

## REASON-GIVING IN COURT PRACTICE: THE EXAMPLE OF FRENCH IMMIGRATION LITIGATION\*\*

### AS RAZÕES NA PRÁTICA DOS TRIBUNAIS: CASOS DE IMIGRAÇÃO NA FRANÇA

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**Abstract:** This Article examines the thesis according to which the practice of giving reasons for decisions is a central element of liberal democracies. In this view, public institutions' practice—and sometimes duty—to give reasons is required so that each individual may view the state as reasonable and therefore, according to deliberative democratic theory, legitimate. Does the giving of reasons in actual court practice achieve these goals? Drawing on empirical research carried out in a French administrative court, this Article argues that, in practice, reason-giving often falls either short of democracy or beyond democracy. Reasons fall short of democracy in the first case because they are transformed from a device designed to “protect” citizens from arbitrariness into a professional norm intended to “protect” the judges themselves and perhaps further their career goals. In the second case, reasons go beyond democracy because judges' ambitions are much greater than to merely provide petitioners with a ground for understanding and criticizing the decision: they aim at positively—and paternalistically in some instances—guiding people's conduct. The discussion proceeds by drawing attention to social aspects that are often neglected in theoretical discussions on reason-giving. A skeptical conclusion is suggested: one can rarely guarantee that any predetermined value will be achieved by the giving of reasons. The degree to which individuals are empowered by the reasons given to them is dependent on the way in which decision-givers envision their reason-giving activity, and this representation is itself conditioned by the social setting of the court.

**Keywords:** Arbitrariness. Reason-giving. Judges.

**Resumo:** Este artigo examina a tese segundo a qual a prática de apresentar razões para decisões é um elemento central das democracias liberais. Nesta perspectiva, a prática das instituições públicas - por vezes é seu dever - de apresentar razões é necessária para que os indivíduos possam ver o Estado como razoável e, também, como legítimo, como sustenta a teoria democrática deliberativa. Mas será que as razões apresentadas atualmente pelos tribunais realizam esses objetivos? A partir da pesquisa empírica realizada em um tribunal administrativo francês, este artigo argumenta que, na prática, as razões muitas vezes correspondem a uma quase democracia ou a algo para além da democracia. Razões aquém da democracia, no primeiro caso, porque elas são transformadas: de dispositivos destinados a “proteger” cidadãos contra a arbitrariedade, em normas profissionais destinadas a “proteger” juízes e talvez, ainda mais, os seus objetivos de carreira. No segundo caso, as razões vão além da democracia porque os juízes ambicionam mais do que oferecer tutela judicial a jurisdicionados, com fundamentos para que compreendam e critiquem a decisão: eles desejam positivamente - e em alguns casos de modo paternalista - orientar a conduta das pessoas. A discussão deste artigo evolui para chamar a atenção de aspectos sociais que são, muitas vezes, negligenciados nas discussões teóricas sobre decisões baseadas em razões. Uma conclusão cética é sugerida: raramente se pode garantir que qualquer valor pré-determinado seja realizado mediante a apresentação de razões. O grau em que os indivíduos são empoderados pelas razões apresentadas a eles depende da maneira pela qual os decisores imaginam sua atividade de tomar decisões baseadas em razões, e essa representação é em si mesma condicionada pela configuração social da Corte.

**Palavras-chave:** Arbitrariedades. Decisões baseadas em razões. Juízes.

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## 1 Introduction

“Mr. M,<sup>1</sup> I reject your petition. The deportation order does not violate your family life. Your marriage project, if it exists, is too recent and you have many relatives in your home country. You can appeal this decision, but the appeal is not suspensive, which means that the prefecture will execute the deportation order. Come closer to sign the decision.”<sup>2</sup>

This is what Judge A announced when she returned from her deliberation. The small courtroom dedicated to deportation hearings in the administrative court of Y felt unusually solemn. Everyone fell silent. A tense, awkward atmosphere seized the room. Mr. M, the young claimant who had been sitting the whole time while awaiting the sentence, nervously tapping his shiny shoes on the floor, stood up and approached the platform where Judge A and her clerk were standing. After signing the decision, he would be escorted back to a detention center and, later on, deported to his country, by force if necessary.

A couple of days later, when interviewed, Judge A came back to this very distinctive moment in a judge’s work when he or she must announce a decision confirming deportation to a detained immigrant: “Humanely, it is a very difficult moment. One just made a decision that has immediate effect, which is unusual. I try not to formulate the decisions too dryly, I always formulate the reasons and I indicate that he [*i.e.* the petitioner] can appeal the decision. I always try to humanize, but this isn’t something that is practiced by all my colleagues.”<sup>3</sup> By “humanizing” effects, Judge A might mean that reasons help claimants accept judicial decisions. Both the decision and the process by which the decision was reached are more likely to be accepted if the claimant is able to judge the soundness of the decision. Reason-giving demonstrates that attention has been paid to the special features of a case and the parties involved. Yet will Mr. M feel better about being deported by virtue of learning the reasons underlying the decision? How may the knowledge that he has not established a sufficiently substantial family life in France for the purposes of residency affect him?

Judge A’s declaration implicitly relies on the currently dominant justification for reason-giving in contemporary legal and political theory, which holds that requiring public institutions to substantiate their decisions with reasons constitutes an essential component of a liberal democracy.<sup>4</sup> Reasons will not necessarily make Mr. M feel better, but he will certainly be empowered by them. Knowing the grounds of the decision and being reminded that he can appeal are two fundamental pieces of information that might enable him to decide whether any further action should be undertaken. The reasons also guarantee that Judge A’s decision is

<sup>1</sup> In order to protect the interviewees’ identities, this Article designates interviewees by letter and the exact locations of the courts are not disclosed. Quotations have been translated from French into English.

