

**ARGUMENTS AGAINST
REDISTRIBUTIVE JUSTICE
BASED ON KANT'S
DOCTRINE
OF PRIVATE RIGHT**

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According to Kant, "right in a state of nature is called private right" (MS, AA VI, S. 242). It is my claim that there is no room for a right to enforce the offer of benefits in the private right. Firstly, I will show how the concept of an innate right to freedom provides no conceptual foundation for a right to enforcement of alleged duties of cooperation. Since my argument is much more conceptual than hermeneutical, Isaiah Berlin's analysis of negative liberty in "Two Concepts of Liberty" will be helpful here. Secondly, I will argue that the concepts of original acquisition and voluntary transfers are also at odds with the idea of a redistributive justice. At this point, it will be very useful to notice that the first two principles of justice in holdings of Robert Nozick roughly corresponds to the first two sections of Kant's theory of acquisition of external things in the private right. Finally, I will sketch an objection against political uses of a principle of historical rectification of acquisitions. The principle of rectification is the third and last principle of Nozick's entitlement theory of justice in distribution, and it should be of concern to Kantians too, since it is a mere principle of rectification of the two first principles. Due to the points I am going to make, I conclude that, if somewhere, redistributivism should make its case in Kant's doctrine of public right, as a right of a State.

Key words: rights, freedom, possession, historical rectification

1

Since I intend to argue that a negative general right to freedom may not coexist with a general right to benefits¹, certainly, I should start by defining what I mean by "freedom"², in the sense in which one can claim a moral right to individual freedom. I rest my arguments on Kant's conception of an innate right to freedom "insofar as it can coexist with the freedom of every other in accordance with a universal law", where freedom means "independence from being constrained by another's choice" (MS, AA VI, S. 237).

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¹ By a general right, I understand a right to be claimed before everyone, or a right which does not depend on particular contracts.

² I make no difference between "freedom" and "liberty".

Kant speaks of an innate right as a human right, i. e. a right belonging to every human being by virtue of her humanity (MS, AA VI, S. 237). Besides, a moral right in Kantian sense is always related to an obligation corresponding to it (MS, AA VI, S. 230). This is why one's right to freedom is internally limited by the equal right to freedom of every other human being.

The rationale behind a human right as such does not concern us here. I am just willing to investigate the implications of an assumption like that. At first, we should keep in mind that a right based on our human condition is not equal to a right to have our human condition sustained thus that we would have a right to be provided with the material conditions necessary for keeping our human condition in existence.

I have been talking about a *negative* right to freedom, because the obligation corresponding to the right to freedom is not a positive obligation to provide someone else with benefits. It is a negative obligation of non interference, since freedom in that context means "independence from being constrained by another's choice". Thus, it makes perfect sense for Kantians to agree with Nozick that: "someone else's not providing you with things you need greatly, including things essential to the protection of your rights, does not itself violate your rights, even though it avoids making it more difficult for someone else to violate them" (Nozick, 1974, p. 30).

Both the components of Kant's definition of "freedom" in the context of our innate right to freedom – the independence from being constrained and the specification of another's choice as the source of the relevant constraint here – also fit the concept of "negative liberty" to be found in Isaiah Berlin's famous paper "Two Concepts of Liberty". I believe the long quotation will be useful to clarify the meaning of that concept:

I am normally said to be free to the degree to which no man or body of men interferes with my activity. Political liberty in this sense is simply the area within which a man can act unobstructed by others. If I am prevented by others from doing what I could otherwise do, I am to that degree unfree [...]. Coercion is not, however, a term that covers every form of inability. If I say that I am unable to jump more than ten feet in the air, or cannot read because I am blind, or cannot understand the darker pages of Hegel, it would be eccentric to say that I am to that degree enslaved or coerced. Coercion implies the deliberate interference of other human beings within the area in which I could otherwise act. You lack political liberty or freedom only if you are prevented from attaining a goal by human beings. Mere incapacity to attain a goal is not lack of political freedom (Berlin, 2002, p. 169).

