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Freedom as Non-Domination and Private Law's Autonomy[1]

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ABSTRACT

This article deals with Arthur Ripstein's attempt to defend a conception of private law that avoids both instrumentalism and absolute property rights (Lockeanism). The article's thesis is that the basic principle of Ripstein's conception, that of freedom as independence or non-domination, is ambiguous. Once this ambiguity is brought to light, it is clear that private law is subordinated, for Ripstein, to an objective that is external to it, namely, that of avoiding systematic dependency relations. Thus, Ripstein surrenders to an instrumentalism analogous to that which characterizes both economic analysis and distributive justice accounts of private law.

Keywords: private law, Ripstein, freedom as non-domination, instrumentalism.

1. INTRODUCTION

On the basis of Kant's *Rechtslehre*,[2] Arthur Ripstein[3] has developed in recent years a conception of political justice whose central idea is that of freedom as non-domination. One of the peculiarities of the concept of justice defended by Ripstein is the role that it assigns to private law as an

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[2] References to Kant's *Rechtslehre* will be made with the volume and page number of the academy's edition. Transcripts from the original German will be accompanied by the English translation of Mary Gregor in *The Metaphysics of Morals* (Cambridge: Cambridge University Press, 1991).

[3] Here is a list of Ripstein's works as cited throughout the article, each with its respective abbreviation: "The Division of Responsibility and the Law of Tort" *(DR)*, "Beyond the Harm Principle" *(BHP)*, *Force and Freedom: Kant's Legal and Political Philosophy (FF)*, and *Private Wrongs (PW)*. Complete references are provided at the end of the article.

institutional locus *par excellence* of this freedom.[4] Ripstein is thus opposed to instrumentalist theories that treat private law (and law in general) as a simple means for achieving objectives external to legal practices. In the sense that I have in mind here, an objective is considered external to the legal system if its achievement does not depend solely on the rules that make up this system and on the application of these rules by courts of law. Examples of external goals are optimal use of resources (efficiency) and certain states of affairs regarding the distribution of goods (other than rights), such as one in which wealth is distributed according to the maximin pattern, or in which everyone enjoys certain capabilities. Once the legal system is linked to the achievement of objectives such as those, its rules are instrumentalized, since the justification of legal rules is then attached to the achievement of objectives not contained in the rules themselves.

In this article, I intend to demonstrate that Ripstein employs two different conceptions of freedom as non-domination (FND). One of these conceptions is specific to private law—this is what I will call *legal* FND. The other conception appears in arguments about public law or, in Kant's terms, in arguments regarding the conditions for reaching a rightful condition (*rechtliche Zustand*). In particular, Ripstein refers to FND in this last sense, which I will designate as factual, when dealing with poverty and income redistribution policies.

My thesis is that these two conceptions of FND are in tension. Ripstein tries to accommodate them, although apparently without recognizing the cost of this accommodation. This cost is, in my view, to undermine the ambitioned (by Ripstein) autonomy of private law, subjecting this department of law to consequentialist considerations that Ripstein (and Kantians in general) would like to avoid.

Ripstein's theses on private law have been criticized for some time (see e.g. Kordana and Tabachnick 2006; Brudner 2011; Dagan and Dorfman 2016; Dagan 2021: ch. 5). This article aims to expose an internal fracture of the Ripsteinian building, which stems from the fact that the concept of freedom as non-domination that is used to justify redistributive policies in *Force and Freedom* ends up subjecting private law to an external objective analogous to those adopted by instrumentalist theories, such as that of the economic analysis of law, to which Ripstein is opposed.

Despite the large amount of comments that Ripstein's work has attracted in recent years, the problems of the multiple meanings of FND and of the

[4] With the expression "institutional locus *par excellence*", I refer to the fact that, for Ripstein, there is a certain kind of freedom as non-domination that is constituted by private law (more precisely, by a private law with the characteristics of a system of equal freedom), and which can only be enjoyed under such law.

implications of the primacy of factual FND over legal FND have been ignored. An exception is an article by Kyla Ebels-Duggan (2011), in which she criticizes Ripstein for oscillating between two different conceptions of freedom, which she designates as the "normative" and "descriptive" conceptions, respectively. Ebels-Duggan's thesis is that while Ripstein's "official" conception of freedom is the normative one (according to which freedom is a function of what we are allowed to do, rather than of what we are actually able to do), several of Ripstein's arguments, such as his arguments about the transition from the state of nature to the civil condition, about the need for public roads, and about the justification of the state's duty to fight poverty, are arguments that depend on an "unofficial" conception (the descriptive one, in Ebels-Duggan's terms) of freedom. In addition to presenting a different interpretation from Ebels-Duggan's of the status of freedom in Ripstein—in my view, Ripstein admits the two conceptions of FND, legal and factual—the present article deals with the implications of these two conceptions for the issue of private law's autonomy.

