
Why (constitutional) law matters: A reply to Lorenzo Zucca

Alon Harel*

Lorenzo Zucca wrote a challenging review of robust constitutionalism, which is the subject matter of Part III of my book *Why Law Matters*.¹ *Why Law Matters* develops a non-instrumentalist account of various legal institutions and procedures. It argues that various legal and political institutions that are often perceived as contingent means to the realization of valuable ends are necessary components of a just society, namely that they matter *as such*. Part III defends a non-instrumentalist defense of constitutionalism. More particularly it defends two aspects of constitutionalism: binding constitutional directives and judicial review.

Robust constitutionalism maintains that the value of binding constitutional directives and the value of the institutional mechanisms designed to protect these directives (namely judicial review) do not hinge merely on their contingent contribution to the substantive merit of the political or legal decisions. Binding constitutional directives and judicial review are valuable because they transform and restructure the relationship between the state and its citizens.

By “robust constitutionalism” I refer to two distinct phenomena: constitutional directives that bind the legislature (chapter 5) and rights-based judicial review (chapter 6). Chapter 5 defends “binding constitutionalism”; it argues that the constitutional entrenchment of preexisting political rights is valuable not merely because such entrenchment benefits legislation and improves its quality. Instead, it rests on the value of the *binding* nature of constitutional norms. Constitutional entrenchment of rights facilitates public recognition that the protection of rights is the state’s duty, rather than a mere discretionary gesture on its part. Chapter 6 defends judicial review on the grounds that when a person argues (justifiably or unjustifiably) that her rights are violated, the state ought to provide her a hearing. The duty to provide a hearing

* Phillip P. Mizock & Estelle Mizock Chair in Administrative and Criminal Law, Hebrew University Law Faculty; member of Federmann Center for the Study of Rationality, Hebrew University. Email: alon.harel@mail.huji.ac.il.

¹ ALON HAREL, WHY LAW MATTERS (2014); Lorenzo Zucca, *Why Law Matters: A Debate*, 13(1) INT’L J. CONST. L. 297 (2015).

requires the state (a) to provide individuals with the opportunity to challenge decisions that they believe (rightly or wrongly) violate their rights; (b) to justify its decisions to the alleged rightholder; and (c) to reconsider its decisions on the basis of the hearing and act in accordance with the conclusions of this hearing. Judicial review is valuable not because it is likely to result in “better” decisions or to better promote or protect rights or minorities, but (also) because judicial review is nothing but a hearing.

Zucca’s challenges both components of robust constitutionalism: binding constitutional directives and judicial review. His analysis is both negative and positive. His negative analysis identifies weaknesses of robust constitutionalism. He argues that some of the claims I raise are based on a misunderstanding of existing institutions and procedures. His positive analysis points to an alternative instrumentalist understanding of constitutionalism based on separation of powers. In Zucca’s view, separation of powers is a highly valuable tool designed to protect freedoms as well as other important constitutional values. In my response I will address primarily the negative analysis and, in the end, I will discuss briefly Zucca’s own positive proposal.

My analysis of binding constitutional directives rests upon an informal understanding of what constitutional directives are. Constitutional entrenchment of a directive is grounded in “practices, conventions, and shared understandings of legislators, lawyers, or public officials” (at 154). Further, “to interpret a constitutional norm one has to resort to the way the norm was interpreted in the past, to the conventionally accepted articulations of the norms, and to the ways it was applied in the past” (at 154). In contrast to purely moral norms, constitutional entrenchment presupposes the existence of social conventions and practices.

Zucca criticizes my account of constitutional entrenchment on several grounds. He first argues that my understanding of entrenchment is stipulative and even idiosyncratic; it does not reflect the conventional understanding of the concept of “entrenchment.” He usefully differentiates between *de jure* entrenchment and *de facto* entrenchment. *De jure* entrenchment is associated with written constitutions and it requires the imposition of procedural mechanisms designed to impose burdens on revising the constitution. Most typically, in order to amend (*de jure*) constitutionally entrenched norms or to produce norms that are incompatible with (*de jure*) constitutionally entrenched norms, one has to overcome procedural hurdles, for example, meet special majority requirements. Zucca argues that the *de jure* understanding of entrenchment is the conventional one and he also believes that it cannot support robust constitutionalism.

