The Right to Judicial Review

Yuval Eylon, ** Alon Harel***

Abstract
Judicial review (JR) is typically justified on consequentialist grounds, namely that it is conducive to the efficacious protection of rights. This paper disputes this popular justification and argues instead that JR is based on a "right to an explanation" – explanation targeted at the person whose rights are infringed. The explanation must justify, and, in appropriate cases, lead to a reconsideration of any infringement of rights in light of the particular claims and circumstances of the victims of the infringement. This right-based justification implies that JR is justified even if it is found to be ultimately detrimental to the efficacious protection of rights. Finally, it is argued that the right to an explanation is a participatory right and consequently that JR does not conflict with the right to equal democratic participation.

** Kreitman Fellow, Ben Gurion University, Department of Philosophy.
*** Estell and Philip Mizock Professor of Law, Hebrew University
1. Introduction

Judicial review is a bete-noire of democratic theory. The controversy surrounding the place of an institution of JR in a democratic system of government focuses on the relation between two distinct bodies: the elected legislature and an appointed judiciary. The struggle for political power between the two bodies is mirrored in the intellectual arena. Generally speaking, advocates of JR are branded as enemies of the legislature. Proclaimed friends of the legislature oppose JR. It is hardly surprising, then, that even some of the staunchest advocates of JR shift uneasily when called upon to defend an institution that seems to depend on, and in many cases expresses, a deep mistrust of elected representatives.¹

This image of the two branches of government locked in a struggle is allied to another powerful image, that of the institution of JR as a watchdog that protects rights from the legislature, and ultimately from the people it represents. According to this watchdog hypothesis, the function of JR is to guard against the excesses to which the legislature is prone - namely, over-stepping its authority and infringing the rights of individuals. Since it seems indisputable that a commitment to democratic rule means that JR is justifiable only if it serves an essential function, it is only natural to seek its justification directly, by defending the need to constrain the legislature. Consequently, the numerous debates conducted in recent years between advocates and foes of JR have a similar structure. Both sides sincerely proclaim to take rights seriously. The advocates of JR claim that it is instrumental to an effective protection of rights.² Whereas its foes do sometimes deny this claim,³ they also appeal to the right to "equal participation" in the political process. JR, it is argued, violates this right.⁴ Hence, the

² See Ronald Dworkin, Freedom’ Law: The Moral Reading of the American Constitution 34 (Harvard University Press, 1996). Dworkin argues that: "I see no alternative but to use a result-driven rather than a procedure-driven standard for deciding…The best institutional structure is the one best calculated to produce the best answers to the essentially moral question of what the democratic conditions are, and to secure stable compliance with these conditions.” For an effective critique of this view, see Sreenivisan, supra note 1.
⁴ This is only a sketch of the rights-based arguments provided by foes of judicial review. Most recently the argument was put forward by Waldron. See Jeremy Waldron, Law and Disagreement 232-254 (Oxford University Press, 1999). This right is defined by Waldron as "a right to participate on equal terms in social decisions on issues of high principle." See Waldron id at 213.
debate pits a consequentialist camp (rights consequentialism) founded on the conviction that courts are instrumentally superior to the legislature in protecting rights, against a camp that relies on a rights-based argument – the right of democratic participation.

This asymmetry between consequentialist arguments upheld by advocates of JR and arguments upheld by opponents of JR places the former at a disadvantage. Even if JR is conducive to the protection of rights, advocates still have to demonstrate that its contribution justifies infringing the right to democratic participation. Advocates of JR can avoid this asymmetry either by denying the right to democratic participation (or, more plausibly, by claiming that such a right does not cover the subject-matter governed by judicial review), or else by contending that JR is not desirable merely for consequentialist reasons.

This paper adopts the latter strategy by providing a non-consequentialist rights-based justification of JR. We claim individuals have a "right to an explanation" - a right to challenge any infringement of their rights. In order to honor this right, the state is obliged to provide an "individualized explanation." It must justify any such infringement in light of the particular claims and circumstances of individuals whose rights are affected by the legislature. Moreover, we argue that the right to an explanation inevitably opens the possibility of reconsideration of the state's treatment of victims of infringement. The legislature cannot honor the right to an explanation because legislative deliberation is general and abstract. Inevitably, it is detached from concertedly addressing the concerns of actual individuals whose rights are infringed (either justifiably or unjustifiably). In reality, the right to an explanation can be realized only by a judicial body with the power of review. The judiciary is the body suited to address the explanatory requirements following an infringement of rights. JR follows legislative deliberation and completes it, rather than - as its opponents

---

5 Consequentialism of rights depicts the minimization of rights as collective goal, which competes with other goals, such as maximization of utility. See Alon Harel, Theories of Rights in The Blackwell Guide to the Philosophy of Law and Legal Theory 198-199 (eds., Martin P. Golding & William A. Edmundson, 2005)

6 Admittedly one could argue that consequentialist arguments could also be rights-based. Arguably a person could have a right to live in an institutional scheme which promotes and protects her rights. Under this view, a person could justify JR on the grounds that it is an institution that is conducive to the protection of rights and that a person has a right to live in an institutional environment which is conducive to the protection of his rights. Yet, most advocates of JR do not make this claim and furthermore our arguments below address also this claim.

7 See Dworkin, supra note 2.

8 For brevity's sake, we will often refer to this right as "the right to JR". Strictly speaking, the right is for an individualized explanation. It will be shown that an institution of JR realizes this right.
maintain - aims to replace it. The argument entails that only JR which attends to the grievances of individuals meets the obligation to provide an individualized explanation.

Section 2 examines and criticizes the watchdog hypothesis. Section 3 explains what the right to explanation is and demonstrates its relevance to judicial review. Section 4 addresses two primary objections to our model. Last, section 5 demonstrates that the right to JR ought to be understood as a participatory right – the right of victims of infringements of rights to participate in decisions concerning their own rights. Thus, JR, properly understood, protects rather than undermines the right to political participation.

