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# Why (constitutional) law matters: A debate

Lorenzo Zucca\*

Alon Harel. *Why Law Matters*. Oxford University Press, 2014. Pp. 256. £34.99.  
ISBN: 9780199643271.

## 1. Introduction

It is conventional to believe that law matters because it is the best means to achieve valuable societal goals. Contract law, for example, is the best means to facilitate private agreements. Environmental law is the best means to protect the environment. Labor law is the best means to protect the interests of workers. Constitutions are the best means to protect and promote a just society. And so is judicial review: it is valuable because it is the best means for the protection of constitutional rights against the supremacy of parliament. Disagreement with the views above is about the appropriateness of the means to achieve a given goal. But almost nobody disagrees with the idea that law and legal institutions are instruments to achieve desirable goals. Law matters because it is the most sophisticated social instrument for preventing disputes and resolving them.

*Why Law Matters* by Alon Harel challenges this view. It argues that law in general, and legal institutions in particular, are constitutive components of a just society; they are not mere means to a just society. The book 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. Instead, Harel argues that law matters for non-instrumental reasons; it matters “as such.”

The book consists of three parts. The first part examines the nature of rights and the relations between rights and values; the second examines the state and public institutions and argues that the state and public institutions provide distinctive goods which cannot even in principle be provided by private entities; the last part identifies the value of constitutional directives and judicial review. Before exploring in detail the arguments in Part III let me briefly provide an overview of the first two parts.

In Part I Harel denies that rights are grounded in values such as equality or dignity; in fact, such values are themselves partly constituted by rights and stand in reciprocal relation to them. The realization of the values underlying some rights is made possible by legally entrenching rights so that the relation between the rights

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\* Reader in Jurisprudence, King's College London. Email: [Lorenzo.zucca@kcl.ac.uk](mailto:Lorenzo.zucca@kcl.ac.uk).

and the values underlying them is reciprocal. While the values underlying the legally or politically entrenched rights dictate what rights we have, these values also depend upon the rights, such that the (legal or political) entrenchment of the rights ultimately determines the content of the values. In other words, Harel argues, legal rights are not merely means to realize values; they shape and determine what values are worth pursuing. In Part II, Harel claims that public officials—whether legislatures or bureaucrats—are not merely charged with tasks that might in principle be assigned to private individuals; they are members of public institutions who are to perform tasks that must (as a conceptual matter) be undertaken only by them. Public officials provide what Harel labels “intrinsically public goods,” namely goods that cannot even in principle be provided by private entities. For instance, the infliction of punishment by a private entity is inherently defective. Sanctioning a wrongdoer is an expressive or communicative act of condemnation, and unlike deterrence, public condemnation is possible only if it emanates from an agent with a privileged status to the one subjected to the condemnation, i.e., the state.

Part III, which will be the focus of this review, develops a similar claim in the context of constitutional law. Part III argues that constitutions and judicial review are constitutive components of a just society, and not merely instrumental to it. Hence, Harel argues for what he labels robust constitutionalism—constitutionalism the value of which does not depend upon empirical or contingent factors.

As a whole, Harel’s book challenges a dominant view in the literature shared by Thomas Aquinas, Jeremy Bentham, Hans Kelsen, contemporary rights theorists, and utilitarians. Under this dominant view, the value of legal institutions is contingent and depends upon the prospects that legal institutions and procedures improve the quality of decision-making. In Harel’s view, contingent considerations often miss the point as they purport to rationalize political institutions and procedures in terms that do not capture what makes such institutions or procedures politically and morally attractive.

Harel’s argument is deeply original and well worth engaging with. I will nevertheless take a position that is opposed to his. Let us call it Robust Instrumentalism: Law matters only as a social instrument; perhaps it is the most important tool to organize society. In fact, I believe that it is a necessary tool that emerges in any society. While I believe this is true of all fields of law, I will focus my attention here on public law. The same can be said for constitutions, broadly understood. Constitutions are instruments necessary to organize and preserve political institutions. Finally, judicial review is also an instrument necessary not so much to protect human rights, but rather to maintain a correct balance of power between various institutions of the state. Robust instrumentalism maintains that law, constitutions, and judicial review are, first, about organizing horizontal relations between institutions, and only second, about the vertical relationship between the state and individuals.

Harel claims that the value of constitutionalism and judicial review should not be solely determined by how well they score in achieving certain goals. An instrumental understanding, he claims, opens the door to unverifiable empirical assumptions about the actual fitness of constitutions and judicial review to deliver certain outcomes:

instrumental understandings of constitutionalism and judicial review make their legitimacy contingent upon how well they perform in each given society. Harel opposes instrumentalism and proposes instead what he calls robust constitutionalism (RC).

