimes may need a degree of procedural and legal formality to hold together, thereby setting certain limits to what even the worst tyrant can do if he wants his state to function with any efficiency and avoid collapse, but these limitations need not be terribly demanding. Yet strengthening them could lead to the doctrine incorporating contentious substantive notions and thereby losing its distinctiveness vis-à-vis comprehensive theories of the just and good polity.

Section 1 argues that some of these problems can be avoided if we see the main task of the rule of law as the prevention of arbitrary rule. Two broad approaches are identified. The first centres on the very nature of rules and the constraints

that arise from following them. The second focuses on political checks and balances for constraining power. Though related, both historically and substantively, I shall argue the second offers the chief defence. Sections 2 and 3 defend this argument by analysing respectively an example of each approach.

1 The idea and value of the rule of law

The core idea of the rule of law can be grasped via the classic contrast with the 'rule of persons'. The objection to the latter resides in the fear that unfettered personal rule, be it by a single individual, such as a monarch, a group, such as a democratic majority, or a corporate agent, such as a bureaucratic body, places the ruled under the arbitrary sway of their rulers. In other words, such rulers have the capacity to intentionally coerce, obstruct, manipulate or otherwise interfere with the ruled, without consulting the views or interests of those affected. By forcing rulers to follow certain forms and procedures, law constrains such arbitrary power – though theorists differ as to the effectiveness and normative implications of different sorts of constraint. Naturally, the capacity for arbitrary interference is never absolute. No agent can always choose when, where, how and with whom to interfere, or to what degree. Nor can arbitrary interference ever be eliminated entirely. Paradoxically, the rule of law always depends on the rule of persons to make and uphold it. Even if their rule is carefully controlled, no political system can avoid giving either executives or minor officials a degree of personal discretion which could be abused. The aim must be to limit such opportunities as far as possible without producing inflexibilities in decision-making that lead to inefficiencies and a lack of responsiveness that are themselves sources of injustice.

Three related concerns are involved in the fear of arbitrariness. First, there is the danger that rulers will simply govern wilfully and capriciously. As a result, there will be no consistency or coherence to policy, so that people will not know where they stand. An act that appeared unexceptional before could suddenly and for no apparent reason attract a severe penalty simply because the ruler has taken a dislike to it or become unusually attentive. Second, people will feel dominated by their rulers. They will be permanently in awe of their power, attempting to second guess their next move either to escape their wrath or win their favour. Finally, arbitrariness can produce oppression when people's legitimate expectations and needs are overridden or ignored for the sake of another's self-interested ends. Though linked, one kind of arbitrariness can exist without necessarily involving the others. For example, an enlightened despot may not act capriciously or oppress people's interests, but by virtue of his comparatively unchecked power will still exert domination over them. All three kinds reduce the ruled to slaves of their ruler by removing their capacity to act autonomously. In each case, individuals lose the capacity to plan ahead on their own account, without the anxiety of being subject to unpredictable and possibly malicious interferences by either the public authorities and their supporters or the inadvertent actions of others.

This feature of arbitrary rule provides the key to the purpose and value of the rule of law. If domination is the condition to be avoided, then the task of the rule of law must be to guarantee people's status as free and equal citizens. All non-trivial accounts of the rule of law conceive equality and freedom as intimately related. It is because there is no ascribed status justifying seeing some as the natural servants of others, that individuals should be treated as moral equals, able to act as responsible and autonomous agents free from the domination of others. However, different versions of the rule of law cash out this linkage between equality and autonomy in different ways. One version, surveyed in section 2, argues that the key lies in the law having a certain form: namely in being general, public, clear, prospective, stable and applying equally to all. As a result, none are above the law and it is hard to manipulate for self-serving and partial purposes. Another version, examined in section 3, suggests the crucial factor is the process of law-making: equality in the making of the law must be such that legislators show equal concern and respect to different points of view by 'hearing the other side'.

Despite their differences, these two versions of the rule of law do not necessarily pull in opposite directions. First, both try to tread the line between offering a purely formal or procedural and an overly substantive account of law. The first version tries to pack these substantive features into the form taken by the law, the second into the process of legislation. The aim in each case is to ensure not only a reduction of uncertainty by limiting the ability of rulers or others to act totally wilfully, but also to ensure the law embodies non-arbitrary or dominating ends by virtue of treating those subject to it as moral equals.

