

# On the Value of Constitutions and Judicial Review

Laura Valentini, LSE

**Abstract.** In his thought-provoking book, *Why Law Matters*, Alon Harel defends two key claims: one ontological, the other axiological. First, he argues that constitutions and judicial review are *necessary constituents* of a just society. Second, he suggests that these institutions are not only means to the realization of worthy ends, but also *non-instrumentally valuable*. I agree with Harel that constitutions and judicial review have more than instrumental value, but I am unpersuaded by his arguments in support of this conclusion. I argue that Harel's ontological claim is unsustainable, and that his axiological claim needs revision. Regarding the former, I show that constitutions and judicial review are only *contingent* constituents of a just society. Regarding the latter, I contest Harel's specific account of the value of constitutions and judicial review. Harel grounds the non-instrumental value of constitutions in freedom as non-domination but, upon scrutiny, it emerges that their non-instrumental value lies elsewhere. Further, Harel holds that the non-instrumental value of judicial review stems from its embodying a right to a fair hearing. I argue that this right has non-instrumental value only under a particular set of circumstances. I thus conclude, contrary to Harel, that the non-instrumental value of judicial review is contingent on those circumstances obtaining.

**Key words:** constitutions, judicial review, disagreement, instrumental value, intrinsic value

## 1. Introduction

Does the value of institutions depend on their ability to produce good outcomes or does it rest on their intrinsic (“procedural”) virtues? Answers to this question vary. Virtually no-one denies that outcomes matter in institutional evaluation: if a political-legal system leads to recurrent violent crises and fundamental rights violations, it must be rejected, no matter how intrinsically fair its procedures are. Yet there is disagreement about whether the intrinsic qualities of institutions also matter, independently of their outcomes.

Alon Harel's thought-provoking book, *Why Law Matters*, offers an uncompromising, affirmative answer to this question. In Harel's view, familiar institutions such as rights, the state, constitutions, and judicial review matter, at least in part, independently of their instrumental benefits. As he puts it, “legal institutions and procedures are often not mere

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*contingent* instruments to realize valuable ends; they are often *necessary components* of a just society” (Harel 2014, 3, second emphasis added).<sup>1</sup>

Particularly interesting and original is Harel’s defence—in Part III of his book—of what he calls “robust constitutionalism,” specifically of the non-instrumental value of constitutions and judicial review of legislation (Harel 2014, 135). This is because, as Harel himself notes, even those who acknowledge that some components of our political-legal system (e.g., democratic suffrage) have non-instrumental value are reluctant to include constitutions and judicial review among them. Instead, “non-instrumentalists” either are sceptical of constitutional rights and judicial review (e.g., Waldron 2006), or defend them on purely instrumental grounds, and argue that, in some cases, their instrumental value—in terms of fundamental rights protection—outweighs their non-instrumental disvalue (e.g., Brettschneider 2005). Harel’s view thus aims to “*level the playing field in constitutional theory*” by showing that the non-instrumental considerations predominantly invoked by anti-constitutionalists actually speak in favour of constitutional entrenchment and judicial review (Harel 2014, 135).

More precisely stated, Harel’s case for “robust constitutionalism” consists of an ontological and an axiological claim.<sup>2</sup> At the level of ontology, Harel argues that constitutions and judicial review are *necessary constituents* of a just society. At the level of axiology, he holds that these institutions have some *non-instrumental* value: they matter “not merely as contingent instruments to bring about desirable outcomes” (Harel 2014, 8).

I share Harel’s view that constitutions and judicial review have more than instrumental value, but I am sceptical about his ontological claim as well as his justification for the axiological one. In this article, I (i) argue that constitutions and judicial review are only *contingent* constituents of a just society, and (ii) account for the non-instrumental value of constitutions and judicial review by appeal to grounds that differ from Harel’s.

The article is structured as follows. In Section 2, I define key terminology and, on this basis, offer a sharper statement of Harel’s overall position. In Sections 3 and 4, I specifically focus on his views about constitutional entrenchment of rights. I deny that constitutions are necessary constituents of a just society, and argue, contrary to Harel, that their non-instrumental value rests on the symbolic recognition of citizens’ equality, not on the protection of freedom as non-domination. In Sections 5 and 6, I turn to Harel’s views about

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<sup>1</sup> There is something a little odd about this formulation, in that Harel qualifies his necessity claim by using the adverb “often.” Given the emphasis Harel places on “non-contingency,” at least for now, I discount the “often” qualification.

<sup>2</sup> I will define “ontology” and “axiology” in Section 2.

judicial review, and show that the arguments he offers in their support contain some gaps. Once the gaps are filled, it also becomes evident that judicial review is a constituent of a just society and has more than purely instrumental value *only contingently*—namely when there exist particular kinds of disagreements about justice.

Although my discussion is critical, there is much to admire in Harel’s book. Most importantly, the book has the virtue of offering a wealth of imaginative arguments for the often neglected—but I believe correct—view that our legal institutions are more than mere means to ends.

## 2. Ontological and Axiological Claims

I said in the Introduction that Harel’s view consists of an ontological and an axiological claim. To put the present discussion into sharper focus, let me elaborate on this terminology.