RC consists of two related claims: constitutions and judicial review are constitutive of a just society; their existence should be celebrated as a necessary feature of a just society, and not evaluated on the basis of how well they contribute to political justice. Harel's first central idea (in chapter 5) is that constitutionalism guarantees that legislatures do not merely protect individual rights out of their own volition but, instead, that they are bound to protect them by duties that are acknowledged publicly. Consequently, individuals protected by constitutional provisions are not "at the mercy of the legislature," that is to say: their liberties do not depend on the legislature's good will. Harel insists that potential freedom is at stake here: it is not about non-interference, but about the lack of (normative) power to interfere on the part of legislatures. Harel extends this point and argues for entrenching international human rights norms that bind the state. Such international norms convey public recognition of a duty to protect rights on the part of the polity (Harel 185–188).

RC's second component is judicial review (in chapter 6). What makes judicial review valuable is not the mere fact that it produces desirable outcomes, for example, a better protection of human rights. A just society, according to Harel, is one that recognizes a right to a hearing for its citizens, and judicial review instantiates precisely that right. Judicial review is not a means to realize a just society; it is a component of a just society and it is valuable therefore independently of whether or not it delivers just outcomes.

## 2. The meaning of constitutional entrenchment

Robust constitutionalism (RC) maintains that a society with constitutional entrenchment of rights is morally superior to a society without such entrenchment. The former society is morally superior because it acknowledges publicly the existence of a duty on the part of the legislature (at 149). Harel does not specify what the content of the duty is; he insists however that it is the recognition of a rights-based duty on the part of the state that justifies the entrenchment of constitutional provisions.

### 2.1. Entrenchment

Harel presents an idiosyncratic conception of entrenchment: entrenchment is "grounded on practices" (or rooted in conventions and practices (at 156)). Harel takes his cue from Dicey, the famous English constitutional lawyer, according to whom there are some constitutional practices that can become over time constitutional conventions. These conventions are social practices that bind institutions and are considered to be part of the constitution of a country. I would call this *de facto* entrenchment. Harel believes that constitutional directives become entrenched by virtue of the fact that they are supported by social practices. However, it is odd to take English constitutional law as a paradigmatic example of entrenchment and claim that it is rooted

in conventions and practices alone; if anything, I shall argue, entrenchment becomes more important when constitutional conventions begin to matter less, or when they no longer matter.

To understand this last idea, think of post-Thatcher Britain. A country once known for its respect of civil liberties grounded in social and political practices, Britain under Thatcher undermined those standards very quickly by implementing aggressive policies. A few years later, to bring back a minimum level of rights protection, the Labour Party led a reform establishing a bill of rights and enacted the Human Rights Act (HRA 98). However, the HRA 98 does not entrench rights. It merely transposes the European Convention on Human Rights into English law, but does not legally protect the legislation from future amendment. Indeed, the present government intends to scrap the HRA 98. Lack of *de jure* entrenchment implies that citizens are at the mercy of the legislative majority.

Robust instrumentalism regards entrenchment as protecting a particular set of constitutional values as they are found in written constitutions. Entrenched norms are those norms that require a special and typically cumbersome procedure to be amended: entrenchment protects those norms from the day-to-day business of legislation. We could refer to this as *de jure* entrenchment. It is possible here to draw a distinction between *de jure* and *de facto* entrenchment; *de jure* entrenchment is typically associated with written constitutions, take the US Constitution as an example. *De facto* entrenchment contains the set of all constitutional practices that emerge along the years and that bind the legislature by virtue of social practices supporting shared values, take the UK Constitution as an example. Harel's conception of entrenchment is more aligned with *de facto* entrenchment and, as such, it is open to criticism; it seems to be tailored to justify his RC, while, conventional understandings of *de jure* entrenchment support robust instrumentalism.

Beside constitutional norms that are *de facto* entrenched and constitute the spirit of a just constitution, Harel needs a technical definition of entrenchment under which some norms become more difficult to amend as a result of a political decision (and not because of their moral pedigree in the society). He needs such a definition for the reason that his argument is justified in terms of republican freedom. Such freedom requires not merely that rights be protected but that the protection of these rights is not "at the mercy of" the legislature. Only a *de jure* entrenchment, namely the formal requirement of a supermajority, can guarantee such protection. In order not to be "at the mercy of" a legislature, it is necessary that the legislature be constrained and it is only the requirement of supermajority, namely *de jure* entrenchment which can provide such a constraint.

