JACOB WEINRIB *Dimensions of Dignity: The Theory and Practice of Modern Constitutional Law* Cambridge: Cambridge University Press, 2016

In this well-written and closely argued book Jacob Weinrib offers his solution to a fundamental problem of jurisprudence. How are we to explain the nature of law without collapse into anarchism, on one side, or quietism, on the other? Anarchism insists that what is unjust cannot impose genuine obligations; the law is binding, accordingly, only when it mirrors what morality in any case requires. Quietism, by contrast, denies that legal obligations, if genuine, can be unjust. Whereas anarchism leaves no space for legal obligation to apply independently of its subject’s appraisal of the demands of justice, quietism leaves no space for the moral criticism of law: legal obligation is treated as conclusive of moral obligation.

H.L.A. Hart’s middle way, in which legal obligations are understood to derive from valid legal rules, proves unhelpful.[[1]](#footnote-1) While it is undoubtedly true that a legal rule (and hence a legal obligation) may be valid even if unjust—neatly uncoupling legal and moral obligation—Hart’s explanation of validity does not establish the existence of coercive state authority. Even if state officials take the appropriate internal attitude towards the ‘rule of recognition’, treating it as the correct standard for determining the validity of other rules, the position of the ordinary subject or citizen is unaffected. From his or her point of view, subjection to legal rules, as identified by officials, looks much the same as subjection to the illegitimate commands of an Austinian sovereign, wielding an effective monopoly of force.

Weinrib explains that anarchism and quietism share a common error: they fail to distinguish the constitutive from the regulative aspects of law. Weinrib’s ‘unified theory’ avoids the dangers of anarchism and quietism without embracing legal positivism’s attempt to ground law wholly in social fact. There is a dual normative dimension: the principle of authority establishes the existence of law; the principle of justice provides the standard for internal criticism of the arrangements established. A legal system consists in the publicly authoritative institutions under which persons can interact with each other under conditions of equal freedom. Only when there is a separation of legislative, executive, and judicial powers, constituting a regime of public law, can individuals cooperate on the basis of established norms that secure equal freedom. The regulative principle of justice does not demand that legal order be perfectly just, which would be unreasonable: it imposes a duty on government to bring the legal system into the closest possible conformity with its own internal ideal of equal freedom.

The unified theory of public law, accordingly, echoes Kant’s notion of a rightful condition, as explained in terms of freedom as independence—independence from the will of another—by Arthur Ripstein in his influential *Force and Freedom*.[[2]](#footnote-2) There is a moral duty to accept the authority of public institutions because only such authority can establish and sustain a regime of equal freedom under law. Corresponding to the two principles of legal order are two distinct legal pathologies. Injustice, which involves violation of the regulative principle, is distinct from barbarism, which by subjecting a person’s freedom to the arbitrary power of others, violates the constitutive principle. Weinrib emphasizes that the distinction is one of kind, not degree. By treating Nazi barbarism as merely grave injustice, as opposed to the abrogation of law itself, Radbruch, Alexy, and Fuller each failed, it is alleged, in their various attempts to show why Nazism replaced law and legal obligation by arbitrary force.

A famous article by Julius Ebbinghaus, published in 1953, is usefully deployed to illustrate this distinction between injustice and barbarism, or injustice and inhumanity.[[3]](#footnote-3) Nazi power was not merely unjust but inhuman: it sought not merely to constrain the freedom of persons subject to law on impermissible grounds—grounds that freedom itself did not require—but to negate the freedom of some persons in relation to others. Jews and other persecuted minorities were stripped of their status as human beings, treated as objects to which others could behave as they chose. Inhumanity preceded genocide: the ordinary private and criminal law was undermined by systematic, radical discrimination. In violating the constitutive principle of public law, the Nazis used private violence rather than public authority; resistance to such violence is no breach of law. Weinrib’s excellent analysis of Nazi barbarism, by reference to a range of prominent historical analyses, shows that the nature of Nazi rule was perfectly identifiable to ordinary Germans even when they submitted to the repression. Hitler’s attempt to keep the extermination of the Jews a secret showed his awareness that German public culture, for all its anti-Semitism, unequivocally condemned such violence.

Central to Weinrib’s argument is the idea that the unified theory of public law provides for internal critique of existing legal orders. The ideal of public justice is met by a legal system that fully conforms to the terms of its justification, which is the guarantee of each person’s right to independence. Not only must citizens collectively write the laws by which all are bound, but the laws enacted must be capable of eliciting general consent: ‘The ideal of public justice is satisfied when the legal order that citizens collectively enact accords with the right of every person to equal freedom under law’ (page 120). That ideal arises, not from history or contingent circumstance, but simply from the constitutive feature of every legal system—the right of government to exercise public authority over private persons. It does not follow that all legal orders must be identical, indifferent to varied historical experience and contrasting traditions. The duty of public justice requires governments to seek to bring their own system, in all its particularity, as close as possible to the regulative ideal; and there may be a variety of arrangements capable of realizing this requirement.