*Ontological claims* about an object X concern what X is, and in what relation it stands to other objects. Take, for instance, the following claim: “A blender is a kitchen appliance and a means to producing fruit smoothies.” This is an ontological claim about a blender. It specifies what kind of object a blender is, and in which relation it stands to other objects. In this specific case, the relevant relation is *instrumental*: the blender, when used properly, produces (causes the existence of) a further object, namely a fruit smoothie. Or, take a different—more complex—example: “Pleasure is a hedonic state, and is partly constitutive of happiness.” This is an ontological claim about pleasure. It specifies what pleasure is, and in which relation it stands to another object: happiness. In this case, the relation is *constitutive*—pleasure is a constituent of/a part of happiness, but does not “cause” happiness (see Schroeder 2012). Furthermore, the relations referred to in ontological claims may be *necessary* or simply *contingent*. For example, we can plausibly say, “A blender is a contingent means to producing a fruit smoothie.” This tells us that we could also produce a fruit smoothie without a blender, e.g., if some other appropriate appliance was available. Or, we can say: “A hard-drive is a necessary constituent of a functioning personal computer.” This means that we cannot have a functioning personal computer without a hard-drive. The hard-drive is a necessary or “essential” constituent of a functioning personal computer.

*Axiological claims* about an object X concern the *value* X possesses. Again, take the example of a blender. We can say that a blender has *instrumental value*, insofar as its value stems (at least in part) from its being a means to the production of something valuable: a tasty smoothie. Or, we can say that pleasure has *constitutive value*, insofar as its value stems (at least in part) from its being a constituent of happiness. The idea is that, by being a part of

something valuable, a given object may “inherit” some of that value. Happiness, in turn, may be said to have *intrinsic value* insofar as it is valuable “as such,” not as a means to some further end, or as a constituent of some other object with intrinsic value (on different types of value, see Carter 1995; Schroeder 2012). All of these are axiological claims, concerning the value that objects possess, as opposed to what they are and in which relations they stand to other objects.

The distinctions presented so far may seem like “analytical overkill,” but they are helpful in getting clear about the precise nature of Harel’s views about constitutions and judicial review. In particular, although Harel doesn’t state these views very precisely, Part III of his book suggests that he endorses the following two claims.<sup>3</sup>

**Ontological claim:** Constitutions and judicial review are *necessary constituents* of a just society.

This means that, just like one cannot have a functioning pen without ink, or a functioning personal computer without a hard-drive, on Harel’s view, one cannot have a just society without constitutions and judicial review.

**Axiological claim:** Constitutions and judicial review are *non-instrumentally* (e.g., constitutively or intrinsically) valuable.

This means that, for Harel, the value of constitutions and judicial review is not exhausted by instrumental considerations. These institutions may be valuable “as such” or at least as constituents of something else that is valuable—e.g., in the way a particular sentence may have constitutive value as part of a beautiful poem (Callan 1988, 23).

With a clearer picture of Harel’s views, I now turn to examining their tenability. I focus on his discussion of constitutional rights first, and subsequently on his treatment of judicial review.

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<sup>3</sup> Harel does not clearly distinguish between them.

### 3. Why Constitutions Matter: Freedom as Non-Domination

Harel's arguments in defence of the ontological and axiological claims in relation to constitutions heavily rely on the idea of "freedom as non-domination," and can be concisely stated as follows.<sup>4</sup>

**Argument for the ontological claim:** Freedom as non-domination is a necessary constituent of a just society. Constitutionally entrenched rights are necessary constituents of freedom as non-domination. Therefore (via transitivity) constitutionally entrenched rights are necessary constituents of a just society.

**Argument for the axiological claim:** Freedom as non-domination is non-instrumentally valuable.<sup>5</sup> A necessary constituent of something non-instrumentally valuable has constitutive value. Constitutionally entrenched rights are necessary constituents of freedom as non-domination. Therefore, constitutionally entrenched rights have constitutive value.

Evaluating the plausibility of these arguments requires us to gain a better sense of what, exactly, non-domination is. Non-domination, in line with the republican tradition, can be understood as the robust or guaranteed absence of arbitrary interference. Conversely, domination consists in the potential for (the possibility of) arbitrary interference on the part of an agent *vis-à-vis* others (Harel 2014, 174; drawing on Pettit 1997).<sup>6</sup> As Harel understands it, interference is *arbitrary* when it involves the violation of those fundamental rights that ought to be protected by any decent political system.

To illustrate the intuitive plausibility of freedom as non-domination, Harel (2014, 176–7), like the republicans by whom he is inspired, resorts to the master-slave analogy. A slave with a *de facto* non-interfering master, he points out, enjoys considerable freedom as simple non-interference. Yet, many would want to resist the claim that a slave with a non-interfering master is free. Why? Because the slave is dominated: even if, contingently, the master does not interfere with the slave, he has the *power* to do so. The slave is just lucky

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<sup>4</sup> What I offer below is my own reconstruction of Harel's arguments.

<sup>5</sup> It does not matter, here, what type of non-instrumental value freedom as non-domination has. It could be "intrinsic," "constitutive," or both. Harel is not fully clear about this. What does matter is simply that part of freedom's value is non-instrumental.

<sup>6</sup> Harel (2014, 175) claims not to want to endorse the specifics of Pettit's republican conception. That said, he relies on the *broad structural features* of Pettit's notion in his defence of the non-instrumental value of constitutions.

that, in the actual world, his master allows him to do whatever he wants, but this non-interference is fragile, not guaranteed. There are many nearby possible worlds in which the master would interfere with his slave (List 2006). The slave is thus, ultimately, at the mercy of the master, despite the master's contingent non-interference.