Given the concept of "freedom" as defined above, right concerns external relations between choices, not a relation between one's choice and another's mere wishes or needs (MS, AA VI, S. 230). In other words, one cannot derive a right to overcome any kind of inability and realize her ends from her right to be free in that negative sense. One's innate right is merely a right to pursue her ends without external interference by another's choice. The only inability that matters here is an obstruction by another's choice, and my obligation is a negative obligation not to be that obstruction. It is not even a positive obligation to remove those obstructions for others. Kant could not be clearer about the fact that one does not have a juridical duty to care whether others are being well succeeded or not in pursuing their purposes: "it is not asked, for example, whether someone who buys goods from me for his own commercial use will gain by the transaction or not" (MS, AA VI, S. 230).

All things considered, it is in order to notice that, since one sticks to Kant's definition of "freedom" inside his definition of our only innate right, it is to claim that freedom is not impaired by scarcity. At this point, Berlin's analyses of negative liberty is useful again. He points out that:

If my poverty were a kind of disease which prevented me from buying bread, or paying for the journey round the world or getting my case heard, as lameness prevents me from running, this inability would not naturally be described as a lack of freedom, least of all political freedom (Berlin, 2002, p. 170).

Berlin's point is that poverty itself does not amount to a constraint of my choice by another's choice. Therefore, it is impossible to deduce a right to poverty relief (or to redistribution) analytically from the negative right to freedom. The inference to the first right from the last one rests on the assumption of an (empirical) economic and social theory which is not to be found in Kant's doctrine of right. Besides, the right at issue would be more properly presented as a right to compensation of damage:

It is only because I believe that my inability to get a given thing is due to the fact that other human beings have made arrangements whereby I am, whereas others are not, prevented from having enough money with which to pay for it, that I think myself a victim of coercion or slavery. In other words, this use of the term depends on a particular social and economic theory about the causes of my poverty or weakness (Berlin, 2002, p. 170).

Let us make the lack of identity in the relation between the right to freedom and a right to poverty relief/redistribution clearer by supposing that agent A has 300 alternative ways to reach her goal, while agent B has none or, maybe, only a bad one. In addition, B's lack of means was caused by objective circumstances (an illness, a natural catastrophe...) as well as A's abundance (she is lucky). Now, an agent C hinders A in her choice of one of her 300 alternative ways of getting her goal. According to Kant's definition of "freedom" regarding our right to freedom, it is safe to say that B is free, but not A. In other words, A's choice was constrained by another's choice, while B's choice was not.

Now, let us go back to the fact that the right not to be interfered with has an important condition: its capacity of universal coexistence. As it has been said above, the right belonging to you by virtue of your humanity is a universal right. This being so, such a right implies an obligation not to interfere with others too. In other words, right not to be interfered with contains an authorization to interfere: authorization to hinder prior hindrances to freedom. Kant makes clear that only hindrances to freedom may be object of rightful constraint when he says that: "If then my action or my condition generally can coexist with the freedom of everyone in accordance with a universal law, whoever hinders me in it does me wrong; for this hindrance (resistance) cannot coexist with freedom in accordance with a universal law" (MS, AA VI, S. 230).

Since 1) indifference to others wishes or needs or ends does not amount to a hindrance to freedom, and 2) only a hindrance to freedom can rightfully be hindered, a Kantian should agree with Nozick: "your being forced to contribute to another's welfare violates your rights" (Nozick, 1974, p. 30).

2

I have been defending that a right to be free is not consistent with a general right to be provided with means. But I left untouched an essential point: why am I under coercion by whom takes my external possession away to redistribute property? The aim of this section is to examine possession rights in the context of our main issue.

In order to agent A be the owner of the object X even though A is not physically holding X, there must be an authorization for A to coerce any other to refrain from using X. But we have seen that right only authorizes hindrances of hindrances to freedom. This being so, how is it possible that right authorizes the coercion of a choice B to refrain from using X when it is B's body physically holding X? After all, it appears that the only agent undergoing coercion in that case is B. To sum up, Kantians need to justify A's claim to be wronged by B whenever B uses X without A's consent, nevertheless A is not empirically holding X.

