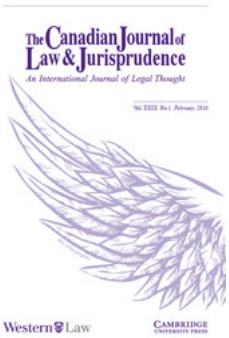

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Book Review

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Why Law Matters **by Alon Harel***

Alon Harel's *Why Law Matters* articulates a powerful and neglected approach for justifying legal institutions. Pushing back against the instrumentalist approach which dominates contemporary legal theory, he argues that legal institutions are not simply tools for realizing extrinsic values, but are themselves constitutive features of a just society. On this view, law is not an instrument for bringing about something that matters; rather, law itself matters and Harel elaborates a series of rich and insightful arguments to explain why. In this brief review, I will sketch the connection between Harel's non-instrumental methodology and his account of 1) the nature of rights, 2) the distinctiveness of state authority, and 3) the justificatory basis of constitutional governance. I close with some critical comments about the non-instrumental justifications that Harel develops.

Methodology. Legal theorists invariably proceed by identifying values that can be specified without referring to legal institutions, and then holding that legal institutions are justified to the extent that they bring about these values. Although proponents of this instrumentalist approach disagree about the values that law should serve, they stand in agreement that law is simply a tool for the pursuit of independent values.

Harel suggests that instrumental theories often fail to overcome two basic challenges. First, to justify a particular legal institution, instrumental theories must establish its effectiveness in achieving a particular value. Such demonstrations require "sweeping" empirical evidence that social science is often incapable of substantiating (4). The result is that the conclusions of instrumental theories about whether a particular institution is justified often outstrip their evidentiary foundation. Second, instrumental theories exhibit a propensity to offer justifications for legal institutions that do not track the actual convictions and commitments that sustain and nourish them (4). In *Why Law Matters*, Harel's aim is neither to refute legal instrumentalism nor to establish a general non-instrumental alternative, but to demonstrate how a non-instrumental approach might justify particular legal institutions and processes without succumbing to these difficulties (5, 225-26).

Why Rights Matter. According to instrumentalist theories, rights matter to the extent that they contribute to the realization of values that can be conceived of and specified without referring to rights (13). This view renders rights superfluous because "it is (at least in principle, absent any pragmatic or institutional concerns) sufficient simply to be guided by the values underlying the rights." (15) Harel's aim is to formulate an account in which both values and rights are ineliminable: values (such as autonomy) demand the protection of rights but rights also

*Oxford: Oxford University Press, 2014.

make an "essential" contribution to the realization of these values (37). Rights are not superfluous because in delineating protected activities "they facilitate the creation of a culture in which the exercise of autonomy can be made possible." (45) Thus, rights rest on values that they in turn advance.

Why the State Matters. For Harel, the reason why the state matters is not that, as an empirical matter, those who occupy public offices are more likely to make certain decisions correctly than private persons. Rather, the state matters because certain kinds of goods are intrinsically public, which means that the state alone can provide them. His leading example of a "public good" is punishment (96). Only the state can punish because, as Harel stipulates, punishment involves a judgment made in the name of the state that specified conduct constitutes a public wrong (97-98). To say that only the state can punish is not to deny that private persons can act violently towards another, but to insist that private persons lack the standing to pass judgment in the name of the state (81, 98). Further, drawing on republican theories of government, Harel argues that the state may not authorize private persons to punish because giving one individual the standing to punish another would violate their moral equality (61, 98).

Why Constitutions Matter. Defenders of constitutionalism typically defend the entrenchment and judicial oversight of constitutional rights by arguing that these arrangements are justified to the extent that they produce desirable outcomes (133). While defenders of constitutionalism employ instrumental arguments, critics develop opposing visions of democracy in non-instrumental terms.[1] The result of this methodological divide, Harel suggests, is that defenders of constitutionalism find themselves at a disadvantage because their mode of justification "rests on factual speculations that cannot be substantiated" and "suffers from inauthenticity or insincerity." (135) The aim of his constitutional project is "*to level the playing field in constitutional theory*" by offering proponents of constitutionalism a non-instrumental justification of constitutional directives (including rights) and rights-based judicial review (135, 145). He terms this project *robust constitutionalism*.

Harel justifies the entrenchment of rights by arguing that individuals have rights against their government and the enjoyment of their rights should not be "at the mercy" of the legislature (148). With these convictions in place, he argues that a legal system is defective if the enjoyment of rights within it is a matter of legislative *discretion* rather than *duty* (133, 189). In the absence of constitutional rights, a democracy faces an inescapable problem: "Even if the legislature is highly enlightened and is devoted to the protection of rights and justice, the mere fact that [individual] rights are 'at its mercy' is a deficiency that needs to be addressed." (189) The reason that constitutional rights are valuable is not that they tend to generate preferable outcomes, but because constitutional rights reconfigure the relationship between rulers and ruled by publicly establishing the norms by which the legislature is bound and by which the rightfulness of its conduct can be critically assessed (133).

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1. See, for example, Jeremy Waldron, "The Core of the Case against Judicial Review" (2006) 115:6 Yale LJ 1346 at 1386.