A just society—one committed to equal respect for its citizens—Harel plausibly continues, must be domination-free, i.e., free from “master-slave” relations, be they between citizens or between citizens and those who govern them. A domination-free society, in Harel's view, can be realized only through fundamental rights being constitutionally entrenched.

In order fully to appreciate Harel's position in this regard, let me briefly explain what he means by “constitutions,” and how these are meant to secure individuals against arbitrary interference on the part of the legislature. Harel's understanding of constitutional norms is rather capacious. In his characterization, these norms are:

- i. “rooted in practices and conventions of certain communities” (154) and “embraced not only by the legislature itself but also by the polity at large, or at least by powerful components of it” (171) such that “to the extent that the legislature fails to honour [them], it is subjected to *effective* condemnation” (180, emphasis added);
- ii. relatively specific; and
- iii. often “accompanied by interpretive privileges of professional institutions/experts” (154).

Since constitutional norms *effectively* bind the legislature, Harel argues, they are uniquely capable of eliminating the potential for its arbitrary—i.e., rights-violating—interference in citizens' lives. In Harel's (2014, 151) words: “[o]nly citizens whose rights are constitutionally entrenched do not live ‘at the mercy of’ the legislature and, consequently, their rights do not hinge upon the judgments or inclinations of such legislatures.” This is the argument for the ontological claim.

For Harel, establishing the ontological claim also sheds light on an under-appreciated dimension of the value of constitutional entrenchment. This value, Harel (2014, 7) says, is not only dependent on constitutions' “likely contingent effects or consequences, e.g., better protection of rights.” Instead, constitutional rights also matter by virtue of their being

*constituents* of freedom as non-domination.<sup>7</sup> Just like (arguably) pleasure’s constitutive relation to happiness accounts for an important part of pleasure’s value, so too constitutions’ relation to freedom as non-domination accounts for an important part of their value. Constitutions “inherit” some of the non-instrumental value of freedom as non-domination. Once this becomes apparent, the value of constitutions is no longer held hostage to their “likely contingent effects.” This is the argument for the axiological claim.

Are Harel’s arguments in support of his core claims convincing?

#### **4. Why Constitutions *Really* Matter: Instrumental and Symbolic Value**

I grant the claim that a just society must be a non-dominating one. My discussion exclusively focuses on the relationship between constitutional entrenchment and freedom. I argue that Harel’s ontological claim turns out to be unsustainable and so does his account of the non-instrumental value of constitutions. I conclude by sketching an alternative account of this value.

Starting with the ontological claim: is constitutional entrenchment *necessary* for freedom as non-domination? It seems to me that it is not. To see this, consider the following—admittedly somewhat far-fetched, but conceivable—scenario.

*Hypothetical Society (HS)*: In *HS*, fundamental rights are not publicly acknowledged as binding, yet legislators are each privately committed to respect for rights; it is *psychologically impossible* for them to make laws that would breach such rights, hence they never do.

In *HS*, it is impossible for citizens to be arbitrarily interfered with by the legislature because, *ex hypothesi*, none of its members would ever support laws and policies inconsistent with the relevant rights. To be sure, the legislature is not “externally constrained,” but nonetheless citizens are *robustly shielded from arbitrary interference*. Therefore, we have non-domination, yet no constitutional entrenchment. Harel’s ontological claim, namely that constitutional entrenchment is a *necessary* constituent of freedom as non-domination, seems easily refuted.

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<sup>7</sup> At times, Harel (2014, 151) suggests that these rights matter “as such,” which is typically interpreted to mean “intrinsically.” This gloss, though, seems inaccurate given how Harel characterizes the relationship between constitutional entrenchment and freedom as non-domination. Reference to intrinsic value appears more appropriate in relation to the “public recognition” function of constitutions, which I will briefly discuss later in this section.

Two responses might be available to Harel. The first consists in pointing out that, when it comes to freedom as non-domination, it is not the “possibility” of arbitrary interference that matters, but rather its “socio-legal permissibility.” In other words, freedom as non-domination is not concerned with agents’ power to interfere arbitrarily *tout court*, but with the socio-legal acceptability of agents’ doing so (Kramer 2010; List 2006). In *HS*, although it is impossible, as a matter of fact, for the legislature to violate citizens’ rights, it is *socio-legally permissible* for it to do so, and this is what makes citizens of *HS* dominated.

This response comes at two costs. First, it renders Harel’s ontological claim almost tautological. If freedom as non-domination simply means the “absence of the socio-legal permissibility of arbitrary interference” and constitutional entrenchment of rights occurs whenever “arbitrary interference is socio-legally impermissible,” then it follows *trivially* that constitutional entrenchment is non-contingently constitutive of non-domination. But this happy result would stem from a dubious reverse-engineering of the notion of non-domination, aimed at delivering the conclusion that constitutions are necessary constituents of non-domination.

Second, and relatedly, this form of “reverse-engineering” renders the notion of freedom as non-domination, on which Harel’s argument relies, somewhat implausible. After all, while the absence of the *possibility* of arbitrary interference seems intimately connected to freedom,<sup>8</sup> the absence of the *socio-legal permissibility* of arbitrary interference has little to do with freedom, unless it *correlates* with robust non-interference. The presence of a rule against interference that can be easily violated does not seem to make one particularly free. To see this, consider the following scenario.

