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PROPERTY RIGHTS AND PRIVATE LAW A PROCEDURAL APPROACH

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RESUMEN

Los derechos de propiedad pueden ser fuertes, constituyendo límites al logro de fines colectivos, o débiles, subordinados a estos mismos fines. Ciertas teorías, como la de Rawls, pueden tratar ciertos derechos (por ejemplo, el derecho a la propiedad personal) como fuertes y otros (por ejemplo, la propiedad de los medios de producción) como débiles. En este artículo, mi interés radica en las teorías que propugnan lo que denomino como "tesis del derecho privado como caso especial" o simplemente "tesis del caso especial" (SCT). De acuerdo con esta tesis, los derechos de propiedad de las relaciones privadas son fuertes, lo que es compatible, sin embargo, con que objetivos como la justicia distributiva se persigan por otros medios (por ejemplo, impuestos). Se analizan tres argumentos a favor de la SCT: el argumento de la división de responsabilidades, el argumento de las libertades básicas y el argumento prepolítico. De estos, los dos primeros, que se esfuerzan por conciliar la SCT con una concepción de justicia (la concepción de justicia de Rawls) cuyo objeto principal es la estructura básica de la sociedad, enfrentan considerables dificultades. Esto sugiere que la especialidad del derecho privado en las teorías liberales puede depender de renunciar a la primacía de la estructura básica para acomodar ciertos mandatos de la moralidad prepolítica.

Palabras clave: Derecho privado; Derechos de propiedad; Justicia Correctiva; Escuela de Toronto; Rawls.

ABSTRACT

Property rights can be strong, constituting limits to the achievement of collective goals, or weak, subordinated to these same goals. Certain theories, such as Rawls's, may treat certain rights (e.g., the right to personal property) as strong and others (e.g., ownership of the means of production) as weak. In this article, my interest lies in theories that espouse what I designate as "private law as a special case thesis" or simply "special case thesis" (SCT). According to this thesis, the property rights of private relations are strong, which is compatible, however, with objectives such as distributive justice being pursued by other means (e.g., taxation). Three arguments in favor of the SCT are scrutinized: the division of responsibility argument, the basic liberties argument, and the pre-political argument. Of these, the first two, who strive to reconcile the SCT with a conception of justice (Rawls's conception of justice) whose primary object is the basic structure of society, face considerable difficulties. This suggests that the specialty of private law in liberal theories may depend on relinquishing the primacy of basic structure in order to accommodate certain injunctions of pre-political morality.

Keywords: Private Law; Property Rights; Corrective Justice; Toronto School; Rawls.

Introduction

Liberals may endorse two distinct conceptions of property. According to one of these conceptions, which I will designate as strong, individual property rights are limits to the achievement of any collective goals, such as the maximization of utility or an equitable distribution of wealth. This conception is famously illustrated by Robert Nozick's opening words in *Anarchy, State, and Utopia* (Nozick 1974, p. ix): "Individuals have rights, and there are things no person or group may do to them (without violating their rights)."

According to the second conception (weak), in contrast, property rights are means to the realization of collective goals.

This conception is compatible with individual property rights, but only in so far as these rights prove to be an adequate means to certain common ends. Consistent with this weak sense, Liam Murphy and Thomas Nagel (Murphy & Nagel 2002, p. 8) state: "Private property is a legal convention, defined in part by the tax system; therefore, the tax system cannot be evaluated by looking at its impact on private property, conceived as something that has independent existence and validity."

It would be premature, however, to associate the strong conception with libertarians such as Nozick and the weak conception with egalitarian liberals such as Murphy and Nagel. It is more accurate to state that both libertarians and egalitarian liberals defend property rights in a strong sense, differing only on the extent of these rights. Rawls, an egalitarian liberal, includes a right to personal property among the freedoms guaranteed by the first of his two principles of justice (Rawls 2005, p. 298). As this principle enjoys lexical priority, the right to personal property in Rawls is a property right in the strong sense, which imposes limits on the achievement of the second principle's goals (for example, the goal of a distribution of primary goods that benefits the worst-off citizens as much as possible). On the other hand, Rawls denies that the right to own capital is among the basic freedoms protected by the first principle (Rawls 2005, p. 298). Therefore, the ownership of capital is, for him, a right only in a weak sense, since it is a right subordinated to the objectives of the second principle. For libertarians, by contrast, there is no distinction between personal property and other property rights, including ownership of the means of production: they are all property rights in the strong sense.