<sup>2</sup> Field Notebook, hearing presided over by Judge A, administrative court of Y, France (May 19, 2006).

<sup>3</sup> Interview with Judge A, administrative court of Y (May 23, 2006).

<sup>4</sup> Gerald F. Gaus, *Justificatory Liberalism* (1996) (analyzing the prominent role played by justification in liberal political theory).

not arbitrary. They act as a check on decision-makers' discretion. Public decisions such as judicial decisions may be imposed on citizens, but only if they are justified on certain foundations. Reasons legitimize decisions while at the same time providing grounds for criticism.

It is striking that Judge A immediately stressed that this practice of reason-giving is not universal among her fellow judges from the administrative court. French judges are under a statutory duty to give reasons for their decisions.<sup>5</sup> In fact, in most contemporary legal systems, there is a requirement for courts, administrative agencies, and other public institutions to provide reasons for their decisions. Perhaps what Judge A meant is not that her colleagues fail to explain their decisions, but rather that they do not give appropriate reasons or that they give reasons for the wrong purposes. She is implying that unlike her, their goal may not be to "humanize" decisions. They are not motivated by the desire to foster democracy. What can their justification for giving reasons be?

In this Article, Judge A's popular claim that reason-giving fosters democracy is evaluated not only on theoretical grounds, but also through empirical research. My aim is neither to substitute one justification for reason-giving with another nor to complete an existing justification, but to raise questions about the "democratic" justification of reason-giving. There is a vast literature on the legal and historical sources of the reason-giving requirement as well as on its philosophical underpinnings,<sup>6</sup> but little attention has been directed to the way in which decision-makers who are subjected to such a requirement perceive it throughout their practice. This is the reason why I chose to inquire into the meaning that judges confer to the giving of reasons. Is this meaning coherent with theoretical elaborations on reason-giving? More precisely, when giving reasons, do judges see themselves as fostering democracy? Since the giving of reasons is a context-dependent practice, an empirical inquiry is important and reveals attitudes that do not accord with theoretical claims. Charles Tilly has shown that reasons arise out of situations and roles.<sup>7</sup> Reasons establish, repair, and negotiate relationships. This Article focuses on a very specific kind of reason-giving in society: that of judges in a court setting. The discussion is limited to interactions between judges, administrators, and petitioners. While Judge A understands reasons as a way to establish, repair, and negotiate relationships with claimants, her colleagues, according to her, give reasons in relation to their professional environment (other judges in particular). In practice, reason-giving often turns out to be either short of the democratic ideal or beyond it. In other words, reason-giving requirements may "miss" the democratic ideal in two opposed ways: because democracy is not taken seriously enough or because it is taken too seriously.

<sup>5</sup> Title V, Article 15 of the August 16 and 24, 1790 Statute; Article 455 N.C.P.C; Articles 485 & 593 C. PR. PÉN; Article L9 C. ADM.

<sup>6</sup> Martin Shapiro, *The Giving Reasons Requirement*, U. Chi. Legal F. 179 (1992). See also Frederick Schauer, *Giving Reasons*, 47 Stan. L. Rev. 633 (1995).

<sup>7</sup> Charles Tilly, *Why?* (2006).

This Article develops the preceding argument in four stages: after indicating the research method, it expands the main hypothesis. The Article then puts forward two contradictory conceptions for judges' reason-giving.

## 2 Method: An Empirical Viewpoint

The research is based on ethnographic work that was conducted in a French administrative court in 2006, as part of a collective survey of administrative litigation, "The Social Uses of Administrative Justice." I belonged to a team studying administrative justice from the point of view of judges, in the context of immigration litigation, while collaborating groups focused on other actors (administrators, lawyers, claimants, etc.) or on other areas of administrative law (tax litigation or housing benefit litigation). Our team employed the techniques of interviews and participant observation. Specifically, together with Sarah Mazouz, I observed ten days of deportation hearings in an administrative court and, with Vincent Braconay, I interviewed seven judges using semi-directive interviews.

The empirical data that were collected pertain to a special type of deportation hearing ("*audiences d'arrêtés préfectoraux de reconduite à la frontière*").<sup>8</sup> The proceeding is designed to enable petitioners to appeal an order to leave the country that has been entered by the immigration agency or prefecture. The procedure allows two types of outcomes. A judge sitting alone can either side with the prefecture and confirm the order ("*décision de rejet*") or dismiss the order ("*décision d'annulation*"), thereby constraining the prefecture to reassess the claimants situation and perhaps even grant them a residence permit.

All French judges, administrative judges included, are subjected to a statutory reason-giving requirement: they must write opinions memorializing the reasons for the disposition of a case. This requirement can be traced back to the August 16th and 24th, 1790 revolutionary statute on judicial organization, which imposed a formal requirement on all courts to provide reasons for their decisions.<sup>9</sup> It was constructed on the principle—a corollary of legislative sovereignty—that the arbitrary power of the courts under the *Ancien Régime* (the "*Parlements*") must end. The judiciary was perceived as a corrupt and reactionary enemy of social reform. Judges were no longer to participate in the lawmaking function, but were merely to be the "mouthpiece of the law."<sup>10</sup> Reasons were thought of as the ideal tool to monitor the judges of the young Republic.<sup>11</sup>

<sup>8</sup> The proceeding is governed by Book V, Title I (in particular, Articles L511–1 to L513–4) of the *Code de l'entrée et du séjour des étrangers et du droit d'asile*.