The basic framework of the modern constitutional state, including judicial review in defence of constitutional rights, is nonetheless mandatory. According to Weinrib’s attractive argument, it is only when all acts of government are subject to judicial review that the problem of accountability is adequately addressed. The exercise of public authority must be made accountable to the inherent dignity of all who are subject to it; each person must be empowered to challenge the validity of an exercise of such authority as a failure to comply with his or her right to just governance. It is only the judiciary which has the expertise and independence to assess constitutional complaints on their merits, providing a public determination of the constitutionality of state action. Such arrangements, by contrast with unconstrained majoritarian democracy, reflect the basic commitment of the modern constitutional paradigm: ‘that each person subject to public authority must enjoy the legal capacity to respond to a public wrong by standing on his or her right to just governance’ (page 153).

Weinrib’s defence of judicial review neatly sidesteps objections that challenge its supposed beneficial effects. If judicial review is defended on the basis of desirable outcomes, such as improvements in the quality of public debate or the better protection of rights, it may be objected that other kinds of legal order may in practice realize similar outcomes. Public debate may flourish, for example, in majoritarian democracies or flounder in rights-based constitutional regimes. The unified theory shows why judicial review is intrinsically, not merely instrumentally, valuable: it ensures accountability, transforming ‘the inherent equal human dignity of each person subject to law’s authority into a justiciable legal norm’ (page 172). A number of other objections to judicial review, articulated by Jeremy Waldron, are usefully considered and persuasively rejected. It is denied, for example, that citizens should feel ‘slighted’ by relevant constraints on their participation in decisions about their rights: ‘No one should feel slighted by arrangements that render the legal system accountable to each person subject to its authority’ (page 174).

It is argued that ‘commonwealth constitutionalism’, as defended by Stephen Gardbaum, falls short of the ideal of public justice.[[4]](#footnote-4) It fails to address the problem of accountability, according to Weinrib, because the judiciary is not empowered to strike down legislation that infringes basic rights, which accordingly lack the status of supreme law. If, however, the United Kingdom is supposed to be ‘the paradigmatic instance of commonwealth constitutionalism’, on the ground that the Human Rights Act (1998) does not empower the judiciary to invalidate legislative measures that contravene European Convention rights, the argument proceeds here rather too quickly. The differences between divergent forms of constitutional democracy may be more nuanced, in practice, than the author appears to appreciate.

While Weinrib perhaps understandably follows Gardbaum’s lead, he goes astray in supposing that the Human Rights Act is the only basis for judicial review, British-style. While, it is true, assertions of unlimited Parliamentary sovereignty abound, the common law constitution of the United Kingdom also recognizes the fundamental status of the rule of law. When the rule of law is understood as a commitment to the protection of human dignity and the fundamental rights associated with that dignity—in precisely the way Weinrib understands it—it can be perceived that legislative supremacy and the rule of law must operate in harmony. All legislation must be read, accordingly, in the light of common law constitutional rights, which overlap to a large degree with Convention rights. While the judiciary may have no power to *strike down* primary legislation, they must interpret it consistently with basic rights; and in practice the interpretative obligation achieves a constitutional balance and integration that cannot be achieved (as Weinrib observes) by the grant (under the Human Rights Act) of mere declarations of incompatibility with Convention rights. Parliamentary sovereignty, correctly understood, authorizes nothing that, in the context of a particular case, would violate the rule of law.[[5]](#footnote-5)

Questions arise, then, about whether Weinrib’s unified theory is sufficiently sensitive to the common law tradition, in which the relevant constitutional principles are always in the process of reappraisal and readjustment in response to changing perceptions of the requirements of human dignity. Here we should welcome the author’s reassurance that the unified theory is not an institutional blueprint: there is scope for each legal system to work to bring itself more closely into line with dignity’s moral demands. It is interesting, in this respect, that Weinrib rejects the suggestion that Canada cannot be regarded as an example of modern (as opposed to mere commonwealth) constitutionalism. While the legislature is empowered to override a range of constitutional rights, under section 33 of the Charter of Rights and Freedoms, an appropriate convention has developed against its use: ‘In the context of a legal culture that is in principle hostile to overriding rights, the override does not subvert the accountability of the legal order’ (page 164). It may be suggested, by analogy, that in the similar culture of the United Kingdom, the absence of a formal power of invalidation of statutes need not subvert the accountability of the legal order.