The article is organized as follows. Sections 2 and 3 present, respectively, the two conceptions of FND found in Ripstein's writings: legal and factual FND. Section 4 highlights differences between these two conceptions of freedom. Section 5 clarifies why these are potentially conflicting conceptions, and exposes what appears to be Ripstein's solution to this conflict: that of subordinating legal FND to factual FND. Section 6 argues that, by giving priority to factual FND, Ripstein sacrifices private law's autonomy and surrenders to consequentialism.

2. LEGAL FREEDOM AS NON-DOMINATION

In this section I shall deal with one of the conceptions of FND employed by Ripstein—what I call here legal FND. First, however, it is necessary to make some observations about FND in general.

Ripstein advocates for FND as a metric of justice. In his writings, FND is defended both as an interpretation of Kant's innate right of humanity[5] (for example, in *FF*) and independently (for example, in *BHP*). This right to freedom is also referred to as a right to independence, which emphasizes that it is a kind of relational freedom. To be free, for Ripstein, is to enjoy a certain position in relation to others.

Let's see more precisely what this freedom—in the sense that I shall

[5] In this article, I propose to address the merits of Ripstein's conception of justice in itself, and not as an interpretation of Kant's writings.

refer to as "legal"—consists of. I am legally free from domination if I control the means available to me for the pursuit of my ends, regardless of what ends they are.[6] The means in question are what belongs to me innately (my body) and everything else that I acquire. Legal freedom (or independence) in Ripstein's sense is, therefore, the power to use these means as is convenient, the only condition being that the exercise of that freedom is compatible with the exercise of others' freedom. In a system of equal freedom, therefore, everyone can make use of the means at her disposal to pursue the ends she wants, as long as this is compatible with the freedom of others.[7]

Before addressing private law as the institutional locus of legal FND, it is important to draw attention to the fact that the definition of freedom presented in the previous paragraph presupposes the difference between mine and yours. I am free if I can use my means for the purposes I wish, but I cannot, in a system of equal freedom, require that the means that belong to you be employed (against your will) for the pursuit of my ends. This difference between what is mine and what is yours, according to Kant, can definitely occur only under a rightful condition (*rechtliche Zustand*). Ripstein sets out in detail the reasons why rights (with the exception of everyone's right over their own body) are provisional in the state of nature (*FF*: ch. 6). Here it is interesting to point out that there is a particular instance of domination or infringement of freedom that is avoided when one enters into a rightful condition. Since in the state of nature the definition of what is mine and what is yours is made unilaterally, there is a sense in which each of us is subject to the other's discretion, because there is no general point of view (or institutions that represent and enforce that point of view) from which to define what belongs to each person.

Let's focus on the rightful condition. This condition is characterized, as mentioned above, by a definition of what belongs to each person. What FND requires, under this condition, is a system of private law[8] that assures everyone of the free use (compatibly with the same freedom being enjoyed

[6] It is to this irrelevance of ends that Kant refers, according to Ripstein, when he affirms that, for the law, *"kommt auch gar nicht die Materie der Willkür, d.i. der Zweck, den ein jeder mit dem Objekt, was er will, zur Absicht hat, in Betrachtung"* (6:230). In Mary Gregor's translation: "no account at all is taken of the matter of choice, that is, of the end each has in mind with the object he wants".

[7] Which is consistent with the general principle of Kant's right (6:230): *"Eine jede Handlung ist recht, die oder nach deren Maxime die Freiheit der Willkür eines jeden mit jedermanns Freiheit nach einem allgemeinen Gesetze zusammen bestehen kann etc."*. In Mary Gregor's translation: "Any action is *right* if it can coexist with everyone's freedom in accordance with universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law".

[8] As should be clear, "private law" in the sense to which I refer above is a part of the legal system, and not the private law (with its provisional rights) of the state of nature.

by the others) of what is hers. Let's see what this requirement consists of more precisely.