Among the theories that incorporate the two conceptions of property—that is, theories that, like Rawls's, admit strong and weak property rights—are those that defend what I will call here the thesis of private law as a special case (or, simply, special case thesis, SCT). According to this thesis, property

rights in the strong sense are the rights of private law, that is, the property rights enjoyed by individuals (including legal entities) in their relations with other individuals. These rights are the rights of property relations proper (i.e., rights *in rem*) and the rights involved in transactions, whether voluntary (such as those in contract law) or involuntary (such as those in torts and unjust enrichment).[1]

On the other hand, a different character is conferred by the SCT to the property rights of public law. In opposition to libertarians, theorists of private law as a special case admit that certain property rights are subject to goals such as combating poverty and preventing dependence, as long as these rights are not the rights we enjoy in our private relationships. The SCT admits, for example, that taxation pursues collective goals such as those just mentioned—and, consequently, that property rights be shaped according to these goals.

In this article, my intention is to scrutinize some of the arguments put forward in favor of SCT. At first glance, this thesis may seem shaky. After all, if there are goals to which property rights must be subordinate—that is, if we have reason to treat property rights as weak rights—what difference does it make whether those goals are pursued through taxation or contract law? Against the charge that the way they mix strong and weak property rights is arbitrary, SCT advocates make three arguments. The first (section 1) appeals to the idea of a division of responsibility between society and citizens. According to this argument, the independence of private law in a just society is a condition for citizens to be held responsible for the realization of their life plans. The second argument (section 2) piggybacks on the considerations that lead Rawls

1. Family rights could be included in the list, but I chose to omit them in view of the specificity of these rights and the emphasis of the best known versions of the SCT on the laws of property, contracts, torts and unjust enrichment.

to defend the priority of basic freedoms in order to give the same priority to private law. Finally, the third argument draws on Kant's theory of law to defend the specialty of private law based on pre-political property rights (section 3).

But before proceeding, a clarification. The arguments I will discuss below are found in authors—such as Ernest J. Weinrib, Arthur Ripstein, and Peter Benson—belonging to what is sometimes called the "Toronto School".[2] These authors sometimes defend the thesis of strong property rights as an interpretative thesis of private law. There is a difference, however, between claiming that a certain conception of property best explains current private law systems and claiming that a certain conception of property is morally best. As the SCT is a thesis of political morality, it only regards work by Toronto scholars that go beyond the mere interpretation of private law.[3]

1. The division of responsibility argument

A first argument in favor of SCT can be found in the writings of Arthur Ripstein (Ripstein 2004; 2006) and resorts to the idea of a division of responsibility between society and citizens.[4] This division of responsibility is described by John Rawls as follows:

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2. Due to the connection of the cited authors with the University of Toronto, in Canada.

3. For an example of a certain ambiguity about the character of the theory made by the Toronto School, see Ripstein (2016, p. 19): "Theoretical accounts of specific doctrinal areas of law are sometimes divided into classifications, such as historical, descriptive, prescriptive, and interpretive. I do not purport to be offering a historical account here . . . . Given the choice between the other three classes—is the account descriptive, prescriptive, or interpretive?—I am inclined to answer "yes."

4. In presenting the division of responsibility argument, Ripstein's emphasis is on the law of torts. For a similar argument applied to contract law, see Hevia (2013).

> "This conception [the public conception of justice in a well-ordered society] includes what we may call a social division of responsibility: society, the citizens as a collective body, accepts the responsibility for maintaining the equal basic liberties and fair equality of opportunity, and for providing a fair share of the other primary goods for everyone within this framework, while citizens (as individuals) and associations accept the responsibility for revising and adjusting their ends and aspirations in view of the all-purpose means they can expect. . . ." (Rawls 1982, p. 170).

What the division of responsibility rules out, therefore, is that citizens make claims of justice based on their particular preferences or ends. I cannot complain that my tastes are more expensive than yours or that my ends are more difficult to realize, because the conception of justice that Rawls defends ("justice as fairness") is based on a conception of citizens —found in public culture of democratic societies—as people capable of revising their ends.

Rawls appeals to the division of responsibility to explain why it is enough for justice to arbitrate citizens' claims for primary goods such as freedoms, wealth and income. Ripstein, in contrast, develops from the same idea of division of responsibility an argument for why private law—a private law with "a certain kind of independence" (Ripstein 2004, pp. 1814-1815)—is necessary for justice.

According to Ripstein, although it is understandable that Rawls (in view of his interest in constitutional essentials) emphasized the relations between citizens and society, the division of responsibility is also important for the relations of citizens with each other. For the division of responsibility to hold (and for citizens to be able, in fact, to be answerable for how well their lives are going), it is not enough for society to fairly provide everyone with resources and opportunities. It is also necessary that, in their relations with each other, citizens are safeguarded against interference by other citizens, as well as that they bear the consequences of any interference they

may practice. I cannot be called upon to respond for how well my life goes if others can wrong me with impunity. Nor, on the other hand, would I be taking responsibility if I could harm others, thus imposing the cost of my choices on them.[5]

Something to be clarified is whether, for Ripstein, the independence of private law is among the equal basic liberties of Rawls's first principle of justice. Assuming this is not the case—Ripstein avoids tying his argument to Rawls's original position[6]—the question then becomes whether—and why—the division of responsibility requires more than the two principles of justice. Let me explain.