The anarchism-quietism dichotomy reappears in a chapter on Constitutional Reform, in which Weinrib considers questions of constitutional amendment. By holding that each legal system must engage in reform to bring itself closer to the modern constitutional paradigm, the unified theory invokes the idea of constituent power. The relationship between constituent power and constituted power is controversial. If it is accepted that all legitimate power originates in the nation, it would appear to follow either that no arrangement can be legally authoritative (a nation is actually the *consequence* of government’s authority) or that every legally authoritative arrangement is beyond criticism (the nation chose it). Weinrib’s response to this dilemma is to insist that it is the legal order that creates the people by subjecting a plurality of individuals to common institutions. But insofar as constituent power involves establishing, modifying, or repealing constitutional norms—constitutional *reform*—it is an instance of public authority and must, accordingly, be directed to the realization of public justice.

There is a particularly interesting discussion of proportionality, as part of the doctrinal aspects of the unified theory, which explains how the various stages of proportionality analysis operate to determine the validity of state action that threatens basic rights. Weinrib argues persuasively that such analysis should be understood as the means of resolving constitutional conflict between competing specifications of the ideal of public justice. When rights are broadly interpreted by reference to that overarching ideal, they will conflict with other objectives integral to the protection of human dignity, including those of public safety, public health, and public order. A strict application of each of the familiar steps of the proportionality analysis is needed to affirm the government’s claim that a rights infringement is justified in the light of its duty to govern justly. While Weinrib’s approach is usefully contrasted with Robert Alexy’s morally neutral approach to proportionality, it finds common ground with Ronald Dworkin’s understanding of rights as ‘trumps’.[[6]](#footnote-6) Weinrib finds echoes of proportionality analysis throughout Dworkin’s writings, even if they contain no explicit discussion of the doctrine.

According to this book, the failure of legal and constitutional theorists to grasp the true character of modern constitutional government has resulted in ‘a chasm that separates the practice of modern constitutionalism from a theory that could explain and guide it’ (page 270). While Hart and Fuller were generally opposed to the constitutional entrenchment of substantive rights and values, Dworkin’s interpretative model of law is too much dependent on the contingent features of existing practice. While Dworkin emphasized that what law is depends in part of what it ought to be, it unfortunately follows from his model that ‘what law ought to be in a particular legal system depends in part on what law is’ (page 267).

When applied to a liberal democratic regime, however, a Dworkinian approach seems unlikely to diverge too sharply from the unified theory; interpretation of practice is necessary to give the ideal of justice specific content. A great deal depends, it seems fair to conclude, on how much variability the unified theory permits between legal systems. If, for example, there is scope (as Weinrib at one point suggests) for contrasting interpretations of such basic principles as freedom of expression, according to different historical traditions, the concrete demands of public justice will depend on those divergent traditions. Weinrib plausibly rejects the charge of incoherence—that the ideal of public justice is ‘both beyond history and within it, universal and yet particular’ (page 131). An unchanging ideal must be extended to particular societies in the light of experience. Nevertheless, there is plainly great scope for controversy about both when and precisely how, in practice, a noble ideal of accountability is transmuted from abstract norm into more local and specific doctrinal detail.

The author must be applauded for bringing fundamental questions of legal theory to bear on our controversies about constitutionalism and judicial review. His clarity of thought and precision of language combine to make this work a real pleasure to read. It is, in summary, a stimulating and accomplished achievement, making a very welcome addition to the *Cambridge Studies in Constitutional Law*. It is a work of theory that, like all good theory, draws extensively on constitutional practice—especially German and Canadian practice—by way of illustration. That well-judged combination of theory and practice enables the book to make a fine contribution to both legal and constitutional theory—if indeed these disciplines are, on the correct view of matter, actually distinguishable.

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1. H L A Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961). [↑](#footnote-ref-1)
2. Arthur Ripstein, *Force and Freedom: Kant’s Legal and Political Philosophy* (Cambridge, Mass: Harvard University Press, 2009). [↑](#footnote-ref-2)
3. Julius Ebbinghaus, ‘The Law of Humanity and the Limits of State Power’, *Philosophical Quarterly* 3 (1953): 20. [↑](#footnote-ref-3)
4. Stephen Gardbaum, ‘The New Commonwealth Model of Constitutionalism’, *American Journal of Comparative Law* 49 (2001): 707 - 60. [↑](#footnote-ref-4)
5. See T R S Allan, *The Sovereignty of Law: Freedom, Constitution, and Common Law* (Oxford: Oxford University Press, 2013). [↑](#footnote-ref-5)
6. Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass: Harvard University Press, 1977). [↑](#footnote-ref-6)