2. The Watchdog Hypothesis.

The debate presented above is shaped by the watchdog hypothesis, shared by advocates and foes of JR alike: that the function of the institution of JR is to protect rights from the excesses of the legislature. The institution is justified, if it is, because it fulfills this function. In the same way as police is designed to protect from crime and the Holy Inquisition was designed to protect the faith, so JR is designed to protect individual rights from the legislatures. Of course the hypothesis does not imply that we should have a watchdog, i.e., that JR is desirable or undesirable. Only that this is what it does. On the basis of this hypothesis, the normative question of JR can be neatly separated into two questions: should we have an institution that watches over the legislature, and does the judiciary optimally fulfill this role? Do we need review, and should it be judicial?9

However, the reasoning for this hypothesis is far from compelling. It will be argued that in order to better account for the judicial nature of JR, it should be replaced with the claim that JR is a right (rather than a means of protecting rights). This argument paves the way to the prima-facie case for the right to an individualized explanation.

The watchdog hypothesis is founded on two observations. First, that invalidating a statute on constitutional grounds often rests on the fact that the statute

9 See Alon Harel, Rights-Based Judicial Review Law & Philosophy vol. 22 247.
violates rights. In exercising their power of JR, judges are required to determine whether a particular statute infringes rights, and if the answer is positive to determine whether this infringement is nevertheless justified. It is tempting to conclude from what judges aim to do when they exercise the power of JR that the institution of JR is designed to promote and protect rights.

The second observation that grounds the watchdog hypothesis is historical. The ideals of an overall protection of rights and curbing the power of the legislature have accompanied JR since its inception, and played an important role in creating and shaping the institution, and continue to play an important role in sustaining it. Notably, Hamilton defended JR on the basis of his grave suspicion concerning the legislature's attentiveness to the protection of rights:

"This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which [...] have a tendency [...] to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community." And: "it is not with a view to infractions of the Constitution only, that the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws."11

In our view neither the first nor the second observation provides support for the watchdog hypothesis. The first observation is based on a flawed reasoning. The purpose underlying, or justifying, an institution is not necessarily a replica of the objectives guiding its officials, or vice-versa.12 Consider criminal sentencing. Many believe that individuals have a right to fair hearing because it is unfair to convict someone without allowing her to articulate her arguments. But the individual who exercises that right does not do so for the sake of reinforcing the fairness of the legal system. One typically exercises her right to a fair hearing in order to establish a "reasonable doubt" about her guilt. Yet it is widely believed that the right to fair hearing should be respected regardless of its efficacy in enabling the accused to create a reasonable doubt. Similarly, some philosophers believe that the existence of a penal

---

10 As is common in the philosophical jargon, the term violate is used to denote an unjustified infringement of rights. An infringement of a right can be a justified infringement or an unjustified one.  
11 The Federalist Papers 78 (Hamilton).  
12 Sometimes striving to achieve the purposes justifying the existence of these institutions is even self-defeating. This is an instance of what Jon Elster called states that are "essentially by-products." In Elster's view: "Some mental and social states appear to have the property that they can only come to about as the by-product of actions undertaken for other ends." See Jon Elster, Sour Grapes: Studies in the Subversion of Rationality (1983) 43.
system is ultimately justified on utilitarian grounds, but rather than maximize
deterrence, judges should appeal to considerations of retributive justice.\textsuperscript{13}

Thus, the first observation does not sustain the watchdog hypothesis. Even if
judges should aim at protecting rights, this does not entail that JR is designed to
protect rights. According to our view, JR is analogous to the right to fair hearing.
Individuals have a right to be provided with an explanation when their rights are
infringed. The institution of JR realizes this right. Officials who exercise the power of
JR – the judges – must be guided by considerations of justice. It is only by aiming at
doing justice that the institution of JR can fulfill the obligation of the state to provide
an explanation.

The historical emergence of the institution of JR cannot support the watchdog
hypothesis either. To better appreciate why, consider a further problem facing the
watchdog hypothesis.\textsuperscript{14} If we wish to protect rights and curb the power of legislature,
why not set up a body of wise men and women, with the power to reexamine and
review every piece of legislation? Why settle for an awkward procedure that involves
particular cases and individual plaintiffs? If some expertise is required in order to
apply JR, why assume it is the expertise of judges and not legal scholars, political
theorists, religious leaders, and (parish the thought) philosophers?\textsuperscript{15} The "judicial"
features of JR seem arbitrary and counter-productive.\textsuperscript{16} These questions suggest that if
JR is justifiable for instrumental reasons, then it should be replaced with an institution

\textsuperscript{13} This is the position taken by Hart. Hart distinguishes between the question of what justifies the
general practice of punishment and the question of to whom punishment may be applied. In Hart's view
the first question is a question of "General Justifying Aim" and ought to be answered by citing
utilitarian concerns. The second ("To whom may punishment be applied?") is a question of
"Distribution" and ought to be answered by citing retributive concerns. See HLA Hart, Prolegomenon

\textsuperscript{14} This problem was identified by Waldron. See Waldron, supra note 4 at 252.

\textsuperscript{15} It may seem that judges are required because rights must be, or actually are, protected by a
constitution, and judges are trained to make constitutional judgments. However, this claim fails to
account for the uniqueness of the constitution; in particular it fails to account for the fact that
determining whether a law is contrary to it involves considerations that differ from ordinary judicial
considerations. Finally, the justification for judicial determinations is stronger the more technical and
doctrinal the reasoning is. But constitutional determinations are typically not technical or doctrinal in
nature.