Second, the two versions are not logically incompatible. Certain theorists have argued that only laws having the form advocated in the first version could be agreed to by the law-making process recommended by the second. Whether such a process actually has to be employed then becomes a largely prudential matter. Thus, some analysts have argued that it offers the most realistic safeguard for ensuring rules have the desired form, whereas others believe it is too difficult to institutionalise in practice, so that laws must simply be drafted 'as if' they had emerged from it. However, I shall argue that this fit is not quite so neat, and that departures from rule formality are often necessary in ways that are only likely to be satisfactory if checked by a particular process. That process, though, does have certain formal rule of law features.

Third, both versions engage with different aspects of what could be termed 'the Hobbesian challenge'. Stated crudely, Hobbes argued that in circumstances of conflicting interests and deep disagreements about values and judgements, laws would only be equitably and coherently drafted and applied by all individuals being equally in awe of a sovereign who was outside the law and whose power was indivisible. All law has to be interpreted and these interpretations are necessarily controversial. As a result, political stability cannot result from the rule of laws *per se* but only from having an unquestioned authority vested with the power to formulate, interpret and apply the laws. To suggest that any

agent or agency is subject to the law is simply to place another interpreter of the law above them, while to divide sovereign power is to create a divisive conflict between interpreters.² By contrast, both versions of the rule of law seek to place all persons within the law and to divide law-making power, although the ways they do so differ.

Fourth, the theories of the rule of law discussed here differ from certain notions of the *Rechtsstaat* with which the doctrine is sometimes conflated. These last centre on upholding a certain list of rights reflecting a particular conception of justice, rather than simply preventing the arbitrary use of political power by virtue of law or law-making having a given form. Joseph Raz cites as an instance of this approach the International Congress of Jurist's equation of the rule of law with the creation and maintenance of 'the conditions which will uphold the dignity of man as an individual' – a requirement that includes 'not only recognition of his civil and political rights but also the establishment of the social, economic, educational and cultural traditions which are essential to the full development of his personality'.³ This view simply takes on too much. Its not just that people may hold differing visions of the good life. Even within a particular vision, a distinctive role exists for law and the legal and political system as mechanisms for facilitating social interaction and protecting against abuses of power: for example, by managing discussions over how best to achieve agreed goals and ensuring the appropriate administration of the distribution of goods on which 'human dignity' allegedly depends. As Catriona McKinnon argues in her chapter, contemporary rights theorists seek to avoid turning them into a wish list of all good things. Thus, more sophisticated versions of this approach to the rule of law aim simply at delineating a narrowly 'political' conception of justice.⁴ As we shall see, the two accounts discussed here differ also from these versions. Naturally, both accept that legal rules and political arrangements give rise to rights, but neither takes them as their starting point. Limits of space prevent giving chapter and verse of their critique of rights-based theories. Instead, I shall focus on the coherence of their positive claims to offer an alternative to theories centred on a set of constitutional rights that define and limit the political sphere.

2 Hayek and the rule-like nature of law

Among contemporary political theorists, the rule of law has been closely associated with the work of F. von Hayek, who gave it a pivotal role in his constitutional theory. Hayek's account developed out of a critique of economic planning.⁵ He believed interventionist economic policies and totalitarian politics were intimately connected: the one entailed an incremental increase in arbitrary interferences with individual liberty that ultimately led to the other. To understand Hayek's view of the rule of law, therefore, we must turn to his contrast between planned and market economies and see why he identified the

former with a legal-positivist view of law as 'command' and the latter with a formal conception of law as the 'rules of the game'.

Briefly, Hayek maintained that economic planning required God-like powers. Planners would have to be omniscient, knowing on the one hand what consumers actually wanted and what they might want if it was available, and on the other how producers might best utilise existing resources not just to meet existing demand but to create demand. They would then have to use this information to fix prices. The problem in each case is that producers and consumers not only engage in conceptual innovations but also respond to unpredictable events of various kinds, such as changes in the supply of natural resources resulting from unexpected disasters such as droughts. These innovations, events and the responses they elicit are impossible to second-guess yet are constantly altering the character of supply and demand. Since attempts to predict the future are futile, planners end up arbitrarily imposing their views on others and vainly trying to prevent any unplanned innovations or choices that might upset their calculations. Even so, they lack the omnipotence required to precisely coordinate everyone's activities to the plan. The result is a hopelessly inefficient economy and an increasingly authoritarian state.