The claim here is: were the coercion contained in external possession not rightful, right would nullify any object of choice from a practical point of view. The main premise is that: "The subjective condition of any possible use is possession" (MS, AA VI, S. 245). If external possession is a condition of any possible use of an object of choice, any use of objects of choice would be rightfully impossible whether the claim to a right to coerce contained in the concept of "external possession" were illegitimate. This is a *reductio ad absurdum* (Byrd, 2010, pp. 110, 114, 119) that, for Kant, "gives us an authorization [...] to put all others under an obligation, which they would not otherwise have, to refrain from using certain objects of our choice because we have been the first to take them into our possession" (MS, AA VI, S. 247).

The right at issue here is not a right provided by any kind of authority. It is the right of the first owner.³ Indeed, the rationale here is clear, since we analyze the premise according to which external possession is a condition for the use of an object of choice. To be clear, Kant is not claiming that one needs to possess an object in order to use it, what would be a false statement.

B can use X (that belongs to A) since A consents to B's use. The use of X is only rightfully impossible whether nobody is entitled to determine the use of X.⁴ In this case, we would need to physically hold all the objects that we intend to use as means for our ends. Otherwise, others would be allowed to employ the same means for other ends as soon as we are not physically attached to the objects anymore. And, certainly, we will just need to wait them to put the same objects momentarily aside in order to take them back.

It is to be noted that it is the lack of a natural authority among human beings that grounds the statement that possession is a condition to use. What more could avoid such a situation where A is always disturbing the use of X by B, and

³ Kant claims that "its possibility [of original acquisition] is [...] an immediate consequence of the postulate of practical reason" (MS, AA VI, S. 263). That postulate says that: "It is possible for me to have any external object of my choice as mine, that is, a maxim by which, if it were to become a law, an object of choice would *in itself* (objectively) have to belong to no one (*res nullius*) is contrary to rights" (MS, AA VI, S. 246).

⁴ This is why Kant is not claiming that "every human being has an innate right to a certain title of ownership, nor claiming that every human being has a right to at least own something" (Höffe, 2010, p. 91).

vice-versa, in a state of nature? Certainly, a natural authority could. A natural distributive authority could rule which object would be to be used by each agent, for what, and for how long. But Kant could not accept an appeal to a natural authority among human beings as a rightful solution, because our innate right to freedom involves “a human being’s quality of being his own master” (MS, AA VI, S. 238). This is why, Kant solves the problem of the use of external objects through the right of the first possessor (original acquisition), and not through a natural distributive authority.

If the argument is sound, it proves that “an obligation to refrain from using certain objects of our choice because we have been the first to take them into our possession” (MS, AA VI, S. 247) is more than merely consistent with freedom, it is even required by freedom. In other words, an agent B acting as if there were no mine or yours is converting himself in a hindrance to everybody else’s freedom. This is why B may be rightfully hindered.

To sum up: 1) There is no such thing as a right to be provided with possessions following from the negative right to freedom. 2) The violation of a first owner rights amounts (synthetically) to a violation of the right to freedom.

Coincidentally, the principle of justice in acquisition is the first principle of the Nozickian theory of distributive justice. It sets that original acquisition – the appropriation of unowned things – is legitimate. A second principle of justice to be found in Nozick’s theory is the principle of justice in transfer, which sets that it is legitimate to acquire a possession from someone else entitled to the possession providing that both of the parts agree with the transference (Nozick, 1974, p. 150). As it could not be otherwise, Kant also has a concept of acquisition by contract in his doctrine of private right: “Transfer of the *property* of one to another is *alienation*. An act of the united choice of two persons by which anything at all that belongs to one passes to the other is a *contract*” (MS, AA VI, S. 271).

Thus, there are two principles of justice in holdings so far, whereas one can easily realize that they are perfectly consistent with poverty and inequalities. It would mean that poverty itself is not to be an issue for a theory of distributive justice. Indeed, there would be injustice whether one were forced to transfer her possessions to other. After all, Kant and Nozick define possession of X as the right to determine what shall be done with X⁵, and we have also seen how Kant attempts to derive such a right from the subjective conditions of practicing freedom.

Now, we can go further and show how coercive attempts to avoid or end inequalities must clash against freedom and possession rights as defined here. In other words, I want to suggest that a rival theory of justice is not consistent with freedom and external possession rights. In order to do that, I will analyze the (in)famous Wilt Chamberlain thought experiment of Robert Nozick.