<sup>9</sup> The August 16-24, 1790 Statute, Title V, Art. 15 stipulates that a judicial opinion must have four parts, the third of which must consist of "the reasons that determined the judge" ("*les motifs qui auront déterminé le juge*").

<sup>10</sup> This expression originates from Montesquieu, *The Spirit of the Laws*, Book XI, Chapter 6 (Cambridge University Press 1989).

<sup>11</sup> This interpretation is comforted by historical research on the emergence of a duty to give reasons in French law, see, e.g., Tony Sauvel, *Histoire du jugement motivé*, 61 RDP 5 (1955); Pierre Godding, *Jurisprudence et motivation des sentences, du Moyen-Âge à la fin du XVIIIème siècle* in *La motivation des décisions de justice* (Chaim Perelman & Pierre Foriers, eds., 1978); and Pascal

Deportation litigation is an expanding domain in French administrative litigation and represents, depending on the location of the court, between twenty and fifty percent of administrative judges' work.<sup>12</sup> In the court under examination, which is located in a large city with an important foreign population, the proportion averaged thirty percent and is increasing. The consideration of deportation hearings, therefore, requires the study of a form of reason-giving prevalent among administrative judges. Moreover, deportation litigation involves a class of people increasingly at the center of debates on the claims and limitations of social democracy. Usually poor, under-informed, badly-counseled, unaware of the subtleties of the legal system, and often facing language barriers, foreign petitioners are especially vulnerable and dependent upon the officials involved in their cases. For these reasons, thorough judicial explanations should play an essential role in immigration cases.

### 3 Decision-makers at a crossroads

The current literature on reason-giving focuses on the virtues of reason-giving from the point of view of the public, citizens, or consumers of public services.<sup>13</sup> This analysis is consistent with the policy goals that legislatures promote by introducing reason-giving requirements into the legal system. For instance, the French parliamentary debate concerning the July 11, 1979 statute that (partially) extended the duty to give reasons to administrative agencies turned on the principle that reasons would not only promote an ideal of transparency, but would introduce democratic practices often lacking in the traditionally secretive and sometimes seemingly arbitrary administration.<sup>14</sup> Legislators conceived of the reason-giving duty as beneficial to citizens and litigants involved in legal proceedings, despite those (deputies or senators, law professors, experts, etc.)<sup>15</sup> who stressed that it would unduly burden the administration and be too costly (in time, labor, money, etc.) as compared to the potential benefits expected for individuals dealing with administrative agencies. The French debate illustrates the common belief in the democratic virtues of reason-giving. The question remains whether reason-giving in actual court practice achieves these goals.

How does reason-giving foster democracy? The connection between reason-giving and democracy has become a commonplace in political theory and philo-

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Texier, *Jalons pour une histoire de la motivation des sentences*, in Travaux de l'Association Henri Capitant, *La Motivation. Tome III. Limoges-1998*. 5 (2000).

<sup>12</sup> The increasing weight of deportation litigation on administrative judges' workload has been given a statistical translation in a report by Marie-Danièle Barré et al., *Dynamique du contentieux administratif. Analyse statistique de la demande enregistrée par les tribunaux administratifs (1999–2004)* 12–14 (2005).

<sup>13</sup> This focus can be traced back to Rawls' conceptualization of the concept of "public reason," see, e.g., John Rawls, *The Domain of the Political and Overlapping Consensus*, 64 N.Y.U. L. Rev. 233 (1989).

<sup>14</sup> For a synthesized discussion of the French debate, see Bruno Lasserre, Noëlle Lenoir & Bernard Stirn, *La transparence administrative* (1987).

<sup>15</sup> For example, law Professor Georges Dupuis, a renowned specialist of French administrative law, was never enthused by the idea of subjecting administrative agencies to a giving reasons requirement. See George Dupuis, *Les motifs des actes administratifs*, in 27 *Études et documents du Conseil d'État* 37 (1974–1975).

sophy, particularly since John Rawls's revitalizing discussion of the concept of "public reason."<sup>16</sup> Under this conception, public justification is the core of liberalism, so much so that this branch of political theory is often referred to as "justificatory liberalism."<sup>17</sup> Deliberative democracy has been described as affirming the need to justify decisions made by citizens and their representatives.<sup>18</sup> Both are expected to justify the laws they would impose on one another.<sup>19</sup> In this way of thinking, reason-giving is required so that each individual will view the state as reasonable and therefore, according to deliberative democratic theory, legitimate.<sup>20</sup> Reason-giving also aims to impede the arbitrary use of state power. Liberal branches of political theory agree that the arbitrary use of state power is tyrannical and that individual freedom requires freedom from being subjected to arbitrary state power.<sup>21</sup> People must therefore have access to the reasons supporting those decisions and be given the opportunity of contesting the soundness of those reasons.<sup>22</sup> The underlying idea is that a government does not exercise arbitrary power insofar as it is effectively contestable.<sup>23</sup> This effective contestability in the political domain requires a variety of institutions, such as courts and appeal procedures, as well as rights to a hearing before administrative agencies.<sup>24</sup>

All of the judges I observed and interviewed envisioned their giving reason practice in two primary ways. On the one hand, they endorsed the democratic analysis of reason-giving and considered their practice of reason-giving as the ultimate way not only to respect petitioners, but also to foster their autonomy. On the other hand, they also insisted that reason-giving is mainly an activity directed toward the appellate court so as to avoid reversal. Five judges occupied a position along a continuum leading from one perspective to the other and seemed to be influenced by both to differing degrees. Two judges, F and B, claimed to be motivated by one to the exclusion of the other. In the first approach, by giving reasons judges aim not only at pedagogically explaining their decisions to claimants, but also at positively "helping" them by influencing their conduct. This conception is self-serving for judges. In reality, there is a risk that it may lead to paternalism. In the second approach, judges use reason-giving as a tool in their professional relationships with their fellow judges at the court and other judges the higher courts. This double discrepancy between the practice of reason-giving and the democratic rationale was particularly illustrated by Judge C, a senior judge. As soon as the issue of reason-giving came up, he exclaimed: "I over-give reasons,"<sup>25</sup> a phrase he repeated several

<sup>16</sup> John Rawls, *The Idea of Public Reason*, in *Political Liberalism* 212–54 (1993), and John Rawls, *The Idea of Public Reason Revisited*, in *Collected Papers* 573–615 (Samuel Freeman ed., 1999).