The distinction between *de jure* and *de facto* entrenchment would help Harel to make sense of the concept of entrenchment. While it is easy to see the value of *de jure* entrenchment, it is hard to understand why socially entrenched duties would benefit from constitutional recognition. Norms that are socially entrenched do not need to be legally entrenched, since they are already practiced and as such respected. Further,

by legally entrenching a principle it will eventually root itself as part of social norms, even if that is not guaranteed.

Harel needs therefore *de jure* entrenchment to achieve his goal of protecting republican freedom. Yet, *de jure* entrenchment does not imply anything about the relation between preexisting moral duties and constitutional norms. *De jure* entrenchment is by and large a procedural tool that makes it more difficult to amend certain norms rather than others. The norms that are entrenched by constitutional decision-making do not necessarily reflect preexisting moral duties. *De jure* entrenchment, being procedural, lacks the substantive quality that Harel would like to attribute to entrenchment in general. If anything, the practice of *de jure* entrenchment shows that its value is independent of substantive constitutional norms; instead its value depends on substantive outcomes, which means that *de jure* entrenchment is ultimately justified in instrumental terms.

## 2.2. Republican freedom?

Harel cooks his argument for RC in republican sauce: “to be free it is not sufficient that the person is not coerced . . . ; to be free it is also necessary that the potential victim not live ‘at the mercy of’ the potential violator’s inclinations” (at 171). Against this statement, it can first be argued that contemporary republicans approve of coercion so long that it is not arbitrary.<sup>1</sup> Second, not being at the mercy of the potential violator’s inclinations does not tell us anything about which institution are capable to realize republican virtues.

Indeed, the main problem with modern theories of republican freedom is that these are moral theories without clear institutional implications.<sup>2</sup> A republican theory that is much more sensitive to these implications is Montesquieu’s, and in particular his idea of a Constitution of Freedom: what preserves republican freedom is the entrenchment of checks and balances, and not the entrenchment of substantive rights.<sup>3</sup> What is crucial here is to create a constitutional framework within which the different branches control each other, so that no one branch can exercise power in a way that is detrimental to freedom. This reinterpretation can usefully help Harel to defend the idea of “[n]ot being at the mercy of any potential violator.”

What matters as far as institutions are concerned is not that they are bound by an entrenched set of values or norms. What matters instead is that those institutions can effectively control and monitor each other. The mechanisms of control vary with historical periods—in the nineteenth century it was about control of the purse and anticorruption norms. Today, it may well be that judicial review of legislation provides an effective mechanism of control, since governments around the world are becoming more presidential and less parliamentary. This trend points to the fact that the executive power attempts to control and dominate representative institutions. In

<sup>1</sup> PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* 5 (1997).

<sup>2</sup> Christopher McMahon, *The Indeterminacy of Republican Policy*, vol 33 (issue 1) *PHILOSOPHY AND PUBLIC AFFAIRS*, 67–93 (2005);

<sup>3</sup> BARON DE MONTESQUIEU, *DE L’ESPRIT DES LOIS* [1748].

this context, judicial review of legislation has the merit of checking on the increasing power of the executive to pass legislative measures without democratic scrutiny.

The idea of checks and balances and separation of power is central to robust instrumentalism. Constitutions are instruments to maintain state institutions under constant check. But for a written constitution to be an effective instrument, one needs a background political culture that is sound and stable.

### 2.3. The risk of infinite regress and the case for globalism

Harel claims that RC can explain the appeal of constitutional provisions and of international law, in particular human rights treaties. Constitutions are designed to protect us from legislatures and international human rights norms would protect us from the judgments, preferences or whims of the drafters and interpreters of the constitutions. For Harel, when human rights treaties entrench human rights they impose a duty on national constitution-makers.

Robust instrumentalism claims instead that international human rights norms and institutions can at best contribute to correcting and promoting the existing regimes of checks and balances. The international community can do so by encouraging the proper development of national institutions. Instead of imposing duties that cannot be enforced, international human rights institutions can instrumentally improve the national record by holding national institutions to be democratically accountable. For instance international institutions often monitor elections and provide support for states, which go through a process of democratization.<sup>4</sup> International human rights treaties ought to focus their attention on reinforcing the establishment of institutions that are capable of protecting rights rather than dictate what these rights are.

