

Book Review – The Rule of Law in the Real World

Paul Gowder

Cambridge University Press, 2016, pp 275, ISBN: 9781316502020

The rule of law is integral to any contemporary understanding of an effective legal system. In the literature, it is frequently described as synonymous with Western institutions and ideology. The notion's purpose, scholars suggest, is to protect individual liberty; that purpose is best achieved through the establishment of Western democratic institutions. Paul Gowder's *The Rule of Law in the Real World* aims to respond to this consensus. In reframing the rule of law as egalitarian, dependent upon public commitment rather than particular institutions for its success, Gowder makes the case for a more universally applicable understanding of the concept, able to support effective and targeted legal reform.

Gowder begins with a definition of the rule of law. The concept becomes reality, he suggests, where a state's law meets three conditions: regularity, publicity and generality. Regularity requires that officials be constrained in their use of coercive power by 'pre-existing, reasonably specific, legal rules'.¹ Publicity requires that those legal rules be available to, and examinable by, citizens.² Generality requires that legal rules not make irrelevant distinctions between types of citizen.³

This definition is in some respects under-analysed. Gowder acknowledges that the rule of law is on certain accounts an essentially contested concept, incapable of objective definition.⁴ He also recognises that, to the extent definition is possible, there is disagreement amongst leading scholars as to its content.⁵ Having established that any definition of the rule of law is likely to be contested, however, Gowder builds his own with little further reference to the existing literature, or analysis of why the criteria he has chosen might be valuable. To the extent that he provides explanation for his choice of criteria, it is by circularly reasoning from the characteristics displayed in states where the rule of law is widely considered to exist to conflation of those characteristics with the rule of law. More explicit elucidation of the reasoning behind his definition would accordingly strengthen Gowder's analysis.

Gowder's definition of the rule of law forms the foundation of his thesis, which has three parts. First, *The Rule of Law in the Real World* develops an account of the rule of law as fundamentally egalitarian, in contrast to its

¹ Paul Gowder, *The Rule of Law in the Real World* (Cambridge University Press, 2016) 7.

² Ibid 15-8.

³ Ibid 28-41.

⁴ See, eg, Jeremy Waldron, 'Is the Rule of Law an Essentially Contested Concept (in Florida)?' (2002) 21 *Law and Philosophy* 137.

⁵ Gowder, above n 1, 2.

traditional conceptualisations as a tool for promotion of individual liberty.⁶ Next, it suggests that the rule of law is institution-independent: democratic governments may play a role in its promotion, but are neither necessary nor sufficient for its operation. Finally, it argues that the rule of law instead relies for its existence upon ‘widespread coordinated action to hold the powerful to account’.⁷ Gowder supports the second and third aspects of this thesis with analysis of ancient Athenian democracy and contemporary legal systems in the United Kingdom, alongside game theoretical modelling.

The first element of Gowder’s thesis is its most compelling. That the rule of law promotes equality by preventing arbitrary or terroristic uses of official power is well established within the literature. Gowder’s addition to this consensus comes in his argument that the requirement of generality prevents substantive as well as formal discrimination. A law cannot be general, he suggests, unless it can be justified to every individual within a polity with reference to reasons that do not assume those individuals’ fundamental inferiority to others.⁸ Properly implemented, Gowder argues that the rule of law accordingly prevents both formal and substantive inequality, by precluding the enactment of legislation which is discriminatory in its practical effects. This argument is novel and it is well made.

The second and third elements of Gowder’s argument are less persuasive. His contention that the rule of law is institution-independent relies on analysis of Athenian and British democracy, which, while intuitively reasonable, is ultimately speculative.⁹ Further, the game-theoretical analysis upon which both this argument and his case for coordinated enforcement draw is at times difficult to follow. Detailed description of the formulae which inform Gowder’s statistical modelling tends to opacify rather than clarify the assumptions upon which that modelling is based, creating difficulty for readers in assessing the validity of its conclusions.

Gowder’s writing is for the most part clear, accessible and engaging, benefiting from well-placed use of examples and explanation of complex concepts in simple terms. However, the complicated statistical modelling which undermines his argumentation also at times detracts from that clarity. If *The Rule of Law in the Real World* is written, as Gowder suggests, for a broad audience of ‘philosophers and lawyers ... political

⁶ See, eg, Friedrich Hayek, *The Constitution of Liberty* (University of Chicago Press, 1960) 155; John Rawls, *A Theory of Justice* (Harvard University Press, 1999) 207-10; Joseph Raz, *The Authority of the Law: Essays on Law and Morality* (Oxford University Press, 1979) 220; Steven Wall, ‘Freedom, Interference and Domination’ (2001) 49 *Political Studies* 216, 221-2.

⁷ Gowder, above n 1, 144.

⁸ *Ibid* 28-41.

⁹ See, eg, Gowder, above n 1, 121.

scientists, economists, and development experts',¹⁰ its thesis would benefit from more accessible explanation.

The Rule of Law in the Real World makes a valuable attempt to transform legal communities' understanding of the rule of law. By focusing on the concept's egalitarian properties and its independence from institutions, Gowder provides support for a novel (and manifestly effective)¹¹ approach to the rule of law's implementation: one which recognises the failings of existing democracies, and works to establish new legal systems in a locally sensitive manner. Although his work requires substantiation in order for this support to be truly compelling, *The Rule of Law in the Real World* lays foundations upon which others may build in order to reframe common understandings of the rule of law, and reshape the purposes for which those understandings are employed.

*Kathryn Ellis**

¹⁰ Ibid 8-9.

¹¹ Ibid 168-76.

* BA-LLB (Hons) (University of Tasmania) and Co-editor of the *University of Tasmania Law Review* for 2018.