

REVIEW SYMPOSIUM

## Hanoch Dagan and the liberal concept of autonomy

Gregory S. Alexander\*

A. Robert Noll Professor of Law Emeritus, Cornell University, USA

\*Corresponding author. E-mail: [gsa9@cornell.edu](mailto:gsa9@cornell.edu)

Scarcely anything these days is said in property circles about autonomy. Much is said about costs and about the structure of property (Smith, 2004; 2012). A few libertarians and Kantians, mainly from our neighbours to the North (Ripstein, 2009; Weinrib, 2012), do discuss independence, but independence is not the same as autonomy. Autonomy and its relationship to property are largely neglected topics.

All that changes with the appearance of Hanoch Dagan's important new book (Dagan, 2021). The greatest achievement of his book is to base property, as both a concept and an institution, on personal autonomy. This is a major contribution not only to property theory, but also to liberal theory in general, and it deserves a wide and diverse audience.

There is a long tradition in liberal political and legal thought defining freedom in terms of independence, understood as a constraint on the conduct of others. Dagan departs from this tradition by defining freedom in terms of autonomy:

‘A liberal outlook should insist that an individual is free not only in the formal (or negative) sense of not compelled by another's choices but also in the stronger sense of able to make meaningful choices about the course of his or her life.’ (Dagan, 2021, p. 52)

Self-authorship, we are told, ‘requires the ability to write and rewrite our life story’ (Dagan, 2021, p. 53). Based on this more robust idea of self-authorship, property can accommodate ‘the role of personhood, community, and utility [with]in [its] normative infrastructure’ (Dagan, 2021, p. 50).

With autonomy occupying such a central role, it becomes important to be clear about just what conception of autonomy is at work here. Dagan tells us that by autonomy, he means self-determination or self-authorship (Dagan, 2021, pp. ii–iii) but more needs to be said about this. In recent philosophical literature, two different understandings of autonomy have emerged, which I will call coherentist, or individualist, and relational (Mackenzie and Stoljar, 2000). These understandings are rough, but they suffice to capture a basic dispute among theorists regarding the main parameters or terms of individual autonomy. I will begin with the coherentist approach, which has been perhaps the most influential of all individualist accounts of personal autonomy.

The coherentist approach understands autonomy in terms of the idea of self-rule, itself understood as the ability to govern oneself and self-mastery (Frankfurt, 1988). Self-governance, the core of the idea of self-rule, requires that one be able to act on preferences, desires and so on that are of one's own making. Such a capacity for self-governance requires authenticity and competence (Christman and Anderson, 2005, p. 3). Authenticity refers to the capacity to reflect on and endorse one's desires, values and preferences. For us to be autonomous agents, our preferences and desires must be genuinely ours, or at least we must have the capability of forming our own normative field rather than having them formed by others. Merely having the authority over our actions is no guarantee of self-control. We may have the authority over our actions with no real control over what leads us to act. Various factors, our background, our environment, both physical and social, our economic status and so on influence our actions, of course, but the question is whether they undermine our ability to form our own reasons for action, not whether various factors influence our actions.

Competency refers to the capacity for rational thought, reflection, self-understanding and the like. The distinguishing feature is that competency conditions focus on the capacity for rational thought rather than on threats to genuineness.

Two aspects of the coherentist account are notable. First, it is proceduralist in the sense that the constraints that it imposes on autonomous actions are strictly procedural. The conditions make no reference to the substantive content of one's choices or actions or the reasons for them. It is value-neutral, including no conditions that refer to the agent's substantive value commitments. Procedural accounts are neutral as to what an agent thinks of as good or what his objectives might be. This view of autonomy fits well with contemporary accounts of political liberalism. Consistently with political liberalism, procedural accounts of autonomy permit theorists to accommodate a wide variety of preferences and conceptions of the good as autonomous.

The second aspect worth noting is that this vision of autonomy is largely individualistic and non-relational. Its focus is primarily on the agent and his capacities, preferences and desires. The agent's relationships with others are relevant only in a negative sense – that is, whether the agent is free from constraints that others place upon him such that he is unable to form or act upon desires that are genuinely his. To this extent, procedural accounts of autonomy overlap with independence.

The other approach that philosophers have taken to analysing personal autonomy is relational. The basic idea of this conception is to retain the commitment to the liberal notion of a free, self-governing agent while situating that agent within her social environment. The social self retains her commitment to familiar basic values, but her value commitments are refracted through a prism of social relationships.

Some theories of relational autonomy are content-neutral; others endorse values such as caring or empathy (Mackenzie and Stoljar, 2000, pp. 13–14, 19–21). Proponents of content-neutral autonomy view it as a means of rehabilitating liberal autonomy from associations with notions of self-sufficiency and self-reliance. Autonomy need not endorse these or any other set of values or preferences. Values of caring and interdependency are just as compatible with autonomy as self-reliance. Substantive autonomy rejects the value-neutrality of proceduralism. In one way or another, all versions of substantive autonomy take into account certain normative considerations.

