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ARIE ROSEN

BOOK REVIEW

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Alon Harel, *Why Law Matters*. Oxford: Oxford University Press, 2014, pp. xii + 240, £34.99

Normative debates in law often involve instrumental arguments. We argue for a particular institutional arrangement or for the reform of a certain doctrine by showing that it would lead to favorable results for society. Implicit in these arguments is the notion that law is an instrument for achieving desirable goals and the promotion of preferred values, and that it is valuable as long as it fulfils its instrumental purposes. In his book, Alon Harel challenges this approach to law and legal debates. Legal institutions and legal doctrines, says Harel, are valuable ''as such'', regardless of their ability to lead to substantively good social arrangements, and this should inform our positions on major debates in law and in politics.

The book comprises five substantive chapters, four of which are based on formerly published articles. Going through a series of relatively independent topics in public law, Harel debunks instrumental reasoning and offers his own non-instrumental account of the value and desirability of key legal institutions and procedures. Harel finds such non-instrumental arguments attractive for two main reasons. First, while instrumental justifications are always contingent and require ample empirical evidence for their substantiation, non-instrumental arguments seem more stable and attractive.[1] An instrumental argument, for example, against privatization of prisons will have to provide comprehensive empirical evidence regarding the consequences of privatization and the comparative performance of

[1] Alon Harel, *Why Law Matters* (Oxford: Oxford University Press, 2014), p. 3.

state-owned prisons.[2] Harel's non-instrumental argument against privatization, on the other hand, does not depend on the results of such an extensive empirical investigation. Second, and more importantly, instrumental justifications suffer from what Harel calls 'inauthenticity' or 'insincerity'.[3] Harel maintains that the "genuine" source of popular support of legal and political institutions is found in their non-instrumental credentials.

The book's notion of non-instrumentalism is broad, and seems to encompass several different types of normative arguments: accentuating the value of formal determination over substantive correctness, emphasizing procedural values over outcomes and preferring deontological considerations over consequentialist ones. Although these types of arguments are not new in either legal or political theory, Harel succeeds in employing them in original and provocative ways. He advances non-instrumental arguments in unexpected places: in theorizing the relations between rights and values, in an argument against the privatization of prisons, in the justification of binding constitutionalism and, perhaps most controversially, in favour of judicial review of legislation.

By focusing on the *sort* of argument that is employed (rather than solely on the normative conclusion), the book also contributes to a larger debate that is of both theoretical and practical significance. The question of the proper grounds on which law is respected and valued is more than an academic curiosity: the way we practice law and design our legal institutions, and the way we interpret law and legitimately contribute to its content, are highly sensitive to the question of its value.[4] The question of whether law is valuable mainly because it "gets things right" and is likely to bring about beneficial outcomes or mainly for correctness-independent reasons

[2] *Ibid.*, p. 78.

[3] *Ibid.*, p. 4.

[4] For examples of the significance of different attribution of values to legal institutions, *see* Lon L. Fuller, *The Law in Quest of Itself* (Boston: Beacon Press, 1966); William N Eskridge, "Dynamic Statutory Interpretation", *University of Pennsylvania Law Review* 135 (1987): p. 1479; Ronald Dworkin, "The Moral Reading and the Majoritarian Promise", in Harold Honju Koh and Ronald C Slye (eds.), *Deliberative Democracy and Human Rights* (New Haven: Yale University Press, 1999); John F Manning, "Textualism and the Equity of the Statute", *Columbia Law Review* 101(1) (2001); Jeremy Waldron, "The Core of the Case against Judicial Review", *Yale Law Journal* 115 (2005): p. 1346.

(such as its democratic credentials) is significant to a series of practical and theoretical debates in law and in politics.[5]

It is therefore worthwhile to focus on this general point, aside from any particular argument offered in the book, and ask whether the book is successful in substantiating its overarching claim that law matters for non-instrumental reasons. I start by critically surveying the book's argument, distinguishing between the different meanings it associates with non-instrumentalism and querying whether there is truly a common principle underlying the different arguments it offers. I then focus on two particular examples, suggesting that seemingly non-instrumental justifications in fact include instrumental elements, inadvertently smuggled into the argument through stipulative definitions.