*Dysfunctional Society (DS)*: In *DS*, fundamental rights are constitutionally entrenched, i.e., publicly acknowledged as binding, but it is nonetheless possible for legislators to violate them, as they in fact routinely do.

Although, in *DS*, arbitrary interference is socio-legally impermissible, it is clearly possible, and this warrants the conclusion that members of *DS* are dominated. A notion of freedom as

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<sup>8</sup> This is so at least if one is sympathetic to “modally robust” understandings of freedom. See List and Valentini (forthcoming) for discussion.

non-domination focusing exclusively on socio-legal permissibility, then, loses its appeal: it is the shadow of a full-blooded notion of freedom (see the discussion in Wendt 2011).<sup>9</sup>

The second line of response available to Harel involves confirming his commitment to a plausible (i.e., possibilistic) account of non-domination, but protesting that my depiction of *HS* is *problematically* counter-factual. In the world as we know it, under “normal” political circumstances, we cannot rely on legislators being psychologically *incapable* of violating rights. Appeal to such counter-factual scenarios, Harel might continue, should be discounted on methodological grounds.

Interestingly, in the book’s conclusion, Harel comes very close to offering precisely this response:

the arguments [defended in this book] are *not universal ones*; they are grounded in the ways our institutions have developed in western liberal traditions and, in particular the ways in which they are understood by citizens. The meanings attributed to the institutions are ultimately our creation and they could have been developed differently. Hence, an objection based on the claim that ‘things could have been otherwise’ is beside the point as none of the claims made here are intended to apply universally (Harel 2014, 227, emphasis added).<sup>10</sup>

The trouble with this response is that it contradicts one of the advertised aims of the book, namely that of vindicating the claim that constitutions are non-contingent, “necessary ... features of a just or legitimate society” (Harel 2014, 139). Harel cannot consistently hold both (i) that constitutions are necessary constituents of a just society, and (ii) that constitutions are constituents of a just society only under particular circumstances. Harel must make a choice between (i) and (ii), and my discussion clearly points in the direction of (ii).

This may not be such a big concession to make though. After all, Harel can still hold that constitutional entrenchment is “*weakly necessary*” for freedom as non-domination (and hence a just society), namely necessary *given* the circumstances of our common political life. Since these are the circumstances that matter to us, Harel’s claims about “necessity” can be

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<sup>9</sup> A third—and promising—option, which I do not have the space to discuss here, is for a notion of freedom to focus on *social, or socio-legal, possibilities*: i.e., what is possible given how “the social world works.” Notice, however, that social possibilities are not *reducible* to what is “legally or socially permissible.” For example, it may be socio-legally impermissible to cross the road when the light is red—due to the existence of a positive legal norm that forbids it—and yet socio-legally possible to do so, say, if the rule is routinely ignored and not enforced. See List and Valentini (forthcoming).

<sup>10</sup> Thanks to Alon Harel for drawing my attention to this passage.

toned down without his argument losing much force. Indeed, perhaps the claim does not even need to be “toned down.” On a charitable interpretation, “weak necessity” is what Harel had in mind all along.<sup>11</sup> There is a further complication, however.

Once it is acknowledged that Harel’s ontological case is contingent on certain assumptions about political life, doubt is also cast on his axiological claim, namely that constitutions have *constitutive* value by virtue of their contribution to freedom as non-domination. After all, constitutional entrenchment of rights has been revealed to be nothing more than a *very good means*, under normal circumstances, to realizing freedom as non-domination. Why? Because we know that, typically, formal constitutional entrenchment goes hand-in-hand with effective guarantees against rights-violating interference. This means that, if the value of constitutional entrenchment is to be explained by appeal to freedom as non-domination, there is nothing “constitutive” about it. Constitutions are just an *effective means* of implementing freedom as non-domination: their freedom-based value is instrumental.

Note that the difficulties with Harel’s (2014, 227) view do not mean that a successful argument for the non-instrumental value of constitutions—always contingent on “the ways in which they are understood by citizens”—cannot be made. For example, it seems plausible to value constitutions as *symbolic expressions* of society’s commitment to rights, and of persons’ equal status.<sup>12</sup> Harel (2014, 149) comes close to defending this view when he says that “constitutional entrenchment of moral or political rights is in itself a form of public recognition that the protection of rights is the state’s *duty*.” As the old saying goes, it matters not only that justice be done, but also that justice be “seen to be done.” Similarly, one might say, it matters not only that rights should be respected, but also that respect for them should be accompanied by a public, visible commitment to them, expressive of the equal status of citizens (on this, see Christiano 2008).

I thus agree with Harel’s (2014, 169) general claim that “in cases in which the legislature violates its duties, public condemnation ought to follow,” and not only for instrumental reasons. However, contrary to Harel, I think public condemnation matters as a *means* to realizing non-domination under real-world circumstances and, arguably, as a *public expression* of citizens’ equal moral status, whose symbolic value is contingent on how “our institutions have developed in western liberal traditions.”

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<sup>11</sup> This may also explain the qualification I mention in note 1.

<sup>12</sup> The idea of non-domination itself (especially when it is not used to flesh out a conception of freedom) is underpinned by a concern with persons’ equal status.

