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PROJECT

The Morality of Privatization

My project rests on the premise that the desirability of legal institutions and procedures is not merely instrumental and does not hinge merely on the prospects that these institutions are likely to result in valuable ends. Instead, various legal institutions and legal procedures matter as such; they have intrinsic value. I defended this claim in my book Why Law Matters.

I intend to apply this observation to examine the relationship between the private and the public sphere. It is traditionally believed that the division of labour in providing goods between the state and the individual rests on instrumental considerations such as which entity can provide these goods more efficiently. Hence, in principle, all goods can be provided by either private or public entities and the choice between these two rests merely on the question of who is most likely to provide the goods more efficiently. This influential view does not account for our intuitions. Most people believe that punishment, legislation or decisions to go to war are all decisions that cannot be delegated to private individuals, even if those individuals are particularly smart or capable.

The primary claim of the manuscript I am currently writing defends this intuition. I argue that there are some goods that can be provided only by the state. Some governmental decisions cannot be successfully made (or executed) by private entities, as the goodness of the goods resulting from these decisions can be realized only by the state. I further defend the view that performance by the state requires the direct involvement of public officials. Only public officials can act in the name of the members of the political community.

The book aims at challenging the instrumental premise underlying the debates concerning privatization. Public provision of certain goods is necessary, not because the state is better at providing these goods, but because these goods should be provided in our name as members of a political community. In doing so, the book will examine questions such as who can act in the name of the state (or its citizens), what counts as representation, what it means to be a public official etc. It is therefore a research concerning the foundations of the legitimacy of the state and its role in public life.

Recommended Reading

Harel, Alon. Why Law Matters. Oxford: Oxford University Press, 2014. German: Wozu Recht? Rechte, Staat und Verfassung im Kontext moderner Gesellschaften. Freiburg/Br.: Karl Alber, 2018 (= Kosmopolis, Band 5).

-. "The Case Against Privatization." Philosophy and Public Affairs 41, 67 (2013): 67-102.

-. "The Easy Core Case for Judicial Review." Journal of Legal Analysis 2, 1 (2010): 227-256.

COLLOQUIUM, 24.03.2020

Law, Legitimacy, and Representation

This paper examines the normativity of law, namely why the law is (or, at least, can be) morally binding. I examine here two main views: positivism and natural law theory, reject both views, and provide a new proposal that rests on the ability of law to speak in the name of the people.

In the first part, I describe two main views concerning the nature of law: positivism and natural law theory. Positivists believe that law is conventional, while natural law theorists regard law as grounded necessarily in moral norms. I show, however, that both views fail because both of them maintain that the normativity of law is important to the extent that its norms are just or correct or converge with reason. In spite of their otherwise competing views, both the legal positivists and the natural-rights lawyers reduce law's normativity to a question concerning its content, namely, how the content of legal norms converges with the demands of right reason (or political morality). In the second part, I defend the view that law has normative value to the extent that it establishes a public point of view from which normative pronouncements of public officials could count as made in the name of (or even by) the people. Accordingly, it is legitimacy rather than justness or convergence with reason that explains (at least ideally) law's normativity.

More specifically, law's normativity is not a matter of content. Rather, it is one of status or standing and, so, legitimacy. Standing requires a certain relation between lawmakers and officials, on the one hand, and citizens, on the other, such that the former "represent" in some sense the latter and, therefore, can speak in their name. To properly understand what law requires or demands, one ought to understand what pronouncements can properly be described as pronouncements that are made in the name of the people and, therefore, pronouncements that cannot be attributed to the will or to the judgment of any private person in particular.

I also elaborate two types of theories of representation: agency and essentialist theories. Agency-based theories rest on the deference of the decision-maker to the preferences or judgments of the public. By contrast, essentialist theories rest on the deference of the decision-maker to certain "natural" or "essential" features of the represented. In both cases, the standing to make laws in our name depends on a sufficiently tight connection between the decision-maker (public officials) and those to whom the decision is addressed (citizens).

PUBLICATIONS FROM THE FELLOW LIBRARY

Harel, Alon (Freiburg,2018)

Wozu Recht? : Rechte, Staat und Verfassung im Kontext moderner Gesellschaften

https://kxp.k10plus.de/DB=9.663/PPNSET?PPN=884778649

Why law matters

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Harel, Alon (Oxford,2017)

Embracing the tension between national and international human rights law : the case for discordant parity

https://kxp.k10plus.de/DB=9.663/PPNSET?PPN=1668679957

Harel, Alon (Hoboken, NJ,2013)

The case against privatization

https://kxp.k10plus.de/DB=9.663/PPNSET?PPN=1668678888

Harel, Alon (Cambridge, Mass.,2010)

The easy cor case for judicial review

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