<sup>17</sup> See *supra* note 4.

<sup>18</sup> See, e.g., Amy Gutmann & Dennis Thompson, *Why Deliberative Democracy?* (2004).

<sup>19</sup> *Id.* (developing this view).

<sup>20</sup> *Id.*

<sup>21</sup> See, e.g., Philip Pettit, *Republicanism: A Theory of Freedom and Government* (1997).

<sup>22</sup> See Philip Pettit, *Deliberative Democracy and the Discursive Dilemma*, 11 *Phil. Issues* 268 (2001) (developing this argument).

<sup>23</sup> *Id.*

<sup>24</sup> See, e.g., Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (1999).

<sup>25</sup> Interview with Judge C, administrative court of Y (April 6, 2006).

times during the discussion. But what was it exactly that he meant by “over-giving” reasons? In relation to what was the giving an “*over-giving*”? The preposition “over” can bear two distinct meanings: it could refer to this extra attention in the writing of the opinion designed to avoid reversal by a higher court or to an effort to ensure that the foreign claimant understands the decision and can act accordingly. Reason-giving falls short of the democratic ideal in the first case because they it is transformed from a device designed to “protect” users from arbitrariness into a professional norm intended to “protect” judges themselves inasmuch as it furthers their career goals. In the second case, reason-giving goes beyond democracy because judges’ ambition is much greater than of merely providing petitioners with a ground for understanding and critiquing the decision. They aim at positively guiding people’s conduct. There is a double shift at play, both in the first and in the second approach to reason-giving, which is examined successively below.

#### 4 Reason-giving falls short of Democracy

The idea that reason-giving is a “self-protection” for judges smacks of paradox. In principle, judicial explanations are supposed to help the public as well as other decision-makers to understand the grounds of decisions. Institutions have the obligation to give reasons because others (other institutions or citizens) need grounds to criticizing them. This challenge can be channeled by formal appeals procedures (*e.g.*, for judicial decisions) or informal criticism (*e.g.*, criticism of politicians’ decisions in the press). The reason-giving requirement in adjudication presupposes that one cannot criticize the outcome of a judicial decision unless one has specific legal grounds for doing so. Appellants need to state a specific ground for appeal such as an error on the applicable law or a flaw in the judge’s reasoning.

From judges’ perspective, however, judicial explanations are also designed to *prevent* appeals on the part of the prefecture. My first question to introduce the topic of reason-giving was usually the following: Who is your audience when you give reasons? Judge A, a former high school teacher who had only been on the bench for six months, responded, despite the fact that she had previously argued that reasons have a humanizing function: “I would like to answer: to the claimant, but it’s a legal fiction. On the one hand, reasons are meant for lawyers, but above all for the prefecture, especially when we are reversing its decision.”<sup>26</sup> Fresh out of the school, A had not forgotten her lessons. She remembered the prevailing doctrinal justification of the reason-giving requirement, *i.e.*, democratically empowering petitioners by making public decisions accessible. Yet her experience as a judge, no matter how brief, had already familiarized her with a professional norm bearing on the court: a good judge is a judge who is not too often overruled by the appellate court. As the Law and Economics literature has shown, judges maximize their utilities and are not insulated from external pressures—in particular, they do not like being reversed

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<sup>26</sup> Interview with Judge A, administrative court of Y (May 23, 2006).

by higher courts.<sup>27</sup> What is the consequence of this so-called “reversal aversion” and reputation-seeking behavior on the justification of decisions?<sup>28</sup>

All seven of the judges interviewed mentioned, in varying degrees, that what displeased them most was to see one of their decisions overruled as a result of an appeal by the prefecture. This happens when they have dismissed a prefectural order and the prefecture’s legal counsel appeals their decision. Petitioners often appeal from decisions by which a prefecture order is affirmed, but this case does not seem to bother the judges. Most petitioners who have adequate resources try their luck and appeal, even though they do not have a case. This type of appeal does not usually raise doubts about judges’ competence and is not perceived as threatening. Concern arises when the prefecture appeals, that is, when the prefecture’s representatives deem the judges too “generous” in allowing a particular petitioner to stay in the country. In this type of appeal judges feel that their professional skills are being called into question. As a consequence, an important part of reason-giving is designed to avoid this possibility. As C put it:

The more you over-give reasons, the less you are appealed [by the prefecture]. In other words, you are convincing when you give reasons. When the prefecture appeals a three-line opinion, it’s easy for them to write an application for appeal. But if it’s two pages long, they must write an application responding to each argument.<sup>29</sup>

When they reverse a prefectural order, judges give reasons not so much to convince petitioners that they were right to contest the order, but to convince the administration. This is typical of public law litigation: the governmental agency is the party to convince, because it is the powerful party which judges are supposed to keep under check. In this process, the giving of reasons becomes a protective device for the judges to preempt professional opprobrium.