Just as Harel argues that constitutional rights are valuable not because of the outcomes that they might bring but because of what they are, he offers a parallel justification of judicial review. Rejecting justifications that would "require establishing complex empirical assertions, such as the claim that courts render better decisions or the claim that courts' decisions are more protective of democracy, rights, or stability and coherence" (192), Harel offers a non-instrumental justification that purports to capture the conviction held by defenders of judicial review. Judicial review is justified simply because it constitutes the right to a hearing. This right consists in 1) the opportunity for an individual to bring a grievance alleging that the state has violated a constitutional right, 2) the willingness of the state to deliberate upon the merits of the grievance, and 3) the commitment of the state to reconsider decisions that violate rights (202, 205, 221). Harel insists that the right to a hearing can be vindicated by the strong form of judicial review that obtains in the United States (in which the judiciary has the power to invalidate legislation that fails to meet constitutional standards) and the weaker form that obtains in the United Kingdom (in which the judiciary can merely declare legislation incompatible with rights):

> [U]nder the British Human Rights Act, the petitioner can raise a grievance and she is entitled to a full account of whether her rights have been violated (a declaration of incompatibility). But the reconsideration is left to the legislature and its good will and in principle the legislature is not obliged to rely in its decision on the particularities of the case. (222)

In a system of weak judicial review, the task of reconsideration, which forms the third component of the right to a hearing, is undertaken not by the judiciary but by the legislature (222). Such an arrangement is permissible because meaningful reconsideration remains possible. As Harel explains, a legislature can "take seriously the hearings conducted by courts even if they are not obliged to accept their judgments." (223)

In my view, even if the justifications that Harel offers for constitutional rights and judicial review each succeed, they cannot be combined. The justification of constitutional rights holds that a legal system is defective if the freedom of any individual within it is "contingent on the good will of the legislature" (7). The justification of judicial review holds that weak form judicial review satisfies the right to a hearing even though the task of determining whether to conform to a right is left "to the legislature and its good will" (222). These discrete justifications culminate in a dilemma. If individual rights must not be left at the mercy of the legislature, then Harel is correct to reject majoritarian democracy, but by the same token he must reject weak form judicial review. Alternately, if the right to a hearing can be fulfilled, in part, by the legislature (213-14),[2] then weak form judicial review is acceptable, but by the same token so is a majoritarian democracy

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2. "The right-to-a-hearing justification for judicial review does not require review by courts or judges. It merely requires guaranteeing that grievances be examined *in certain ways* and *by using certain procedures* and *modes of reasoning*, but it tells us nothing of the identity of the institutions in charge of performing this task. Thus, in principle, the right to a hearing can be protected by any institution, including perhaps the legislature."

that lacks rights-based judicial review, whether strong or weak. Insofar as robust constitutionalism seeks to repudiate majoritarian democracy while affirming weak form judicial review, each of these possibilities fails to satisfy its ambitions.

A further set of difficulties confront Harel's account of why rights matter. If Harel's claim is that autonomy (conceived of in terms of the obligation to exercise one's capacity to make valuable choices) (16, 40-41) is *impossible* in any context in which rights are not subject to legal protection (42, 45), then the claim is implausible. For whatever moral or prudential problems one might have in a state of nature, in which one's rights are neither publicly acknowledged nor enforced, it surely remains possible to make valuable choices. Alternately, if Harel is making the more modest claim that rights merely *contribute* to the realization of autonomy—a value that could be (at least to some extent) realized even in the absence of rights (42)[3]—then he has characterized rights as a contingent instrument for the realization of a valuable end. Such a statement echoes the instrumentalist approach that Harel rejects. Thus, his account of rights seems either implausible (insofar as persons can act autonomously without rights) or inadmissible (insofar as the justification of rights purports to be non-instrumental).

A subsequent challenge concerns the relationship between values and rights. If the point of rights is to enable individuals to make valuable choices that enhance the realization of autonomy, then the protections that rights afford their bearers are too broad. Take Harel's example of the right to choose one's spouse (17). He claims that one acts autonomously when one selects a spouse on the basis of appropriate considerations: love, friendship, and compatibility. In contrast, one betrays autonomy when one selects a spouse on the basis of inappropriate considerations, for example, the results of a lottery conducted among willing partners (40-41). But what is striking about rights in general, including the right to choose one's spouse, is that the protections that they offer are not contingent on whether one's choice furthers or frustrates the value of autonomy. Thus, a gap emerges between the institution of rights and the underlying justification that Harel proposes. This means that the protections that rights offer their bearers must either be dramatically narrowed to promote autonomy-enhancing choices or must rest on an alternative justification. Here Harel's approach perhaps exhibits the vice of the instrumental theories he rejects: the justification is alien to the practice it purports to ground.

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Why Law Matters is an indispensable resource for anyone committed to thinking seriously about the justification of the legal institutions and processes that comprise a liberal legal order. While Harel neither purports to offer a general criticism of legal instrumentalism nor a general defense of its non-instrumentalist counterpart, he deftly navigates the challenges surrounding the justification of rights, public institutions, and constitutional arrangements. In this way, his book offers an innovative and deeply valuable engagement with the challenges that any justificatory account must ultimately confront.

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3. Suggesting that rights "facilitate the exercise of autonomy".