BOOK REVIEW: *WHY LAW MATTERS* BY ALON HAREL

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In *Why Law Matters*, Alon Harel asks us to reconsider instrumentalist approaches to theorizing about the law. These approaches, generally speaking, understand legal rules and institutions as means to achieve desirable ends but not as valuable goods in themselves. Constitutionally entrenched rights, for example, may be considered desirable because they promote pre-existing and free-standing values. From this perspective, rights are merely instrumental to attaining values. Consider that the right under s. 8 of the *Canadian Charter of Rights and Freedoms*, "to be secure against unreasonable search or seizure,"[1] has been defined by the Supreme Court of Canada as protecting an underlying right to privacy, or as the notion that Canadians enjoy a reasonable expectation of privacy.[2] Privacy, in turn, is protected partly because it promotes the underlying value of autonomy. As Justice Dickson, referencing American fourth amendment jurisprudence, noted in *Hunter v Southam*, privacy is at least partly a "right to be let alone by other people."[3] In contrast, Harel argues that the relationship between the right and the underlying value is not unidirectional, but reciprocal.[4] The constitutional entrenchment of a right does not merely promote its underlying values, but contributes to the development and appreciation of those values. Rights are therefore not contingent goods but are intrinsically valuable in themselves, defining the activities through which values are realized.

Harel's argument is divided into three parts. In Part I, he advances the aforementioned argument that an instrumentalist understanding of rights (or, *the primacy of values hypothesis*) is deficient, positing instead a position he calls *the reciprocity hypothesis*. In Part II, he argues that public institutions and public actors are not merely preferable but indeed required to carry out certain types of actions which cannot be performed privately–thus, instrumental justifications for privatizing certain government functions must fail, since these functions cannot be performed by other than a sufficiently public actor. In Part III, Harel argues

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1 *Canadian Charter of Rights and Freedoms*, s 8, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

2 *Hunter v Southam Inc*, [1984] 2 SCR 145 ("This limitation on the right guaranteed by s. 8, whether it is expressed negatively as freedom from 'unreasonable' search and seizure, or positively as an entitlement to a 'reasonable' expectation of privacy, indicates that an assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement" at 159-60).

3 *Ibid* at 159.

4 Alon Harel, *Why Law Matters* (Oxford: Oxford University Press, 2014) at 13-14.

for "robust constitutionalism", the notion that a binding constitution is valuable independent of whether that constitution contributes to protecting the rights entrenched within; the follow-on to this argument is a strong defence of judicial review as the embodiment of the right to a hearing.

Many of the underlying ideas and arguments presented in *Why Law Matters* aren't new; Harel himself acknowledges that *Why Law Matters* builds on his scholarship in the areas of philosophy of rights, public/private actors, and constitutionalism.[5] But Harel shows his careful development of these ideas as he persuasively argues against instrumentalist accounts to conclude that rights and institutions are to be valued in themselves, not merely as means to some end. Harel's discussion of these concepts is nuanced and at times complex. As a result, readers without some background in moral philosophy may have difficulty keeping up. But Harel doesn't take the reader for granted, often briefly surveying the existing philosophical literature before arguing against it or providing concrete examples of the concept under discussion.[6] *Why Law Matters* presents a compelling argument about how we should think about, judge, and value our legal institutions.

In Part I, Harel begins his argument by establishing that rights are goods which he terms "reason-dependent demands."[7] As such, justifying a demand as worthy of protection through entrenchment as a right requires examining the reasons which justify that protection. Not all reasons justify protection. Harel uses the example of freedom of expression to demonstrate his point.[8] Justificatory reasons may be *intrinsic* to the right to freedom of expression (such as that an individual's expression promotes their dignity or autonomy) or *extrinsic* to it (such as that commercial speech promotes economic growth); only intrinsic reasons justify protecting the expression as an instance of the right to freedom of expression. Importantly, extrinsic reasons may justify protecting expression–they do not,

5 *Ibid* at ix-x. See also Alon Harel, "What Demands Are Rights? An Investigation Into the Relation Between Rights and Reasons" (1997) 17 Oxford J Legal Stud 101; Yuval Eylon & Alon Harel, "The Right to Judicial Review" (2006) 92 Va L Rev 991; Alon Harel, "Why Only the State May Inflict Criminal Sanctions: The Argument From Moral Burdens" (2007) 28 Cardozo L Rev 2629; Alon Harel, "Why Only the State May Inflict Criminal Sanctions: The Case Against Privately Inflicted Sanctions" (2008) 14 Legal Theory 113; Alon Harel & Tsvi Kahana, "The Easy Core Case For Judicial Review" (2010) 2 J Legal Analysis 227; Alon Harel & Assaf Sharon, "'Necessity Knows No Law': On Extreme Cases and Uncodifiable Necessities" (2011) 61 UTLJ 845; Alon Harel & Adam Shinar, "Between Judicial and Legislative Supremacy: A Cautious Defense of Constrained Judicial Review" (2012) 10 Int'l J Const L 950; Avihay Dorfman & Alon Harel, "The Case Against Privatization" (2013) 41 Phil & Pub Affairs 67; Alon Harel, "Why Constitutionalism Matters: The Case for Robust Constitutionalism" (2014) 1 Critical Analysis of Law 32.