The first substantive chapter is dedicated to the separateness of rights and values. Harel reacts to the common notion that narrowly defined rights (such as freedom of speech or privacy) are only valuable to the extent to which they promote and protect privileged values (such as human dignity or individual autonomy). After persuasively pointing out the shortcomings of this view in accounting for contemporary legal practice, Harel suggests that there is something to be said in favour of the partly arbitrary, narrow definition of specific rights. He claims that although narrowly defined rights never fully protect underlying values, they are still valuable *as such*. He explains that a finite catalogue of circumscribed rights is necessary for the concretization of abstract values[6]; that is, for determining what "autonomous choices" or "human dignity" mean in our culture.[7]

It is not clear whether Harel in fact mounts here a non-instrumental justification of rights, or successfully defends the notion that rights matter "as such".[8] Ultimately, even according to Harel's own account, it seems that rights matter as necessary instruments for the concretization of a given set of values.[9] Instead, what Harel seems to argue for in this chapter is the notion that rights are valuable for reasons that have to do with their form and not their content,

[5] For a general account of the relation between the value of law and the logic of its development, *see* Arie Rosen, "Two Logics of Authority in Modern Law", *University of Toronto Law Journal* 64 (2014): p. 669.

[6] Harel, *supra* note 1, at 42.

[7] *Ibid.*, p. 41.

[8] Although this is clearly Harel's general claim. *See Ibid.*, pp. 2, 8–9.

[9] *See* especially *Ibid.*, p. 16 ('It is argued here that legal, constitutional, or political rights are part of a set of social, political, and legal practices which facilitate and contribute to the realization of values.').

regardless of the limited overlap between any particular right and the value it aims to protect and promote. Although from the perspective of values there is an arbitrary element in the narrow delimitation of the content of rights, still this formal delimitation is valuable and important in and of itself. We can therefore label this sort of argument 'formalist'.

The following two chapters make a different non-instrumental argument regarding various roles the state should and should not play in our lives. Harel outlines here, on the one hand, the limits of legitimate privatization and, on the other hand, the limits to the sort of decisions that the state can legitimately make. Both chapters reject the primacy of outcome-related (''instrumental'') evaluation of legal institutions. When it comes to privatization, Harel argues, the question is not which agent – the state or a private actor – is more suited to making the best decisions (say, regarding the way prisons should be run). Rather, the provision of some goods – ''intrinsically public goods'' – is agent-dependent in the sense that the goods simply cannot be provided by any other agent but the state. Engaging in warfare, as well as punishment for criminal offenses, are offered as examples of goods that are intrinsically public and whose provision is agent-dependent in this way.[10] The provision of these goods by private actors is either impossible by definition[11] or is grossly offensive to the moral equality of individuals.[12]

Intrinsically public goods can only be provided by people whose actions and decisions can be attributed to the state. This leads to a focus on official action and the importance of procedure. State officials, explains Harel, observe a particular deferential mode of reasoning, attentive to past decisions of the political leadership. It is this mode of reasoning that makes them exclusively suitable for providing intrinsically public goods in the name of the state. Only by engaging in deferential reasoning can one act as a public official, and only the actions of a public official are capable of providing goods that are intrinsically public in their nature.

The same procedural emphasis underlies Harel's claim in the following chapter that some decisions – decisions that can never be the product of deferential reasoning – cannot be legitimately

[10] *Ibid.*, pp. 96–101.

[11] *Ibid.*, pp. 95–96, 103.

[12] *Ibid.*, pp. 98, 102.

attributed to the state.[13] In both chapters, Harel invokes a procedural notion of non-instrumentalism, which is similar but not identical to the formalist one used in the previous chapter. Here, what commands respect for the legal institution is not the need to arbitrarily delimit concrete legal norms, but the virtues of the procedure observed by decision-makers. It is not enough merely that decisions are made; the value of these decisions depends on the employment of a particular deferential and integrative mode of reasoning by decision-makers.

A similar procedural logic is employed in the final chapter, where Harel defends judicial review. Judicial review, he claims, is justified based on the inherent right to a hearing that every right-holder has. To have a right, says Harel, entails having a right to a hearing when one believes her right has been infringed.[14] Adjudication for Harel is the procedural embodiment of the right to a hearing.[15] He therefore concludes that it is not the superior reasoning capacity of judges or the greater suitability of their position for the protection of rights that justifies judicial review. Rather, judicial review is justified on correctness-independent grounds, in relation to the formal procedure observed by courts, a procedure that necessarily recognizes the claimant's right to a hearing.