Judge B discussed the full consequences of the fact that the reason-giving requirement has become a professional norm. There are tactics to fulfill the requirement quickly and efficiently. B’s strategy consists in turning the reason-giving requirement into an organizational device for his work. Because reason-giving is so important from a professional point of view, B chooses to dedicate most of his time to it, during the preparation of the deportation hearings. This means that he transforms a proceeding that is, in principle, oral into a written proceeding, whereby the essential aspects of a case are decided and put down on an informal written record prior to the hearing. To facilitate this enterprise, B created for himself an electronic “reasons database”<sup>30</sup> listing all the possible reasons he may need

<sup>27</sup> See, e.g., Rafael Gely & Pablo T. Spiller, *A Rational Choice Theory of Supreme Court Statutory Decisions With Applications to the State Farm and Grove City Cases*, 6 J.L. Econ. & Org. 263, 265 (1990); Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 Sup. Ct. Econ. Rev. 1 (1993); and Thomas J. Miceli & Metin M. Coşgel, *Reputation and Judicial Decision-Making*, 23 J. Econ. Behav. & Org. 31 (1994).

<sup>28</sup> David E. Klein & Robert J. Hume, *Fear of Reversal as an Explanation of Lower Court Compliance*, 37 Law & Soc’y Rev. 579, 580 (2003).

<sup>29</sup> Interview with Judge C, administrative court of Y (April 6, 2006).

<sup>30</sup> Interview with Judge B, administrative court of Y (June 5, 2006).

in the various areas of law he is working with. To reduce the time he spends on deportation hearings, while ensuring that his opinions are securely justified, he has developed the habit of systematically writing – before the hearings – opinions rejecting the petitioner’s demand. When a judge affirms a prefectural deportation order, she or he must explain the decision exhaustively by responding to every single argument that was raised by the claimant in his application for review.<sup>31</sup> In contrast, when judges reverse, they only need to mention the ground they chose for reversal.<sup>32</sup> B systematically prepares rejection decisions, not because the petitions are doomed to fail on their merit, but purely as an organizational device in his work. Since opinions rejecting a demand must be more comprehensive because all the arguments raised in the petition ought to be answered, B finds it easier and more practical to answer all those arguments in advance by cutting and pasting from his reasons database. When the hearings change his mind and convince him to grant the demand, he can simply erase the supernumerary arguments: “It’s always simpler for me to write a rejection draft because you must answer all the arguments and it’s less work afterwards.”<sup>33</sup>

B’s method shows that in current practice the reason-giving requirement far from being a proxy for democracy may instead bias judicial outcomes. Paradoxically, the requirement creates an incentive to reject petitions. Because rejecting a petition demands more reason-giving, it is more “efficient” from an organizational point of view to systematically draft rejection decisions. Yet psychologically, one might suspect that a rejection-oriented preparation of a case will negatively influence the outcome. Not surprisingly, B revealed that his “annulment rate,” *i.e.*, the percentage of the deportation orders that he overrules, is significantly lower than the average rate for the court. B’s rate is around twenty percent whereas the entire court’s rate is closer to twenty-five percent.

A further distortion comes to bear on the process as well. In principle, imposing a reason-giving requirement on judges not only benefits the parties involved in the litigation but, by the same token, also facilitates the higher court’s exercise of its supervisory jurisdiction.<sup>34</sup> The superior court exercises a supervisory power, either by way of statute (appeal) or by its inherent powers (judicial review) over inferior decision-makers such as judges. In the case of French deportation hearings, the higher court, the *cour administrative d’appel*, can review the trial court’s decision through an appeals procedure. Explanatory opinions below show the relationship between the evidence and the decision and enable the higher court to determine whether irrelevant considerations have been taken into account. This

<sup>31</sup> This rule has been reaffirmed several times by the Conseil d’État, *see, e.g.*, CE Ass. July 7, 1978, Croissant 292, AJ 1978, p. 559, chron. O. Dutheillet de Lamothe & Y. Robineau; CE Dec. 3 ; CE Sect. May 23, 2001 *Assoc. pour la défense de l’environn. du pays artésien et du Limousin*, CJEG 2001, p. 474, concl. F. Lamy.

<sup>32</sup> When judges give satisfaction to petitioners, their obligations are much more limited. In virtue of the principle of “economy of arguments” (“*économie des moyens*”), established by the Conseil d’État in CE May 29, 1963, *Maurel*, p. 334, judges can restrict themselves to the (sole) argument that they take as a ground for the outcome of the case.

<sup>33</sup> Interview with Judge B, administrative court of Y (June 5, 2006).

<sup>34</sup> *See* Paul P. Craig, *The Common Law, Reasons and Administrative Justice*, 53 Cambridge L. J. 282 (1994).

explains how something like professional honor can be involved in reason-giving. For instance, Judge C is very proud of his reason-giving, which works for him as a “label.” According to him, his well-argued and thoroughly justified opinions are famous throughout the whole circuit: “When the prefect of X receives a decision, he immediately knows it’s from Judge C.”<sup>35</sup> C argues that his reason-giving skills account for the “solidity” of his decisions in that they are only very seldom overruled by the court of appeals, partly because the prefecture rarely dares to appeal.