A system of private law based on FND is one by force of which people are only restrained as to the use of their means in such a way that this use is compatible with the freedom of others. It follows that no one can be restrained as to the use of what is hers for the fulfillment of the ends (including the needs) of others, because to be restrained in the use of what is hers for the sake of the ends of another person goes against the principle according to which the use of what is yours can only be restricted in order for it to be compatible with the freedom of others. For example, my use of my car may be limited if it imposes excessive risk on other people (I may be subject to pay damages if, when driving the vehicle recklessly, I bring harm to someone). My use of the car cannot be limited, however, to accomplishing someone else's purpose, however important (for the person in question) that purpose may be—for example, I cannot be forced to use my car or to allow others to use it to take a patient to the hospital.[9] Ripstein says that the only mode of cooperation consistent with FND is voluntary cooperation. Thus I may have to cooperate in order for others to achieve their ends, but only if the pursuit of those ends is a use for which I have wanted to use my means—for example, if, under a contract, I oblige myself to provide a service to someone.[10]

A fundamental difference for a system of private law organized around the idea of FND is, therefore, the difference between *misfeasance* and *nonfeasance.*[11] Misfeasance is an action contrary to a system of equal freedom, and can consist of either the destruction or the mere misuse (without causing any harm [12]) of others' resources. Nonfeasance, on the other hand, is an action that merely frustrates or abstains from fulfilling

[9] One of the characteristics of a private law based on the idea of FND, therefore, is that it does not include among the causes of liability (except in special circumstances) the mere abstention from providing relief or the breach of a duty to rescue. See *PW*: 59-64.

[10] On voluntary cooperation being the only kind of cooperation consistent with private law as a system of equal freedom (or what Ripstein designates as "foreground justice"), see *PW*: 291. See also *FF*: 243: "Mandatory cooperation requires a distinctive principle of public right."

[11] On this difference, see *PW*: ch. 3. It is also expressed in *FF* (77-8) through the following example: "Suppose that you and I are neighbors. You have a dilapidated garage on your land where our properties meet. I grow porcini mushrooms in the shadow of your garage. If you take down your garage, thereby depriving me of shade, you harm me, but you do not wrong me in the sense that is of interest to us here. Although you perform an affirmative act that worsens my situation—exposure to light destroys my mushrooms—I do not have a right, as against you, that what I have remains in a particular condition. Although I do have a right to my mushrooms, which prohibits you from doing such things as carelessly spilling fungicide on them, I do not have a right that you provide them with what they need to survive, or that you protect them from things that endanger them apart from your activities."

[12] On the fact that it is possible to act wrongly by simply misusing the means of others, see, in particular, *BHP*.

the purposes of another person, but which does not involve unlawful interference, that is, interference incompatible with a system of equal freedom. In *FF* (77), Ripstein describes the wrongdoings, or violations of "external freedom", as follows. As a private person, you can only interfere with another person's capacity to pursue ends in two ways—either by wrongfully depriving someone of a means she already has, or by failing to provide her with a means to a pursuit to which you have given her a right. You violate a property right by using or destroying the means a person already has; you violate a contractual right by failing to provide her with a means—your action—to which you have given her a right.[13]

I close this section with some considerations on the relationship between FND and private law. First, it is worth mentioning that there is no way for the freedom in question to be realized except through a system of private law.[14] This is a freedom that is enjoyed only under certain institutions (the institutions of private law as a system of equal freedom), and which is constituted by those same institutions. FND does not depend on private law institutions just because it is a freedom to use what belongs to me and, therefore, a freedom that presupposes the difference between what is mine and what is yours. Nor is the importance of private law for FND limited to defining the parameters under which the means available to each of us can be used in a manner compatible with the freedom of others. Private law is constitutive of FND, because that freedom can only be enjoyed under a system of private law[15] that is indifferent to the ends of each person and which is concerned only with reconciling the use of what belongs to each person with the same freedom being enjoyed by others. It is a system of private law with those characteristics that Ripstein has in mind when he refers to private law as a system of equal freedom, and *it is only under a system of private law with those characteristics that legal FND takes place.*

Second, it is important to note that the idea of private law as a system of equal freedom can be realized in different ways. Ripstein is emphatic in

[13] The classification of wrongs is completed with a third category, that of violations of status relations. These relationships are characterized by the fact that one of the parties is obliged (by status, and not by contract) to act for the sake of the other's ends (for example, parents in relation to their children).

[14] The above statement refers to private law in the civil condition, that is, to a system of rules promulgated and regularly applied by the courts in order to make up for the deficiencies that Ripstein (*FF*: ch. 6) detects in private law as found in a state of nature, namely the problems of indeterminacy, unilateralism, and assurance. Thanks to an anonymous reviewer for urging me to make this clarification.