Before I do that, I would like to point out that the Nozickean – and (I hope) Kantian – theory of justice in holdings I am supporting here has nothing to do with the achievement of a pattern in distribution of possessions. The distribution is just whenever and only when it arises from the operation of a small number of principles (we already know two of them). On its turn, any patterned theory of justice must be based on coercive interference in distribution of possessions: the interference aims to achieve a pattern, or correct deviations from a pattern. Let us see “how liberty upsets patterns” and clashes with a central planner.

⁵ For instance: “The central core of the notion of a property right in X, relative to which other parts of the notion are to be explained, is the right to determine what shall be done with X” (Nozick, 1974 p. 171); and: “That is *rightfully mine (meum iuris)* with which I am so connected that another’s use of it without my consent would wrong me” (MS, AA VI, S. 245).

Usually, objections against the Wilt Chamberlain argument developed by Nozick in *Anarchy, State, and Utopia* rest on the fact that the circumstances are too idealized: they do not mirror reality, we are told. Nonetheless, that is purposeful. The aim is to show that, to avoid inequality and poverty, it is in order to constantly interfere with voluntary transfers of private property (and, therefore, with private property itself), since a free system of transfers would develop into a system of unequal shares of holdings whatever is the starting point (the distribution regarding original acquisitions).

Hence, in the beginning of that thought experiment, Nozick asks us to suppose a distribution of possessions that fits our favorite pattern, like equal shares, for instance. Given this initial condition called D1, the argument follows:

Now suppose that Wilt Chamberlain is greatly in demand by basketball teams, being a great gate attraction. [...] He signs the following sort of contract with a team: In each home game, twenty-five cents from the price of each ticket of admission goes to him. [...]

The season starts, and people cheerfully attend his team's games; they buy their tickets, each time dropping a separate twenty-five cents of their admission price into a special box with Chamberlain's name on it. They are excited about seeing him play; it is worth the total admission price to them.

Let us suppose that in one season one million persons attend his home games, and Wilt Chamberlain winds up with \$250,000, a much larger sum than the average income and larger even than anyone else has. Is he entitled to this income? Is this new distribution D2, unjust? If so, why?

The core of the argument is that D1 instances your patterned theory of justice, instead of historically unjust original acquisitions thus that you cannot claim that D1 is unjust. Nonetheless, society spontaneously moves from D1 to D2, being D2 unequal and compatible with poverty. The only way to avoid D2 is to deny that another's use of my property without my consent would wrong me, therefore, to refuse the concept of private property itself.

After all, to avoid the spontaneous evolution from D1 to D2, a third part needs to interfere in the contract between Wilt Chamberlain and a basketball fan, forbidding the basketball fan to transfer her possession to Chamberlain, and forcing her to transfer it to another person (someone receiving less voluntary transfers) or to keep it to herself. In other words, perhaps the basketball fan would be allowed to drop twenty-five cents into that special box with Chamberlain's name on it, but Chamberlain would not be allowed to collect the full amount. That is the only way to keep Chamberlain from accumulating possessions. Thus, the last question in the passage quoted above is: who is being wronged when the basketball fan drops *her*⁶ twenty-five cents into that box thus that right authorizes an interference in the contract?

Now, as well as we can imagine a scenery in which one accumulates property while nobody is wronged, we can imagine the opposite too. Let us suppose that one can count only with her share in D1 to fulfill her wishes and needs, since she has a serious inability that causes the fact that she has nothing to exchange with others except for her initial share of holdings. If we admit nobody is wronged by the transfers resulting in Chamberlain's accumulation, it seems to be the case that we should admit that nobody is wronged by the transfers (or the lack of transfers) resulting in the increasing poverty of our unfortunate.

⁶ Remember D1 is an instance of your theory of justice. This is why you need to agree that those twenty-five cents are rightfully *hers*. For this reason, Nozick points out, about redistributionists, that "their theories are theories of recipient justice; they completely ignore any right a person might have to give something to someone" (Nozick, 1974, p. 168).

Those remarks make the case that our innate right to freedom and our acquired rights to external things are not analytically connected to an individual juridical obligation to relieve poverty and inequality, consequently, they do not make the case for redistributive rights. What is more, a coercion that does not correspond to the enforcement of a juridical obligation is an initial coercion, that is, pure and simple violence.