I believe that *de jure* entrenchment is merely a sub-category of *de facto* entrenchment. Under the view I develop in chapter 5, constitutionally entrenched constitutional directives can be written or unwritten, enforceable or unenforceable, originating in a custom or in a convention or drafted by the founders of the constitution. In fact, I argue that “the conventions, understandings, habits, and practices are more central to understanding constitutional directives than written bills of rights, as written constitutional norms become ‘constitutional’ in the relevant sense only by virtue of the fact that they are enshrined in existing practices and conventions” (at 153). In other words, what grants written constitutions (including ones that use procedural

mechanisms to make constitutional amendments difficult) their force is the societal conviction that constitutional provisions merit respect, namely, that such provisions impose duties on legislatures. In the absence of such a *de facto* shared understanding that constitutional directives merit respect, *de jure* entrenchment would be futile, as the example of the USSR Constitution illustrates. What ultimately causes compliance *even with constitutional provisions that are entrenched de jure* is the respect towards the normative force of these provisions. Effective *de jure* entrenchment presupposes therefore a *de facto* disposition to comply with constitutional provisions.

Note that I do not argue that any social convention is a constitutional one. A convention which is constitutional is one that satisfies certain conditions: it is perceived as binding the legislature; it is grounded in practices and conventions of communities that have legal power such as legislators, lawyers, and judges; it is also one that is characterized by greater specificity than moral norms. While this may not be the standard way of characterizing entrenchment, it is one that has great importance and it is the one I rely upon in explaining the significance of binding constitutional directives.

Zucca argues that the reliance on republican notions of freedom is unhelpful. It is unhelpful because, in his view, modern theories of republican freedom have no clear institutional implications. Instead of relying on republican freedom as understood by Skinner and Pettit, he proposes to rely on Montesquieu and his proposal to establish a scheme of checks and balances. Chapter 5 relies heavily on republican theories of freedom. I believe now that the conclusions of the chapter could and should have been presented otherwise. While republican theories can provide support to the conclusions of chapter 5, they are not necessary to reach these conclusions.

The primary claim of chapter 5 is that binding constitutional directives underscore the fact that the protection of human rights is a matter of duty rather than discretion or good will. The constitution imposes duties on the legislature. Thus, when the legislature acts in accordance with these duties it does not do so voluntarily; it is *bound* to protect them. Similarly, the global order consisting of binding global directives facilitates a clear differentiation between duty-based decisions and discretionary decisions, and highlights the fact that the former category must be publicly acknowledged and differentiated from the second. The state *may* pursue certain economic policies, but it *must* protect the right to life or the right to equality. Constitutions facilitate the publicly salient demarcation between those things that the legislature *may* do and those that it *must* do. Similarly, international law facilitates the demarcation between those things that the polity *may* do and those that it *must* do.

The intuition underlying this observation has two distinctive components. The first concerns cases of violation of rights while the second concerns cases in which rights are honored. First, it is argued, it is bad for us if our rights are being violated by the state, but it is even worse if the state violates them *without the violation being labeled as a violation* and being condemned as wrongful. The constitutional provisions serve as norms that publicly recognize the wrongfulness of the violation and, consequently, as means to pronounce condemnation of such violations. Such condemnation may of course serve to deter (or prevent) future violations or help to bring about a remedy.

But this is not the only purpose of constitutional directives. In addition, such directives constitute public acknowledgment and recognition that the state committed a wrong.

Second, it is good when our rights are being honored by the state, but it is even better if it is acknowledged that honoring them is not a byproduct of discretion or a judgment on the part of the state. The constitutional provisions serve to highlight the fact that the protection of rights is not discretionary; it is mandatory. Precisely as it is wrong on the part of a debtor to pay his debt without conceding that he has a duty to do so, so it is wrong on the part of the state to honor rights without conceding that it has a duty to do so. It can acknowledge such a duty only when it is bound by constitutional directives which identify what its publicly recognized duties are.

To sum up I defend here two observations. (i) It is bad when rights are violated, but even worse when the violation is not publicly recognized as such. (ii) It is good when rights are respected, but it is even better when rights are respected not merely out of the good will or the judgment of the legislature but out of public understanding that it is its duty to respect them. The overriding normative force of the constitution serves to underscore the fact that the protection of rights is obligatory rather than discretionary.

I believe that this analysis is sufficient to establish the conclusions of chapter 5. In chapter 5, I argue that republican freedom can provide further support for these conclusions. I argue that a public declaration that the state has duties towards its citizens implies that citizens enjoy freedom as understood in the republican tradition because their rights are not subject to the will of the state or to its judgments. In the language of Pettit individuals are not “at the mercy of the legislator.” I am grateful to Zucca for stressing his reservations concerning republicanism, as I see now clearly that the discussion of republican freedom is not necessary to establish my conclusions in chapter 5. As the explanation above illustrates the conclusions of this chapter can be established without resorting to the concept of republican freedom.