Dagan holds a substantive relational view of autonomy. This becomes clear from his idea of relational justice. He defines that term as 'respect for others' self-determination' (Dagan, 2021, p. 140) but this notion is not as strictly formal as it sounds. Rather, it is substantive and particular. Dagan tells us that to respect others' self-determination, we must take them as they actually are. He rejects the Kantians' relegation to the state the entire responsibility for the care and concern of others, leaving social relations within the private sphere without any intersubjective responsibility save a negative obligation to avoid harming others. Such a position is, in Dagan's view, neither feasible nor normatively attractive. There is such a thing as oppression in the world, and private ownership of property is major contributant to that problem. Kantians would rely on a tax-and-redistribution system to address the intrinsic problem of property with domination of others, but Dagan points out that this scheme is simply not in the cards given the workings of majoritarian politics (Dagan, 2021, p. 147). Moreover, even if such a scheme could be implemented, it would not address the normative objection that property owners would have no responsibility for others save respecting interpersonal boundaries and formal equality (Dagan, 2021, pp. 150–154). So, Dagan observes: 'Support for a strict division of labor exacerbates the alarming implications of property's spectacular private authority ..., aggravating the concomitant vulnerability (if not subordination) of non-owners' (Dagan, 2021, p. 151).

The exclusion of concern for the predicament of others from horizontal, namely interpersonal, relationships overlooks two aspects of the human condition to which Dagan draws attention: interdependence and personal differences. Because of our interdependence, personal autonomy and social equality depend on the conditions of our interpersonal relationships, not just on the structure of relations between the state and society. Dagan illustrates this important point through a simple but powerful hypothetical of an owner of a café who decides not to let customers enter the premises on the basis of their sexual orientation (Dagan, 2021, p. 151). The café, we are to imagine, is the only one to discriminate against gay people in Manhattan so that, in its liberal surroundings, there are easy substitutes

and no discernible external effects to the owner's bigotry. Dagan tells us that this is a case in which public law justice can and should do nothing: 'it is a simple private law case in which one private person (who really values his or her independence) disrespects the self-determination of another person on the basis of the latter's sexual identity' (Dagan, 2021, p. 153). A public guarantee of background justice cannot rectify the injury here, for what it is lacking is 'the indispensable dimension of private responsibility for justice' (Dagan, 2021, p. 153). Relational justice requires that we respect how others construct their own lives and their opportunities to do so. How we construct our lives and who we become are intensely context-dependent. We become concrete human beings within the context of our own personal circumstances. Formal justice and formal equality do not and cannot take that into account. That is why they permit private owners to exclude others from the owners' businesses for discriminatory reasons, while relational justice does not.

The conception of autonomy that this concept of relational justice implies is consistent, so far as it goes, with a substantive version of relational autonomy, or at least by some accounts. What substantive accounts do is to introduce necessary conditions of autonomy, such conditions being derived from the social relations within which agents are located (Mackenzie and Stoljar, 2000, p. 21). Such conditions are posited as a matter of normative competence: agents who do not satisfy the required condition lack the competence to distinguish right from wrong. So, for example, an individual who was raised to be sadistic and who has internalised a sadistic worldview may be autonomous according to procedural accounts (because he identifies with his first-order preferences) is not autonomous according to substantive accounts because his rearing has undermined his ability to distinguish right from wrong (Wolf, 1987, p. 54). What distinguishes substantive accounts, then, is their claim that a necessary condition of autonomy is to form preferences and adopt values that survive self-critical evaluation.

Consistently with other substantive versions of relational autonomy, Dagan's account adds constraints to the value menu available to autonomous agents. It does so with a twist, however. Relational autonomy is largely the creation of feminist theorists. Relational autonomy was a reaction to the notion of self-sufficiency that figures prominently in liberal accounts of autonomy influenced by Kant. Relational feminists have been concerned with the ways in which the failure of this account is linked to practices of gender oppression. So, some feminists have seen self-abnegation, preferences that are adapted to dominant males and practices like female circumcision as manifestations of such failures of the self-sufficiency view. They have constructed various versions of relational autonomy as means of responding to these perceived failures without abandoning the concept of autonomy altogether. Substantive relational accounts do so by treating certain preferences or values as incompatible with autonomy due to their content. So, for example, agents who choose subservience are non-autonomous because they make a special kind of moral mistake (Superson, 2005, p. 109) or because it is a moral failure of self-respect (Hill, 1991, p. 15).