## 5. Why Judicial Review Matters: The Right to a Fair Hearing

In this section, I turn to Harel's arguments concerning judicial review. Constitutional entrenchment and judicial review are intimately connected with each other. As Harel acknowledges, the former is often—but not always—accompanied by special organs with the authority to interpret constitutional directives. Courts with the power to review legislation are a prime example of this.

Harel's ontological and axiological claims about judicial review are grounded in the "right to a fair hearing," rather than in freedom as non-domination.<sup>13</sup> The arguments in their support can be concisely stated as follows:

**Argument for the ontological claim:** The right to a fair hearing is a necessary constituent of a just society. Judicial review uniquely instantiates the right to a fair hearing. What uniquely instantiates a necessary constituent of X is itself a necessary constituent of X. Therefore, judicial review is a necessary constituent of a just society.

**Argument for the axiological claim:** The right to a fair hearing is intrinsically valuable.<sup>14</sup> Judicial review uniquely instantiates the right to a fair hearing. A unique instantiation of something intrinsically valuable is itself intrinsically valuable. Therefore, judicial review is intrinsically valuable.

Why, exactly, does "a fair hearing" matter? A just society, Harel plausibly argues, is one that treats citizens with respect. In addition to avoiding domination, he suggests, treating citizens with respect requires that, when the existence of a right or the justification for its infringement is contested, the "losing party" ought to be offered a fair hearing. Denying the opportunity for a hearing, Harel (2014, 208) says, "is unfair [to citizens] because such a deprivation fails to respect them as potential right-holders."

Let me offer an example. If, in line with local legislation, an association refuses to give membership to an applicant on the basis of ethnicity, and the rejected applicant feels that his or her rights against arbitrary discrimination are thereby violated, he or she is entitled to a fair hearing. There should be avenues available to him or her to challenge the local legislation, and have his or her complaint heard. Unless we can assume that legislatures are infallible—something that obviously cannot be assumed (!)—there is a straightforward

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<sup>13</sup> Harel talks about a "right to a hearing," but given what he has in mind, I find "fair hearing" a better label.

<sup>14</sup> Harel (2014, 192) is clear about this.

rationale for granting a right to a fair hearing out of respect for people's dissenting opinions, when their own rights are at stake.

Specifically, the right to a fair hearing entails "a duty on the part of the state to provide the right-holder an opportunity to challenge the [alleged] infringement, willingness on the part of the state to engage in moral deliberation and provide an explanation, and a willingness to reconsider the presumed violation in light of the deliberation" (Harel 2014, 210). Harel thinks that a right to a fair hearing so understood is uniquely instantiated by procedures of judicial review.

For Harel, judicial review is characterized by two main features. First, courts are entitled to make binding decisions about (democratically approved) statutes that are relevant to the specific cases they are asked to consider. Second, courts have special authority when it comes to constitutional interpretation (Harel 2014, 194). In Harel's view, when disputes arise about whether legislative decisions violate rights, the alleged victims ought to be heard and the disagreement fairly adjudicated. Thanks to their special mode of reasoning and operation, the judicial procedures characterizing courts are the only ones that "instantiate" such a right. In Harel's words, "judicial procedures are not merely an instrument to providing a hearing. In fact these procedures *constitute* a hearing" (Harel 2014, 212).

It is important to note here that Harel adopts a *very capacious* understanding of judicial procedures. What makes a procedure "judicial" and "court-like" is its internal functioning, not who conducts it. In his words:

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 (Harel 2014, 213–4).

This means that, for Harel, "judicial review" obtains also when courts have an advisory function, and the final word on whether a particular statute is or is not unconstitutional falls on the legislature (this is also known as "weak judicial review"), provided the legislature is open to the court's input. Which particular form of review we should favour in any given context depends on which institutional configuration would best embody the procedural virtues of fair hearing in that context (Harel 2014, 222–3). Setting details aside, it is clear that, for Harel, judicial review uniquely embodies or constitutes a fair hearing. Indeed, one could say that Harel stretches the meaning of judicial review so much as to make it

encompass whatever institutionally instantiates a fair hearing (Zucca 2015, 308). This *ontological* relation between judicial review and a fair hearing is also meant to shed light on the *value* of judicial review. Judicial review matters, from this perspective, not by virtue of the quality of judicial decisions, but by virtue of the quality of the judicial *process*. For Harel, the right to a fair hearing is itself procedurally justified: its value is intrinsic, not instrumental. This right is not defended on account of it being conducive to better outcomes, but as necessary to *treat* citizens with respect as potential right-holders. The procedure of a hearing itself expresses respect for citizens, quite independently of its outcomes.

This conclusion is original. While many are prepared to argue that democratic procedures, giving all citizens an equal say in political decision-making, must be part of a just society—quite independently of the quality of their outcomes—few say the same about judicial review. Critics protest that judicial review offends the fundamental moral equality of persons, by giving a particular category of people—judges—a privileged position in solving disputes about rights. Advocates of judicial review, by contrast, predominantly focus on its instrumental benefits, and say relatively little about its procedural virtues. If Harel’s argument is successful, it has the potential to provide a particularly strong defence of judicial review, capable of meeting its democratic critics on their own ground—i.e., that of the non-instrumental, and, specifically, intrinsic, value of procedures (Harel 2014, 145). But is the argument successful?