The transformation of the reason-giving requirement from a rule intended to benefit claimants into a political tool within the judicial community is not an undocumented conjecture, but was explicitly endorsed by the court’s chief judge (“*président de juridiction*”), G. As the head of the court, G is entrusted with a hierarchical and disciplinary role. He must assign a yearly grade to the judges in his court (all civil servants in France are subjected to periodical grading)<sup>36</sup> and he is in charge of distributing bonuses. G essentially bases his assessment on the number and nature of appeals. According to G, this is the case because the court—which included thirty-four judges at the time of the survey—is too large to allow him to evaluate each judge in person by attending hearings, sitting in deliberations or reading sample opinions. It appeared to G more efficient to base his assessment on appeals. Each time an appeal is entered against a judgment of the court, the chief judge receives a copy of the appeal together with a copy of the contested decision. “I must sign them, so I see the quality of the writing, whether it’s well argued and legally justified.”<sup>37</sup> The chief judge thus only actually reads a judge’s opinion when it is the object of an appeal. According to G, a lower reversal rate indicates a better judge, who deserves promotion. The performance indicator aspect of reason-giving sheds a new light on the reason-giving requirement, as it explains why it has become another professional norm within the court.

In theory, reason-giving should be a means of furthering democracy by facilitating the accountability of decision-makers to the public and the legal system. One role traditionally assigned to reason-giving is to constrain the potentially misguided or arbitrary exercise of power, especially of judges who are not elected and are therefore not directly accountable to citizens. Instead, in the case under examination, reasons appear to be crafted partly to preserve professional standing and shield judges from accountability. There is a form of contradiction, or at least, a tension at play. Judges coin their reasons either with a view toward furthering their professional advancement or toward their professional duties. It is more beneficial to their career to give reasons aimed at the appellate court, but their mission is to give reasons directed to claimants.

<sup>35</sup> Interview with C.

<sup>36</sup> French judges are civil servants and, as such, they are life-tenured. They do not run the risk of being dismissed even if they behave in a way contrary to the prevailing standards among their superiors. The only professional “sanctions” are the annual grading and bonus distribution.

<sup>37</sup> Interview with Judge G, administrative court of Y (June 29, 2006).

## 5 Reason-giving goes beyond Democracy

There is a second way in which the practice of reason-giving at the court of Y appeared to move away from straightforward democratic justifications. A couple of judges argued that the reasons they give are mainly directed at claimants and have pedagogical virtues. At first glance this explanation seems perfectly consistent with the democratic rationale: citizens should be able to understand public decisions so as to act on them. Judge E, a young judge who had arrived in this court two years before, explained, using the same expression as C, that he “over-gives reasons” in this type of litigation because decisions must be understandable by foreign petitioners who do not necessarily have a command of either the language or the legal system.<sup>38</sup> He revealed that he was especially sensitive because his wife is a foreigner and they had been confronted with the intricacies and harshness of the French administration while applying for her residence permit. What had struck him most during this personal ordeal was the dearth of explanations and communication on the part of the administration. Accordingly, he considered it to be the responsibility of judges not only to allow petitioners to “express themselves” during the deportation hearing, but also to write clear and accessible opinions. Judge F, who shares this viewpoint, went so far as to saying that the hearings constitute a collective catharsis: “There is a hearing catharsis. I don’t want people to leave frustrated from my hearing. It’s often the first time that people can express themselves.”<sup>39</sup>

When pressed on the issue, other judges admitted that what they initially presented as a pedagogical use of reasons is really much more ambitious. For instance, Judge C, who otherwise prides himself for shielding his decisions from appeals by over-giving reasons, explained that reasons also have a moral status in relation to claimants: “In this administrative court, it takes us three to four years to judge, so handing down a three-line opinion would be outrageous.”<sup>40</sup> In his view, just as in E’s, reason-giving is a way to compensate for the failures of the administrative process. Judges use reasons as one of the only legal devices available to counterbalance, even tentatively, the brutality of encounters with the immigration agencies.

These interviews suggest that judges, even when they consciously adopt a democratic justification for reason-giving, have much more in mind than merely achieving pedagogical objectives and enabling criticism. They try to *communicate* with claimants. Their goal is not only to enable petitioners to understand the decision and appeal it, but also to show respect in their duty to petitioners. They develop the non-instrumental rationale, arguing that petitioners are owed reasons as part of what is owed to them as a person. One should be told what one is thought to have done and have an opportunity to respond. This goes further than saying that judges, as governmental agents, should remain neutral. In this view,

<sup>38</sup> Interview with Judge E, administrative court of Y (June 2, 2006).

<sup>39</sup> Interview with Judge F, administrative court of Y (May 19, 2006).

<sup>40</sup> Interview with Judge C, administrative court of Y (April 6, 2006).

judges should give reasons as a way of respecting citizens and petitioners. In doing so, they acknowledge people as autonomous beings. Reason-giving is a mark of respect because it implies that public institutions assume people are autonomous beings, who can choose whether to adopt or contest those reasons.

In this view, reason-giving is not only a passive way of respecting people, of merely refraining from interfering. It is not only a principle of self-restraint. Reason-giving makes heteronomy less unpalatable, to be sure, but it even aims at fostering autonomy. We are autonomous because we are capable of intentional action, *i.e.*, of holding an opinion about our situation and the situation around us. Reason-giving can increase claimants' autonomy by helping them to view their situation more clearly. This is done in two ways. First, reason-giving, it is thought, helps people to make better-informed choices, by having more information available, in particular on the rules that apply to them. Second, reason-giving also opens new courses of action and introduces new goals, which people may or may not pursue—either way, it generates more democratic possibilities. It may lead people to discover valuable options of which they were not previously aware. Various options appear as a result of ethical reason-giving, which citizens and petitioners may then choose whether to pursue or not. Reason-giving is a way to reinforce this openness. This is why reason-giving involves respecting people's ability to conduct their lives by helping them to do so.