\textsuperscript{16} For the distinction between review and judicial review, see Harel, supra note at. Judicial review is
characterized there as an institution which is based on the conviction that the review of statutes is a
legal process and that the task of review should be assigned primarily or exclusively to the judiciary.
Indeed some of the advocates of judicial review have argued that review of statutes is not "judicial" in
the full sense of the word. Judges do not perform a legal task when they review statutes. In Eisgruber's
view it is the judges' distinctive institutional position rather than their legal expertise that is the basis
for granting judges the power of judicial review. See Christopher L. Eisgruber, Constitutional Self
Government 57-64 (Harvard University Press, 2001)
tailor-made to fulfill this function (unless, of course, other considerations count heavily against all alternative mechanisms).

One consequence of this problem is that advocates of JR cannot settle for demonstrating that JR is conducive to an overall protection of rights. They must adduce some further consideration that defends its judicial character, e.g., to demonstrate that JR serves this purpose better than alternative review institutions. However, the problem has a further, more damning, consequence. It undermines the watchdog hypothesis shared by the opponent of JR. If JR is not straightforwardly optimal for the overall protection of rights, why was it set up? Why judicial review? The assumption fails to straightforwardly account for the judicial nature of JR, regardless of what we think about the merits of the institution. This argument does not show that an account based on the watchdog hypothesis cannot contrive an account for the judicial nature of JR. However, the hypothesis does not directly explicate it.

So what is JR for? According to the view proposed below, JR realizes the right to an individualized explanation. Only a judicial body can realize this right, and this right cannot be realized without granting the institution the power of review. "Judicial" precedes "review", rather than proceeds it. One advantage of this view is that it provides an immediate account of the judicial nature of JR. If individuals have a right to JR, then this fact both explains and defends the fact that it is a judicial body that is entrusted with review, and that JR deals with cases rather than simply review every bit of legislation in light of a constitution or bill of rights. The key point is that a judicial body must arbitrate in a dispute between an individual and the legislature, a dispute that is similar to the disputes of the kind the judiciary is designed to handle both in respect of the status of the two sides, and in respect of the type of reasoning involved. This conception of the role of an individual and her particular case - as a side to a dispute - embodies the right to individualized explanation. The right to individualized explanation accounts not only for the existence of an institution designed to examine the compatibility of statues to fundamental moral principles but also for the fact that the relevant institution is the court.

Thus far it has been argued that the proposed view accounts for the judicial nature of JR. But to account for an institution is not to justify it. Even if the conception of a right to JR lies at the heart of the institution, it may prove to be a misconception. The relation between the institution of JR and the right to an individualized explanation does not establish a right. But rejecting the watchdog
hypothesis implies that a defense of JR does not have to appeal to consequentialist considerations. Furthermore, JR is no longer viewed as primarily concerned with limiting the power of the legislature. This limitation can be viewed as a byproduct of an institution designed to realize the right to an individualized explanation, not its aim.

Rejecting the watchdog hypothesis paves the way to a shift in perspective. It is no longer necessary to argue that we need an institution that overlooks the legislature, but at most concede that an institution that we need happens to curb the power of the legislature. To better appreciate the significance of this shift, consider a small and self-governing polis. In this polis it is practically feasible that each citizen who reasonably believes his right has been breached has the right to stand up in the citizen's assembly, presents his case, and demand reconsideration of the statute in light of it. The officials who are entrusted with the smooth running of proceedings are also entrusted with preventing an abuse of this right (using this devise as a means for introducing new legislation).

The envisioned procedure does not limit the power of the legislature: the legislature itself is addressed, and decides. In this respect, labeling this arrangement "JR" is a misnomer, and "legislative review" is more apt. But the crucial point is that the arrangement fulfills the obligation to address the particular grievances of individuals: every individual has access and can present her case before the deciding body, and the body is required to review legislation in light of the particular case. According to the proposed view, JR fulfils the function of the review procedure in the imaginary polis, rather than deliberately limit the legislature's authority.17

3. The right to an Explanation

17 Furthermore, it is for this reason that the arrangement is appropriate and just, and the case for preserving it quite strong. Suppose that in our polis those who wish to speak must submit their names and indicate if they intend to support or oppose the motion. If the number of those wishing to speak is too large, the officials in charge of proceedings hold a lottery, and the speakers for and against are selected. This procedure seems fair and necessary. Suppose however, that if someone can reasonably claim that her rights are infringed by the motion (or wishes to present a motion because some stature violates her rights), then she is allowed to bypass the lottery, and have her say. We claim that such an arrangement is prima-facie preferable to one in which she must submit her name like everybody else. The access granted to citizens who (reasonably) believe their rights have been infringed allows individuals to actively defend their rights, and guarantees that their case will be heard. It serves their interest in self-rule, and embodies respect for individuals and their particular concerns.
What does the obligation to explain amount to, and how does it relate to review? To address this question let us investigate a simple example. Suppose I promised my friend to meet her for lunch, and that unexpected circumstances disrupted my plans. I believe that in these circumstances my obligation to meet my friend is overridden. Assume also that I could not inform my friend of my intention to cancel the appointment. What must I do?

Clearly, I owe my friend an apology. However, normally, a simple apology is insufficient. What I owe my friend is an explanation. In some cases, the nature of the friendship may be such that no further explanation is due. Simply saying something like “I could not make it” will suffice. But in most cases, an explanation is required. This explanation is called for irrespective of whether my decision is ultimately justified (and perhaps even mandatory). Moreover, it is even called for when my friend expects and even ought to expect that this is the case.