The penultimate chapter invokes an altogether different notion of non-instrumentalism. Here, Harel advocates for what he calls ''binding constitutionalism'' (i.e. the legal entrenchment of moral and political rights). He argues that law should set the limits as to the content of legitimate legislation, but insists that this requirement is valuable ''as such'', that is, separately from the actual enforcement of these limits. Constitutionalism, he claims, is valuable even when constitutional rights are unenforceable since it creates a duty to respect these rights and does not leave the matter of their protection to the discretion of politicians. Invoking a republican notion of freedom as non-domination, Harel argues that the constitutional entrenchment of rights is superior to the protection of rights that is due only to the good will or inclination of the legislature. Only the constitutional entrenchment of rights frees citizens from living ''at

[13] *Ibid.*, pp. 126–128.
[14] *Ibid.*, pp. 204–205.
[15] *Ibid.*, pp. 212–213.

the mercy'' of the legislature.[16] This non-instrumental insight, he argues, explains the value of under-enforced and unenforceable constitutions.

Here, in contrast to the other chapters, non-instrumentalism takes the shape of simple non-consequentialism: arguing for the importance of the entrenchment of moral and political rights regardless of whether it in fact contributes to their protection.[17] This is a considerably different understanding of non-instrumentalism than those that are invoked elsewhere in the book. Here, Harel does not consider different modes of ''flight from substance'' to either formalism or proceduralism. It is neither the mere determination of constitutional rights (regardless of their content) nor the particular procedure behind their entrenchment that makes them valuable. Rather, constitutional rights are important because they entrench pre-existing moral and political rights, regardless of whether they are enforced or not; that is, regardless of the consequences of such entrenchment.[18]

Does the book succeed in showing that law matters ''as such'', for non-instrumental reasons? It depends what notion of non-instrumentalism one has in mind. We have seen that the formalist justification for narrowly defined rights involves a consequentialist element (i.e. that their narrow formulation facilitates the creation of a culture of autonomy and dignity), that the proceduralist justification involves a substantive requirement for a particular mode of reasoning that goes beyond mere formal determination, and that the non-consequentialist argument in favour of unenforceable constitutional rights involves an assumption regarding the substantive content of those rights. The book's short introduction and conclusion do not address these differences, which seem pertinent to its overall claim. This is particularly noticeable in the discussion of constitutionalism, in which the book makes explicit assumptions regarding the substance of entrenched rights. By assuming that constitutional directives accurately entrench pre-existing moral rights and can be unproblematically referred to by courts in the evaluation of indi-

[16] *Ibid.*, p. 149.

[17] *Ibid.*, pp. 148–149.

[18] While Harel encourages us to disregard arguments of content and substance in previous chapters, content takes centre stage in his argument in favour of constitutionalism. The chapter's starting point is that constitutional rights correctly mirror and entrench pre-existing moral and political rights; that is, the argument's starting point is that constitutional rights by definition ''get things right,'' morally speaking. *See Ibid.*, pp. 153–158. I will come back to this point shortly.

vidual grievances, the book seems to ignore the main challenge supporters of judicial review have to face.

Harel is not troubled by the lack of commonality between his different arguments.[19] From the book's perspective, it seems, all of the arguments equally offer viable alternatives to instrumental justifications and they are valuable exactly for the reasons instrumental justifications are problematic: they are necessary and are not dependent on fickle empirical data, and they authentically capture the source of the institutions' popular support. Indeed, in contrast to instrumental justifications, the book offers arguments that seemingly make no reference to contingent empirical data and usually progress from basic definitions (e.g. definitions of 'dignity,'[20] 'punishment,'[21] 'deliberation,'[22] 'public official,'[23] 'war,'[24] 'constitutional directives,'[25] 'hearing'[26] and 'having a right')[27] to full justifications of existing institutions. This methodology is perhaps the only feature common to the different chapters, and as such deserves our attention and scrutiny.

It is clear that with the book's particular mode of argument, the definitions with which one starts are of paramount importance. In this specific case, it seems that various modes of ''instrumentalism'' creep into Harel's suggested justifications through some of his thick – and sometimes admittedly stipulative[28] – definitions. Consider, for example, the book's discussion of privatization and the duty to leave the provision of some goods to public officials. As noted above, Harel's definition of 'a public official' is quite rich, particularly when compared to the ordinary way in which this term is used, referring simply to an individual formally appointed to a governmental position. Harel explains that –

[19] *Ibid.*, p. 5.
[20] *Ibid.*, pp. 55–63.
[21] *Ibid.*, pp. 70–72.
[22] *Ibid.*, pp. 82–86.
[23] *Ibid.*, p. 67.
[24] *Ibid.*, pp. 99–100.
[25] *Ibid.*, pp. 157, 177–178.
[26] *Ibid.*, p. 202.
[27] *Ibid.*, pp. 204–205.
[28] See, e.g., *Ibid.*, p. 153.