Hayek contended this foolhardy enterprise was encouraged by the misguided belief in social justice and the doctrine of popular sovereignty. He interpreted social justice as the conviction that an ideal distribution of goods existed, whereby each individual's needs and deserts could be determined by certain rational criteria and the economy so planned that they were precisely met. As we saw, he thought this state of affairs was impossible to achieve and entailed severe restrictions on individual freedom. Democracy fostered and legitimated the pursuit of this ideal. First, politicians would always be tempted to woo voters by offering to promote their sectional interests, while these demands could be rendered generally acceptable by being presented as claims for social justice. Second, popular sovereignty transferred the despotic authority of monarchs to legislatures, with law whatever the duly elected government decreed. It thereby became legitimate for governments to issue legally binding directives aimed at pursuing certain policy goals.

Hayek maintained the democratic pursuit of social justice was gradually moving western states along 'the road to serfdom'. To question the legitimacy as well as the economic advisability of such actions, he had to attack the conception of law on which they rested. In sum, he wished to claim that planning and the pursuit of social justice infringed the 'rule of law'. Hayek accepted that most bureaucratic organisations, including the state apparatus, often operated on the basis of commands issued by an executive. That was because they had clear organisational goals. But the wider society had no common purposes of this kind, just the very diverse and evolving ends of the individuals who composed it. To make laws that could realise the ends of each individual would require the same sort of God-like powers needed to plan the economy and involve similar restrictions on individual liberty. The true role of law was to provide stable

conditions in which individuals could choose for themselves which ends to pursue without being arbitrarily interfered with by governments and other individuals or arbitrarily interfering with others themselves. As he put it, the law should operate like a Highway Code: it provides those rules of the road needed for people to drive about with a reduced risk of accidents, not a set of orders directing people where to go, when and how.⁶

Thus, Hayek thought the 'rule of law' involved precisely those features I identified at the start of this chapter: namely, it must offer a framework for human interaction which neither regards law as whatever legislation has been duly enacted nor attempts to promote a particular vision of the good society. It was impossible to construct an ideal legal code aimed at achieving certain ends. Rather, rules arose spontaneously through individuals trying to adapt to each other and their environment. Rational appraisal involved weeding out poor conventions through trial and error, not assessing their fit within a supposed rational system of law. To continue the Highway Code analogy, it is custom rather than a priori reasoning that determines whether one drives on the right or left, and experiment that tends to fix the most appropriate speed limits. However, laws had to have certain formal features to avoid becoming instruments of arbitrary power. They had to be universalisable, expressed in general terms and apply equally to all (while taking into account relevant differences), be prospective (only invoking retroactivity as a curative measure), public (albeit often through publicly funded experts), clear (avoiding vague terminology open to wide discretionary interpretation) and relatively stable (but not so as to ossify). Taken together, he believed these criteria would prevent ad hoc, discretionary decision-making that was aimed at either benefiting or harming certain individuals or groups of persons. His claim was that their very generality and abstractness meant that it was impossible to know how they might effect particular people. As a result, law-makers had an incentive to ensure legal rules and procedures were as fair as possible and enacted solely for purposes requiring collective agreements that were in the public interest. Hayek thought only laws that protected the individual's negative liberty were compatible with these constraints because laws serving any other purpose would need to refer to particular persons, places or objects and treat some differently to others.