What does the explanation consist of? It is insufficient to state that circumstances beyond my control prevented me from honoring the promise. The promisor is required to specify these circumstances. A second and an equally important part of the explanation consists of providing a moral argument establishing that the circumstances justify the infringement. Sometimes, as in cases of emergencies, this latter part of the explanation is superfluous. Saving the life of a drowning child obviously justifies breaking a lunch appointment. No explicit moral reasoning is needed. However, when the moral stakes are lower, an explanation is owed even if the failure to keep the promise is ultimately justified.

Suppose, for instance, that a promisor fails to show up because he was informed in the last minute about the memorial of an acquaintance. It may be controversial whether attending this memorial justifies infringing the promise. If it is, then the promisor is obliged to provide a moral argument. For instance, he might contend that participating in a memorial is a way of expressing one's empathy towards the deceased family.

Addressing the demand for an explanation exposes the promisor to the possibility that the promisee would challenge his reasoning and argue that the infringement was unjustified. In the face of such a challenge, the promisor may be obliged to reconsider her moral convictions and sometimes concede that he was wrong. This openness to the possibility that the infringement was unjustified is an essential part of the duty to explain. If the promisor is unwilling to reconsider his
moral stance and consider the matter in light of the arguments of the promisee, providing a moral explanation seems disingenuous. The promisor's unwillingness to reconsider his position in the face of powerful moral arguments exemplifies the same type of arbitrariness a refusal to grant an explanation would. Furthermore complying with the promisor's obligation serves not only the interest of the promisee in an explanation. It also serves the promisor's interests. The explanation enables the promisor to confront the actual real world ramifications of her decisions and to familiarize herself with the real effects of these decisions as perceived by the victims of infringement. Although this is not the primary reason for the obligation, it is certainly an important desirable byproduct of it.

What happens if the promisor decided he has a sufficient reason to infringe, and informs the promisee of his intention prior to the infringement? A future infringement is also subject to the duty of explanation. It also involves a willingness to engage in a serious moral deliberation. Most importantly for our purposes, the obligation to reconsider the grounds for one's infringement presupposes a willingness to reconsider the decision to infringe.\(^\text{18}\)

The duty to justify a future infringement involves review, i.e., a duty to reconsider one's intention to infringe. Think of the promisor who is engaged in explaining his intention to infringe the promise. He informs the promisee that his decision is final, irrespective of the persuasiveness of the arguments provided by the promisee. Clearly, this attitude is incompatible with the duty of explanation. Precisely as a genuine explanation of a past infringement presupposes willingness to reconsider the justification for the decision to infringe (and in appropriate circumstances to apologize), so a genuine justification of a future infringement presupposes willingness to change one's decision to infringe. The unwillingness of the promisor to change his mind constitutes a violation of the duty of explanation. A person who is willing to concede that the infringement may be unjustified but is unwilling to reconsider his decision, and the person who is willing to concede that his decision was unjustified but is unwilling to act accordingly, (i.e., to apologize in case the infringement has

\(^{18}\) It might be claimed that only the promisee has the power to release the promisor (see, e.g., Scanlon, T.M. 1998. *What We Owe to Each Other*, Cambridge Mass.: Harvard University Press, ch. 7.). But the case at hand is one in which the promisor believes some other obligation overrides the obligation to perform.
already taken place or to honor his obligation in case in which the infringement has not yet taken place) are both violating their duty.\textsuperscript{19}

4. Judicial Review and the Duty of Explanation

One usually owes an explanation when one infringes someone's rights. The injured or disappointed party is entitled to an explanation. Naturally, the scope and content of the right to explanation varies in accordance with the sphere of the rights. A disappointed promisee may protest and demand an explanation by exclaiming "you have no right to... (without consulting me first)." This rhetorical use of "right" is, as rhetoric normally is, telling. It highlights the intuitiveness of the thought that infringements of rights give rise to a duty of explanation and also that such a duty does not hinge on the justifiability of the infringement. The assertion "You had no right" calls for an explanation, by invoking the supposedly uncontroversial fact that even if the infringement is a justified one, an explanation is clearly owed.\textsuperscript{20}

The claim that when a person’s rights are infringed, that person may demand an explanation seems to be part and parcel of what rights are about. After all, at least some rights demarcate the sphere in which one is supposedly the master, an autonomous deliberating agent. And when it is accepted that those supposed rights are infringed, respect for their bearer requires that she be given an explanation.

The existing literature in administrative law already provides ample support for the conviction that the state also has a duty of explanation. The duty of explanation of legislatures is already acknowledged by legal theorists as a constitutional requirement.\textsuperscript{21} In his classic treatise on constitutional law, Laurence Tribe defended an even stronger view - the legislature owes a duty of explanation

\textsuperscript{19} The willingness to change one's mind does not require the promisor to treat his earlier decision as if it never happened. His earlier decision and perhaps conflicting obligations which may have been incurred by him may have relevance concerning the justifiability of infringement. Nevertheless in the appropriate circumstances, the promisor has an obligation to act in accordance with the new more deliberative moral convictions.

\textsuperscript{20} It is important to stress that it is not the importance of the consequences of the action to the other party that determines whether an explanation is owed or not. In some cases, we make decisions that significantly alter the lives of other people (the decision to lower prices that changes the lives of the competitors and consumers alike), but this in itself does not grant anyone the right to an explanation. An explanation is owed only if some right was infringed.

\textsuperscript{21} Jerry Mashaw, A leading legal theorist suggested that: "A reason must be provided as a constitutional minimum" otherwise "an individual "is treated as a being for whom reasons are unimportant-an obvious affront to his self respect." See
which includes the right of a citizen to be consulted about matters that affect their lives. He wrote: "Both the right to be heard from, and the right to be told why, is analytically distinct from the right to secure a different outcome; these rights to interchange express the elementary idea that to be a person, rather than a thing, is at least to be consulted about what is done with one." Some legal theorists have even suggested protecting such a right by imposing an affirmative duty on legislators to explain the statutes in the forms of committee reports and floor management statements.22

Judicial review is understood by us as required by the duty of explanation of the state. The act of the state which triggers an explanation is an infringement of a right. The citizen challenges the state to provide an explanation for the infringement. The state fulfills its duty by engaging in a judicial deliberative process.