Dagan imposes a substantive constraint of a different sort. His constraint affects how we treat others, not simply how we treat ourselves. His substantive constraint is overtly external, focusing immediately on our behaviour with respect to others. So, he insists that we adopt the value of equality, or, stated better, non-subordination, in our relations with others. The operation of non-subordination is perhaps best illustrated by Dagan's discussion of a hypothetical that is reminiscent of the *Masterpiece Cakeshop* case (*Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 584 U.S. \_\_\_\_ (2018)). The hypothetical involves a 'private owner of a boutique café who decides not to let customers enter the premises adducing some morally arbitrary grounds, such as their sexual orientation' (Dagan, 2021, p. 153). Dagan has us further suppose that this café is the only one to practice discrimination against gay people in Manhattan so that, in its liberal surroundings, there are easy substitutes and no discernible external effects to the owner's prejudice. Dagan tells us that this is one private person 'disrespects the self-determination of another person on the basis of the latter's sexual identity' (Dagan, 2021, p. 153). He argues that the case 'vividly renders the indispensable dimension of private responsibility for justice' (Dagan, 2021, p. 153). It illustrates the necessity for relational justice.

What relational justice means in this case is that self-determination is relational and mutual. The owner's self-determination is not an isolated matter but must take into account the self-determination

of others with whom he interacts. The owner's self-determination is constrained by the value of equality. When we speak of equality here, what we mean is non-subordination. Part of the very constitution of self-determination is the non-subordination of others. When our behaviour results in their subordination, we deny their own self-determination, violating the injunction for what Dagan calls 'reciprocal respect for self-determination' (Dagan, 2021, p. ii). In the café owner's case, the owner's exercise of what we can call Kantian autonomy subordinates the customer's self-determination – indeed, his very identity. In doing so, the owner action lacks autonomy in the more robustly relational sense that Dagan lays out for us.

Dagan asserts that the focus on the self-determination of non-owners 'need not, should not, and indeed does not, override the self-determination of owners' (Dagan, 2021, p. 9). This is so because the interest of others' self-determination, particularly their non-subordination, is constitutive of the owners' own self-determination. This analysis is part of a theory of relational justice, as opposed to distributive or corrective justice, and from such a relational perspective, it is easier to understand why the owner's self-determination is contingent upon his non-subordination of others with whom he interacts. In society, no one act in isolation. We cannot evaluate the autonomy of actions apart from their effects on others. That is the mistake made by procedural accounts of autonomy. Such accounts require merely that an agent ratify his own values and preferences.

Dagan's position that non-subordinating relations as constitutive of autonomy implies that the value of non-subordination is valid for individuals even if they, *ex hypothesi*, authentically and freely reject it. Not all philosophers will agree with that view, considering it a form of perfectionism (which they reject) (Christman, 2004, p. 152). Dagan does not pursue a defence of perfectionism; indeed, he explicitly separates his account of autonomy from at least some versions of perfectionism (Dagan, 2021, p. 95). He maintains, he insists, neutrality regarding conceptions of the good life (Dagan, 2021, p. 95). Still, as we have seen, he is hardly neutral on the question of whether non-subordination is a good that we should practise. So, the version of perfectionism to which he must commit himself appears to be one holding that at least one value – non-subordination – is valid independently of our acceptance of it and one that we ought to pursue in our relations with others.

This is a book not only about property, then, but also about justice and, more fundamentally, the nature of the self. Dagan has shown why a theory of property cannot but address questions of justice, particularly relational justice, and the self. It is a deep and deeply penetrating exposition of a new understanding of what liberalism means. Bravo.

## References

- Christman J (2004) Relational autonomy, liberal individualism, and the social constitution of selves. *Philosophical Studies* 117, 143–164.
- Christman J and Anderson J (2005) Introduction. In Christman J and Anderson J (eds), *Autonomy and the Challenges to Liberalism*. Cambridge: Cambridge University Press, pp. 1–23.
- Dagan H (2021) *A Liberal Theory of Property*. Cambridge: Cambridge University Press.
- Frankfurt H (1988) Freedom of the will and the concept of a person. In Frankfurt H (ed.), *The Importance of What We Care About*. Cambridge: Cambridge University Press, pp. 11–25.
- Hill T (1991) *Autonomy and Self-respect*. Cambridge: Cambridge University Press.
- Mackenzie C and Stoljar N (2000) Introduction: autonomy reconfigured. In Mackenzie C and Stoljar N (eds), *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self*. New York: Oxford University Press, pp. 3–31.
- Ripstein A (2009) *Force and Freedom: Kant's Legal and Political Philosophy*. Cambridge, MA: Harvard University Press.
- Smith HE (2012) Property as the law of things. *Harvard Law Review* 125, 1691–1726.
- Smith HE (2004) Property and property rules. *New York University Law Review* 79, 1719.
- Superson A (2005) Deformed desires and informed desire tests. *Hypathia* 20, 109.
- Weinrib EJ (2012) *Corrective Justice*. Oxford: Oxford University Press.
- Wolf S (1987) Sanity and the metaphysics of responsibility. In Schoeman F (ed.), *Responsibility, Character and the Emotions*. New York: Cambridge University Press, pp. 46–62.

**Cite this article:** Alexander GS (2022). Hanoch Dagan and the liberal concept of autonomy. *International Journal of Law in Context* 18, 237–240. <https://doi.org/10.1017/S1744552321000641>