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RELATIONAL JUSTICE AND THE VALUE OF PRIVATE LAW

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ABSTRACT. *Relational Justice: A Theory of Private Law* articulates a distinctive theory of private law that claims this body of law is grounded in a basic commitment to self-determination and substantive equality. In this short comment, I focus on three aspects of Dagan and Dorfman's theory: the relationship between relational justice and other more traditional notions of interpersonal justice; the idea that private law is intrinsically valuable; and the connection between private law and liberalism. In each of these cases, my comments are not meant to question the substance of the theory itself but rather to explore some meta-theoretical aspects concerning its relationship to the idea of commutative justice, the nature of its claims, and its connection to liberalism.

In *Relational Justice: A Theory of Private Law*, Hanoch Dagan and Avihay Dorfman articulate a distinctive theory of private law.[1] The basic rights and powers that constitute private law—the law of contracts, torts, property, and unjust enrichment—are grounded, under their theory, in a basic commitment to the ideas of self-determination and substantive equality.[2] In this way, the theory aims to vindicate—against some forms of economic analysis and critical legal theory—the notion that private law is distinctive.[3] At the same time, the theory does so without endorsing the more orthodox formalism of Toronto Kantian private law theory, emphasizing against the latter the notion that private law is not just concerned with a formal idea of independence or equal freedom.

[1] The book is an expanded and more ambitious version of ideas already contained in their previous work, such as Hanoch Dagan and Avihay Dorfman, 'Just Relationships', *Columbia Law Review* 116 (6) (2016): pp. 1395–1460; Hanoch Dagan and Avihay Dorfman, 'Justice in Private: Beyond the Rawlsian Framework', *Law and Philosophy* 37 (2018): pp. 171–201.

[2] Hanoch Dagan and Avihay Dorfman, *Relational Justice: A Theory of Private Law* (Oxford: Oxford University Press, 2024), p. 4.

[3] Dagan and Dorfman, *Relational Justice*, p. 6.

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There is a lot in *Relational Justice* that is worth taking seriously and that scholars working on private law would benefit from engaging with. The book, although focused on one central claim, makes multiple arguments and offers many insightful suggestions. There are multiple doctrines and ideas in private law that the book engages with and that are reframed or refined from the perspective of relational justice.

However, in this comment I focus on only three aspects of Dagan and Dorfman's theory: the relationship between relational justice and other more traditional notions of interpersonal justice (I); the idea that private law is intrinsically valuable (II); and the connection between private law and liberalism (III). In each of these cases, my comments are not meant to question the substance of the theory itself but rather to explore some meta-theoretical aspects concerning its relationship to other theories about interpersonal justice; the nature of the claims about private law that the theory makes; and the relationship between the liberal commitments underlying *Relational Justice* and the current illiberal wave we are going through in most of the world.

I. INTERPERSONAL JUSTICE, CORRECTLY UNDERSTOOD

The idea of corrective justice is sometimes conceptualized as a remedial notion—namely, as the idea that 'liability rectifies the injustice inflicted by one person on another'.[4] As Weinrib puts it, corrective justice would be a form of justice occupied with the restoration of what belonged to each party before a wrongful transaction that upset a previous (normatively valuable, or at least lawful) baseline.[5] Consistently with this remedial understanding, corrective justice is typically distinguished from distributive justice in that the first is concerned with the rectification of injustices arising out of bilateral interactions whereas the second is concerned with widespread allocation of benefits and burdens across multiple individuals.[6] Because of this remedial role, it is common for theorists to

[4] Ernest J. Weinrib, 'Corrective Justice in a Nutshell', *The University of Toronto Law Journal* 52 (4) (2002): p. 349.

[5] Weinrib, 'Corrective Justice', p. 349. Similarly, Ernest J. Weinrib, *The Idea of Private Law* (Oxford: Oxford University Press, 2012), Ch. 3.