Before we establish why an individualized explanation is required, let us first examine two main objections to the view that judicial review is a form of an explanation. First it could be argued that the state has no obligation to explain. Under this view, while most infringements of rights generate a duty of explanation, the state is a unique agent which is not required to provide an explanation. Second, it could be argued that the state has such an obligation but that it fulfills (or ought to fulfill) its obligation by engaging in legislative deliberation. The legislature, so it is argued, is a deliberative institution. It is an institution whose role is to legislate on the basis of reasoned argumentation and deliberation.

**A. Does the State have a Duty of Explanation?**

It might seem that the duty of explanation and the ensuing duty to reconsider decisions do not apply to the state because the state is in a position of authority with respect to its citizens. The state is not required to provide an explanation just as an army commander or employer is not expected to explain her commands. If a commander issues a legitimate command, her subordinates are not in a position to demand an explanation. To grant them this right would be to undermine legitimate authority.

---

22 Bernard W. Bell, Legislative History Without Legislative Intent: The Public Justification Approach to Statutory Interpretation 60 Ohio L. Rev. 1, 6 (1999). Under this view the vote on the statute would be a vote on the text plus certain documents comprising the 'public justification' of the statute.
Consider, however, the following example which involves an authoritative relationship. Every parent has probably resorted, at one time or another, to the notorious argument: "because I said so." Despite its air of arbitrariness, "because I said so" is not always an infelicitous argument, and turning to it is not always a sign of arbitrary coercion. Sometimes, it is the only justification available. Perhaps the time and effort required for providing an explanation is not available. Perhaps the full explanation is not suited for the child’s age – and “because I said so” may be completed with its equally notorious counterpart “you will understand when you are older”. Still in other cases, the parent realizes that the original prohibition was unjustified, but deems it necessary to insist on it in order to maintain parental authority. Finally, in some cases a parent may be justifiably impatient: “because I said so” is as far as explaining can go at the end of a long day.

Nevertheless, “because I said so” is the paradigm expression of the arbitrary use, or perhaps misuse, of parental authority. This might seem odd. After all, parents simply are adults who are expected, indeed required, to exercise legitimate authority for appropriate ends. So a child’s demand for an explanation is out of place. Retorting “because I said so” merely reiterates the fact that as a parent, one has legitimate authority to decide how much TV a child may watch.

Why should parents justify their decisions? Two related considerations suggest themselves. First, respect for the child. From a tender age children are able to reason and appreciate the distinction between arbitrary and justified prohibitions. Children deserve an explanation because they are, in some sense, rational autonomous agents. Furthermore - and this brings us to the second consideration – although children are not autonomous rational agents in the full sense, they are capable of becoming ones, in the fullness of time. One important way of inculcating a sense of autonomy and respect for reasons and indeed for others, of initiating children into the space of reasons, is to treat them accordingly in appropriate circumstances. What these two considerations share is a rejection of arbitrariness or apparent arbitrariness. Even if the parent is exercising her authority with benevolent paternalism, the child is entitled to an explanation. Providing an explanation is not (primarily) a means of preventing or reducing the likelihood of arbitrariness. The point is that respecting the child means that the child is entitled to voice her objections, and is entitled to an explanation that addresses these objections.
Furthermore, the authority of the parent does not alter the fact that the duty to provide an explanation involves review. It is not only the authority and patience of the parent that are tried by listening to complaints and having to provide reasons. When one engages in argumentation with a child, one opens up the possibility that it will transpire that the prohibition was unjustified. And since the rules of the game dictate that the exercise of authority must not be arbitrary, the parent might have to withdraw or overturn the original stance. A rule that was thought to be justified is revealed to be arbitrary and unjust. In such cases, parental willingness to explain and justify inevitably leads to a process of review.

As the examples of the military commander and the employer demonstrate, there are some authoritative contexts in which a duty of explanation is out of place. The fact that in some other contexts the duty exists does not seem overly significant. In particular, since likening adult individuals to children is as much an affront to democratic ideals as likening them to disciplined soldiers or even paid employees.

Despite the fact that soldiers and employees are adults, the authority of the state over its citizens is closer to that of parents rather than of employers or commanders. This is manifest by the fact that soldiers, and to a lesser degree employees, are by definition subordinates who should comply with instructions. This is what being a soldier or an employee means - that one follows instructions. Perhaps an army in which soldiers are entitled to an explanation is still an army, but it is a different kind of army. The same holds for employees who rent their labor. What employees are entitled to is pay, not an explanation. Individuals under the authority of the state, however, may be subordinate to its authority, but their role is not defined by their position in a hierarchy.

The reason for this difference between the types of authority seems to stem from the fact that parents, like the state, hold their power for the sake of promoting the well-being of their subordinates. In contrast, neither the employer nor the commander holds their power for the benefit of their subordinates. Their powers are granted to them for the sake of realizing goals that are not directly related to the wellbeing of their subordinates. It is not surprising therefore that, as claimed above, legal and political theorists believe that legislatures and other state agencies typically have an obligation to provide an explanation to their citizens.23

23 See Text accompanying notes 17-18.
The above example highlights two points. First, authoritative agents are sometimes bound to provide explanations. In particular, it is the case when the authoritative agent holds his powers for the sake of promoting the wellbeing of his subordinates. Second, even in the case of authoritative agents, the right to an explanation typically involves a duty to review the original decision. In cases in which the explanation is given after the fact or in cases in which changing the decision may be too costly, review might result in an admission of error, an apology, compensation, etc. So if construed broadly, to allow for review after the fact - the right to an explanation is also a right to review in which the victim of an infringement is allowed to participate personally – make his case, i.e., be a participant in deliberation.

