Kantian Justice and Aggregate Welfare

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Yitzhak Benbaji, *Welfare and Freedom: Towards a Semi-Kantian Theory of Private Law*, 39 **Law & Phil.** 473 (2020), available at SpringerLink.

Is it permissible to take into account considerations of aggregate welfare, distributive justice, and others which concern the impact of the law on society as a whole in setting the content of private law rules? Certain Kantian theories—notably, Arthur Ripstein's—seem to answer 'no': the only normative business of private law should be the realization of our innate right to freedom as independence.[1] Benbaji's article, *Welfare and Freedom: Towards a Semi-Kantian Theory of Private Law*, seeks to show that a superior Kantian theory should answer 'yes', but only in so far as a *legislator* is choosing between private law systems which equally realize our innate right to freedom. In his view, the Kantian state's duty to realize a private law that secures freedom has strict lexical priority over other non-freedom-related considerations.

Consider a toy example to illustrate Benbaji's basic idea. Suppose there are two different, inconsistent, schemes of private law rights in relation to unreasonable risk imposition, P1, and P2, which equally realize freedom as independence. According to Benbaji, it would be permissible for the Kantian legislator to choose between P1 and P2 on the ground that P2 maximises aggregate welfare. If, however, P1 realized freedom as independence but P2 fell short of realizing freedom as independence, then the Kantian legislature would be duty-bound to establish P1, even if P2 scored much higher on welfarist grounds. Benbaji calls his view 'semi-Kantian', then, because it accords lexical priority to Kantian freedom, but departs from Ripstein's Kantian 'minimalism' in permitting non-freedom-based considerations to determine the content of private law entitlements once that lexical threshold is met.

The bulk of Benbaji's article is given over to showing that semi-Kantianism (henceforth 'SK') is *possible*. SK is possible only if there *are* multiple private law arrangements which equally realize freedom as independence. Why believe this? Part of the justification for the state, on Kantian views, is normally the inherent indeterminacy of certain kinds of entitlement. A public determination of the content of rights in positive law is necessary in order for entitlements to be permissibly insisted upon. One major reason for this is that "the juridical concepts of property, authorization, duty, excessive risk, etc. are vague." (P. 481.) Consequently it might be "indeterminate, indefinite, or unsettled" where a defendant's conduct on a particular occasion was "unreasonably dangerous." Similarly, a contractual duty may employ concepts which "run dry" in their application to particular cases: a duty requiring a shipment of grapefruit pulp pellets to arrive in "good condition" does not allow one to determine precisely how many spoiled pellets are consistent with the shipment being in "good condition." (P. 482.) While this may appear to be a highly localized indeterminacy, Benbaji holds that many central freedom-as-independence-realizing concepts, such as those mentioned above, are indeterminate in their extension until specified. This being so, one could envisage a large-scale legislative choice that could legitimately be said to be a choice between different 'systems' of private law.

Not only are the concepts by which freedom as independence is articulated vague, they also "incorporate conceptions that are inconsistent with each other." (P. 482.) One of Benbaji's examples is the notion of "excessive risk." He gives the following scenario to illustrate the point that "excessive risk" could be conceptualised in multiple, inconsistent, ways:

> Suppose that the plaintiff had been at a 30% risk of being hit by the right hand side of a very large trolley. The defendant threw a switch and thereby the plaintiff was pushed to the other side of the track. As a result, the plaintiff was under a 30% risk of being hit by the left hand side of the trolley. (You may ask, why the defendant threw the switch. Answer: the defendant was about to be hit by the right hand side of the trolley, was trying to avoid it, and the plaintiff was blocking his way.) On the one hand, the plaintiff was under a 30% risk of being hit by the right hand side of the trolley, and the defendant effectively removed it. On the other hand, the defendant created a 30% risk that the plaintiff will be hit by the left hand side of the trolley. How risky was the defendant's action?
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> One analysis is that the defendant does not impose a risk upon the plaintiff at all here since the defendant's act does not alter the magnitude of the risk which the plaintiff faces. Another analysis is that the fact that the defendant saves the claimant from a pre-existing 30% risk is irrelevant to the assessment of whether the act was excessively dangerous. If the defendant negligently damaged the plaintiff, thereby preventing her boarding a flight which crashed, the defendant saved the claimant from a greater harm, but might still be said to have wronged the claimant; perhaps, analogously, then, one can wrongfully impose a risk upon a person, even when one does not increase the overall magnitude of risk faced by the person.

Having thus argued for the possibility of SK, one might think Benbaji would conclude that, other things being equal, private law adjudication in the Kantian state could also take into account considerations of aggregate welfare etc., whenever there is a genuine indeterminacy by the lights of freedom as independence. Or, more generally, private law judges ought to give lexical priority to freedom as independence, but may permissibly decide on the basis of other considerations once freedom as independence is realised. That is not his position, however. Interestingly, Benbaji holds—in line with the view he attributes to Kantian minimalists like Weinrib and Ripstein—that *judges* should not act upon these considerations under SK. Only the legislature is permitted to do so. Why? For Benbaji, a person's right to be free from the state's domination "implies that a concrete dispute between two individuals ought to be resolved by attending exclusively to facts about how things stand between them." (P. 490.) Benbaji's essential point here seems to be that private law litigants would be unjustly singled out as the bearers of a distributive policy, when the burdens ought to be borne across society. By the nature of private law adjudication, the thought goes, judges can only make *ad hoc*, piecemeal contributions to the advancement of distributive goals; that being so, particular litigants will arbitrarily be singled out for distributive justice treatment, so to speak.