Although these rules give rise to rights, some of which – notably the standard civil rights – he thought so important as to possibly warrant being given special protection within a constitution, his argument was not right based. Consequently, though Hayek saw judicial independence and review as vital for ensuring the integrity of the law and preventing its arbitrary use or abuse by the authorities, he was against the idea of an activist judiciary promoting certain policies and obliging new laws to be passed through the creative interpretation of constitutional rights. In other words, he favoured formal over substantive judicial review. Otherwise, he feared the courts would lapse into acting like a Hobbesian sovereign, issuing commands rather than merely ensuring conformity to the law. All the same, Hayek maintained constitutional checks on the

legislature were necessary, since the chief cause of the expansion of command-like law had been popular sovereignty. He suggested that as well as separating the judicial, legislative and executive functions, as in the American system, one should also separate the legislation needed to run the public administration from law-making for the wider society and proposed the latter be assigned to a representative body that was free from some of the perverse electoral pressures that afflicted modern parliaments. The details of this ingenious scheme cannot be gone into here.⁷ Instead, I shall concentrate on the coherence of his attempt to distinguish formal, general rules from particular commands, and the contribution this distinction makes to controlling arbitrary power.

Rules can reduce certain kinds of ad hoc and discretionary decision-making in ways that remove some sources of uncertainty, insecurity and inefficiency. For example, the rule that one cannot be imprisoned for a crime that has not been previously declared an offence in law and before the proper procedures for conviction have been followed, constrain the arbitrary power of a government to gaol people it dislikes or finds troublesome. However, properly passed and applied laws may still be harsh and unjust, even if they are not completely capricious. True, the consistent application of unjust laws means that one can often learn how to get around or avoid them. But consistency also prevents sympathetic judges and officials quietly bending the rules to avoid injustices. Similarly, rules can economise on the time and effort needed for case-by-case decision-making, and will often guard against carelessness, a lack of thoroughness or prejudice on the part of officials. Likewise, rules increase visibility and accountability. If citizens know the rules, they can ensure officials play by them. Rules can also embolden officials to make hard decisions because they are simply applying the rule rather than making a personal judgement. Indeed, agreement on a fair procedural rule, such as majority vote or first come first served, can often help us reach a decision in areas where there is considerable substantive disagreement. In part, that's because the impersonality of rules involves a rough and ready form of equality and fairness. Like the traditional image of justice, rules are 'blind' with regard to their effects. Still, these same qualities also create difficulties. Rule-bound decisions can become mechanical and unsuitable. Officials who stick to the letter of the law rather than its spirit often appear obtusely or maliciously oppressive, with an inflated view of their own importance. The very blindness of rules to difference can render them inappropriate and inefficient or even discriminatory. For example, small businesses often complain about being subjected to the same regulations as large ones, and feminists have criticised equal opportunities law for including a covert 'male comparator test' that overlooks relevant differences such as pregnancy or the structural factors that have relegated women to low-paid, casual employment. In such circumstances, transparency may be lost either by people surreptitiously evading or bending certain rules, or by their devoting considerable effort to playing them in ways that exchange form for substance.

In sum, rules guard against certain kinds of arbitrariness but embody other kinds. Clearly, one could not imagine a legal *system* existing without some general rules setting up judicial institutions and authorising particular agents and agencies to adjudicate on certain matters according to a given set of procedures. To be followable, laws will also need to possess various formal qualities without which people would be unable to modify their behaviour so as to conform to them in consistent ways that others could reasonably rely on. In other words, law to be law in any meaningful sense must have certain characteristics to a given degree, much as a ball would not be a ball without a measure of roundness and volume. But just as notions of 'ballness' do not tell you *per se* whether it is a cricket or a rugby ball, so notions of 'lawness' or 'legality' do not say anything about the purpose or content particular laws might have.

Law as such does eliminate many forms of arbitrary rule in ways that entail equity and promote autonomy. Clarity, prospectiveness and regularity in the law and the rules governing the processes that regulate it reduces the dangers of social relationships and interactions being disrupted by unpredictable changes in people's behaviour. Formal rules provide a degree of stability and certainty essential for fixing goals and working to achieve them. For example, traffic laws give me a certain security when navigating the roads in my car, giving me a reasonable expectation that people will stop at red lights and so on. And these laws would not work unless they applied equally to all and could not be changed except by procedures designed to ensure everyone knew and could abide by the reformed code. However, law can meet these formal criteria and still embody dominating ends, including the institution of slavery.