[6] See, e.g., John Gardner, 'What is Tort Law For?' Part 1. The Place of Corrective Justice', *Law and Philosophy* 30 (1) (2011): p. 9.

describe corrective justice in terms of *remedying*, *correcting*, or *reversing* wrongful interactions or rights violations.[7]

This does not mean that corrective justice is *purely* remedial. As Dagan and Dorfman note, in the dominant Kantian version of corrective justice, for instance, the idea of corrective justice is associated to a conception of persons as free and equal agents. Corrective justice is not, on this view, just about remedying wrongs. It is also about securing the conditions for rightful interaction.[8]

The problem with this Kantian view, according to Dagan and Dorfman, is that it loses sight of the fact that contemporary private law is not just about interpersonal independence.[9] It is also about structuring categories of interaction in our lives as employees, consumers, and so on, in ways that are responsive to a richer conception both of the person and of the institutions of private law. From this perspective, as they argue, work law, consumer law, antidiscrimination law, and even the direct application of constitutional rights are not foreign incrustations into the realm of private law.[10] Instead, they are a realization of private law's commitment to people's self-determination and substantive equality, which Dagan and Dorfman encapsulate under the notion of *relational justice*.[11]

Unlike the Kantian conception of corrective justice, relational justice is sensitive—according to Dagan and Dorfman—'to systematic patterns of disadvantage, including those that are products of past injustices', which 'usually escape scrutiny because their entrenchment in the structure of our everyday lives often renders them invisible'.[12] While *also* interpersonal, relational justice is thus attuned to these systematic patterns. Therefore, it goes beyond the formal consideration of the bilateral relationship between the parties in and of itself that is characteristic of the Kantian conception of corrective justice.[13] Again, this does not mean that relational justice is another name for distributive justice: it is, like corrective justice, a

[7] Gardner, 'What is Tort Law For?' p. 10.

[8] Dagan and Dorfman, *Relational Justice*, p. 39.

[9] Here, there are important connections between Dagan and Dorfman and Greg Keating's account of tort law. See generally Gregory C. Keating, *Reasonableness and Risk: Right and Responsibility in the Law of Torts* (Oxford: Oxford University Press, 2022).

[10] Dagan and Dorfman, *Relational Justice*, p. 23.

[11] Dagan and Dorfman, *Relational Justice*, p. 37.

[12] Dagan and Dorfman, *Relational Justice*, p. 44.

[13] Dagan and Dorfman, *Relational Justice*, pp. 39–40.

norm about horizontal, interpersonal relationships. Its particularity is that it takes into account systemic social phenomena that impact those relationships. It is a commitment to (fully) just interpersonal interactions, rather than to a thin form of interpersonal independence.[14] Because of this, judges deciding on private law disputes, according to Dagan and Dorfman, need to be concerned with ensuring the justice of private law.[15]

Dagan and Dorfman's position is certainly plausible, and I am very sympathetic to the idea that the evaluation of a relationship or interaction as *just* requires taking into account the impact of systemic patterns and widespread social phenomena on that particular relationship. But I am not sure that we need a *new* notion—'relational justice'—to capture this. In fact, everything Dagan and Dorfman argue for can be cabined, I would argue, within the notion of corrective justice. By this I do not mean *Weinrib's* or, more broadly, Kantian corrective justice, but simply corrective justice as a distinct form of justice—i.e., as a form of justice that is different from distributive justice.

To avoid an overly remedial emphasis, I would prefer to speak of *commutative* rather than *corrective* justice, even though I would acknowledge that commutative and corrective justice are different labels for the same idea. Indeed, traditionally, Aristotle's account was conceived of as an account of the former, with the expression *corrective justice* becoming more common relatively recently (i.e., in the past fifty or sixty years).[16] While this is just a matter of terminology, I believe *commutative justice* is a better label to capture the notion that all that the idea refers to is to the idea of justice in interpersonal transactions as opposed to justice in the distribution of benefits and burdens.[17] But ultimately whether we talk about *corrective* or *commutative* justice lacks substantive significance. The more important point I want to make here is that the Aristotelian distinction is a purely formal one, between norms of justice in interpersonal transactions and norms of justice in the distribution of benefits and

[14] Dagan and Dorfman, *Relational Justice*, pp. 42–45.