## **6. Why Judicial Review *Really* Matters: A Contingent Right to a Fair Hearing**

Let us go back to Harel’s claim that the right to a fair hearing is a *necessary* constituent of a just society. For Harel, any time people protest that their rights have been violated—no matter how plausible or absurd their complaints are—they are entitled to having their complaints heard, taken seriously, and reasoned about, with an honest willingness to “reconsider the presumed violation.” This counter-intuitively implies that, say, if John protests that the legal prohibition on murder violates his rights, he is entitled to a fair hearing, though his complaint is obviously absurd. Even in a society in which everyone’s complaints were absurd (like John’s), the right to a fair hearing would be required by justice.

Harel explicitly considers an objection of this kind, but is prepared to “bite the bullet” on it. He “maintain[s] that the right to a hearing ought to be granted in any case of a dispute.” He soon, however, qualifies this statement by saying “[a]dmittedly the scope and depth of a satisfactory hearing could differ from one case to another. In the case of crazy demands, a simple shrug of the shoulders could constitute a satisfactory hearing” (Harel 2014, 209). This

qualification is telling: a “shrug of shoulders” is a far cry from the demanding account of a fair hearing Harel officially defends. A shrug of shoulders is, in fact, no fair hearing at all. This suggests that, ultimately, Harel himself believes that a fair hearing “proper” is a demand of justice *only in circumstances* involving specific kinds of disagreements about rights—i.e., not “crazy” ones—yet he refrains from explicitly commenting on what they are.

This is a problem. First, it suggests that, ontologically, a fair hearing and, consequently, its institutional embodiment via judicial review, is a “contingent” constituent of a just society, not a necessary one. Second, and more interestingly, at the axiological level, without an explanation of *why* certain types of disagreement trigger special normative demands, Harel’s defence of the *non-instrumental value* of judicial review remains under-motivated. To see this, consider the following analogy. Two children, Freddie and Tommy, are quarrelling over which one of them owns a particular toy car. The car was given to Freddie for Christmas by his parents. The boys’ mother arrives at the scene, and determines that the car is Freddie’s. Tommy immediately protests: “I know it was given to Freddie for Christmas, but now I want it, so it is mine!” Tommy’s argument is silly. Suggesting that he has a right to a fair hearing, say, *vis-à-vis* his father, who should give the mother’s decision “serious reconsideration,” is implausible.

Furthermore, even in cases involving *reasonable* complaints against parental decisions, the justification for a fair hearing would appear to rest on epistemic (instrumental) considerations as opposed to procedural ones. The granting of a right to fair hearing would be justified if it was, on the whole, more conducive to settling disputes *correctly*. For example, if the boys’ father was known to have seriously poor judgement, due to a long-standing alcohol addiction, it is unclear how a concern with treating the boys with respect could justify establishing a right to paternal fair hearing. In such circumstances, respect for the boys would seem to speak in favour of giving their mother final authority in disputes between them, without this involving any loss of value.

This is of course a somewhat unsophisticated example, but it helpfully illustrates the challenges facing Harel’s “fair-hearing” case for the non-instrumental value of judicial review. As it stands, this case lacks a convincing account of:

- (i) *what* kind of complaints merit a fair hearing, and
- (ii) *why* a right to a fair hearing should be justified on procedural—as opposed to instrumental—grounds.

In what follows, I show that, surprisingly, the materials necessary to fill the gaps in Harel's argument are central to some of the strongest *critiques* of judicial review (Waldron 1998; 2006). This is, in a way, excellent news for Harel: it allows him to defend the procedural virtues of judicial review starting from *the very premises* endorsed by those who lament its procedural vices. However, the good news also comes at a cost, namely explicitly acknowledging that the non-instrumental value of judicial review is only contingent on the presence of what I call "thick reasonable disagreement" about justice.

### 6.1 Democracy and Judicial Review: The Role of Thick Reasonable Disagreement<sup>15</sup>

Let me start by noting that participants in debates about democracy and judicial review typically distinguish between "reasonable" and "unreasonable" perspectives about justice. What exactly counts as "reasonable" is a vexed question, and answers vary from theorist to theorist. For present purposes, I assume that a perspective on justice is reasonable (i.e., not "crazy") only if it is consistent with respect for those fundamental rights that are a "*sine qua non*" of justice (Harel 2014, 189–90).<sup>16</sup> A perspective on justice is instead "unreasonable" if it challenges fundamental rights. To illustrate, while it is unreasonable to deny that justice includes a right to bodily integrity, to freedom of religion, thought, association, speech, and to equal opportunities, people reasonably disagree about both (i) the interpretation of these fundamental rights, and (ii) what else justice demands, above and beyond them (e.g., Gaus 1996; Waldron 1999; Christiano 2008; Estlund 2008; Valentini 2013).

The question addressed by contemporary democratic theorists—both critics and advocates of judicial review—is: "Which decision-making procedures for settling *reasonable* disagreements about rights should we favour?" A popular desideratum on answers to this question is that the proposed procedures be justifiable in the eyes of all reasonable persons. An inability to be justified to holders of *reasonable views* is seen as a "moral defect" of any political decision-making procedure. By contrast, a failure to command the support of citizens holding *unreasonable views* does not count against candidate procedures. For instance, the fact that the procedure, "majority rule constrained by constitutional rights," rules out slavery is no ground for disfavouring it. The fact that the procedure would not be justified

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<sup>15</sup> In the next few paragraphs, partly drawing on Valentini (2013), I sketch some key moves in the rich and complex debate about the justification of democracy. A lot more could be said about this debate, and many more of its participants could be mentioned. Due to space constraints, and the limited purposes of my argument, I cannot be comprehensive here.