[15] I understand a "private law system" to be both the set of rules applicable to private (voluntary and involuntary) transactions, the way in which these rules are applied in court decisions, and the concrete rights that are recognized through those decisions.

denying that his theory sets out to offer a single answer to any and all private law issues.[16] What the FND principle does is to rule out certain answers—or certain ways of reaching them. Let's consider the question of the standard of care to be established for the purposes of negligence liability. The idea of private law as a system of equal freedom certainly does not provide a single answer as to how that standard should be defined. What is required is that the standard of care be developed in accordance with the idea of equal freedom, that is, in view of the need to reconcile the freedom of the potential agent of harm with the freedom of the potential victims. The question to be answered is something like this: what limits is it reasonable to impose on the action of the agent (subjecting it to liability), so that his freedom is reconciled with the freedom of the potential victims? Any considerations other than those based on the idea of equal freedom must be ruled out. It is unacceptable, for example, that the liability of the person causing harm is justified by the need to offer reparation to the victim or by the purpose of maximizing social wealth, because, in such a case, the agent's freedom would be limited for the sake of something other than the goal of rendering her freedom compatible with that of others. A system of private law that restrains the freedom of action of some people for the sake of others' purposes, such as the purpose of reparation or those realized through the maximization of social wealth, is not a system of equal FND.

3. FACTUAL FREEDOM AS NON-DOMINATION

Another conception of FND, which I call here factual FND, is revealed in Ripstein's argument about poverty and redistribution. Ripstein presents this argument as an interpretation of Kant's defense of redistributive policies in the *Rechtslehre* (6:325-326).

What is wrong with poverty and what justifies the state's obligation to fight it? According to Ripstein, state actions are only legitimated if they can represent the general will (or "united will") of the citizens. That laws can be viewed as resulting from a general will requires, in turn, that relations between citizens be compatible with that will. Dependence relationships are incompatible with a general will because, if some citizens are dependent on the choices of others, laws cannot be regarded as resulting from their

[16] He does this, for example, by differentiating his theory from Ronald Dworkin's theory of law as integrity. See *PW*: 21.

will (*FF*: 273).[17]

The problem of poverty is, therefore, that of giving rise to dependence relations. Let's look in more detail at how Ripstein characterizes this dependence. Remember that there is no affront to *legal* FND in the event that the realization of any of the purposes I give myself is frustrated by other people's choices, as in the case where my mushroom plantation is ruined by the demolition of my neighbor's garage. FND in a legal sense grants me the use of what belongs to me, but gives no assurance about the achievement of any ends I set—in particular, of ends whose achievement depends on how other people choose to use what belongs to *them*. The case of poverty, however, is different from that of someone who depends on the choices of others to achieve a given end. The dependence of the poor on the choices of others is *general* or *systematic*, because whatever ends the poor person intends to realize depend on her subsistence, and such subsistence is not something that she, the poor person, is able to provide independently of others' choices.

All property rights prevent people from doing things that they might have otherwise been free to do, because a property right entitles the owner to determine how the object in question will be used. The sort of factual dependence that is thereby created raises no issues of right. On the other hand, poverty, as Kant conceives it, is systematic: a poor person cannot use his or her own body, or even so much as occupy space, without someone else's permission. The problem is thus not that some particular purpose depends on the choices of others, but rather that the pursuit of any purpose does. If all purposiveness depends on the grace of others, then the dependent person is in the legal position of a slave or a serf (*FF*: 281, footnote omitted).

A poor person is dominated, in short, not because some of the ends she may want to pursue depend on other people's choices (after all, this is the case for all of us). The domination of the poor person, which reduces her, as Ripstein says in the passage transcribed above, to a position comparable to that of a slave or a servant, stems from the fact that she depends on the

[17] Ripstein recalls that the idea that poverty is incongruous with a general will is already found in Rousseau, but notes that, in Kant, this incongruity is normative and as such independent of any concrete effects of poverty on the quality of political representation

agency of others for whatever purposes she decides to pursue.[18] Ripstein compares the poor person to a landless person in a world in which the entire surface of the planet has become privately owned, a world in which, therefore, the landless depend on the permission of others to be anywhere. The same justification for maintaining public roads for circulation—avoiding a general or systematic subjection of some people to the discretion of others[19] —applies, therefore, to the state duty to fight poverty.