When arguing about the division of responsibility, it is plausible that Rawls considers the two principles of justice as fairness to be sufficient for this division. The first of these principles, the principle of equal basic liberties, requires "a fully adequate scheme" of liberties, while the second principle imposes fair equality of opportunity and the greatest possible advantage (measured by an index of primary goods) for the worst-off citizens (the difference principle) (Rawls 2001, pp. 42-43).[7] One might think that, once these principles are met, society is discharged from its duties, and each citizen then becomes responsible for her or his own well-being.

One reason for thinking that the two principles might be enough is that the fully adequate scheme of the first principle

5. Ripstein (2004, p. 1813): "It makes no sense to say that someone is responsible for what he or she makes of his or her own life if what becomes of that life depends in the wrong kinds of ways on the deeds of others, either because he or she is made to bear costs that properly lie with others, or because he or she is free of costs that are put onto others."

6. Ripstein (2004, p. 1816): "taken on its own, the contract argument is poorly suited to understanding the doctrinal details of private law."

7. My interpretation is that Ripstein does not argue against the two principles, but only against the thesis that they suffice for the division of responsibility. For a different interpretation, according to which Ripstein endorses a different conception of justice than Rawls when arguing about the division of responsibility, see Perry (2004).

might include safeguards against the intrusions that Ripstein refers to. These safeguards, however, are not necessarily of a private law character. For example, attacks against the body and property can be treated as criminal offenses and prevented, as such, in a manner consistent with a fully adequate scheme of basic liberties.

In order to sustain the SCT, Ripstein therefore owes us an explanation of why the two principles—including the first principle, its fully adequate scheme of liberties, and the measures against acts of private aggression that form part of that scheme—do not suffice. Why would the responsibility of citizens also require the independence of private law?

Ripstein does not explicitly argue against the thesis that the two principles are sufficient, so we have to speculate about the possible answer. He might say that injuries to the body and property deprive victims of the resources they have to pursue their ends. As an institution of corrective justice, private law is concerned, as far as possible, with restoring to victims what belongs to them.[8] This is why the repressive measures that can be part of the fully adequate scheme of first principle freedoms are not enough. By eventually denying compensation, these measures deprive victims of resources that were unfairly taken from them, which is incompatible with the division of responsibility. I cannot be responsible for the failure of my projects if a substantial part of the resources I had to carry them out was taken from me by the careless action of another citizen and I have not had any compensation for that loss.

This answer has, however, some shortcomings. First, it treats private wrongs as a cause of injustice. An action by another that deprives me of my current possessions would only be a matter of justice, however, if my current possessions

8. One of Ripstein's projects in theorizing about private wrongs is "to redeem the commonsense idea that damages really do make it as if a wrong had never happened." (Ripstein 2016, p. 233).

were a matter of justice. In Rawls, however, this is not the case. As a conception of justice whose object is social institutions, justice as fairness is not concerned with what citizens possess, but only with the rules under which these possessions were obtained. This is why Rawls (2001, pp. 50-51) designates justice as fairness as a conception of pure procedural justice: once the basic structure of society—the basic terms of social cooperation—is fair, the results obtained under that structure, whatever they are, will also be fair.

According to Rawls, therefore, there can be no injustice in the mere fact that, owing to an accident caused by a neighbor, my estate has been reduced by $1,000. Consequently, the fact that this loss is not compensated cannot be, in itself, an obstacle to my responsibility as a citizen. One might suspect, of course, a basic structure that denies compensation to accident victims, especially in the case of accidents with devastating consequences. There is no reason, however, to suppose that the injustice in question cannot be treated as an affront to one of the two principles. Even if it counts (which is doubtful) with a fully adequate scheme of freedoms, a society that denies compensation to the victims of serious accidents would hardly be in conformity with the fair equality of opportunities or with the difference principle.

And as for the assertion that my neighbor's action against me—for which I suffered a $1,000 embezzlement of assets—constitutes, yes, an injustice, but not an injustice of the kind that Rawls's two principles of justice are concerned with, but a corrective injustice? This statement makes the division of responsibility argument circular. Recall that this argument is intended to convince us that the division of responsibility requires private rights that are immune to collective goals. The reason that the independence of private law is a condition for the division of responsibility cannot, however, be corrective justice, because that justice is simply what characterizes a private law indifferent to everything that does not concern the transaction between the parties. What

we want to know, in other words, is why corrective justice is a condition of the division of responsibility, and the answer to that question cannot simply be that corrective justice is such a condition.

Another difficulty is that the mere appeal to compensation is not enough to redeem the division of responsibility argument. Suppose it is correct to say that a fully adequate freedoms scheme may not include compensation measures for victims, and that such compensation is necessary for the division of responsibility. It would not follow from this that private law is necessary for the division of responsibility, because private law is not content with offering compensation to victims of accidents. Characteristic of private law is that compensation occurs—and can only occur—at the expense of the offender. Therefore, Ripstein would have to demonstrate that, in addition to compensating the victim, it is necessary for the division of responsibility that this compensation be given at the expense of the agent.