<sup>16</sup> The validity of my argument is independent of what exactly counts as "reasonable." Different readers may simply use their preferred "reasonableness threshold." Note, also, that I am treating acceptance of fundamental rights as only a necessary condition for reasonableness.

to a citizen holding the unreasonable view that slavery is permissible should not trouble us. Against this backdrop, then, what political decision-making procedures should we select?

The answer may appear straightforward: we should opt for whichever procedures are most likely to track the correct view about justice (e.g., Arneson 2004). This, we can assume, is what any reasonable person would want. Well-known defences of judicial review employ precisely this epistemic-instrumentalist rationale.<sup>17</sup> Some justify judicial review by claiming that judges are (at least sometimes) better placed than democratic majorities to decide disputes about right *correctly* (e.g., Moore 1992, 230–1; Dworkin 1996; Bretttschneider 2005).<sup>18</sup> Others, who are sceptical about the alleged epistemic superiority of the judiciary, argue that judicial review has the virtue of minimizing a particularly serious moral mistake, namely the under-protection of rights (e.g., Fallon 2008). Differences in emphasis aside, on this rather familiar picture, the value of decision-making procedures is dependent on how just the outcomes they deliver are.

Crucially, this picture presupposes the possibility of identifying institutions that all reasonable people would deem capable of delivering just outcomes. As several democratic theorists have pointed out, however, given the character of existing disagreements about rights and justice, this possibility is foreclosed to us (e.g., Waldron 1999; Christiano 2008; cf. Estlund 2008). This is because, in my preferred terminology, disagreements about rights are “thick” rather than “thin” (Valentini 2013). A disagreement about a proposition X is “thin” just in case it is underpinned by agreement about its truth conditions. For example, you and I might disagree about whether “our friend Christian is two meters tall.” You think this proposition is true, I think it is false. Even though we disagree about how tall Christian is, we agree about what facts would have to obtain for the proposition in dispute to be true (or false). Our underlying agreement about truth conditions, in turn, allows us to agree on what procedure we should follow to determine Christian’s height: measuring him with a measuring rod. In other words, when there is agreement about the truth conditions of disputed propositions, epistemic instrumentalism about procedures is, in principle, a live option.

As anticipated, moral disagreements about rights are of a different kind: they are thick, not thin. This means that the disagreeing parties dispute not only whether the truth conditions of rights-claims are satisfied in any given circumstance, but also what the truth conditions of those claims are. Consider the claim “A has an unconditional right to a basic

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<sup>17</sup> For an overview, see Harel (2014, 195–98).

<sup>18</sup> To be precise, epistemic considerations play a part in Dworkin’s and Bretttschneider’s arguments for judicial review, but do not exhaust them.

income.” In existing pluralistic societies, people disagree about what would have to be the case for A to have such a right. For some, the truth (or falsehood) of this claim rests on whether an unconditional basic income maximizes aggregate utility; for others it rests on whether it is consistent with, or mandated by, the commands of some sacred text (and different texts will matter to different people); for others still it rests on whether such a right is consistent with the property rights established by a history of legitimate transactions—and so forth (see Waldron 1998, 84–6; 1999).

When disagreement is thick, there is no account of the facts our institutions should track that can win the assent of all reasonable people. Designing institutions that every reasonable person could regard as reliable truth-trackers is therefore impossible. In these circumstances, any epistemic-instrumentalist defence of decision-making institutions, including of judicial review, would have to rely on a controversial account of justice, and thereby arbitrarily privilege the views of a particular subset of the population over others (Waldron 1999; Valentini 2013).

The unavailability of epistemic-instrumentalist rationales for institutional selection under conditions of thick reasonable disagreement motivates the turn to *procedural* considerations. Since we cannot defend a decision-making mechanism as “epistemically superior” without violating the demands of equal respect, institutions must be selected based on the “intrinsic” virtues of their procedures, not on the epistemic quality of their outcomes.<sup>19</sup> Those who accept this line of reasoning typically advocate majoritarian democracy—coupled with deliberation—as the best decision-making mechanism. By giving everyone an equal say, democracy embodies a procedural commitment to equal respect: it treats everyone as an equal, without *ex ante* privileging any reasonable views over others (e.g., Waldron 1999; Christiano 2008; Valentini 2013).<sup>20</sup>

Crucially, in addition to supporting majoritarian democracy, these procedural considerations account for a prominent source of opposition to judicial review. Since judicial review gives a much greater say to a small portion of the population—i.e., judges—on reasonably contested matters of justice, it is accused of violating the demands of equal respect for persons (Waldron 1998; 2006). This complaint would carry little weight if it could be demonstrated that a decision-making system including judicial review is *epistemically*

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<sup>19</sup> Instrumental institutional evaluation is not exhausted by epistemic considerations. Crucially, it matters greatly whether institutions are able to maintain peace, security, and the protection of fundamental (non-reasonably-disagreed-upon) rights. My discussion presupposes that, at least under “normal” political circumstances, constitutional democracy is defensible on these non-epistemic instrumental grounds.

<sup>20</sup> The authors cited defend subtly different versions of this general claim.

