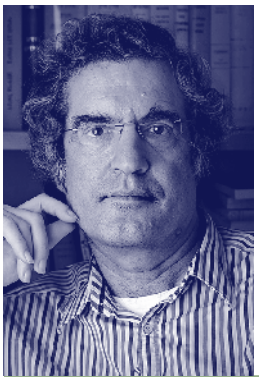

THE LEGITIMACY OF LAW
ALON HAREL

Alon Harel is a Professor of Law at the Hebrew University of Jerusalem. He is also a member of the Federmann Center for Rationality at the Hebrew University. Alon Harel has written extensively in various fields of the law, legal theory, and political theory. He has written numerous articles in political theory, philosophy of law, constitutional theory, criminal law, and law and economics. He has also written op-eds in the daily press and has been an activist in human rights organizations in Israel. Alon Harel completed his D. Phil. at Balliol College Oxford. He was a visiting professor at Columbia Law School, the University of Chicago Law School, Boston University Law School, and the University of Texas Law School and was a Fellow at the Center for Ethics and the Professions at Harvard University and at the Center for Ethics at Toronto University. In his book *Why Law Matters* (Oxford University Press, 2014) (German: *Wozu Recht? Rechte, Staat und Verfassung im Kontext moderner Gesellschaften*, 2018), Alon Harel develops a non-instrumental theory of law. He maintains that the desirability of many legal institutions and legal procedures is not contingent and does not hinge on the prospects that these institutions will be conducive to the realization of valuable ends. Instead, various legal institutions and legal procedures that are often perceived as contingent means to facilitate the realization of valuable ends matter *as such*. His project at Wiko pursued this line of thought. – Address: Faculty of Law, Hebrew University, Mount Scopus, Jerusalem, 97702, Israel. E-mail: alon.harel@mail.huji.ac.il.

The philosophical study of law concerns the nature of law, that is, what law is. An important subset of this study takes up the connection between law and morality. My project

at Wiko considers the difference law makes in moral space or, in short, law's moral difference. It defends a *standing* conception of law, according to which law's distinctive moral contribution is that of establishing a *public* entity, by which I mean an entity whose normative pronouncements could count as made in the name of (or even by) the polity. By doing so, the law aims to address the basic question every law subject confronts: How can thou (lawmaker) tell me what to do? I defend the view that part of the answer must be that the "thou" is in fact "I". I identify a certain relationship of representation in which the thou speaks and acts not merely for this *I*, but rather in all *I*s' name.

Law as standing is qualitatively different from the two most influential traditions of explaining the nature of law's interaction with morality. One tradition, most famously associated with contemporary legal positivism, suggests that it is in the nature of law to make the demands of morality more determinate and salient in order to improve conformity to them. In this conception, law can be instrumentally valuable in setting out rules and institutions that help people comply with the demands of morality and right reason that exist independently of the law. The main point of all law is to help people to do what they ought to be doing anyway, quite apart from the law. The other tradition, associated with natural rights theories of law, suggests that law does not merely render the preexisting demands of morality more salient, but rather determines these demands in the first place. Law is constitutive of the moral duties we have. In spite of their otherwise competing views about the nature of the connection between law and morality, both are of a piece insofar as they reduce the question at issue to one concerning content, namely, how do legal norms help us to identify and implement what is right or just.

By contrast, I argue that the difference law makes in moral space is not one of content. Rather, it is essentially a matter of status or standing. The moral difficulty out of which law arises is the basic freedom and equality of private persons. Free and equal persons may not create binding directives for one another. The complaint is not that a private person is incapable of identifying what norms binds us or that he or she is not effective in facilitating compliance. It is the basic equality among people, as much as it is the basic independence of each individual, that rules out private persons' power to legislate, irrespective of how this power is being employed. Basic equality among people is inimical to the idea that any private individual can determine for all of us what legal rights and obligations we have (even when he or she is effective in identifying what we ought to do and in inducing us to do so). Further, legal orders directed at us by a private person also violate our independence by turning us into this person's subjects. The problem is that a

private person cannot speak and act in our name, as he or she is not our representative and, consequently, his or her legislation is an act of illegitimate imposition as such.

Law addresses this difficulty by constructing public entities to form the requisite standing. Standing requires a certain relation between lawmakers, on the one hand, and law subjects, on the other, such that in some sense the former "represent" the latter and, therefore, can speak in their name. Understanding the nature of the connection between law and morality depends on understanding what counts as *public* institutions, institutions whose basic moral aim is to solve a problem of legitimacy, rather than justice. Under the proposed account, legal directives must be enacted by public officials, not primarily in order to guide us to do the right or the just thing, but rather for the sake of making these demands public, properly conceived. Public officials do not decide what the law is, but rather assume the different role of voicing decisions made by the polity. Accordingly, it is legitimacy (that depends on their ability to speak in the name of the public) rather than justice or desirability that explains the difference law makes in moral space.

To properly understand what law requires, one ought to understand what pronouncements count as ones that are made in the name of the polity as a whole, which is to say pronouncements that cannot be attributed to the will or to the judgment of any private person in particular. More particularly, I argue that public officials have a special kind of status or standing, which, in turn, grounds their claim to make decisions attributable to the polity as a whole. Standing requires a mechanism of representation. Representation is conceptualized here as a mechanism designed to guarantee that the decisions made by public officials are only nominally being made by public officials, as, in reality, such decisions are of those whom these officials represent. A representative, properly conceived, differs from a private person in that the former replicates in her decisions fundamental features of the represented. Her decisions are in some respect not hers but rather those of the represented.

Different theories of representation will inevitably provide different accounts of publicness. I sketch below two conceptions of representation: an agency conception under which officials are bound by what citizens consent to, want, or judge to be right or just and an essentialist conception under which officials are bound by who the citizens are, namely by natural or essential characteristics of the constituents. Let me elaborate.

Agency-based theories rest on the deference of the decision-maker to the preferences or judgments of the public. The object of the deference concerns what the public thinks, believes, or consents to. Hence, under the agency-based theories, to speak in the name of

the people, one ought first to know what the people want or judge to be just and then act in accordance with it, i.e., decide as they would have decided had they been in charge. By contrast, essentialist conceptions rest on the deference of the decision-maker to certain "natural" or "essential" features of the represented. The object of the deference concerns who the public is and what its constitutive features are. In spite of their contrasting normative underpinnings and institutional arrangements, both the agency and the essentialist views are of a piece insofar as they are structurally geared to address the difficulty of calling the demands of reason into the binding law of a society of free and equal persons.

The proposed account of the connection between law and morality deviates radically from previous views, many of which characterize the basic problem from which law arises in terms of certain shortcomings in identifying and following the demands of morality. In contrast, my arguments rest ultimately on a commitment to basic equality and to freedom. With respect to the former, the equal status of us all precludes the possibility of private lawmaking, regardless of whether the lawmaker is most capable of identifying what the demands of morality are. It also rests on freedom in the sense that being free hinges not only on whether we are constrained in certain ways, but also on who can constrain us. If the entity that does the constraining acts in our name, the constraint need not infringe on our freedom.

According to my approach, law's moral difference does not necessarily come down to telling us what morality dictates, but rather to establishing a way of attributing decisions to all of us and not to any one of us in particular. What renders this possible is the emergence of *public* officials whose value lies in being public officials, that is, in creating a persona different from their private ones and, so, making decisions that count as being made in our name. It is, therefore, legitimacy understood as the ability to speak in the name of all that is the foundational moral contribution of law. It thereby provides an answer to a fundamental challenge to the idea of governance by law: Who made thee a prince over us?