When extended to the international sphere, robust constitutionalism displays a problem of infinite regress. Once a constitution imposes duties on the legislature, so that citizens are not “at the mercy of” the legislature, citizens become subjects of the judgments of the founding fathers or of the interpreters of the constitution. The creation of international norms protects citizens from the judgments of the interpreters of the constitution but, at the same time, exposes them to the judgments of international courts. Robust constitutionalism cannot overcome the vulnerability of individuals to the judgments of someone. It can only create further layers of decision-makers but ultimately somebody must make a final decision and we are bound to be “at the mercy of” that entity. Thus RC cannot overcome the fact that somebody (be it a legislature, a founder of the constitution or international adjudicator) has the power to make a decision that threatens our freedoms.

Robust instrumentalism is not subject to this objection and does not suffer from infinite regress. One can argue that an international layer of norms can usefully contribute to protect and promote an effective system of checks and balances. What international courts ought to do is to call for the accountability of

<sup>4</sup> JUDITH G. KELLEY, *MONITORING DEMOCRACY: WHEN INTERNATIONAL ELECTIONS OBSERVATION WORKS AND WHY IT OFTEN FAILS* (2012).



domestic institutions. Whenever national institutions ride roughshod over the mechanisms of checks and balances, or whenever one institution charged with checking is failing to do so effectively, international institutions can urge it to perform its function. Crucially, this suggestion does not mean that the substantive result will change (this is the job of national authority) but the national authority has to show that it is subject to an institutional structure that contains checks and balances.

### 3. Non-instrumental judicial review

#### 3.1. Judicial review and the right to a hearing

Harel puts forward an original, though idiosyncratic, conception of judicial review. Judicial review, according to him, is not what we commonly identify as the power of courts to strike down acts of the state that are unconstitutional. In fact, Harel's view gives no special role to judges or courts. Instead, the idea of judicial review he presents is much broader and encompasses many different institutional devices that provide the individual with a hearing. It even includes cases where parliament itself provides a hearing; anybody can engage in judicial review:

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 (at 213–214).

In other words, whatever the state puts in place in order to honor the right to a hearing can count as a form of judicial review. The right to a hearing has three components according to Harel:

- (a) The state provides the opportunity to challenge an individual decision,
- (b) the state engages in genuine deliberation,
- (c) the state is willing to reconsider its decision.

These three elements provide both a definition of the right to a hearing and set out the conditions for judicial review. Few comments are in order.

First, Harel's understanding of the right to a hearing is too individualistic; judicial review is not only about the opportunity to challenge an individual decision. Judicial review is desirable because it makes the ruler accountable in the exercise of its function. Judicial review transforms individual litigation into an examination of state action; it gives voice to popular sentiments and to the collective as a whole, not merely to an individual grievance.

Second, it is not clear what counts as genuine deliberation. According to Harel, a society is just when it gives a voice to the grievances of its citizens. Judicial review is the embodiment of the right to be heard. However, it remains open what counts as voice and what counts as sufficient deliberation on the part of the state. As a matter of

fact, according to Harel, almost anything can count as a response, including a hasty dismissal in some cases. Indeed, Harel points out that the institution performing the review can at any time “reconsider” the legislature’s decision simply by performing a “legal shrug of the shoulders” without serious deliberation (at 209).

Third, it is not clear when an institution should reconsider its decision. Harel mentions that the state should be willing to reconsider its decision. The question is, however, who determines when the state should be compelled to do so. A universal duty of reconsideration is too burdensome. But once you narrow when reconsideration can take place, there are hard choices to be made.

There is a definitional over-determination: any right to a hearing is equated with judicial review. However, the right to a hearing is not exhausted by judicial review: the scope of that right is broader, and does not overlap completely with the scope of judicial review. As a consequence, Harel’s definition of judicial review is capacious, possibly over-inclusive; it may well include many other procedures that commonly have other labels, such as parliamentary scrutiny of legislation, or the work of a mediator or ombudsman. Whatever the state does to hear its citizens appears as a form of judicial review if it meets the conditions specified above.

A more conventional understanding of judicial review focuses instead on the actual power of judicial institutions to hold the legislature or the executive accountable when it exceeds its power. Not only does Harel ignore such a technical definition of judicial review, he also distorts the object of judicial review as commonly understood by focusing on judicial review of legislation on the basis of human rights alone. Judicial review is much broader than this: it includes all cases in which judicial bodies have to review the actions of the legislature or the executive. Judicial review of legislation can be based on the violations of constitutional norms other than rights (e.g., federalism provisions). For instance, Canada has had judicial review of laws since the nineteenth century, but no rights-based judicial review of legislation until recently. Finally, one can also distinguish between judicial review of legislation *in concreto* (once an individual has been affected by measures based on the legislation in question) and judicial review of legislation *in abstracto*, as conducted for example by the French Conseil Constitutionnel that assesses the compatibility between constitutional norms and legislation in the absence of an individual grievance. Harel only focuses on a very narrow phenomenon: judicial review of legislation *in concreto* on the basis of human rights.