4. COMPARING THE TWO CONCEPTIONS

This section offers a systematic comparison of the two conceptions of FND presented above. A first point of this comparison consists of making explicit the meaning in which one of the freedoms in question is a legal one. FND can be called legal, in the first place, in the sense of being a kind of freedom that is legally constituted. As already stated above, legal FND is the freedom enjoyed by citizens subject to a system of private law with the features of a system of equal freedom, i.e. a system of private law that ensures each person's ability to use what is his own in a measure compatible with the freedom of others. Legal FND is, furthermore, *only* enjoyed under an institutional scheme of equal liberty. It is a sort of legal freedom, therefore, also in the sense of being a freedom that is only conceivable under law.[20] It is a freedom, in short, of citizens subject to a system of private law that governs their activities, drawing upon the idea of equal freedom. Such freedom is, finally, also legal in the sense that it does not depend on

[18] In the passage transcribed a few lines above, Ripstein refers to the dependent person as someone for whom the achievement of any purpose ("any purpose", "all purposiveness") is subject to the discretion of others. Hence it could be inferred that poverty only reduces to a state of dependence those who are literally unable to survive without the mercy of others. Ripstein dismisses this interpretation, however, in stating that the redistribution aimed at combating poverty does not have to be limited to what is necessary for "biological survival" (*FF*: 284). This caveat may be welcome, but it raises the suspicion that we have to define the dependent person as someone who is unable to achieve by herself a large quantity of the ends she has reason to value—instead of any ends at all. If that is the case, then it seems inevitable that the characterization of dependence would involve some qualitative criterion. We will have to ask ourselves, in other words, whether or not there are enough valuable ends that someone can achieve regardless of the benevolence of others. For a criticism of Ripstein for trying to avoid considering the value of the ends (or interests) that each person is capable of achieving, see Tadros (2011).

[19] On the issue of public roads, see *FF*: ch. 8.

[20] *BHP* (243): "You can describe the principles of a system of equal freedom without saying anything about institutions, but a group of people cannot live in equal freedom unless institutions to demarcate and guarantee that freedom are in place."

anything other than the law.[21]

In contrast, factual FND not only fails to be constituted by law, as it is also independent, in a sense, from the legal system. This freedom consists, recall, in the fact that the realization of my ends—whatever ends I propose to pursue—does not depend on other people's choices. I can enjoy such freedom even in a state of nature, if my circumstances are such as to allow me to achieve certain ends entirely by myself.[22] It is true that, in the civil condition, FND in a factual sense is influenced by law, because what I am able to do is also a function of what the legal order recognizes as mine or as someone else's. Unlike FND in a legal sense, however, we cannot say whether or not someone is dominated in a factual sense just on the basis of the legal rules and how they are applied, because the factual dependence is also a function of the results of transactions practiced under these rules, as well as of misfortunes in general. FND in a factual sense cannot, therefore, be institutionally ensured, even though institutions are, of course, able to reduce the risk that some citizens are dependent on others.

The following table summarizes the differences between the two conceptions of FND:

	Legal FND	Factual FND
can be enjoyed in the state of nature	No	Yes
It is constituted by the legal system –in particular, by a system of provate law drawing upon the idea of equal frredom	Yes	No
It depends on factual conditions	No	Yes

[21] The above statement may sound exaggerated or valid only under ideal conditions where citizens refrain from interfering with the use of others' resources, or where such interference is invariably rectified. The thesis according to which FND in a legal sense is only fully guaranteed under ideal conditions disregards, however, the provisory nature of property rights in the state of nature for Kant (and for Ripstein). This provisionality extends, in my view, to rights that seem to us to be conferred by precedents or statutory law but which have not yet been recognized and enforced by the courts (consider that, after all, indetermination regarding rights is one of the deficiencies of the state of nature). That is why legal FND is really guaranteed by a system of private law as a system of equal freedom, even though the application of the rules of that system proves, under certain parameters, to be imperfect. I am grateful to an anonymous reviewer for urging me to clarify this point.

[22] This conception of FND therefore differs from conceptions according to which freedom is constituted by property, so that, in a state of nature (without property rights), nobody is free. For an interesting defense of an account of FND of the latter kind, see Essert (2016).

5. RIPSTEIN'S SOLUTION TO THE POTENTIAL CONFLICT: PRIORITY OF FACTUAL FREEDOM

It should be clear by now that the two conceptions of FND are, in addition to being distinct, potentially conflicting. This is a possible result of transactions taking place under a system of equal freedom (as well as of other contingencies) such that some citizens are impoverished to the point of becoming systematically dependent on the choices of others. In other words, legal FND (enjoyed under a system of private law conceived as a system of equal freedom) can give rise to relations of dependence that are contrary to factual FND.[23]

There is no doubt that affronts to factual FND should not be tolerated—we have already dealt with Ripstein's argument about the incompatibility of poverty with the general will on which a legitimate state must be based, and with the state's duty to fight poverty through redistributive measures. The question is whether these measures, which for Ripstein belong to the scope of public law,[24] can be understood as in tension with legal FND.