One explanation for why division of responsibility requires that tort agents be liable for the harm they cause their victims is offered by Ripstein when he asserts that the division of responsibility is incompatible with the costs of our actions being borne by others. This answer is subject, however, to the obstacle already mentioned above. There can be no injustice —not, at least, in Rawls's conception of pure procedural justice—in the mere fact that one citizen obtains an advantage at the expense of another, either through the realization of a gain or through a conduct that offers risks for which the agent is not liable. It is the rules of the game that matter, and it cannot simply be assumed that the two principles of justice as fairness are insufficient to arbitrate on these rules. It can be argued that tort liability is necessary for a fully adequate scheme of freedoms—otherwise agents will not have enough incentive to mitigate risks. The issue can also be addressed in the light of the second principle, extolling the role of tort law in maximizing the advantage of

the worst-off citizens. But if arguments like these fail and we arrive at the conclusion that fair terms of social cooperation may not include tort liability, then what could, once those terms are in place, prevent citizens from assuming their share of responsibility?

To summarize, I have argued that the division of responsibility argument bears the burden of explaining why, contrary to what Rawls implies, a just basic structure conforming to the two principles is not sufficient for citizens to be responsible for their own ends. The argument seems to fail because the answer to this question has to treat the mere fact that one's resources are destroyed by another's action as unjust. For pure procedural conceptions of justice like Rawls's, however, the mere intrusion of others cannot constitute an injustice. Claims must be directed against the basic structure of society—for example, against a structure that is overly lenient toward private offenses. As for these claims, they will either be successful claims based on the two principles of justice or they will not. In the first case, a condition for the division of responsibility is in fact missing, but that condition is that of a basic structure conforming to the two principles of justice. The second case, in turn, is that of a basic structure that does not offer compensation to victims (or does not offer compensation to victims at the expense of the agent of the harm), but which, nevertheless, succeeds in ensuring a fully adequate scheme of liberties, fair equality of opportunity, and the most beneficial distribution of resources possible to the worst-off citizens. It is difficult to imagine what could be missing, in such a case, for the division of responsibility to take effect.[9]

9. My response to Ripstein is different from that of Kevin A. Kordana and David H. Tabachnick, for whom it is inconceivable that the division of responsibility requires more than the two principles, which would be "*definitive of justice*" (Kordana and Tabachnick 2006, p. 1283). Like Samuel Scheffler (Scheffler 2015, p. 229), however, I believe that Rawlsians could consider

Before closing, two caveats. Early in the section, I assumed that the strong property rights of private law are not among the equal basic liberties of Rawls's first principle. Ripstein could redeem the division of responsibility argument by claiming otherwise. This would require some reconstructive effort—after all, Rawls is quite clear about the limits of the right to personal property included among the first principle freedoms—but perhaps it can be done (I will return to this point in the next section).

Another caveat has to do with the fact that my criticism of the division of responsibility argument rests to a considerable extent on the basic structure of society as an object of justice. It is because it has this basic structure as its object that justice as fairness is characterized as a conception of pure procedural justice, in the light of which private offenses cannot constitute, in themselves, an injustice. The division of responsibility argument could also be rehabilitated by some other conception of justice that, unlike justice as fairness, is not limited to the basic structure.

2. The basic liberties argument

Another argument in favor of the SCT asserts that private law has the status of a basic freedom. In Rawls's theory of justice, the first principle, the principle of equal basic liberties, enjoys lexical priority over the second principle. Thus, if private law property rights are basic liberties in Rawls's sense, they are not subject to the distributive injunctions of the second principle (i.e., the fair equality of opportunity and the difference principles).

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other requirements of justice beyond those contained in the two principles. The difficulty with Ripstein's division of responsibility argument is that it fails to explain why we should treat private wrongs as a matter of justice.

The basic liberties argument appears in a recent book by Peter Benson (Benson 2019):

> "[T]he right of property and the formal freedom of occupation that background political justice embeds and validates from its own standpoint as basic liberties are the very same in content as that which the institution of contract law works out from within its own framework—the only difference being that contract law specifies and justifies these rights as part of its juridical conception, whereas background justice upholds these same rights as part of its own normative political conception of what free and equal citizens need." (Benson 2019, p. 459).

The crux of the argument, then, is to assert that the basic freedoms of personal property and formal freedom of occupation are equivalent to contract law[10] according to what Benson designates as juridical conception—that is, to contract law as the domain of corrective justice or, in Benson's terms, of purely transactional justice. This statement is supported by the fact that Benson's theory of contracts is not committed to contractual laissez-faire and therefore proves to be compatible with limits to the markets (Benson 2019, pp. 459-460). But while these limits are the subject of the second principle, contract law with its purely transactional content (and therefore indifferent to distributive considerations) is, according to Benson, a basic freedom.