3

Now it is time to investigate the situations in which acquisitions do not occur in accord with the first two principles of justice in holdings (original acquisitions and voluntary transfer). According to Nozick, nobody is entitled to a possession except by (repeated) applications of the principles of acquisition and transfer. It means that: "Justice in holdings is historical; it depends upon what actually has happened" (Nozick, 1974, p. 151). This being so, the third principle of justice in holdings is the rectification (regarding the first two principles) of injustice. In other words, rectification is a third legitimate way of acquisition besides original acquisition and voluntary transfer or alienation. I cannot see how Kant could refuse a rectification principle at least as it is abstractly conceived⁷, since he does accept the legitimacy of original acquisitions and voluntary transfers.

Since we do not live in an ideal world where every acquisition occurs in accord with the first two principles of justice in holdings, is not the case that the principle of rectification would call for redistribution, i.e., for taxes over the wealthy in order to provide social benefits to the poor? I believe such a conclusion would be a misuse of a principle of rectification.

A principle of rectification must be limited by an epistemic principle, otherwise it itself could amount to a violation of the first two principles of justice in acquisitions. According to Nozick, an epistemic principle like that says: "If someone knows that doing act A would violate Q's rights unless condition C obtained, he may not do A if he has not ascertained that C obtains through being in the best feasible position for ascertaining this" (Nozick, 1974, p. 106). In our case, act A is taking possessions away from an individual Q, and the C condition is Q having acquired the same amount in possessions by violating the first two principles of justice in holdings.

Thus, one may not take possessions from Q if one has not ascertained that Q has acquired possessions by violating the first two principles of justice through being in the best feasible position for ascertaining this. Certainly, Kant would not reject an epistemic requirement like that, otherwise any system of holdings would be completely unstable. Without the epistemic principle, anyone would be able to claim that absolutely any property right may be violated, since *allegedly*, in the real history of mankind, every piece of land has been acquired against the first two principles of justice at some point. However, the adoption for our actions of a maxim that allows to treat any property as illegitimate would amount to a violation of that obligation that Kant intended to have proved: "to act towards others so that what is external (usable) could also become someone's" (MS, AA VI, S. 252). Due to the epistemic principle, we can avoid that ma-

⁷ The empirical applicability of such a principle is in need of further developments even for Nozick (Nozick, 1974, pp. 151–153).

xim. The burden of proof belongs to the one willing to take possessions away from Q. The epistemic principle provides Q with procedural rights, and the system with stability, making private property possible.⁸

All things considered, one can conclude that a rectification principle should not be used to disturb a system of private property, by introducing an assumption of illegitimacy against every title thus that the one who owns less could always demand a transfer from the one who owns more. Each claim for rectification should be analyzed as a separate case before a judge. Therefore, that is not a principle of redistributive justice either.

Final Remarks

Providing that the arguments presented here are sounds, one can assert that there is no bases for redistributive justice to be found in the concept of an innate right to negative freedom, or in the concept of a right to acquisition of external things. However, I have finished my argument by mentioning a judge who is supposed to adjudicate juridical conflicts regarding property titles. Who is supposed to be that judge? According to Kant, it is only possible that one plays the role of that judge in a civil condition. This is why we would be morally obligated to move from the state of nature to a civil condition (for instance, TP, AA VIII, S. 298).

It is possible that a claim for redistributive justice be justified in the context of public right. We have seen that individuals hold no juridical and general obligation to provide others with goods, and, consequently, that no individual holds a right to coercively transfer possession from an individual to another for redistributive purposes. In a few words, redistributive justice is not a matter of private right at all. Nevertheless, perhaps the State holds an obligation to provide the poor with goods, and, consequently, a right to transfer possession from a citizen to another (for instance, MS, AA VI, S. 325–326). Be that as it may, the analysis of this issue is beyond the scope of this paper.

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⁸ Indeed, even an epistemic principle may not be sufficient to guarantee a stable system of property rights. This is why one can find, for instance, the concept of "usucaption" [*usucapio*] in the Roman Law of property and current civil law systems. The aim is to remedy known defects in titles of property by introducing requirements of continuous and peaceful possession. In the US and UK, usucaption corresponds to the concept of "acquisitive prescription".