6 For an example of the former, see Harel's discussion of instrumentalist approaches to rights: Harel, *supra* note 4 at 26-37; for an example of the latter, see Harel's discussion of German legislation authorizing the downing of passenger planes that pose a 9/11-type threat: *ibid* at 108ff.

7 *Ibid* at 18-25.

8 *Ibid* at 20.

however, justify entrenching freedom of expression as a right.[9] The problem this explanation presents, however, is the difficulty of classifying demands: how is one to know how to argue for the protection of an act as an instance of some entrenched right? Harel offers that, "[m]ost of the more influential reasons used in justifying rights are values, e.g., autonomy, dignity, etc."[10] Further, he suggests that, "[t]o identify what the intrinsic reasons for a certain right are one ought to examine the way the right is justified by examining political and legal discourse pertaining to the right."[11] While this may strike some readers as insufficient, Harel's purpose isn't to catalogue the various intrinsic reasons underlying the entrenchment of all rights. Rather, the argument that rights are "reason-dependent demands" is both an attempt to explain why some demands (i.e. those justified by extrinsic reasons) "[sound] so alien to the discourse of rights"[12] and also to lay the groundwork for the critique of the instrumentalist accounts which follow.

Harel pursues the position that rights and values are reciprocal by arguing that instrumentalist arguments cannot account for two "puzzles": first, the arbitrariness of the distinction between intrinsic and extrinsic reasons identified earlier (which he terms the *differential treatment of reasons*), and second, the fetishization of certain value-promoting activities at the expense of other, equally or more value-promoting activities (which he terms the *differential treatment of activities*).[13] In other words, why are certain reasons such as autonomy or dignity elevated in the discourse of rights? And, if autonomy *qua* value is ontologically prior to specific rights that promote it, why not protect all autonomy enhancing activities through rights rather than only certain activities such as expression or religion? For Harel, the differential treatment of both reasons and activities is "necessary as some values, e.g., autonomy, need to be grounded in *certain* protected activities to maintain their vitality."[14] Values indeed justify rights, but rights also contribute to the realization of values.[15] Rights contribute to the realization of values by causing

9 *Ibid* ("It is only when a demand not to be subject to censorship is justified on certain grounds, e.g. autonomy, that the demand is properly classified as an instance of the right to free expression" at 22-23). Note that in the Canadian context, even commercial speech has been accepted as being protected by the right to freedom of expression contained in s. 2(b) of the *Charter*: see *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927; *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199. This does not present a problem for Harel's argument, however, since this protection follows from the Supreme Court of Canada's analytical collapse of all expressive activity except violent expression into justification by a set of ideas approximating autonomy: see *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927 at 969-71.

10 Harel, *supra* note 4 at 20.

11 *Ibid* at 24.

12 *Ibid* at 20.

13 *Ibid* at 26-28.

14 *Ibid* at 45 [emphasis added].

15 *Ibid* ("Political and legal rights, as well as the litigation and political discourse triggered by these rights, are components of a variety of societal practices which must be sustained to facilitate the realization of (certain) values... In the absence of identifying such practices and sustaining them autonomy cannot be successfully exercised" at 37).

the development of practices that are publicly recognized, and litigation around the practices "helps to disseminate information, identify the complexities of exercising choice, expose dilemmas, and enrich the practice of exercising autonomy."[16] Harel's intentional focus on autonomy as an example of an intrinsic reason[17] leaves open for the reader the question of which other values require a culture of public practices to sustain them. This gap is not fatal to Harel's argument, however, since challenging *the primacy of values hypothesis* merely requires him to demonstrate that in at least one circumstance this hypothesis cannot completely account for the differential treatment of reasons and activities.