Meanwhile, eliminating all discretion in applying the law or denying it any purposeful content, as Hayek proposed, appear neither possible nor desirable. Thus, traffic regulations have elements of generality to secure fairness and the benefits of co-operation but are also determined in part by notions of expediency and various substantive purposes (for example, decisions about speed limits and their enforcement, which usually allow for a number of exceptions for emergency services, say). Hayek is no doubt right to observe that legislators rarely set out to frame laws in formal terms *per se*. But that is because it would be nonsensical to do so. They devise laws with certain ends in mind and then give them a certain form in order to obtain the law-like characteristics which enable these purposes to be achieved. Yet these purposes need not be that benign and Hayek's formal criteria fail to ensure that they will be.

These difficulties become apparent if we turn to Hayek's two main claims with regard to the 'rule of law' – that they will operate against redistribution and economic planning while protecting liberty. Hayek's problem is that there are no particular purposes that cannot be framed within some general description that applies to them alone or be derived from some suitably designed general rule. 'All persons earning above £100,000 pay supertax' is a general, equal rule. Likewise, stable prices and plans announced well in advance may also be consistent with a purely formal view of the rule of law. The point in such cases

is whether these policies are socially or economically sound. Far from being incompatible with the pursuit of social purposes, rules help promote them by moving officials and citizens consistently towards that objective without the need for continuous commands. If, as Hayek rightly insists, it would be impossible to direct centrally all the activities of a complex society, it appears equally problematic to employ solely abstract procedural norms possessing no reference to particular persons or sensitivity to local conditions. For example, Hayek suggests that 'measures designed to control the access to different trades and occupations, the terms of sale, and the amounts to be produced and sold' all 'involve arbitrary discrimination against persons' and so offend the rule of law as he conceives it.⁸ Yet he immediately backtracks, admitting it is sensible to ensure doctors are suitably qualified before being allowed to practise, pilots pass eye tests, and even that sellers of firearms and poisons should be 'persons satisfying certain intellectual and moral qualities'. In fact, most government regulations – including much social legislation – arise not as part of a rational plan but as responses to particular problems, being progressively modified through the trial and error mechanism Hayek approves.

These problems prove even more acute in the case of liberty. Hayek's central contention is that 'when we obey laws, in the sense of general abstract rules laid down irrespective of their application to us, we are not subject to another's will and are therefore free'.⁹ At times, he appears to suggest that so long as everyone is similarly affected by a rule, it is not aimed at anyone personally, and infraction is avoidable, then no coercion is involved. Law-givers do not know the particular cases where their rules will be applied and the judge is simply applying that law. Consequently, law is like a natural obstacle. But this too leads to absurdities. As Hamowy has observed,¹⁰ by these criteria a gangster-ridden neighbourhood – being like a plague-infested swamp, neither aimed at me personally nor unavoidable – represents no limit on my freedom. This is a serious problem given that his purely formal criteria not only offer no guidance as to which rules should apply to what sorts of activity, but also are consistent with all kinds of hidden or overt biases that can discriminate against particular groups. Hayek partially acknowledged this difficulty in accepting that it can be misguided to apply the same rules to everyone in all circumstances. Law frequently discriminates on grounds of age or sex, for example. The key is to discover when such discrimination is reasonable or not. His response to this problem is extremely suggestive: 'Such distinctions will not be arbitrary', he wrote, 'will not subject one group to the will of others, *if they are equally recognised as justified by those inside and those outside the group*'.¹¹ However, the appeal here is to the test of the rule of law being less its formal qualities than its capacity to evince reciprocity and, hence, obtain mutual assent from citizens. Equality before the law involves the content of legal rules taking everyone into account and giving equal weight to different points of view. Put another way, Hayek appears to be suggesting that law must reflect the general rather than any particular will. The republican tradition, explored next, agrees, but argues

achieving this result depends on the form of the legislative process more than of the law.