Zucca argues that my analysis leads to infinite regress. Arguably, the same difficulty I identified in the context of legislation, namely that in the absence of constitutional directives our rights are “at the mercy” of the legislature, applies also to the constitution. Somebody after all has to draft the constitution and somebody has to interpret it. It follows that even if rights are constitutionally entrenched (and therefore citizens are not at the mercy of the legislators), citizens still are subject to the judgments of the drafters or the interpreters of their national constitution. It is easy to see that this argument leads to infinite regress. Even if we constrain the drafters of a constitution by establishing global norms, the same concerns could be raised with respect to global norms. Whatever constraints designed to protect individual rights are imposed, it is always the case that there is some entity which imposed these constraints (or which can amend them): for example, founders of a constitution, interpreters of a constitution, the United Nations, or an international court. We are always subject to the risk that, whoever is in charge, be it a legislature, a founder of a constitution, or a drafter of global norms, might fail to recognize or protect our rights.

I believe the challenge of infinite regress is an important one. I think that much of the appeal of global constitutionalism is based precisely on a dissatisfaction of

subjecting individuals to the mercy of their own national constitutions (at 185–188). But as Zucca urges me to concede, global norms do not solve the problem; they merely recreate it at a higher level. Yet, despite its force, I do not think it is a fatal objection. It is often the case that being subject to the will of one entity is demeaning while being subject to the will of another entity is not. It is one thing to be “at the mercy of another individual” or “at the mercy of a legislature,” and another thing to be “at the mercy” of the constitution or “at the mercy of” global norms.

Compare for instance a society in which some individuals are legally recognized as slaves with a society in which slavery is prohibited. Assume further that the legally recognized masters are enlightened masters and therefore they do not exercise their legal powers to issue orders to their legally recognized slaves. We can state with confidence that this society is defective precisely because enslavement is not publicly perceived in it as wrongful. While no person serves as a slave, their freedom hinges on the good will of others. Compare it to a society in which the legislature prohibited slavery. Arguably, the latter society is superior to the former because no individual is subject to the good will of another. But under the objection of infinite regress, one may complain that individuals are subject to the risk that the legislature re-institutes slavery. Even if the legislature is subject to a constitutional duty, the infinite regress objection implies that individuals are subject to the risk of a constitutional amendment. Yet it is evident that there is a very different status to a constitutional provision prohibiting slavery and to the decision of masters not to exercise their rights to issue orders to their slaves. I conclude therefore that while it is always the case that public acknowledgment of rights hinges on the good will or judgment of some entity, it is still the case that there is a relevant moral difference between being subject to the will or judgment of a master and being subject to the will or judgment of the drafters or interpreters of a constitution.

Let me turn to examining Zucca’s concerns with respect to the second component of robust constitutionalism namely judicial review. As discussed above, judicial review in my view is designed to protect the right to a hearing. Zucca raises several objections to this view.

First, Zucca argues that my account of judicial review is too broad. He observes that, in principle, even parliaments, ombudsmen, and mediators can engage in judicial review. It is true that my characterization of judicial review does not presuppose judges or courts. It is also correct that, in principle, under my view even a parliament can perform judicial review. This is because my account emphasizes not *who* engages in judicial review but *what* judicial review is. Judicial review is not about judges or courts but about adjudication. Hence, in contrast to Zucca, I do not think my position implies that parliamentary scrutiny of legislation or the work of a mediator or ombudsman can replace adjudication. To perform a hearing, an *individual* grievance must be heard. Parliamentary scrutiny differs from a hearing as it rests not on individual grievances but on an abstract review of the proposed statute. Mediation, unlike adjudication, is typically a voluntary scheme for resolving disputes. Further, mediation is designed to facilitate the reaching of an agreement; the mediator typically cannot impose a resolution of his own. It does not protect a right to a hearing, as the

mediator (unlike a judge) does not satisfy the third component of the right to a hearing, namely the power and willingness to reconsider the case in light of the hearing. Hence, while I agree with Zucca that my account of judicial review is revisionary, it is not as revisionary as implied by his account. I suggest that what is distinctive about judicial review is the process of adjudication and not the agent who performs this process.

Zucca argues that there are different forms of judicial review. Judicial review need not be constitutional review. Judicial review also need not protect constitutional rights; it often protects other components of the constitution, such as federalism. Further, Zucca points out the important distinction between judicial review *in concreto* (based on a particular challenge which takes place after the legislation is passed) and judicial review *in abstracto* (based on proposed legislation). Zucca concludes that I focus only on “judicial review of legislation *in concreto* on the basis of human rights.”²

I do not doubt the importance of non-constitutional judicial review. Yet such forms of judicial review are less controversial as they are based on legislative authorization. The more controversial forms of judicial review are constitutional, and those forms are the ones I defend in chapter 6. I also admit that my analysis applies only to rights-based judicial review. I agree that there may be other components of judicial review and those require separate justification. My account also does not consider the desirability of judicial review *in abstracto*. It is meant only to provide a new rationale to judicial review *in concreto*. The right to a hearing requires deliberation which is based on an actual grievance of an individual. This does not imply that I oppose judicial review *in abstracto*; it only implies that to justify it requires a different analysis.