[15] Dagan and Dorfman, *Relational Justice*, p. 61.

[16] I don't have a systematic survey that would support this, but as least a casual search of the terms 'corrective justice' and 'commutative justice' on Goggle's Ngram Viewer (a corpus linguistics tool that relies on Google Books) supports my contention.

[17] See Peter Cane, 'Corrective Justice and Correlativity in Private Law', *Oxford Journal of Legal Studies* 16 (3) (1996): p. 477.

burdens. Because of this, everything that Dagan and Dorfman correctly call our attention to under the rubric of 'relational justice' can be understood as a substantive conception of what commutative justice requires. In this way, I think a more historically conscious conception of commutative justice—instead of a too narrow focus on Weinrib's and Ripstein's articulation of corrective justice—allows to see that what Dagan and Dorfman are discussing is a specific conception of an older concept (i.e., commutative justice).

In fact, very early on, scholars like Richard W. Wright criticized Weinrib and Coleman precisely for adopting a conception of corrective justice that creates 'the impression that corrective justice is an empty, sterile abstraction with little or no relevance to the real world of human interaction', while a more traditional Aristotelian conception shows that 'the Aristotelian concept of justice, including distributive justice as well as corrective justice, has a non-aggregative and egalitarian substantive normative content that largely prefigures Kant's moral theory'.[18] On Wright's view, the Aristotelian framework sees norms of corrective and distributive justice as coexisting and compatible sets of norms with different domains of application, but that ultimately depend on each other to actually realize justice as such.[19] On this view, then, corrective justice is perfectly compatible with the recognition of systematic patterns of disadvantage and their impact on interpersonal relationships.

I don't have the tools to assess the exegetical correctness of Wright's reconstruction of Aristotle. But it seems to me that this reconstruction, and particularly its emphasis on the ability of corrective justice to respond to substantive egalitarian concerns, captures a lot of what Dagan and Dorfman have in mind in their articulation of relational justice.

Moreover, if we take other more recent articulations of the idea of corrective justice, instead of the Kantian version, we can say a lot of what Dagan and Dorfman want to say even within the category of corrective justice. For John Gardner, for example, corrective justice is about conformity with the reasons that underpin primary rights and obligations, once those rights and obligations can no longer be complied with.[20] There is no reason why those reasons, or confor-

[18] Richard W. Wright, 'Substantive Corrective Justice', *Iowa Law Review* 77 (2) (1992): pp. 630–31.

[19] Wright, 'Substantive Corrective Justice', p. 707.

[20] Gardner, 'What is Tort Law For?', p. 33.

mity with them, should exclude attention to systematic patterns of inequality, their impact on equal self-determination, and so on. In other words, interpersonal justice correctly understood—and not understood narrowly in Weinrib's sense—can perfectly accommodate the consideration of systematic factors that affect the parties' relationship.[21]

This is not an idiosyncratic view. In fact, and as I have suggested, it fits very well with the pre-Toronto conception of commutative justice that characterized much of the Western legal philosophical tradition. In the Aristotelian tradition elaborated by the late scholastics, for example, commutative justice is *truly* justice only against the backdrop of broad compliance, even if imperfect, with distributive justice.[22]

For reasons of theoretical parsimony, I thus think that instead of coming up with new qualifiers for (in)justice, private law theorists should try to work within the basic Aristotelian framework. Again, everything that Dagan and Dorfman want to say seems to me to fit that purely formal distinction. Instead of *relational justice*, they could just talk of *commutative justice*, correctly understood, because the Aristotelian distinction is formal, not substantive.

One possible response here would be that there are real, substantive differences between Dagan and Dorfman's conception of interpersonal justice (*relational justice*) and the conceptions of those who have used the labels of corrective or commutative justice before them. And that is certainly true. But, again, the distinction between distributive and commutative justice is purely formal, not substantive. From this point of view, relational justice *just is* a substantive conception of the formal concept of commutative justice.