3 Republicanism and the process of legislation

That a political system should constitute ‘an empire of laws and not of men’¹² was a key tenet of the republican tradition, at least in the neo-Roman variant of Cicero, Machiavelli and Harrington recently identified by Quentin Skinner and Philip Pettit.¹³ However, republicans grasped the nettle posed by the paradox that only ‘men’ could bring about this condition and linked the rule of law to democratic self-rule. Freedom from arbitrary rulers, who need not consult the concerns of the ruled, only arises when the people make their collective rules for themselves. To quote Harrington again, it is only when all are equal in the making of the laws that they will be ‘framed by every private man unto no other end (or they may thank themselves) than to protect the liberty of every man’.¹⁴ Thus, the political system must allow the people, usually through their representatives, to ensure the laws show them equal concern and respect. Legislators must be obliged ‘to hear the other side’, displaying reciprocity and an effort at mutual understanding to reach agreement on their collective interests and the various respects in which people merit equal or unequal treatment.

Republicans trace arbitrariness and domination to asymmetries of power. Given that any polity contains groups with conflicting interests and values, power must be so divided that groups may check others – thereby forcing all laws to be collectively negotiated and rendered mutually acceptable. The political constitution must reflect the social complexion of the polity, balancing the various groups in ways that prevent any one dominating another. Standard devices have included bicameral legislatures operating different systems of representation and various forms of federalism. It is the ‘mixed’ form of popular government and the processes of negotiation it fosters rather than the form of law itself that guards against the arbitrary use of power.

As we saw, Hayek voiced the standard liberal fear that popular sovereignty merely transfers the potentially tyrannous powers of the Hobbesian sovereign to electoral majorities. The equitable dispersal of power is designed to guard against this possibility. On the republican view, all individuals must be free to contest both the rules regulating social interaction and those governing how these rules are determined. The purpose of such contestation is to ensure the law serves only the public good – the *res publica* – rather than the factional interests of particular persons. The public good does not comprise only those goods that de facto would be in every individual’s rational interest to have provided publicly. In this case, those well provided for could always object to contributing towards a similar provision for others. Even standard public goods might not pass such a lowest common denominator test. In fact, such objections involve a factionally motivated block on the pursuit of the public good. Rather, the test is whether the law and the purposes it promotes are publicly justifiable. In

accordance with the injunction that legislators should 'hear the other side', such public justification entails the giving of reasons that are shareable by others. Thus, common rules should not only treat all individuals as moral equals capable of autonomous action, but also be attentive to the variety of circumstances in which they find themselves and the diverse forms of practical reasoning they adopt. To meet these criteria, legislators will have to drop purely self-interested and self-referential reasoning and look for forms of argument that other individuals constrained by a similar requirement for public justification could accept.¹⁵ In other words, there will be an assumption that in evaluating laws we start by taking into account the effects of their general performance for securing the various generic goods that one could expect individuals to value in the different situations they find themselves. This assumption implies neither that all are similarly situated nor that they value the same goods. On the contrary, it would exclude any such arguments that failed to heed the plight or concerns of others and could not be plausibly shared. For example, self-serving arguments by the prosperous that there could never be grounds for mutual aid would be unlikely to pass this test. But it does require that arguments be made in terms all could relate to. That requirement is consistent with groups or individuals pointing out either how their peculiar circumstances create special demands which would be felt by others in their place, or asking for special recognition for their particular ideals by relating them to the views or claims of others and justifications based on equal concern and respect.

As a result of these constraints, arguments will tend to have many of the formal features of abstractness, generality and equality that Hayek associates with the rule of law. However, they will operate in a less mechanical manner, allowing the substance of the law to develop as people grow more appreciative of each other's diverse and evolving experiences and concerns. Arguably this logic has operated to produce a number of the policies Hayek finds objectionable as well as those he does not. Thus, much welfare legislation has arisen from acceptance of equality of opportunity as a fair general principle, on the one hand, and an enhanced sensitivity to the disadvantages encountered by people finding themselves in certain social circumstances, on the other. Likewise, if more contentiously, multicultural arguments for group rights have often been based on the claim that members of minority cultures are disadvantaged in parallel ways. In these and similar cases, criticism of the existing law has frequently been tied to a critique of the prevailing process for deciding it, with the demand for equality in the latter preceding improved equal recognition in the former. Indeed, it may often be harder to get agreement on a fair resolution of a substantive issue than a fair procedure for resolving it. However, proposed modifications to the process must also be publicly justifiable. Standardly, such proposals are for the extension of democratic decision-making to spheres where arbitrary rule still prevails because it is not subject to public contestation, such as private corporations, or for new styles of decision-making that allow significant differences of experience to be taken into account, as in demands for various forms of

devolution or the enfranchisement of excluded groups. But these proposals need not turn on specific cases per se. Usually they appeal to reasons that similarly situated others could share and, so, might be applied generally.