In Part II, Harel challenges instrumentalist approaches to the functions of public and private actors. He argues that certain "intrinsically public goods" can only be provided by sufficiently public agents; at the same time, certain other actions can only be conceptualized as being performed by private actors. The instrumentalist question of which type of actor, public or private, can most efficiently deliver certain goods often drives debates over the privatization of public services. For Harel, this question overlooks the fact that the value of certain goods is dependent on being provided by a public actor and thus they cannot be delivered privately.[18] Harel provides punishment as an example of an "intrinsically public good": because punishment conveys "condemnation for public wrongs," the privatization of punishment is logically impossible since private actors cannot "speak and act in the name of the state."[19] Harel's requirements for an action to be considered public, that is, to be performed in the name of the state, are strict.[20] Indeed, this section will likely cause the reader to question whether many of the functions performed in the modern state have the type of public character Harel envisions. Harel, for example, requires public officials to make two types of moral judgments about the actions they are asked to perform. First, "public officials are required to fill only public offices which are necessary for the performance of legitimate state functions."[21] Second, even officials fulfilling legitimate state functions must scrutinize whether the action they are asked to perform falls outside the scope

16 *Ibid* at 44.

17 *Ibid* at 39.

18 *Ibid* at 65-66.

19 *Ibid* at 96-98.

20 *Ibid* ("[S]peaking and acting in the name of the state requires the existence of a practice which integrates the political and the bureaucratic in the execution of the relevant functions. This practice, because of the integrative form that it takes, is characterized by its principled openness to ongoing political guidance and intervention" at 88-95).

21 *Ibid* ("A guard in a concentration camp is not a public office necessary for performing a legitimate state function. It would therefore be impermissible for a person to become a public official of this sort, as the functions performed by such a public official are not legitimate state functions" at 104).

of that function.[22] Though it is unclear whether a modern public bureaucracy is capable of meeting these requirements, Harel's view of the state and its servants is an ideal one, against which we should measure the public character of our own legal institutions.

Harel also argues that certain exceptional actions cannot be performed by the state and can only be understood as being performed by private actors. Torture in a "ticking-nuclear-bomb" scenario is one such example.[23] Harel's argument in this section demonstrates why these actions are necessarily private. For Harel, public officials must act according to rules and principles set by the state, but the Kantian concept of dignity does not permit rule-making about the relative worth of human lives. It follows that the state cannot legislate a set of rules to govern the action of public officials in certain extreme cases: "[e]xtreme cases require action that is taken out of necessity and not under the direction of law."[24] In these cases, even when action is taken by a public official, this action cannot be guided by rules[25] and "[t]he fact that an agent serves as a public official does not imply that an act she committed is a state act."[26] While philosophically consistent with Harel's conception of public action and deontological approaches to moral decision-making, this approach challenges the reader, as the instinctive counterargument is that it is precisely in extreme situations that we would want agents to make decisions based on pre-reasoned, deliberated, and publicly accessible rules. But for Harel, these situations can only be understood as private, individual action, since viewing these actions as private allows for extreme situations to be met while leaving dignity-respecting and rule-governed public order intact.

Finally, in Part III, Harel advances a non-instrumentalist argument for binding constitutional directives and judicial review. The instrumentalist account of these institutions bases their desirability on their contingent results, such as a more just society or the superiority of decision-making.[27] Harel argues instead that "constitutional directives are valuable independently of whether they trigger better decisions... on the part of the legislature."[28] This is because a system of constitutional requirements which bind the legislature promotes a freer citizenry, since citizens do not have to live "at the mercy" of the legislature's whims.[29] Further, though the legislature may still violate constitutional requirements, "if it does so

22 *Ibid* ("A soldier is assigned the task of protecting the state, not the task of killing citizens. A soldier thus ought to make a judgment whether the decision he is about to execute promotes the state functions that the role is designed to promote" at 104).

23 *Ibid* at 129.

24 *Ibid* at 121.

25 *Ibid* at 124-26.

26 *Ibid* at 128.

27 *Ibid* at 136-37.

28 *Ibid* at 170-71.

29 *Ibid* at 171-72.

it is subject to public criticism on the grounds that it has violated its duties."[30] Finally, Harel argues against theories of judicial review which justify the practice on instrumental grounds such as "the superior ability (or willingness) of judges to protect rights, the special deliberative powers of judges, the greater stability and coherence of legal decisions, and so on."[31] Harel argues that judicial review embodies the right to a hearing,[32] which in turn "compels government to be attentive to the grievances of its citizens."[33] It follows that a society with a binding constitution is normatively superior to one without, even if the society without constitutional directives is committed to respecting the same rights as guaranteed in the constitutionally-governed society, since the presence of entrenched rights gives rise to greater freedom and the possibility of judicial review.

In *Why Law Matters*, Alon Harel argues powerfully that rights, public action, and constitutionalism are justifiable on non-instrumentalist grounds. Rights do not merely facilitate access to values, but create the conditions under which values can flourish. Certain actions escape instrumentalist considerations about efficiency and can only be provided by a sufficiently public actor. Constitutionally entrenched rights do not merely improve legislative decision-making, but contribute to the freedom of society. In other words, law matters in itself, not merely as a means to an end.

30 *Ibid* at 181.

31 *Ibid* at 192.

32 *Ibid* at 214.

33 *Ibid* at 224.