For example, I witnessed a deportation hearing presided over by Judge F during which a man who had been residing illegally in France for a couple of years was appealing a deportation order that had been issued ten months earlier.<sup>41</sup> His lawyer argued that the order constituted a violation of his "right to respect for private and family life," in the sense of Article 8 of the European Convention on Human Rights, since he was living together with his (French) partner in Paris, actively taking care of her children, and was planning to marry her. Later that day, I asked Judge F what he had decided in this case. He answered that it had been a hard case, because it was obvious to him that the order was indeed interfering with the petitioner's family life. He nevertheless decided to affirm because under French law the legality of deportation orders must be assessed based on petitioners' situation *on the issuing date*. At the time the order was entered, the petitioner had not yet moved in with his partner and was therefore precluded from claiming violation of his right to pursue a normal family life. However, Judge F said that in this case, like in other cases of this type, he would write a detailed opinion explaining very precisely why he had sustained the order, so as to enable the petitioner to adapt his conduct.<sup>42</sup>

There is a pedagogical virtue in giving reasons. They are directed to claimants. I write for the claimant. Sometimes I write for the prefecture, but most often for the claimant. Here, for example, I made it clear that the order is assessed at its issuing date. To help them understand, I was careful to distinguish the issues of the family life and of the professional life, both to have them accept something

<sup>41</sup> Field Notebook, hearing presided over by Judge F, administrative court of Y (May 17, 2006).

<sup>42</sup> This attitude, which appears to be relatively common among judges dealing with immigration law, is made possible by the fact that a vast majority of deportation orders are not enforced. *See, e.g.*, Xavier Vandendriessche, *Le droit des étrangers* 50 (2005).

that is not easy and to help them take a fresh start and apply again. The thing not to do is to go back to Algeria.<sup>43</sup>

In other words, Judge F was claiming that due to the reasons given in support of his decision, the petitioner would be able to understand that his only options were not either to go back to his country or continue to live a clandestine life in France, but that there could be a third way. Deportation orders expire and must be reissued every twelve months.<sup>44</sup> Since any new deportation order issued after his family life had started would be illegal, he should wait for a new order to be filed against him and then appeal it, this time with a much greater chance of reversal. The reason given, “the legality of the deportation order is assessed on the basis of the petitioner’s situation on the day the order was issued,” is the kind of explanatory reason that can help petitioners make choices for themselves. In contrast, not informing the petitioner of the decision, its reasons, and the possibilities for their consideration and possible action reflects a lack of respect for the rational basis of democracy as well as the individual. Not informing citizens or petitioners may also in effect make the legal process a tool of injustice that diminishes lives in the sense that people are not in possession of the necessary means to shape and pursue their goals.

In this example, Judge F is not trying to suggest new life plans or goals, but merely is giving information regarding the grounds upon which the court intervenes in the petitioner’s life. The trouble, however, with this way of thinking about reason-giving as a way of enhancing people’s autonomy is that it can appear paternalistic. On the one hand, the practice of reason-giving seems to promote autonomy by suggesting values that people can embrace as part of their decisions about how to conduct their lives. On the other hand, in the course of this activity, government agents might not resist the temptation to assume they know what is best for others and impose certain values on people. “Democratic reasons” run the risk of turning into paternalistic reasons. The accusation of paternalism may seem excessive if one understands paternalism, in its classical sense, as coercive interference of a person’s liberty of action on the ground of the welfare or interests of the person being coerced.<sup>45</sup> The element of coercion is missing. Reasons, though defended on paternalistic grounds, do not by themselves interfere with personal liberty. Claimants are given clear information on the entire range of options they can consider. Reasons, taken alone, do not interfere with petitioners’ liberty, but such reasons accompany judicial decisions, which may be coercively enforced, although this is rarely the case. It seems sufficient that they *might* be enforced whenever authorities so decide. The problem is that such decisions, which do interfere with claimant’s liberty, are sometimes justified by reference to their own good, happiness, welfare, or interest.

In a hearing presided over by Judge C, a woman from western Africa, Mrs. B, contested her deportation order on the ground that she had been residing in France

<sup>43</sup> Interview with Judge F, administrative court of Y (May 19, 2006).

<sup>44</sup> Article L. 551-1(3) of the *Code de l’entrée et du séjour des étrangers et du droit d’asile*.

<sup>45</sup> See John S. Mill, *On Liberty* 13 (1859); Gerald Dworkin, *Paternalism, in Morality and the Law* 108, (Richard A. Wasserstrom ed., 1971).

for the past twenty years. At that time, under a 1998 statute,<sup>46</sup> irregular migrants benefited from automatic regularization of status after they could prove ten years of residency.<sup>47</sup> Judge C questioned Mrs. B and her husband, who was also present:

*JUDGE C:* So Madam, you have been in France since 1986?

*MRS. B:* Yes.

*JUDGE C:* You have been here for twenty years, so I hope your French is good. Well, not that it's a criterion yet. But it will come!

*JUDGE C:* Your husband is working?

*MRS. B:* Yes.

*JUDGE C:* Do you file your tax returns?

*MRS. B'S HUSBAND:* (mumbles)

*MR. B'S LAWYER:* I don't think so.

*JUDGE C:* But the best proof of Madam's presence in France are the tax returns! Why don't you file them? This is the former tax expert speaking. Aren't there any connections between the prefecture and the tax administration?

*PREFECTURE'S COUNSEL:* No, not at all.

*JUDGE C:* It might come some day.

*PREFECTURE'S COUNSEL:* Yes, maybe.