Ripstein seems to reject the idea that taxation for the purpose of combating poverty is in any sense whatsoever opposed to freedom. Taxation by the state is consistent with the freedom of those who are taxed because they "owe their existence to an act of submitting to its protection and care". The sense in which they "owe their existence" to the state is formal rather than material: their wealth consists entirely in their entitlement to exclude others from their goods, which in turn is consistent with equal freedom only when consistent with formal conditions of the general will (*FF*: 281, footnote omitted).

But if the equal freedom of private law presupposes attending to the conditions of the general will—including, as we already know, the condition that poverty does not reduce anyone to a state of dependence—then there is a sense in which factual FND has priority over legal FND, since the latter cannot be enjoyed without the former. One way of accommodating the two conceptions of freedom without giving up the redistributive policies advocated by Ripstein would be to confine these policies to public law, through a kind of institutional division of labor. According to such a division, it would be up to private law to ensure legal FND, governing individual transactions in a manner consistent with this kind of freedom—that is, without resorting to

[23] Although Ripstein would probably not agree with the terms of the paragraph above (in particular, with its reference to two different and potentially conflicting conceptions of FND), in what concerns the relation between private law and factual domination he seems to be clearly in agreement: "Private transactions cannot guarantee full membership [the status of full citizen, which includes not being dependent on others], precisely because private transactions do not presuppose any specific ends" (*PW*: 291).

[24] *FF* (283): "The public solution is taxation to provide for those in need."

redistributive or any other considerations that do not relate exclusively to allowing each person to make use of what is hers in a way that is compatible with the freedom of others. Public law, in turn, would be responsible for adopting the tax and income transfer measures necessary to avoid dependence relations.[25]

The problem with this proposal of an institutional division of labor is that it underestimates the weight of Ripstein's considerations about poverty and dependence in general. If dependence relations are an obstacle to a legitimate state and therefore to a state of equal freedom, then there seems to be no reason to restrict the range of actions that the state should practice in order to prevent dependency. Suppose that only tax policies coupled with income transfer programs are insufficient to combat poverty, so that other legal strategies, including private law strategies, such as redefining property rights and regulating contracts, are necessary for that end. How could anyone who subscribes to Ripstein's argument about the conditions of a general will be able to oppose these last measures, claiming, to that end, the intangibility of private law as a system of equal freedom? My conclusion is thus that factual FND should have priority over legal FND, that is, that the prevention of relations of dependence such as those caused by poverty must take place even at the expense of private law's autonomy as a system of equal (legal) freedom.

To put things more clearly, consider two possible meanings of an institutional division of labor. In the first sense, which we can call practical, there is a certain objective (for example, the maximization of well-being) whose realization depends on the fact that only a few institutions (for example, the area of law that we usually designate as public law) are deliberately designed so that this objective is achieved. In this practical sense of an institutional division of labor, the indifference of certain institutions to the objective to be achieved has, therefore, an exclusively strategic motivation. Such a division is justified because, for the sake of the objective in view, it is better that only a few institutions are put at the service of that objective. Practically understood, in sum, the institutional division of labor is a mere convenience.

In a different sense, the institutional division of labor is taken to be a matter of principle. In this case, certain institutions are not put at the service of a given objective because they are alien to that objective. If, in this principled sense, we affirm that private law must remain oblivious to a certain objective, such as the maximization of well-being, it is not because we have come to the conclusion that this is the best way to promote the

[25] Ripstein defends an idea of institutional division of labor like this in older writings. See, for example, *DR:* 1837-9.

objective in question, but simply because this objective does not exert any normative force on private law.

The autonomy of private law is only affirmed with an institutional division of labor in the latter (principled) sense. In the practical sense of this division, on the other hand, the autonomy of private law is contingent: it is only because it happens that the social objective to be pursued is better pursued without the rules of private law being designed with this aim in mind that the institutional division of labor is established. It is enough, however, that this empirical claim (namely, the claim that the best way to pursue a certain objective is not to have it in view when designing certain institutions) is refuted for the institutional division of labor to fall apart. But it is precisely this weaker sense (namely, the practical sense) that is available to Ripstein, due to the role that he grants to FND in a factual sense as a condition of the legitimacy of the legal system (including, of course, the legitimacy of the parts of that system corresponding to private law).