> Public officials are (by definition) those who … deliberate in a way that is attentive and even deferential to political leaders and representatives, and consequently, their acts are performed in the name of the state.[29]

This definition strikes me as controversial and – more importantly for Harel – contingent.[30] Surely, not all public officials reason in a deferential manner. It is possible that this is how things *ought* to be, it is even possible that this is how things might be sometimes in some jurisdictions, but this is surely not how things actually are "by definition". Moreover, the definition seems to smuggle substance into a purely procedural description. Is "deferential reasoning" truly a procedural quality? At the very least, one has to admit that this is a very different type of "proceduralism" from the one normally invoked by the champions of political authority on procedural grounds.[31] Engaging in a particular mode of reasoning is not the same as the observance of formal procedures of drafting, amendment, deliberation, voting and assent. After all, the decisions of someone who "engages in deferential reasoning" are likely to be *substantively deferential*, and this, I think, undermines any strong claim of non-instrumentalism or indifference to outcomes.

Here is another example. In his discussion of binding constitutionalism, Harel characterizes the instrumental justification he rejects in the following way:

> Under constitutional instrumentalism … [b]inding constitutional directives are desirable because they are likely to be complied with by the organs of the state, and therefore to the extent that these directives are just they are likely to bring about a just society, guarantee better protection of human rights, etc.[32]

As an alternative, Harel suggests a justification of constitutionalism that is independent of the actual content of institutional decisions.[33] He argues that "*constitutional* rights matter, as the constitutional entrenchment of pre-existing moral/political rights is valuable (independently of whether such an entrenchment is conducive to the protection of these rights)".[34]

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[29] *Ibid.*, p. 67.

[30] Harel notes that engaging in deferential reasoning is open in principle even to individuals not formally appointed as officials, and also that not every formal decision by officials is necessarily valuable and attributable to the state. *Ibid.*, pp. 93–94. This is telling as it shows the limited correspondence between the employment of deferential reasoning and official action as it is normally understood.

[31] *See, e.g.*, Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999).

[32] Harel, *supra* note 1, at 134.

[33] *Ibid.*, p. 135.

[34] *Ibid.*, p. 148.

This argument might sound bizarre. After all, in what sense can constitutional entrenchment of rights be said to secure citizens' freedom if they are not enforced in practice? What is the difference between a legislature that is free to infringe unentrenched moral rights at will and a legislature that is free to disregard constitutionally entrenched rights at its pleasure? Harel offers a response to this concern that rests on his definition of constitutional directives. But, again, it seems that the definition smuggles into his argument instrumental elements:

> As constitutional directives are (by definition) grounded in the practices and conventions of the legislature itself, the legislature can properly be described as accepting the authority of these directives, i.e., acting from its duties. … Further, as constitutional directives reflect the convictions of a community of policymakers, lawyers, and other relevant elites, even when the legislature does not honour the rights, it is (generally) subjected to effective condemnation.[35]

Leaving aside the question of the merit of this argument, it seems clear that it involves an instrumental-consequentialist premise. It seems that the only reason why enforcement by the judiciary is not essential in Harel's account is because other mechanisms of enforcement such as self-application or effective social condemnation – mechanisms whose existence is part of Harel's stipulative definition of 'constitutional directives' – make judicial review partly redundant. This might well be an argument for the relative independence of constitutional rights protection from the specific mechanism of judicial review, but it is not clear that it is a non-instrumental argument, showing that constitutionalism matters ''as such'' regardless of how constitutional rights are enforced and their effect on legislative outcomes.

The reliance on thick, stipulative definitions, along with the employment of a very broad understanding of non-instrumentalism, goes to the heart of the book's general argument, undermining its claim to provide non-instrumental alternatives to prevalent instrumental justifications of legal institutions. Since at least some of the definitions Harel employs implicitly include contingent elements that are instrumental, it is not clear that the book shows that law ''matters as such'', regardless of its contingent substance or its beneficial consequences for society.

[35] *Ibid.*, p. 178. For the initial definition *see Ibid.*, p. 202.

Yet, even if not all are convinced by Harel that law matters ''as such'', it is clear that Harel is successful in his other stated goal: to provide new, sound arguments that challenge existing positions. In 240 pages, Harel covers an impressive amount of ground in this regard, adding new provocative arguments to a series of high-profile debates. As Harel notes, in some of these debates non-instrumental justifications have traditionally been mounted only on one side. The exploration of new non-instrumental arguments that would ''level the playing field'' is original and promising, and provides a thought provoking, refreshing perspective on some longstanding normative questions.

Faculty of Law,
University of Auckland, Auckland,
New Zealand
E-mail: a.rosen@auckland.ac.nz