Even if it is concerned only with the character of contract law, Benson's interpretation of Rawls's first principle is far from innocuous. It is not difficult to conceive of a contract law—whatever its limits may be—shaped by efficiency or even distributive injunctions. For Benson, however, subordinating

10. Benson's book is a theory of contract law and will be referred to as such, but I believe the basic liberties argument holds for other parts of private law as well.

contract law to goals like these is incompatible with the principle of equal basic liberties.

In *Political Liberalism* (Rawls 2005), Rawls defends an interpretation of the principle of equal basic liberties according to which these liberties are at the service of the moral capacities for a sense of justice and for a conception of the good in two "fundamental cases" (Rawls 2005, p. 332). These two cases are that of applying principles of justice to the basic structure and that of applying rational principles to a plan of life.

This association between basic freedoms and the exercise of moral capacities in the two cases just cited is consistent with the argument that Rawls presents in favor of the principle of equal basic liberties. Interests in the development and exercise of capacities for a sense of justice and for a conception of the good are fundamental and cannot be jeopardized—as would happen if, instead of the principle of equal basic liberties (and its lexical priority), parties in the original position chose the principle of utility.[11]

The question, then, is whether contract law satisfies one of those interests that the parties in the original position, as representatives of citizens conceived as free and equal persons, cannot sacrifice. Benson thus owes us an explanation of why contract law within the framework of the juridical conception is necessary for the proper development and full exercise of moral capacities. Regarding personal property, Rawls (2005, p. 298) states that "[t]he role of this liberty is to allow a sufficient material basis for a sense of personal

11. Rawls (2001, p. 104): "[G]iven the conception of the person in justice as fairness, we say that the parties assume that, as persons with the two moral powers and a determinate complete conception of the good, citizens have, among other interests, certain religious, philosophical, and moral interests, and that the fulfillment of these interests must, if possible, be guaranteed. There are some things we cannot give up; they are not negotiable."

independence and self-respect, both of which are essential for the development and exercise of the moral powers." Could we say the same of contract law? Well, it could be argued that, for the sense of personal independence to which Rawls alludes, in addition to rights *in rem*, it is also necessary that citizens have the right to transact what is theirs. According to this interpretation, therefore, the right to contract would be one of the parts of the right to personal property.

I believe that interpreting the right to personal property to include the right to contract is plausible. This, however, is not enough to support the basic liberties argument. A first difficulty is that a right to contract does not imply a law of contracts. We need a further explanation of why the right to contract must be institutionally realized through a law of contracts—why, in other words, the right to contract as a basic freedom requires that contracts, including executory contracts, be enforceable.

Another difficulty, this time a more serious one, is that Benson is not satisfied that part of contract law—the part in which the right to contract is plausibly a corollary of personal property—is sheltered by the principle of equal basic liberties. It is true that, as Benson points out, his theory says nothing about the boundaries of contract law and is therefore not committed to robust economic freedoms. Benson's theory is nevertheless compatible that, for second-principle reasons, a society makes use of the market and contract law beyond the limits of personal property. The question, then, is why we would have to lend the status of basic freedom to these other parts of contract law as well, such as that relating, for example, to financial market contracts. What seems to me is that, as part of the right to personal property, the right to contract dictates that at most a limited part of contract law remains immune to the distributive considerations of the second principle. The same cannot be said for the rest of contract law, that is, for those parts of the market and contract law not covered by personal property.

What about formal freedom of occupation? This freedom is also unlikely to be broad enough to encompass the entirety of contract law. If Rawls (2001, p. 138) is right in claiming that liberal socialism ensures freedom of occupation, then there are parts of contract law—namely, those abolished under liberal socialism but present in other institutional complexes—that are not necessary for that freedom. It is an open question to know what formal freedom of occupation actually means, but to assume that it implies robust economic freedoms goes against Rawls's pretensions (for which these freedoms would be subordinated to the second principle[12]) and lacks some argument.[13]

Benson weaves the relationship between contract law and basic liberties in yet another way. The relevant passage is as follows:

> "There is a further point going to the congruence between the kinds of entitlements in contract law and Rawls's first principle: the very manner in which contract law determines transactional entitlements within its own domain fits with what is necessary for entitlements, such as those pertaining to personal property, to be included as a basic liberty under the first principle. Here the argument that contract law can meet the formal needs of market participants is pivotal. This shows that contract law can determine entitlements in a way that can be wanted by and acceptable to individuals who interact not only as mutually independent owners but

12. Rawls (2005, pp. 338-339): "[E]ven if by some convincing argument . . . we could trace the right of private or social ownership to first principles or to basic rights, there is a good reason for working out a conception of justice which does not do this. . . . Philosophical argument alone is unlikely to convince either side that the other is correct on a question like that of private or social property in the means of production. It seems more fruitful to look for bases of agreement implicit in the public culture of a democratic society and therefore in its underlying conceptions of the person and of social cooperation."