II. THE INTRINSIC VALUE OF PRIVATE LAW?

Private law, as Dagan and Dorfman understand it, is the body of law that regulates horizontal or interpersonal interactions between persons as such (rather than as citizens).[23] As a normative matter, they claim, private law should (and already does, at least to some extent)

[21] Making a similar argument with reference to *Donoghue v. Stevenson*, see Cane, 'Corrective Justice and Correlativity in Private Law', pp. 480–81.

[22] James Gordley, *Foundations of Private Law* (Oxford: Oxford University Press, 2007), pp. 23, 161, 363.

[23] Dagan and Dorfman, *Relational Justice*, p. 21.

comply with the two notions of reciprocal respect for self-determination and substantive equality that constitute relational justice.[24] A private law regime that complies with this norm, according to Dagan and Dorfman, 'is intrinsically valuable'.[25]

I have always found the idea that legal rules and institutions can be intrinsically valuable somewhat mysterious. If law is not valuable just because it is law, then it can only be instrumentally valuable. Or so it seems to me. This is not to say that law cannot express, articulate, or realize intrinsic values. For example, I believe legal prohibitions on torture realize an intrinsic value. But that does not mean that a body of laws proscribing torture is intrinsically valuable. Such a body of laws will be valuable only to the extent that it is a good instrument for the realization of the intrinsic value, for reasons connected to its impact on behavior, its ability to constitute an expression of the value, and so on. This is particularly evident if we can express and articulate the values independently of the relevant legal institutions.

Dagan and Dorfman sometimes seem to recognize this, while at the same time attempting to hold on to the idea that private law is intrinsically valuable.[26] For instance, they write that relational justice, as an ideal, 'seems independent of law and, in some sense it is', but also that 'in a deep sense, it is not since it is law— specifically private law—that sets up many of the frameworks that structure our everyday life'.[27] It is hard to see how *in some sense* a value can be independent of law yet *in a deep sense* not be. Still, perhaps what Dagan and Dorfman have in mind is that, while we can conceptualize the value of relational justice independently of private law, the latter is so constrained or determined by the former that, in practice, they are not severable. Because of this, Dagan and Dorfman write, private law has a non-instrumental value (even though many of its component parts are valuable only instrumentally).[28] This also applies to specific aspects of private law that comply with relational

[24] Dagan and Dorfman, *Relational Justice*, p. 4.

[25] Dagan and Dorfman, *Relational Justice*, p. 6.

[26] I am not the first to note this tension in Dagan and Dorfman's ideas. For instance, Gardner made a similar critique in his comment on an earlier iteration. See John Gardner, 'Dagan and Dorfman, on the Value of Private Law', *Columbia Law Review Online* 117 (2017): pp. 181–82.

[27] Dagan and Dorfman, *Relational Justice*, p. 57.

[28] Dagan and Dorfman, *Relational Justice*, pp. 67–68.

justice. Private rights of action, for example, are at least sometimes 'intrinsically valuable'.[29]

Dagan and Dorfman recognize that, often, we can make institutional choices on the basis of instrumental considerations. But in some cases, including in the case of the private right of action, certain institutional arrangements are non-instrumentally valuable.[30] Because of this, they write, a system that lacked any personal rights of redress connecting victims and tortfeasors would be 'deficient, even if the latter are properly deterred and the former appropriately compensated'.[31]

My contention here is quite simple. If what we are committed to is a value or a norm, such as relational justice, it is *always* an open, empirical question, whether any set of institutional arrangements realize it or not.[32] Even if private law contains norms of relational justice, those legal norms must still be effective instruments for the value of relational justice.[33] At best, the intrinsic value of private law is *inseparable* from its instrumental value.[34]

[29] Dagan and Dorfman, *Relational Justice*, p. 25.

[30] Dagan and Dorfman, *Relational Justice*, p. 69.

[31] Dagan and Dorfman, *Relational Justice*, p. 84.