**B. Can (or Should) the Legislature Fulfill the Duty of Explanation?**

Let us specify again the nature of the moral obligations of the promisor. The promisor has an obligation of explanation. This obligation consists of the following. First, it requires the promisor to provide the relevant factual information. Second, it requires him to engage in a moral deliberation aimed at explaining and justifying his decision. The latter obligation can be fulfilled only if the promisor is willing in principle to change his earlier moral conviction and concede that the infringement is an unjustified one. Last, his obligation to reconsider his moral convictions presupposes willingness to act in accordance with his new more deliberative moral convictions – ones that are based on the deliberative process.

It might, however, be argued that a democratic legislature can fulfill the duty of explanation. This claim could be justified on two grounds. First it could be argued that the legislature's general deliberations – the rationale of its decisions – is all the explanation that is required to fulfill the duty and, consequently, the requirement for an explanation is met by legislatures. One may accuse actual legislative assemblies of being less deliberative than necessary but, to the extent that legislative assemblies are sufficiently deliberative, their deliberations provide all the explanation one is entitled to expect. Second, it can be argued that in the case of a democratic legislature, the mere fact that it has deliberated and decided constitutes the relevant explanation. This explanation is not an arbitrary "because I said so", but rather a legitimate and sufficient explanation. Unlike the arbitrary "because I said so", “it is the law” does imply that no (additional) justification is required. Democratic procedure is a fair
procedure designed to resolve conflicts. Since the law is the product of a fair decision making mechanism, it is justified and no further explanation is necessary.

The first objection fails to account for the importance of individualized explanation. The fact that the state owes individuals an explanation does not seem to recommend JR at all. The reasons that guided the legislature in its deliberations seem to provide an adequate explanation. The process of legislating itself embodies a deliberation that can serve to fulfill the duty to justify and explain its outcome. A good legislature does not legislate arbitrarily; its directives are grounded in reasons that are carefully articulated, disseminated and debated prior to the legislation. The duty of explanation is supposedly fulfilled in a well-functioning democracy. Some would argue that it is better protected under such a system.\(^24\)

But an explanation is not enough, an individualized explanation is required – an explanation that is tailored to the circumstances of the case. To understand what an individualized explanation is assume that a promisor explains that she adopted a rule which she used consistently in the past and which is based on a thorough moral deliberation. Instead of providing an explanation, the promisor appeals to his commitment to the rule and his actual adherence to it.

Such an explanation is insufficient. The existence of the rule (or the prior adherence to it) may constitute a relevant moral consideration. It may indicate to the promisee that the promisor takes the conflicting engagement leading to the infringement of the promise very seriously, or that deviating from the rule would be extremely difficult and morally costly for the promisor. But the existence of the rule is not sufficient to justify the infringement and consequently it is also not sufficient to honor the duty of explanation. It is not sufficient because the promisee is entitled to question the rule itself or the adherence to it in this case. To the extent that the rule itself justifies an infringement, it ought to appear in the explanation provided to the promisee. But typically its mere existence would not justify the infringement.

Furthermore, assume that the promisor stresses the point that the infringement is based on a rule adopted following a thorough moral deliberation. When the promisor is being challenged by the promisee, she provides a list of the arguments used in past deliberations. When the promisee challenges the rule, the promisor refuses to deliberate and recites the reasons used by her in earlier deliberations – the

\(^{24}\) See Waldron, supra note 4 at 88-118.
deliberations which ultimately resulted in accepting the rule. To her defense she claims that she fulfilled her duty of explanation by providing the promisee with these arguments.

Such behavior violates the promisor's duty of explanation. Simply elaborating the reasons that led to adopting the rule is insufficient. The duty of explanation requires a reconsideration of the justifiability of the decision at stake rule in light of the particular circumstance. In other words the explanation required to justify an infringement of a right is an individualized explanation, tailored to the particular infringement and takes into account the particularities of the victim of the infringement, his specific circumstances etc. A mere recital of the original reasons used in the early deliberative stage does not address the concern that the duty of explanation is meant to address, namely the duty of the promisor to provide an explanation which is tailored to the particular circumstances.

A satisfactory justification of a particular infringement differs in nature from generally justifying a rule. Because it is addressed to a specific victim of a specific infringement, a satisfactory justification of a particular infringement differs from a general one in two respects. First, the addressee dictates certain modifications to an explanation which is not addressed to anybody in particular. Second, the explanation must be tailored to the particular circumstances characterizing the specific infringement. This claim is not restricted to cases in which the original deliberation leading to the rule was neither thorough nor made in good faith. Furthermore, it is even possible that the early deliberation leading to the forming of a rule is more likely to yield sound decisions than deliberation which is shadowed by the particularities of a particular infringement.25 The obligation to consider the particularities of the case in the face of a challenge on the part of the promisee is not founded on instrumental considerations of this sort. Instead such a justification is owed to the promisee as a matter of justice.

The duty of explanation as well as the duty to reconsider the decision is not merely a matter of courtesy to the victim of infringement. To demonstrate its importance it is sufficient to think of hypothetical legislature who knows in advance the nature of the future infringements of every rule it legislates as well as the future identity of the victims of infringement and the particular circumstances surrounding

25 See Waldron, supra note 3.
the infringement. This information would inevitably affect the legislature's reasoning with respect to the desirability as well as the legitimacy of the norms it legislates. The reasoning provided by such a legislature at the stage in which it legislates the norms could indeed satisfy the duty of explanation and no further individualized explanation would be needed. The duty of explanation could be regarded as a scheme designed to approximate the functioning of such an ideal legislature. Real world legislatures, however, are behind a veil of ignorance which prevents them from fully comprehending the real-world effects of their decisions. The duty of individualized explanation addresses this deficiency.