In the final three pages of his article, Benbaji offers a tentative argument for the *superiority* of semi-Kantianism over minimal Kantianism. The basic idea is that the Kantian normative ideal of securing equal freedom as independence for everyone through public institutions leaves Kantians minimalists with insufficient resources to favour, say, progressive taxation regimes. Progressive or regressive taxation achieved by public institutions will both leave members of society as equally free members of society—*in the Kantian sense of freedom as independence*. While freedom as independence may rule out some allocations of the burdens of social co-operation, it is implausibly permissive. In determining what constitutes a fair allocation of the burdens of social co-operation, then, further normative resources are required beyond the austere ideal of freedom as independence.

Overall, Benbaji's thoughtful, rich and careful article describes a very interesting, plausible alternative to minimalist Kantian views, which preserves the appealing importance given in those theories to stringent interpersonal restrictions on the use of, and harm to, other people's bodies and property. By way of conclusion, here are some reflections on his analysis.

First, while Benbaji is correct that 'enhancing welfare' is not itself a permissible end of state action in Kantian theories such as Ripstein's, these theories may well allow *some* considerations about the 'wider impact on society as a whole' of private law rules to bear upon the content of those rules. Weinrib's view, for instance, is that the scope of rights may justifiably be narrowed or extended compared to the right that would exist prior to the existence of the state, because of the need "to adjust the effects of rights so that rights fit within the totality of conditions under which the freedom of all can coexist."[2] Precisely what this permits is not entirely clear, but conceivably it could permit restriction in the private law remedies available to a right-holder if the effect of granting relief would be for the court substantially to contribute towards other right-violations in the future. While a simple 'consequentialism of rights' is clearly not permitted, there may be room within 'minimalist' Kantianism for certain consequential impacts on rights to be taken into account in the design of remedial rules. Possibly, it would permit rules limiting the scope of liability in situations in which crushing liabilities would overdeter and result in more right-violations in the future.

Second, I was not fully persuaded by Benabji's argument against *judicial* consideration of non-freedom-based considerations within semi-Kantianism, i.e. once the lexical demands of freedom are met. It is possible for judges to create *rationes decidendi* of relatively broad and general scope. It is conceivable that judicial law-making power could be permissibly exercised in certain situations in such a way that any additional burdens of a private law rule due to non-freedom-based considerations could be equitably shared. If so, then the arbitrariness objection that Benbaji makes to judicial reliance upon such considerations will not hold in all cases. In some cases, in other words, judges will be able to construct freedom-respecting rules which equally, or otherwise appropriately, burden all relevant members of the distributive class. For instance, suppose that one method of contractual interpretation in cases of vagueness is freedom-consistent, but more likely to maximise welfare than another. If this method is judicially decreed, then all persons who seek to create contractual rights will be subject to the same rules. It is not clear that other distributive changes would need to be made across society for the creation of such a rule to avoid arbitrarily singling out certain members. At any rate, Benbaji's objection seems to give rise to a more contingent objection to judicial reliance upon non-freedom-based considerations than his discussion suggests.

Third, while I am sympathetic to the general structure of Benbaji's argument, one might dispute some of his examples of when Kantian right is supposedly indeterminate. Consider again his example of the defendant's shifting the risk posed by the trolley again. Kantians such as Weinrib would, I think, insist that the *required* characterisation of the risk in this example is not simply one which considers whether the defendant had an impact on the overall magnitude of risk faced by the victim. If running someone over due to failure to pay proper attention to their interests is wrongful on the Kantian view even when, relative to the facts, it ends up saving that person's life (as in the doomed flight example), and if there is a strong analogy between this example and Benbaji's, then isn't Kantian right non-neutral on the issue of how the risk is characterised?

Fourth, while semi-Kantianism may be an improvement on minimal Kantianism, perhaps an even weaker form of Kantianism (semi-semi-Kantianism?) would be still more attractive. One further weakening would involve the introduction of *requirements* to consider and act upon considerations of welfare in certain contexts. While Benbaji argues for the *permissibility* of taking into account considerations of aggregate welfare, he does not argue for the existence of *requirements* to do so. Suppose, however, that P1, P2, and P3 all satisfy the demands of freedom, but P3 would be enormously more beneficial in terms of welfare. Other things being equal between P1, P2, and P3, it's plausible to think that there is a *requirement* for the legislator to choose P3.

1. *See* Arthur Ripstein, **Force and Freedom** (2016).

2. Ernest J. Weinrib, *Private Law and Public Right*, 61 **U. Toronto L.J.** 191 (2011).

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