Zucca is concerned about the depth and seriousness of the deliberation necessary to satisfy the requirement of hearing. He argues that under my view deliberation can be hasty and sketchy. More specifically he argues that under my view: “almost anything can count as a response [to a grievance], including a hasty dismissal in some cases.”³

As briefly mentioned above, the right to a hearing consists of (i) the right to raise a (justified or unjustified) grievance; (ii) the right to be provided with an explanation; and (iii) the right to benefit from reconsideration of the original decision giving rise to the grievance. I also maintained that the scope and depth of reconsideration of the original decision differ from one context to another. Zucca is concerned that this provides an opportunity for decision-makers to fail to engage with the grievance.

This is indeed a serious concern. Yet, any account of judicial review must acknowledge the possibility that some petitioners raise unsubstantiated grievances. The scope and depth of the adjudicative process hinges on the reasonableness of the grievance. A proper implementation of the right to a hearing ought to acknowledge the fact that some grievances merit greater scrutiny than others. This is, however, not unique to my defense of judicial review. It is an inevitable byproduct of the fact that some grievances lack merit.

Zucca argues further that that judicial review must be instrumental to the interests of the person who raises the grievance. He argues for this view on the grounds that

² Zucca, *supra* note 1, at 304.

³ *Id.* at 304.

judicial review presupposes standing, and that standing as understood by the legal system presupposes an interest of the person who raises the grievance.

As I understand his argument, it goes as follows. (i) A hearing must presuppose standing. (ii) Standing in the legal context presupposes that the legislation in question affects real interests of the person who demands to be heard. Hence, it follows that, (iii) the hearing triggered by the legislation is instrumental to the interest that gives rise to the standing and the hearing is designed to protect this interest.

I do not dispute the claim that standing in the legal context requires a real interest. But I do not think it follows from this observation that the right to a hearing rests only upon the concern to protect the interest. After all one may find out that the right to a hearing is often or typically detrimental to the interest of the person who raises the grievance. A person may insist on a hearing even when such a hearing is detrimental to her interests.

Last, Zucca argues that the right to a hearing is not limited to moral controversies. Any disagreement gives rise to the right to a hearing. Hence, he argues that my view is too moralistic; that it focuses attention on a sub-set of cases involving moral disputes; and cannot therefore account for many other cases.

I agree. My attempt has been to justify an important sub-set of cases, namely cases involving grievances that are based on the claim that the state violated the rights of individuals. The paradigmatic cases that I address are cases in which a statute violates (or at least is alleged to violate) an individual right and the court is called upon to strike down the statute on this ground. Zucca's objection is important in that it challenges me to examine whether my explanation could apply to other types of disputes including the ones raised by Zucca.

Finally, let me also briefly discuss Zucca's positive proposal to understand constitutions in terms of Montesquieu's ideal of separation of powers. Zucca urges me to examine the possibility that constitutions are designed to establish a system of separation of powers.

I am sympathetic to this approach. I believe separation of powers is a valuable feature of our institutions. Yet, Zucca is too quick to assume that separation of powers must be a contingent means to promote freedom. I urge Zucca to examine whether the constitutional entrenchment of checks and balances is not merely designed to protect freedom but has also an educational or cultural end. More specifically Montesquieu's Constitution of Freedom rests upon the conviction that no person or institution has direct access to what justice dictates and the multiplicity of perspectives triggers robust skepticism concerning authority. Such skepticism of authority is a healthy feature of a free society. If this is the case, separation of powers may not be merely contingently desirable and its value does not hinge merely on the prospects that it is likely to bring about valuable decisions.

The book *Why Law Matters* examines various legal and political institutions and procedures, and argues that the desirability of these institutions and procedures is not contingent and does not hinge on the prospects that these institutions are conducive to the realization of valuable ends. Public institutions are constituent aspects of a just society, and the contribution they make to it is not contingent but necessary. In other

words, I argue that legal institutions and legal procedures that are often perceived as a contingent means to facilitate the realization of valuable ends matter *as such*. Zucca has explored and challenged some major observations I made in Part III of the book devoted to the value of constitutions and judicial review. I am grateful to Zucca for his penetrating observations. I believe that as a result of his comments I have now a much better understanding of my own enterprise. This is ultimately the mark of an excellent review.