*JUDGE C:* No, I'm just joking.<sup>48</sup>

In this brief exchange, Judge C admonishes Mrs. B—implicitly or explicitly—on what she ought to do: she should speak fluent French, her husband should be employed, and they should file tax returns. Judge C is directing claimants to do certain positive things (learning French, working, filing tax returns) but in doing so, he is also giving reasons in advance for his decision to come. The “advice” have an argumentative value and can be reused to justify the decision. For example, a decision confirming Mrs. B's deportation order would probably proceed by noting her lack of “integration” into French society, as evidenced by her poor command of the language, and by interpreting it as a sign that she could not have been a resident for the twenty years she claims. The argument could proceed by stressing that neither Mrs. B nor her husband have been filing tax returns during that period, such abstention being taken to indicate that they were not present, or at least not continuously, in the territory.

In the judicial setting, paternalism is not necessarily defined by coercion.<sup>49</sup> A lesser standard suffices to characterize a mild version of paternalism in that context. Paternalistic actions need not be coercive and need not involve an attempt to interfere with the liberty of action of a person. Such actions need not even involve an attempt to control the behavior of the person. Admonition by an

<sup>46</sup> Law No. 98-349 of May 11, 1998, Journal Officiel de la République Française [J.O.] [Official Gazette of France], May 12, 1998.

<sup>47</sup> This provision has been repealed by Law No. 2006-911 of July 24, 2006, Journal Officiel de la République Française [J.O.] [Official Gazette of France], July 25, 2006, under which irregular migrants no longer benefit from automatic regularization of status after ten years' residency in France. Regularization now takes place on a case-by-case basis.

<sup>48</sup> Field Notebook, hearing presided over by Judge C, administrative court of Y (July 7, 2006).

<sup>49</sup> Bernard Gert & Charles M. Culver, *Paternalistic Behavior*, 6 Philosophy and Public Affairs 45, 48 (1976) (defining paternalism by the violation of moral rules).

official such as a judge to act in a certain way so as to further one's supposed well-being seems sufficient to characterize paternalism. In the administrative court of Y, such a form of paternalism appeared in the way in which judges formulated their reasons. In the course of explaining why claimants were not successful on the merits, judges often introduce advice or strong recommendation to do *x* or *y*. This was particularly evident during the hearings but is less obvious in the written opinions, arguably because judges are reluctant to leave a record of such arguments. A whole range of more or less paternalistic reasons are developed. The most common consist of arguments that petitioners should not be granted a residence permit because they did not take all the necessary steps to apply for it through the regular procedures (either they abstained from applying altogether, or they did not approach the proper agency, or even that they failed to complete their application). Other paternalistic reasons recurrently surface regarding the awarding of the "*carte de séjour vie privée et familiale*," a special residence permit that may – among other grounds – be granted to immigrants who are the father or the mother of a child residing in France, under the condition that the applicant "effectively contributes to the maintenance and education of the child since his/her birth or at least since a year."<sup>50</sup> Inevitably, the justification of the decision turns on the issue of whether or not the petitioner is a good parent (from the legal standpoint). Hearings were often the opportunity for judges to ask petitioners questions such as "Do you ever pick your son up from school?" or "Do you ever take him over weekends?" or even "Do you ever buy clothes for him?" Cases involving student visas also give rise to such intrusive questioning and admonishing. The yearly renewal of visas is conditioned upon the "real and serious character" of the studies, and is the occasion for claimants to be reminded that they should have studied harder or gotten better grades if they wanted to maintain their status.

There is a potential drifting into paternalism included in the democratic rationale of reason-giving. Giving reasons specifically tailored for particular petitioners and aiming at actively guiding them can result not in fostering their autonomy but, on the contrary, in interfering with it. A judge may direct petitioners to act in certain ways they may think valueless in order to become eligible for residence permits he or she assumes they want. Learning French, being "integrated" into French society, filing tax returns, and taking care of children in certain ways may figure among the requirements to obtain residency but can appear preposterous to some people. Implicit in judges' reasoning is the idea that petitioners' lives can be improved by directing claimants into some acts even though they do not necessarily think them valuable. The question therefore remains whether this (mild) form of paternalism is justified under the circumstances.

## 6 Conclusion

The examination of the way in which these decision-makers envision their giving of reasons is revelatory in several ways. That reason-giving is essentially a

<sup>50</sup> Article L. 313-11(6) of the *Code de l'entrée et du séjour des étrangers et du droit d'asile*.

democratic component embedded in the legal system hopefully appears doubtful at this point. This is not to say that reasons cannot sometimes achieve an important democratic function, but that this happy result is a contingent matter. Reason-giving is a practice highly dependent upon context. In this sense, normative and empirical questions pertaining to the requirement to give reasons are often intertwined. The determination of whether reasons are valuable is dependent upon the circumstances of their formulation. Insufficient reasons may hurt claimants. Too many reasons can also be a hindrance. This Article has aimed at illustrating this mixing with concrete examples. Of course, in the conformation of the hypothesis, one cannot draw general conclusions from a reduced number of interviews and observations, but again one can hardly ever guarantee that any predetermined value will be achieved by the giving of reasons. This skeptical conclusion particularly seems to apply to the democratic justification. In practice, the degree to which individuals are empowered by the reasons given them is dependent upon the way in which decision-givers envision their reason-giving activity, and this representation is itself conditioned by the social setting of the court. In other words, it would be an overstatement to argue in unqualified terms that the reason-giving requirement fosters democracy or is an essential component of liberal democracy. Far from aspiring to rebut the democratic justification, the empirical research helps enrich the discussion of the reason-giving requirement by drawing attention to social aspects that are often neglected in theoretical discussions.

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