[32] This argument might seem subject to the following objection (suggested by an anonymous reviewer). Suppose that human freedom entails certain basic entitlements, and that those entitlements cannot exist unless they are authoritatively determined by a legal regime. This, I take it, is something like Kant's argumentative transition from provisional right in the state of nature to civil society. Under this type of argument, it seems, the legal regime that authoritatively determines our rights has intrinsic value—because it is a necessary condition for those valuable rights to be possible. My view is that this type of argument, while familiar, fails at showing that a body of law can have intrinsic value independently of its content. In terms of the objection, the legal regime's 'intrinsic' value is in fact contingent on its effective realization or embodiment of the idea of human freedom that requires those entitlements. More importantly for our purposes, I don't think Dagan and Dorfman can help themselves to this type of transcendental argument because their own claim that private law is intrinsically valuable is contingent on their assessment that private law realizes (at least partially) the norm of relational justice. Dagan and Dorfman, *Relational Justice*, pp. 4–6.

[33] This is Gardner's argument regarding corrective justice in Gardner, 'What Is Tort Law For?.

[34] Gardner, 'Dagan and Dorfman on the Value of Private Law', p. 184. Whether this 'at best' holds depends on further conditions, as Gardner notes—namely, whether the relationships articulated by private law are intrinsically valuable and whether private law makes a constitutive contribution to that intrinsic value.

Thus, against Dagan and Dorfman, I think it's not possible for private law to be intrinsically valuable (if we understand, as I think we should, intrinsic value as non-instrumental value).[35] It strikes me that many things are intrinsically valuable: friendship, justice, health, happiness, love, aesthetic experience, peace, wisdom, etc.[36] But all of those things are valuable *as such*. They are good, and their goodness does not derive from some other good. A position that said that private law is good *as such*, and that its goodness did not derive from some other good, would be bizarre.[37] In fact, I think Dagan and Dorfman should agree: the best interpretation of their view is that private law is valuable because and to the extent it realizes relational justice, and that its goodness derives from its contribution to relational justice.[38] That is flatly inconsistent with the claim that private law has intrinsic value.

III. ILLIBERAL PRIVATE LAW

The aim of *Relational Justice* is to offer a general theory of private law within a liberal legal order.[39] Within contemporary liberal legal systems, private law establishes terms of interaction between people across a large swath of domains.[40] And within such systems, the idea of relational justice captures an important part of our shared political culture, including the notion that people are entitled to adopt, revise, and pursue their own life projects and their own conception of the good.[41] In attempting to offer an account of private law in liberal

[35] Here, I depart from Gardner, 'Dagan and Dorfman on the Value of Private Law'. It is perhaps possible to distinguish intrinsic from non-instrumental value in certain cases. For example, as an anonymous reviewer suggested, a sunset might be valuable because of its beauty (and therefore not intrinsically), but nevertheless be valuable as such (or non-instrumentally). I have certain doubts about that distinction. But in the case of law—given the fact that we are dealing with a human artifact—it seems to me implausible to think that a body of law can be non-instrumentally valuable because, for example, of its realization of a norm. And the reason for this is that, unlike a sunset, a body of law can fail (and very badly) at realizing the relevant norm—the value of the body of law, even when it is essential or necessary to embody or realize a norm, is contingent on the body of law's effective ability (as an instrument) to embody or realize a norm.

[36] See Michael J. Zimmerman and Ben Bradley, 'Intrinsic vs. Extrinsic Value', *Stanford Encyclopedia of Philosophy*, https://plato.stanford.edu/entries/value-intrinsic-extrinsic.

[37] In my view, even Weinrib's theory ends up accepting as much: his affirmations that private law is its own end, just like love, are well known. But so is his argument, a few pages afterwards, that private law realizes corrective justice and the demands of right.

[38] Similarly, Gardner, 'Dagan and Dorfman on the Value of Private Law', pp. 190–91.

[39] Dagan and Dorfman, *Relational Justice*, p. 10.

[40] Dagan and Dorfman, *Relational Justice*, p. 34.