That Ripstein is not committed to an institutional division of labor in a principled sense is a conclusion that is reinforced in *Private Wrongs*, a book in which he offers a consistent interpretation of tort law as part of a system of equal freedom. In addition to referring to taxation as a means of avoiding dependence, Ripstein also talks in this book about measures of curtailing private rights (that is, rights consistent with the idea of equal freedom). Among those measures are the partial replacement of tort law for social insurance (*PW*: 292-4), and parliamentary and responsible journalism privileges against charges of defamation (*PW*: 218-9, 227-32). Ripstein's argument to justify these measures is similar to his argument favoring redistributive taxation in *Force* and *Freedom*, although he now includes among the conditions for the legitimacy of state activity, in addition to guaranteeing all citizens the means necessary to avoid "extreme" dependence, "the provision of a robust public sphere, and proper conditions for participation in it" (*PW*: 289). Parliamentary and responsible journalism privileges, for example, are justified by the purpose of ensuring this robust public sphere. Although in this case we are no longer dealing with domination in the aforementioned factual sense (that is, domination characterized by systematic dependence on others' choices), the structure of the argument is strictly the same. Private law is conceived of as a system of equal freedom concerned only with reconciling the use that each citizen makes of what is his, but this system of equal freedom is subject to the conditions for legitimate state action. What is made explicit in *Private Wrongs* is that the fulfillment of these legitimacy conditions may depart from the idea of an institutional division of labor, as it may interfere with

the remedies that private law, as a system of equal freedom, would confer to ensure each person the use of what is his. [26]

6. PROBLEMS WITH THE PRIORITY OF FACTUAL FREEDOM

In *Force and Freedom*, Ripstein expresses his rejection of both Lockean conceptions of property rights as absolute rights, and instrumentalist conceptions according to which property is nothing more than "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" (86). In this final section, I express my doubts as to Ripstein's success in achieving a third way between Lockeanism and instrumentalism.

As I have tried to demonstrate throughout this article, Ripstein conceives of FND in two different ways. In one of its meanings, designated above as "legal", such freedom is the freedom characteristic of a system of private law concerned exclusively with ensuring each person the use of what is hers, compatibly with the same freedom being enjoyed by others. Under such a system, the independence of each citizen is independence from the ends of others, in the sense that the use I can make of what belongs to me is not affected by the ends of others, but only by the need to make such use compatible with the same use, by others, of what belongs to them.

In this sense, the freedom or independence of all is fully guaranteed by a private right erected as a system of equal freedom. We are free because the use of the means at our disposal, whatever they are (that is, regardless of how rich or poor we are) is insensitive to other people's ends. This freedom, however, is not enough. For Ripstein, we are still dependent, or not free, if despite being guaranteed the use of what belongs to us, the pursuit of our ends is systematically subject to the choices of others, that is, if we depend on the choices of others for the pursuit not of one end, or some ends, in particular, but of any ends at all that we set out to pursue. FND in *this* last sense, called above "factual", is prior to legal FND and can justify, according to Ripstein, not only redistributive taxation, but also the eventual suppression of private remedies.

[26] One objection in this regard is that the institutional division of labor remains intact despite certain parts of private law being replaced by a public law aimed at preventing dependency relationships (one of the cases that can be considered here is, once again, that of replacing tort law by social insurance), provided that private law remains occupied solely with ensuring FND in a legal sense. Unless, however, we resort to an artificial criterion to circumscribe the scope of private law—a criterion by which we designate as private law only those areas of legislation concerned exclusively with legal FND—it seems inevitable to recognize that the priority of factual FND over legal FND may imply not only the suppression of traditional areas of private law (as in the example of tort law), but also the restructuring of these areas so that they directly contribute to the external objective of combating relationships of factual dependence. Thanks to an anonymous reviewer for urging me to respond to this objection.

What results from this is a picture of private law that is not, in the final analysis, oblivious to "external" considerations such as those that take place in instrumentalist accounts. Non-domination in a factual sense is an objective external to private law because (unlike non-domination in a legal sense) it can be conceived and realized independently of private law.[27] Factual FND, therefore, plays for Ripstein the same role that maximization and equality of well-being exert, respectively, in utilitarian and egalitarian views of private law.[28]

It is of little use to reflect that non-domination in a factual sense is a more modest goal than those mentioned above: a goal, therefore, that can ordinarily be achieved almost entirely through policies (such as taxation accompanied by income transfer) that do not put into question the autonomy of private law as a system of equal freedom. First, it is doubtful that this is the case, since, in order to avoid dependency relationships, it is quite possible that a restructuring of property rights, and not just income transfer policies, will be necessary.[29] Second, and more importantly, even if the goal of avoiding poverty and dependency can be and is even better fulfilled with taxation and other instruments of public law alone, private law would ultimately remain subjugated to external considerations.[30] Which legal measure is necessary to prevent factual dependency relationships is, after all, something to be verified

[27] Note that preventing factual dependence relationships is an objective external to both private law and law in general. Legal rules do not constitute factual FND in the same sense that private law as conceived by Ripstein constitutes legal FND. Legal rules may, therefore, turn to the desideratum of restraining factual dependence relationships, but they may not be sufficient, by themselves, for this desideratum to be achieved.