To sum up, a general explanation does not address the individual concerns of the actual victims of such a rule, namely individuals whose interests were affected by my decision or whose rights were infringed by it. An individualized explanation addresses the particularities of the case and therefore expresses the degree of concern owed to those whose interests are detrimentally affected by my decision. It is their right to be heard, and it is their right that their particularized circumstances are explicitly addressed in the deliberative process as opposed to others who had the fortune that their own rights have not been adversely affected by the decision. The deficiency of the legislative process is not that it fails to provide the right decisions but that it cannot provide the right sort of explanations for these decisions.

Under the second objection, in the case of a democratic legislature, the mere fact that the legislature has deliberated and decided constitutes the relevant explanation. The fairness of the procedure is sufficient to justify the legislation and no further explanation is therefore called for. Its appeal lies in the assumption that the procedure that led to the adoption of the stature is a fair procedure. But this assumption is not available to the opponent of JR at this point. The lesson drawn from the example of the imaginary polis and the reply to the first objection is that a procedure that does not address the particular grievances of an individual is not a fair procedure. Therefore, an explanation that depends on the fairness of such a procedure is unsatisfactory.

5. JR and Equal Democratic Participation
A radical opponent of judicial review may deny that citizens have a right to individualized explanations provided by judicial review. A moderate opponent may concede the existence of a right to an individualized explanation but protest that this right ought to be overridden by the right favored by him, namely the right to equal democratic participation (EDP).

Thus far the discussion targeted the extreme opponent. It is time now to examine the view of the moderate opponent who recognizes the right to JR but believes that this right should be set aside for the sake of protecting the democratic right to equal participation. To address the concerns of this opponent, it will be shown that the two rights (the right to an explanation and the right to EDP) are closely related and express a commitment to similar values. In the absence of a compelling argument, this observation leads to the conclusion that both rights ought to co-exist and that the precise balance between them should be sensitive to particular contingencies. In practical terms, this conclusion suggests that debates should focus on the particular form an institution of JR should take, the type of presumptions and considerations in must involve, how public officials are to be held accountable, etc. In addition, it will be shown that the right to JR does not typically conflict with a right to EDP. A position that recognizes the right to JR but maintains that it is always outweighed by a right to EDP treats equality or participation too simplistically. A closer inspection reveals that the two rights complement, rather than conflict with, each other.

Why would a friend of equal democratic participation be suspicious of a right to JR? The reply seems straightforward. Respect for the decisions of a democratically elected legislature embodies our commitment to EDP, and over-riding these decisions is a direct infringement of EDP. Even if we accept that in principle the legislature does not have the power to (unjustifiably) infringe rights and should be committed to their protection and advancement, the question whether rights have, in fact, been unjustly infringed should be entrusted to the legislature. EDP requires that deliberating over these questions, and deciding what protecting various rights actually means in a given context, be left to democratically elected representatives.

But why is there a right to EDP in the first place? Various replies suggest themselves: the interest of individuals in self-rule, the ideal of a political community of equals, showing similar respect to individuals, etc. Generally speaking, EDP is a right because equal democratic participation manifests, or safe-guards and protects,
the integrity and equality of individuals. Since EDP implies that the decisions reached by deliberating and accountable elected representatives best realize the interest in self-rule, the proponent of JR must be an opponent of the very values that give rise to EDP.\textsuperscript{26}

However, this picture is lacking. The interest of individuals in self-rule or in being treated with respect made an earlier appearance in this paper as the grounds for a right of JR. The right to JR exists, if it does, because JR enhances self-rule, autonomy, and individual worth. The relation between JR and the participatory rights was identified by Sager who claims that:

"The second way that a member of a political community can participate as an equal in the process of rights contestation is to have her rights and interests – as an equal member of the political community and as an equal rights-holder – seriously considered and taken account by those in deliberative authority. Any member of the community is entitled, on this account, to have each deliberator assess her claims on its merits, notwithstanding the number of votes that stand behind her, notwithstanding how many dollars she is able to deploy on her behalf, and notwithstanding what influence she has in the community."\textsuperscript{27}

In order to appreciate why these considerations and values support a right of JR, consider some of the underlying rationales behind the right to an explanation. This right grants a victim of an infringement an opportunity to participate in deliberation concerning the infringement. Individuals' concern over their rights extends to the possibility that even in a system that respects EDP, their rights might be infringed. Clearly, there is no guarantee that this will never be the case. One measure that addresses the possibility of an arbitrary exercise of authority in general, and in the realm of rights in particular, is the duty for an explanation: elected bodies and officials must deliberate, and justify their actions. But this is not a satisfactory guarantee against unwarranted or even arbitrary infringement, because it does not address the requirement of an individualized explanation. In addition, being presented with an explanation without granting the supposedly injured party any role in deliberation cannot alleviate the air of arbitrariness. Self-rule and respect require the type of access and explanation provided by JR. Individuals who believe their rights

\textsuperscript{26} That these values seem to lie at the heart of our (differing) conceptions of rights in general, and not only of EDP highlights the asymmetry mentioned above: opponents of JR are concerned with the infringement of a right; in contrast its proponents are advocates of rights-consequentialism, i.e., in a society better arranged to protect rights, overall - even at the cost of actually infringing a right and depriving people of the power to rule themselves.

have been infringed should be able to demand a hearing and have the legislation reexamined in light of their own case. This concern is not about reducing the probability of such an infringement, but about being deprived of a fair chance to be heard and have one's circumstances taken into consideration. It belongs to the same type of considerations justifying equal democratic participation or the right to a fair trial. As in the case of EDP, this form of participation is worthy in itself, and not merely as an instrument for achieving some further end. The right to JR is important not only because it grants individuals a degree of control - a say - when their rights are infringed, but also because it manifests respect to each individual by respecting her rights. Respecting the individual and respect for her rights, in this sense, does not only amount to making the right decision – the decision which respects her rights; it involves listening to the individual in question and allowing her to participate meaningfully in deliberation.