[41] Dagan and Dorfman, *Relational Justice*, p. 45.

regimes, Dagan and Dorfman do not just offer a detached perspective. They are committed to making this area of law live up to its best liberal reconstruction. They are committed, in other words, to the liberal values that underpin their reconstruction of liberal private law.

My last comment in this regard is not an objection or a critique of Dagan and Dorfman (in fact, I share many of their liberal commitments). Instead, I want to suggest that it might be interesting, and perhaps appropriate in this historical moment, to think how their theory fares as an interpretive or normative theory of private law in illiberal regimes. This is a relevant question today, given the rise of autocratic legalism, illiberal populism, and the new right. For societies that transition away from many aspects of liberalism, will a theory like Dagan and Dorfman's still capture what's central of private law in those illiberal (or at least, less-than-fully-liberal) regimes?

My sense is that there is a lot in the current edifice of private law that would be maintained (although certainly not everything). There isn't a lot in the platforms of illiberal political movements, as far as I can tell, that attempts to upend private law. This is true, I think, even regarding those aspects of private law that are particularly consistent with Dagan and Dorfman's theory—and it is certainly true concerning its most central features. This is not to say that illiberals might not want to modify some aspects of private law. For example, it is obvious that some aspects of non-discrimination law that—as Dagan and Dorfman correctly note—are today central to the operation of private law are inconsistent with many illiberal commitments. But even here it is certainly possible that, instead of replacement, we will see reinterpretation and contestation at the margins. Maybe this is because private law is not where the action is—both for illiberal political movements and for the full realization of liberal egalitarian values.

But while that strikes me as plausible, I wonder whether the lack of interest in the reform of private law might require a deeper explanation.

One possibility is that private law, while justifiable in liberal terms, is not necessarily liberal.[42] This is not an implausible position.

[42] This is a recurrent theme in John Gardner's work. See John Gardner, *From Personal Life to Private Law* (Oxford: Oxford University Press, 2018), pp. 183–84.

One doesn't need to be a critical legal scholar to see that the central doctrines of contemporary property, contract, and tort law were developed in times and places not committed to liberal principles, or at least not *truly* committed to them. Instead, they were developed in the context (and, arguably, in the service) of political orders based on domination, oppression, and injustice. Even the more 'modern' doctrines of contract law reflected in the Uniform Commercial Code and the Second Restatement of Contracts were developed in contexts where *de jure* racial segregation was still prevalent in many parts of the United States.

But here I want to venture a second potential explanation. Perhaps, much of what Dagan and Dorfman value in private law will remain even under illiberal regimes, but not because private law today is perfectly compatible with illiberal ideas (despite private law's sometimes very troubling history). Perhaps, instead, the lesson we should draw from illiberalism's lack of interest in the reform of private law is that liberalism has had an enduring success in this area—a success so fundamental that even those who reject liberalism must embrace it at least in part in this area, even if unwillingly or without much enthusiasm.[43] This, to my mind, could be evidence of the victory of at least an aspect of liberalism even though we are living in an era of retrenchment, and of the potential of private law to be a repository of some liberal values even when they are under attack in public law.[44] But it could also be evidence of a disturbing *modus vivendi* of compatibility between a liberal private law and a very illiberal political order. Perhaps even more disturbingly for Dagan and Dorfman, this *modus vivendi* might suggest that, when it comes to the struggle for and instantiation of liberal values, what fundamentally matters is the domain of public law.

[43] Another possibility, suggested by Avihay Dorfman in his response to my presentation of these comments, is that there is just a contingent overlap between relational justice and the underpinnings of pre-liberal or traditional private law. That is certainly possible, but I think that contemporary illiberalism will probably retain much more of contemporary private law than its traditional or pre-liberal core.

[44] So, my observations here are compatible with Dagan's argument that liberal values might be the best justification for private law, and indispensable to make it fully just. Hanoch Dagan, 'The Liberal Promise of Contract', in *Private Law and Practical Reason: Essays on John Gardner's Private Law Theory*, ed. Haris Psarras and Sandy Steel (Oxford: Oxford University Press, 2023), p. 329.

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