*superior* to its alternatives. But, as was pointed out earlier in our discussion—and as critics of judicial review like Waldron (1998, 88) emphasize—this epistemic justification is unavailable under circumstances of thick reasonable disagreement. From a procedural perspective, then, judicial review is inferior to democratic-majoritarian decision-making, or so its detractors claim.

### 6.2 Revising Harel's Case for Judicial Review

There is much in this proceduralist defence of democracy and in the associated critique of judicial review that one might want to question, but engaging with their merits and demerits is not my task here. I have presented them only to supplement Harel's own argument. In particular, I noted that, to be successful, that argument needs to include an account of (i) *what* kinds of complaints merit a fair hearing, and (ii) *why* a right to a fair hearing should be justified on procedural—as opposed to epistemic-instrumental—grounds. An emphasis on what I have called “thick reasonable disagreement” about justice provides Harel with (i) and (ii).

The idea of “reasonableness”—which, as I said, can be variously interpreted—delimits the scope of the complaints that merit a fair hearing: only reasonable (i.e., not “crazy”) ones do. The thickness of disagreement about rights, in turn, motivates the shift from an epistemic-instrumental to a procedural/intrinsic perspective in institutional evaluation. Importantly, the perspective in question can serve not only to vindicate the procedural virtues of majoritarian democracy, but also those of judicial review. When disagreement is thick and reasonable, there is no “epistemic-instrumental barrier” to reconsidering the outcome of a democratic procedure, since *ex hypothesi* that procedure does not gain its authority from epistemic considerations (but cf. Estlund 2008). The situation is thus different from the simple scenario involving Freddie and Tommy I presented earlier. Taking the moral equality of persons under thick reasonable disagreement seriously may well demand being *open to revising a democratic decision*, if someone reasonably complains that it violates his or her rights.

The value of reconsideration is *procedural*, and stems from a concern with equal respect for persons. The process of managing and settling thick disagreements about rights is an on-going one. None of the “settlements”—judicial or legislative—are in principle definitive; they are all open to challenge. When reasonable challenges are raised, respect for persons demands that they be heard and their merits considered fairly. This is what the process of adjudication does. In turn, what specific institutions might best implement this

process—as Harel rightly points out—will depend on the circumstances at hand. Whether judicial review should be weak or strong, whether courts should have advisory or decision-making power in constitutional matters will depend on what institutional configuration, in any given context, is more likely to instantiate the procedural virtues of “fair hearing.”

Harel is thus right in suggesting that the same procedural concerns that are invoked in justifying the value of democracy as a constituent of justice (as opposed to “merely a means” to it) can also be invoked in support of judicial review of legislation. But his view is mistaken, I think, in holding that this conclusion is grounded in a *non-contingent* right to a fair hearing. A right to reconsideration of a particular decision, defended on *procedural* grounds, only makes sense in cases where disagreement about the decision is thick and reasonable. In such cases, as I said, there is no epistemic-instrumental barrier to reconsideration, since the disagreeing parties are putting forward reasonable views. Moreover, the *purely procedural* (non-instrumental) value of decision-making mechanisms becomes a live consideration in the defence of both democracy and judicial review *only* when reasonable disagreement is thick. Absent thick disagreement, it would be unclear why institutional evaluation should rely on anything other than conduciveness to just outcomes (Valentini 2013, 187–8; Arneson 2004). If all reasonable people could regard, say, an oligarchy of philosophers as most conducive to justice, we would have little reason to insist on democracy.<sup>21</sup>

This, then, requires us to modify Harel’s ontological and axiological claims: the right to a fair hearing, and hence judicial review, is constitutive of a just society and non-instrumentally valuable *only contingently*, namely under circumstances of thick reasonable disagreement about justice.

## 7. Conclusion

My overall message in this article is twofold: partly critical, partly positive. On the critical side, I have claimed that Harel’s ontological and axiological claims are, in some important respects, unconvincing. Specifically, I have suggested that constitutions are at best a contingent instrument for the realization of freedom as non-domination, and that the right to a fair hearing embodied in judicial review makes moral sense only under a specific set of circumstances, rather than “non-contingently.” On the positive side, I have very briefly

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<sup>21</sup> Harel (2014, 144–5, 201–2) would disagree with this statement. In his view, depriving individuals of a right to a say—even when there would be an epistemic justification for doing so—would problematically offend their dignity. I struggle to see how this would be the case, in the absence of thick reasonable disagreement.

sketched alternative ways of vindicating the non-instrumental value of constitutions and judicial review. First, I have suggested that constitutions may be regarded as having symbolic or expressive value, by publicly conveying a commitment to rights. On this picture, there is more “justice-value” in a society where fundamental rights are both *de facto* robustly respected and publicly acknowledged as binding, than in a society where they are *de facto* robustly respected, but not publicly acknowledged as binding. This is, however, for reasons that do not trace back to a commitment to freedom. Second, I have argued that judicial review of legislation may be appropriately seen as carrying “constitutive/procedural” value—i.e., as being part of what justice requires, independently of its outcomes—but *only contingently*, under circumstances of thick reasonable disagreement.

My criticisms notwithstanding, *Why Law Matters* is a rich and thought-provoking contribution to an important debate. As I hope to have shown, its arguments in support of robust constitutionalism and its challenges to pure instrumentalism deserve to be taken seriously.

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