13. As it is offered by Tomasi (2012).

> also as free and equal persons who have determinate conceptions of their good that they seek to satisfy via free market relations. This is exactly how citizens are viewed when attributed the limited but fundamental rights of ownership and freedom of occupation under Rawls's first principle". (Benson 2019, p. 461).

The formal needs of market participants to which the passage refers are the needs for legal certainty (Benson 2019, p. 453). By defining the rights of contractors, contract law makes up for a deficiency in market relations, playing what Benson calls an institutional role.[14] What Benson seems to mean in the passage quoted above, therefore, is that the predictability that contract law confers on market relations is the same as can be willed for entitlements arising from the first principle—in particular, entitlements on personal property and freedom of occupation.

More needs to be said, however, about the relation between Benson's conception of contract and the aforementioned institutional role of contract law. Assuming that the basic liberties of personal property and formal freedom of occupation require the rule of law, why would only a contract law like the one envisioned by Benson (i.e., a contract law of pure transactional justice) be able to fulfill this requirement? Benson claims that the juridical conception of contract is complete, that is, that it "has the normative resources to completely determine any and all issues of private contractual rights arising therefrom". (Benson 2019, p. 453). Another claim is that, unlike economic analysis of law and other instrumentalist theories of contract

14. Benson (2019, p. 453): "[C]ontract law addresses a certain kind of deficiency in market relations that only the law can remedy. It provides the kind of readily knowable and practicable rules that all transactors need to be able to apply in their individual transactions if they are to be able freely and effectively to realize their particular interests and good via market participation."

law, considerations of transactional justice do not go beyond the expertise of courts.[15]

Admitting that Benson's theory of contracts does indeed possess these two virtues—that is, that it is complete and capable of being applied by judges—, it remains to demonstrate that these are exclusive virtues. Contrary to what Benson seems to assume, there is no reason why instrumentalist theories should necessarily be incomplete or difficult to apply, especially if we consider that these theories can be developed to meet the needs of legal certainty. Perhaps the advantage that Benson claims for his theory is the following. As a theory whose intention is to explain ideas underlying the main doctrines of the common law of contracts,[16] Benson's theory already occupies an intermediate position between highly abstract principles and the solution of concrete cases. Other theories, such as the economic analysis of law, are made up of these abstract principles and need, therefore, to be translated into prescriptions that are not too difficult to apply by the courts and meet the formal needs of the contracting parties. I see no reason to doubt, however, that this intermediate level (between abstract principles and concrete cases) can be reached by theories other than Benson's.

In my view, in short, the basic liberties argument fails. Benson cannot corroborate the SCT, except perhaps within the narrow confines of personal property. Nor is it credible that the relationship between the juridical conception of contract and the principle of equal basic liberties can be asserted solely on the basis of considerations pertaining to the certainty of law or the competencies of the courts.

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15. For the critique against the economic analysis of law, see Benson (2019, pp. 13-14). A similar statement is made regarding distributive justice (id., p. 471).

16. Benson (2019, p. xi): "The challenge is to bring out the normative conception of contractual relation that seems to be reflected in its main doctrines and principles . . . ."

3. The pre-political argument

Another argument in favor of the SCT is based on Kant's theory of law. As is known, Kant argues for the property of external things in the state of nature. Although the property rights of the state of nature are, for Kant, merely provisional, these rights (at least for SCT advocates like Ernest J. Weinrib and Arthur Ripstein) persist after the transition to the civil condition. SCT is thus endorsed through a pre-political argument. Because private right property rights are logically prior to (and therefore ground independently of) the civil union, these rights are strong rights. At the same time, private law is, like other institutions of public order, subject to the conditions of state's legitimacy, among them that of a dispersion of wealth sufficient to prevent dependence relationships. Let me detail the argument.

In the opening pages of his *Rechtslehre*, Kant ([1797]1991[17]) enunciates the postulate of practical reason with regard to rights, according to which the ownership of external things must be possible. The argument is as follows:

> "For an object of my choice is something that I have the *physical* power to use. If it were nevertheless absolutely not within my *rightful* power to make use of it, that is, if the use of it could not coexist with the freedom of everyone in accordance with a universal law (would be wrong), then freedom would be depriving itself of the use of its choice with regard to an object of choice, by putting *usable* objects beyond any possibility of being *used*; in other words, it would annihilate them in a practical respect and make them into *res nullius*, even though in the use of things choice was formally consistent with everyone's outer freedom in accordance with universal laws." (6:246).

17. References to Kant's *Rechtslehre* (*Doctrine of Right*) are to the Prussian Academy pagination

Kant also claims that the property rights of the state of nature are provisional (6:256). There is controversy over what the provisory nature of property rights entails,[18] but I must confine myself here to the way in which Weinrib and Ripstein try to reconcile property as a pre-political right founded on external freedom and its provisional character.