The right to JR enhances the right to participation because it allows individuals to participate in the relevant sense in making determinations concerning their life. Meaningful participation in the case of a purported infringement requires the right to JR. A system of equal democratic participation of the type suggested by the opponents of JR fails to meet the required desiderata - namely meaningful participation for all - except in the empty sense that none can participate meaningfully when the question of an infringement of their rights arises.

As far as participation goes, it seems clear that for an individual who believes her rights have been infringed the right to JR enhances self-rule. This is so both because she gets a say in matters of great importance to her, and because the importance of these matters - a supposed infringement of rights - is importantly related to self-rule. What the right to JR allows for is meaningful participation. It is perhaps inevitable that in most matters most citizens can only participate as spectators do, cheering (voting) for their preferred representatives and perhaps voicing their complaints to them. But meaningful participation - the type that is truly conducive to self-rule, must surely amount to more. This is what the right to JR grants - meaningful participation at least in (some) matters that profoundly concern one. The point is that singling out those whose rights have been infringed is justifiable. In other words, facilitating meaningful participation by allowing a relevant set of individuals an opportunity to participate meaningfully is justifiable.
Advocates of EDP may protest and point out that the right to JR does not square with equal participation. The question, then, is does the right to JR significantly compromise the equal democratic participation of others to participate and their interest in self-rule. Does the meaningful participation granted to one person – the victim of the infringement -- come at the expense of all others? Does the person who appeals to this right get an unequal share of political participation?

The rationale behind equal democratic participation is the equality of individuals that leads to equal participation in matters that concern all. Now clearly, not everything concerns everyone equally. At one end, we have the private sphere demarcated from the public one, where self-rule is precisely that - rule by the self. At the other end, we have issues that concern all, in one way or another. In between, there are local matters, issues that pertain only to particular groups, etc.

Viewed from this perspective, the right to JR seems to be an instance of EDP, because it allows for meaningful participation in particular types of instances - when the individuals involved believe their rights have been infringed, thus claiming that they have been treated unfairly. The right to JR is granted to all, but it can be exercised only by those who reasonably claim that as far as the statute concerned, they are the victim of an infringement. It enhances therefore the participation of those who mostly need it; those whose voice deserves to be amplified.

At this point it might be claimed that the meaningful participation granted to individuals comes at the cost of awarding the judiciary a disproportional "chunk" of influence over the legislature. Equal democratic participation is breached not because individuals whose rights have been infringed are given a say, and the particularities of their case must be attended to, but because the very institution designed to realize this right infringes equal democratic participation, irrespective of the right it supposedly realizes.

There are two responses to this objection. First, if we concede that JR realizes a right, then even this infringement of EDP must be weighed against the prospect of denying the right to an individualized explanation altogether.

Second, this objection pits the judiciary against the legislature, as an instrument designed to curb its power. But this view is one-sided view based on the common assumption rejected above - that JR is not a right but at most a mechanism for enhancing the protection of rights. According to the proposed view, the rationale behind JR is the right to JR. What this right requires is a body that can address the
particular aspects of the supposed infringement and supply an individualized explanation that attends to the complaints of the injured party. The judiciary is speaking for - not against - the legislature. From this perspective, the function performed by the judiciary is an integral part of the ongoing process of deliberation and legislation. It allows injured parties to have their say, and allows for the particularities of actual cases to enter the process of deliberation of the state. If one accepts that the exercise of authority involves supplying explanations and allowing for meaningful participation, then the role of the judiciary is a necessary complement to that of the legislature. Equal democratic participation when the notion of participation is broadly construed as argued above, requires JR. Judges, like elected representatives, fulfill an official role in the process of legislation. The supposed privilege they enjoy at the expense of the participation of the citizens is the byproduct of a system designed to ensure meaningful equal democratic participation.

Some may think that this description of the relations between the judiciary and the legislature disguises important institutional realities, i.e., the existence of persistent ideological conflicts between the judiciary and the legislature. The judiciary often overrides legislation because it believes the legislature's ideological commitments are mistaken and the conflict between the two branches is founded sometimes on fundamental disagreements on matters of justice. Our account is not oblivious to these institutional realities. It is inevitable that two separate institutions which are differently composed may sometimes clash. The existence of disagreements between the legislature and the judiciary does not imply that the normative justification for establishing the institutions is founded on the existence of these disagreements. Overriding legislative authority, under our view, is a byproduct rather than the main purpose of the constitutional powers granted to the courts.

6. Conclusion

The proposed defense of JR undermines the traditional asymmetry inherent in the debate concerning judicial review. JR is a rights-based institution not in the sense that it facilitates the efficacious protection of rights but in the sense that citizens have a right to JR – a right derivative of the right to an explanation. The right to an explanation, it was argued, cannot be fulfilled by the legislature given the abstract and
the general nature of the legislative deliberation. It must be fulfilled by a body that is attuned to the particular claims made by individuals, and the particularities of cases involving alleged rights-violation. In order to honor this right, the state is obliged to provide an "individualized explanation." It must justify, and reconsider, any such infringement in light of the particular claims and circumstances of individuals. Moreover, individualized explanation implies principled willingness to reconsider the earlier decision. Last, it was argued that the right to an explanation is a participatory right and should be regarded as an integral part of the right to EDP. There is no inherent conflict between EDP and the right to judicial review because the right to an explanation provides a fair opportunity for any victim of an infringement to participate in the deliberation leading to the infringement of her rights.