[28] Ernest Weinrib (2012: ch. 8) also treats Kant's argument about the state's duty to support the poor as an argument about FND. Unlike Ripstein, however, Weinrib's interpretation of Kant's legal doctrine includes an idea of sequencing that implies the need for distributive objectives to be pursued exclusively through taxation and other instruments of public law. Dealing with Weinrib's thesis on the compatibility of the state's duty to prevent dependency relationships with the autonomy of private law is beyond the scope of this article, but it is important to note a fundamental difference between Ripstein and Weinrib. By renouncing this sequencing idea, Ripstein is immune to the criticism that this idea is incompatible with the provisional nature of private rights in the Kantian state of nature (for an example of this critique, see Brudner 2011). Unlike Weinrib's, by contrast, Ripstein's theory is more likely to be "captured" by instrumentalism. The central thesis of this article is that Ripstein's theory succumbs to instrumentalism by appealing to the ideal of non-domination in a factual sense.

[29] For an argument in this regard, see Dagan 2021: ch. 5.

[30] I consider a conception of law to be consequentialist if it links the justification of legal rules, ultimately, to an external objective such as preventing dependency relationships. This characterization does not imply that the only considerations adduced for the justification of the rules have to relate to the objective in question, nor that considerations about achieving that objective should interfere with the application of these rules to specific cases. The reason that, despite these caveats, we can still speak of consequentialism in this case is that the achievement of an external goal remains the final arbiter even on the question of whether, and under what conditions, a rule (or its application)) must address the objective in question directly. Thus understood, consequentialism is compatible, for example, with a tort law system that deals exclusively with issues of imputation and harm measurement.

empirically. But even if the empirical test confirms taxation to be the most appropriate instrument for combatting dependency, the fundamental question to be answered regarding private law would still be whether there is something it can and should do in order for everyone to enjoy FND in a factual sense. Third, and finally, the idea that, once a certain external objective has been defined, it is appropriate to select some areas of legislation and not others to achieve that objective is misleading. Since there are no substantive (i.e. moral) reasons for an institutional division of labor, the only limits to which the pursuit of a certain external goal is subject are those imposed by conflicting goals. In the absence of moral reasons for a certain area of legislation to remain indifferent to the purpose in question and other external considerations that oppose it, it is difficult to conceive of any reason why the entire legislation should not serve the purpose of preventing factual relations of dependence, which does not mean that some of these areas are not more relevant for the purpose in question than others.

In one of *PW*'s final paragraphs (295), Ripstein states that "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". Nothing that has been said so far calls into question the value of legal FND as enjoyed under private law as a system of equal freedom (nor does Ripstein seem to be engaged in arguing about the value of that freedom).[31] What is doubtful in this passage, however, is the suggestion that legal FND has value regardless of whether the conditions that Ripstein considers to be necessary for a general will are met. Granted that the property rights in question are only constituted through state action—that is, that the preservation of such rights is not an external objective whose realization is conceivable independently of the legal system—what value could private remedies have in the absence of one of the necessary conditions for the state's legitimacy?[32]

[31] In PW's preface (x), Ripstein affirms his willingness to clear up some of the misunderstandings about non-instrumentalist theories of tort law, among them "that tort law has intrinsic value of a sort that is to be added to the catalogue of socially desirable outcomes that the modern state should pursue".

[32] I believe that Ripstein can be charitably interpreted in the passage transcribed above as saying that, although private remedies ultimately depend for their justification on meeting the demands of background justice, it would be preferable that, as far as possible, these demands were met without interfering with private law's autonomy. Although the reasons for this preference may remain unclear, the crucial thing is that such an interpretation still holds private law subordinate, in the final analysis, to the external end of preventing factual dependency relationships.

7. CONCLUSION

In this article, I have endeavored to present the implications for private law of an ambiguity found in the central idea of the conception of justice that Arthur Ripstein has defended in recent years: the idea of freedom as non-domination (FND). My conclusion is that, true to his liberal-egalitarian sympathies, Ripstein is led to give priority to FND understood as freedom from systematic factual relations of dependence (factual FND), to the detriment of a kind of freedom that is ensured by private law structured as a system of equal freedom (legal FND). This solution comes at the price of ultimately subjecting private law to an external objective: that of preventing dependency relationships. Ripstein therefore fails, in my view, in his attempt to achieve a third way between Lockean and instrumentalist conceptions of private law.

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