It is alleged that if, on the one hand, property is based on the mere ability of agents to choose,[19] on the other hand there is a tension between the claims to property raised in the state of nature and the equality of subjects, because, before the passage to civil condition, it is only unilaterally that someone can claim something as her own.[20] This tension is only resolved with the transition to a lawful condition.

The civil union gives finality to the property rights of the state of nature through a system of private law. This system, however, has to be supplemented by measures to deal with certain contingencies of the civil condition, such as distributive policies necessary to prevent dependence relationships. This, at least, is how Weinrib explains the state duty to support the poor in Kant (6:326):

> [T]he progression from innate right to the state's guarantee of all property holdings seems to reach an impasse. On the one hand, this progression is a normative necessity in which

18. For a survey of the literature, see Hasan (2018b).

19. Weinrib (2012, p. 269): "For Kant, . . . property arises from the freedom to act in relation to others in accordance with self-chosen purposes." I don't have space to deal here with the thesis underlying this argument. For a discussion of the normativity of the conception of the person characterized by the capacity for self-determination, see Benson (1992).

20. Weinrib (2012, p. 276): "Unlike the innate right, external rights are acquired through the performance of an act. All such rights presuppose the possibility of original acquisition, when the proprietor comes to own something not owned by anyone. However, the act of original acquisition is the exercise of a unilateral will that puts others under an obligation that they would not otherwise have."

> I am obligated to participate. On the other hand, innate right at least has the advantage that no person or aggregate of persons can engross the world's resources, shut me off from access to what is necessary for my existence, and thereby make the exercise of my freedom dependent on the beneficent or exploitative will of another. Entering a civil condition that, by guaranteeing property, also guarantees the circumstances of possible dependence diminishes my freedom inconsistently with the original contract. The civil condition, it seems, is both the fulfilment of my duty as a free person and the diminishing of my freedom.
>
> The public duty to support the poor breaks this impasse. (Weinrib 2012, p. 284).[21]

It could then be assumed that, in the civil condition, private law rights become subject to collective objectives such as preventing dependence.[22] For Weinrib and Ripstein, however, this is not the case. The considerations that surround the postulate of practical reason with regard to rights continue to apply after the transition to the lawful condition. These considerations form the basis, therefore, of a system of private law concerned solely with reconciling the freedom of self-determining agents.[23]

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21. In a similar manner, see Ripstein (2009, pp. 277-278).

22. How dependence is properly characterized is a question with which we need not concern ourselves here. For a discussion, see Hasan (2018a). In addition to avoiding dependence, Ripstein refers to other conditions for the state to rely on the united will of its citizens, such as formal equality of opportunity (Ripstein 2009, pp. 290-291) and the provision of a robust public sphere. (Ripstein 2016, p. 289).

23. For a different interpretation, see Brudner (2011, p. 299): "Because private rights to acquired things have only provisional force for Kant, nothing in his system stops the citizen lawgiver from wiping the slate clean with respect to acquired rights, consigning private law to the dustbin of history . . . ."

> "Kant purported to show how instituting private property and taxing to support the poor were jointly necessary if society was to be a legitimate union of self-determining agents. His account treats property and taxation to support the poor as distinct but interconnected. On the one hand private property and taxation figure in different kinds of juridical relationship. Property relates one person to another through the correlativity of right and duty; the duty to support the poor relates the taxpayers to the state and the state to the poor. *The consequence of this distinction is that considerations of poverty have no effect on the definition and application of property rights* [emphasis added]. On the other hand, property and the public duty to support the poor are connected through a single sequenced argument that extends the reach of the universal principle of Right while preserving consistency with the ideas of innate equality and non-dependence that this principle implies". (Weinrib 2012, p. 296).[24]

What follows, then, is an institutional division of labor of the sort that is hinted at by Rawls in *Political Liberalism* (Rawls 2005, pp. 268-269), but whose foundation lies, in part, in Kant's private right. According to this division of labor, while private law remains concerned only with the freedom of the parties (or corrective justice), other parts of the legal system would be in charge of meeting the conditions—among them, distributing resources fairly—necessary to that the civil union is consistent with the united will of the subjects.

Note that this pre-political argument is compatible with parts of private law being abolished in order to meet the demands of a legitimate public order. For example, Ripstein (2016, p. 294) treats the absolute privilege granted to parlia-

24. Similarly, see Ripstein (2009, p. 86), according to which the Kantian theory of property is neither libertarian nor does it endorse a conception of property "as a sort of power the state confers on private persons as part of a broader distributive agenda, a sort of public law carried out by other means."

mentary proceedings regarding defamation as the suppression of a private right justified by the interest in protecting the public sphere. Similarly, replacing a tort-based private right of action with a public insurance system would be acceptable, according to Ripstein, in order to meet legitimate public purposes (id.).