Obviously, all rules and political systems give rise to rights. But this argument is not rights based. For rights and their application to particular cases must themselves be specified through the process of public justification. Moreover, rights, like the rules or procedures from which they flow, must be open to contestation. Nevertheless, it might be thought advisable to give certain rights special constitutional protection as a prudential measure. However, this would be consistent with having democratic procedures for reviewing them – albeit ones that require a higher than usual threshold of agreement from various constituencies for any change to pass. Meanwhile, in protecting such entrenched rights, constitutional courts will also be obliged to base their interpretations of their scope and bearing in particular cases on publicly justifiable reasons. Indeed, a standard rationale for handing rights over to the courts is that the absence of electoral pressures renders them more immune to self-interested bargaining than legislatures. Yet the typically limited social range and experience of their membership can also make them unaware or unresponsive to certain demands, while a focus on particular cases can lead them to overlook knock on effects in other areas of policy-making. My aim is not to settle this debate over the advisability of judicially protected bills of rights here, merely to indicate that arguments for them have a procedural and democratic foundation in terms of their responsiveness to public justification and hence are amenable to criticism on those grounds. In any case, we saw that all laws will need to have certain formal characteristics to be followable and that having independent courts that ensure they are consistently and equitably applied provides an important break on arbitrary rule. As such, the judiciary plays a crucial role within a republican system.

Conclusion

The rule of law offers an indispensable defence against arbitrary rule. Formalities with regard to legal processes and the law itself both secure certain benefits in this regard, but are not decisive. The crucial elements are that law is not only public in the sense of being followable, which Hayek's formal criteria help ensure, but also publicly justifiable, which republicans insist is the task of a properly designed democratic system. Within this framework it then becomes possible for people to debate the nature of the good society while devising both the general laws required to further their collective interests and those particular ones needed to respect their differences.

Notes

- 1 Judith Shklar, 'Political Theory and the Rule of Law', in A.C. Hutchinson and P. Monahan (eds), *The Rule of Law: Ideal or Ideology* (Toronto, Carswell, 1987), p. 1.

- 2 T. Hobbes, *Leviathan* (Cambridge, Cambridge University Press, 1991), pp. 143, 169.
- 3 J. Raz, *The Authority of Law* (Oxford, Clarendon Press, 1979), pp. 210–11.
- 4 For example, J. Rawls, *Political Liberalism* (New York, Columbia University Press, 1993).
- 5 F. von Hayek, *The Road to Serfdom* (London, Routledge, 1944), ch. 6.
- 6 Hayek, *Road to Serfdom*, pp. 55–6.
- 7 See F. von Hayek, *The Political Order of a Free People* (London, Routledge, 1979).
- 8 F. von Hayek, *The Constitution of Liberty* (London, Routledge and Kegan Paul, 1960), pp. 227–8.
- 9 Hayek, *Constitution of Liberty*, pp. 153–4.
- 10 R. Hamowy, 'Law and the Liberal Society', *Journal of Libertarian Studies*, 2 (1987), pp. 287–97.
- 11 Hayek, *Constitution of Liberty*, p. 154, emphasis added.
- 12 J. Harrington, *The Commonwealth of Oceana* (Cambridge, Cambridge University Press, 1992), p. 81.
- 13 Q. Skinner, *Liberty before Liberalism* (Cambridge, Cambridge University Press, 1998), pp. 44–5; P. Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford, Oxford University Press, 1999, 2nd edn), pp. 172–3.
- 14 Harrington, *The Commonwealth of Oceana*, p. 20.
- 15 As David Owen notes in his chapter, this is a standard requirement of deliberative theories of democracy, which tend to adopt a similar account of public reason to that employed by modern contractarian theorists of justice such as John Rawls (for example, *Political Liberalism*, lecture 6) and Thomas Scanlon, *What We Owe to Each Other* (Cambridge MA, Belknap Press, 1998). What follows is a slightly weaker (and hence more realistic) version of such theories.