### 3.2. Aren’t you a rights instrumentalist anyway?

Harel is a self-confessed convert: he used to defend an instrumentalist conception of judicial review (at 1). His new insight is based on the idea that the right to a hearing is not an instrument for the realization of existing rights. Harel claims that the right to a hearing can apply both to situations in which the claimant is challenging the justifiability of an infringement of an accepted right and to situations where there is a genuine dispute about the existence of a right. He concludes that the actual existence of a right is not necessary for the right to a hearing to exist. People have a right to a hearing even when their grievances are unsound. Thus, for instance, Harel argues that if A promises to meet B for lunch but unexpected circumstances disrupt A’s plan, it is still



the case that the promisee in this case deserves a hearing to determine whether the circumstances justify cancellation of the promise (at 205).

The existence of the right to a hearing is dependent on the standing of the individual (both moral and legal standing). Here's an example that illustrates what standing means: You customarily ignore my emails, but when you send me one and I do not reply you complain: why did you ignore my email. In this situation, I am entitled to argue that you have no standing—that is to say: you have forfeited your right to be heard.<sup>5</sup> Law also recognizes the requirement of standing and often requires standing. Legally speaking, you only have standing when you prove that one of your actual interests has been frustrated. This is a pre-condition to be heard. It seems therefore that the right to a hearing is after all instrumental and is designed to protect actual interests. There must be a connection between the grievance and an interest. In other words, the right to a hearing is not completely stand-alone and independent. It hinges on the pre-existence of actual interests and it is designed to serve these interests.

### 3.3 The right to a hearing versus *audi alteram partem*

Harel claims that the existence of the right to a hearing presupposes a moral controversy about a right. There are two types of controversies: controversies concerning the justifiability of an infringement of the right and controversies concerning the very existence of a prior right (at 203). I think that this makes litigation too moralistic. Often, as mentioned above, the litigant simply has an interest against someone else. It may simply be the case that there is a conflict between two parties (a disagreement as to how to interpret and apply a norm—a constitutional norm). This conflict does not have to be moral—it can be completely non-moral. It can be about distribution of powers in a federal republic. It can also be about the abuse of power on the part of the state.

When there is a conflict—moral or non-moral—law matters because it helps to settle the conflict so as to avoid unpleasant consequences. Law is the main instrument that societies use to manage conflict and the corollary of this is that whenever a law reproduces conflict or transforms social conflict into a legal conflict, then the basic thing that law has to guarantee is that the parties to the conflict are heard: *audi alteram partem*. But this hearing of the parties to a conflict is not constitutive of justice; it is instead an instrument to manage the conflict. Justice will be served if the conflict is dealt with appropriately; that is if an outcome is reached that is regarded by all parties as fair. In other words, it would be difficult to look at adjudication as constitutive of justice if it provided for a right to be heard without delivering fair outcomes.

<sup>5</sup> See Gerard Cohen, *Casting the First Stone: Who Can, and Who Can't, Condemn the Terrorists?*, vol. 58, ROYAL INSTITUTE OF PHILOSOPHY SUPPLEMENT 113 (2006).

## 4. Conclusion

Harel's argument in favor of RC is very original and worth engaging with. It forces one to re-think the meaning and function of law, constitutions and courts. It is a serious attempt to provide a basis for social institutions that Harel believes to be constitutive of justice. I disagree fundamentally. Law, constitutions and courts are necessary instruments to achieve a number of different goals that human beings are not capable of realizing otherwise.

Law matters because it is a necessary instrument in any human community. It does not entrench any value in particular, but responds to the fact that state authorities are not always virtuous and can abuse their powers in many ways. Constitutions limit the possibility of abuse. They make abuse more difficult, and they set up concrete guarantees against abuse. Constitutions matter if they are effective in this regard. They do not matter if they are mere window dressing—think, for example, of the Soviet constitution under Stalin. One can say the same for international human rights. An endless number of treaties declare and specify all sorts of human rights, but there is little doubt that the world would be better off with fewer treaties that afforded better protection. What matters is how well legal tools can help realize just outcomes: law is an instrument to realize justice. It is not constitutive of justice.