There is, however, a difference between the Toronto School and instrumentalists, such as Kevin A. Kordana and David H. Tabachnick (Kordana & Tabachnick 2005), for whom even an eventual institutional division of labor can only be based on external goals.[25] While for Kordana and Tabachnick private law can only appear insensitive to distributive justice,[26] there is, for Weinrib and Ripstein, a freedom-based reason for private law to be solely concerned with dispensing justice between the parties. Thus, although the pre-political value of freedom is subject to the injunctions of the civil union, the restrictions imposed on private rights in order to pursue collective objectives are not without cost: "if the restriction on the operation of private rights can be justified by the demands of background justice, that does not mean that they count for nothing or that nothing is lost through the restriction." (Ripstein 2016, p. 295).

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25. This is, at least, what Kordana and Tabachnick understand to be the implications of Rawls's theory of justice for private law.

26. Apparently insensitive rules are rules for the application of which characteristics of agents relevant to distributive justice (such as wealth or well-being) do not count. A tort rule indifferent to the wealth of the tort agent and the victim is an example of such a rule. According to Kordana and Tabachnick, insensitivity to distributive justice can only be apparent. If a tort rule abstracts from the wealth of the parts, the reason for this can only lie in distributive justice itself: "While it is true that individual, small scale, or local transactions may be free, that is to say, operating within options constructed as open, it is confused to say that the principles of justice do not 'apply' to these legally permissible moves. It is, after all, the principles of justice that constructed the options open—instrumentally—that is to say, for a particular purpose." (Kordana & Tabachnick 2005, p. 621).

Knowing the extent to which private law is allowed to be just private law depends, of course, on the general goals to be pursued. The more ambitious these goals are, the more the practical results of the pre-political argument will resemble those of instrumentalist theories. In the limit, inexhaustible objectives such as maximizing utility or an index of primary goods for citizens in the worst situation could completely subordinate private law to the requirements of public order.[27]

Unlike the arguments seen in the previous sections, the pre-political argument therefore gives up on basing strong property rights on a conception of justice that, like Rawls's, has the basic structure of society as its primary object. For Rawls (2000, p. 366), the primacy of the basic structure does justice to the "deep social rootedness of people within an established framework of their political and social institutions," so that "[t]he concepts of person and society fit together; each requires the other and neither stands alone." What the failure of the arguments for the division of responsibility and basic liberties suggests, on the other hand, is the difficulty of treating private law as a special case without a socially disembodied conception of the person that accounts for the morality of private relationships.

The question faced by theories such as Weinrib's and Ripstein's, on the other hand, is whether this (socially disembodied) conception of the person can be supported by a theory of social justice.[28] Both authors seem to rely on the idea of a sequence argument: if the civil union is founded on the

27. Weinrib and Ripstein defend somewhat austere conceptions about the objectives of the public right capable of derogating from private law. According to Ripstein (2009, p. 285), because public authority must be exercised in accordance with equal freedom, it "cannot introduce mandatory forms of cooperation merely on the grounds that they will produce an aggregate increase in welfare." It is a separate matter, of course, to assess the merits of Kantian theories about the limits of state activity.

28. For a discussion on this regard, see Sage (2012, p. 128).

rights of the state of nature, then it cannot simply disregard those rights, even though it is authorized to restrict them. It is doubtful, however, that this is sufficient to ensure the "purity" of private law. While considerations of distributive justice are understandably alien to pre-political property rights, why shouldn't these same considerations shape property rights in the civil condition, particularly where those rights turn out to be indeterminate?[29]

Conclusion

This article scrutinized some arguments in favor of the thesis of private law as a special case (SCT). According to this thesis, property rights of private relations are, unlike property rights in general, rights not subject to collective goals such as distributive justice or efficiency.

Two of the three arguments evaluated, the division of responsibility and public liberties arguments, strive to reconcile the SCT with a conception of justice for public order (Rawls's justice as fairness). Both arguments fail, which may suggest a difficulty in defending SCT without resorting to a pre-political argument such as the one seen in the third and final section. It is also doubtful, however, that the argument based on Kant's private right will succeed. Aside from the difficulties inherent to Kant's argument, there is the inconvenience that private law is not immune to suffering restrictions or even

29.For a similar critique, see Perry (1993). Faced with Weinrib's insistence that instrumentalist reasons be ignored even in cases in which corrective justice proves to be indeterminate, Perry (id., p. 618-619) asks: "When indeterminacy strikes, why should a second-tier goal, such as deterrence, not come into play? [footnote omitted] To resolve the particular dispute and determine the future law on a basis equivalent to a coin toss rather than by reference to some non-corrective but nonetheless relevant normative consideration seems completely unjustifiable."

having some of its parts abolished to meet the objectives of civil union. Nor is it clear why private law should remain alien to any considerations other than those of justice between the parties, especially in cases where these considerations are indeterminate.

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