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A Kantian foundation for welfare rights

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ABSTRACT

In this article, I offer a foundation for the prima facie idea of a *right* to welfare based on a neglected aspect of Kant's legal theory: his account of equity rights (*aequitas*, *Billigkeit*). I argue that these rights are not the same as the 'moral rights' of current literature, and that they arise as a consequence of systemic injustice. The contribution of this article is twofold: firstly, it provides an analysis and application of Kant's underanalysed and little understood discussion of equity; secondly, it offers an alternative to contemporary accounts of welfare rights as moral rights which can better account for their juridical nature as rights.

KEYWORDS

Kant; welfare rights; general injustice; systemic injustice; equity

Q3 1. A Hohfeldian right to welfare

Is there a *right* to some form of welfare provision? Let me first explain this question. Clearly, if a right to welfare has been institutionalised in a given society one is entitled to some welfare upon satisfying some specified conditions. This is an uncontroversial understanding of 'having a right' and not the sense I will explore here. Instead, my question is whether there can be a *claim-right* to some form of welfare provision, independently of whether it is available in institutionalised form.

The reader may wonder if my question is whether there is a *moral right* to welfare provision. I consider the moral rights discourse problematic. There is no canonic understanding of what moral rights are. Above all, the contemporary moral rights discourse often conflates rights and other moral notions, making it difficult to identify matters of rights proper as opposed to ethical considerations, such as our moral duty to help others. While I do not dispute that there are good moral reasons for providing welfare, my view is that these moral considerations *per se* do not give rise to a right, only to obligations to ensure that certain human needs be met. The talk of a right would be a mere *façon de parler*, referring to a consideration we deem morally stringent or compelling to provide welfare provision to someone in need. A right, in contrast, is an *entitlement* to some performance or resource. My aim in this article is to provide an alternative to the moral rights discourse as a foundation for a pre-legal claim to welfare provision. I will therefore also set aside the question of whether there is a human right to welfare, understood as a universal right based on the fact that we are human beings.

I will use 'right' in a narrow sense as corresponding to what Hohfeld called a *claim*. A claim correlates to a duty. I will assume with Hohfeld that only a claim is a right proper.

My question is thus whether there can be a Hohfeldian claim to welfare provision valid independently of whether welfare provision has been institutionalised in a given legal order. If that is the case, my argument would imply a strong case for institutionalising such rights, since failing to do so would amount to *wronging* the right-holder in a juridical sense, as opposed to merely failing to discharge a moral duty towards her, by failing to help or benefit her.

I will offer an account of welfare rights as equity rights as Kant understands them in his legal philosophy.¹ According to Kant, equity (*Billigkeit, aequitas*) gives rise to *genuine* albeit non-enforceable claim-rights. Equity rights arise from contractual relations and can be recognised by reason independently of legal systems. The problem with equity rights is that in a condition of public justice a court of justice is bound to observe the explicit terms of contracts and may therefore issue verdicts which diverge from our judgments about what would be equitable. This is the case when a contract lacks explicit information about the intentions and legitimate expectations of the contracting parties. Although Kant argues that equity should not influence the verdicts of a court of justice on a *ad hoc* basis, I argue that equity can and should *inform* improvements and reforms of codified legal systems. Precisely because equity involves extra-positive juridical judgments, it can help us understand the shortcomings and limitations of existing formal legal systems and see violations of rights we would otherwise remain blind to.

By connecting Kant's account of equity rights with what he calls 'general injustice', I argue that welfare rights provision can function as a proxy for the compensation of rights violations resulting from past legal discrimination and ongoing systemic injustice. While this is not the only possible way to justify welfare rights, it can account for the *prima facie* idea that there is a *claim-right* to welfare. I conclude that equity based welfare rights would require providing a sufficient amount of resources for securing substantive economic freedom. This involves not only securing basic subsistence and access to education, but also public policy ensuring *effective* equality of opportunity, social and income mobility, and gender and racial non-discrimination.

I start with an analysis of Kant's account of equity (*aequitas, Billigkeit*), which has been neglected in Kant scholarship. I argue that welfare rights are genuine claim-rights and should not be confused with 'moral rights' as understood in the literature. After situating the notion of equity rights within Kant's legal theory and elucidating Kant's views on 'general injustice', I show the parallels between general injustice and structural injustice, as well as between the difficulties in arguing for the *prima facie* idea of a claim-right to welfare and equity rights.

Before we proceed, it will be useful to clarify the concept of a right as I will be using it. A right is an *entitlement to x*: where x can be an external object, a performance or omission

¹Kant's works are cited by volume and page number of the Academy edition of Kant's works (Berlin, 1900ff). Unless stated otherwise, all translations are from the Cambridge Edition of Kant's Works. I use the following abbreviations:

GMS: Groundwork of the Metaphysics of Morals / Grundlegung zur Metaphysik der Sitten (AA IV).

Moral Collins: Moralphilosophie Collins /student notes from Kant's lectures on Ethics, transcribed for or by Collins, (AA XXVII).

Moral Mrongovius: Moralphilosophie Mrongovius /Mrongovius notes on Kant's moral philosophy (AA XXVII and XXIX).

Moral Brauer, 'Me: Moralphilosophie Brauer' in Paul Menzer (ed), *Eine Vorlesung über Ethik* (Berlin 1924).

MS: Metaphysics of Morals/ Die Metaphysik der Sitten (AA VI).

TP: On the common saying: that may be correct in theory but it is of no use in practice / Über den Gemeinspruch (AA VIII).

ZEF: Towards Perpetual Peace / Zum ewigen Frieden (AA VIII).

by another. Most importantly, the right imposes an *obligation* on others to respect the right. This is what Hohfeld means when he says that a claim correlates to a duty. A right has the capacity to bind when it involves something that, in a sense, *already belongs* to that agent. The correlating duty can be understood as applying to a specific person (a paucital right) or to a wide range of persons (a multital right).²

For example, if I legally buy a horse at the market, even though this horse is not yet in my possession, I have a claim to its being delivered to me; if you fail to deliver the horse as voluntarily agreed in the transaction, you are violating my right. The *suum*, or what belongs to an agent, was a central notion in modern political philosophy,³ and crucial for our understanding of a claim-right. I will adopt the concept of the *suum*, together with the idea that claim-rights are necessary for coordinating a plurality of agents with equal spheres of freedom into a unified system of external freedom.

Claim-rights allow each person to pursue his or her own freedom in a way that avoids clashes with other individuals and groups. They enable the co-possibility of a plurality of equal spheres of freedom.⁴ Unfortunately, the literature on rights is unclear about the nature of rights, and what counts as a right. Rights can be something desirable, in our self-interest, or a good idea to have. However, the idea of a right implies something more specific than all this. Rights need not always be in our interest or even benefit us, although there tends to be a strong correspondence between rights and interests. Most importantly, rights must impose *obligations* on others.⁵ Rights are *entitlements*, meaning that failure to respect them amounts to *wronging* the right-holder (as opposed to merely failing to benefit her). Because they have to do with the equal enjoyment of external freedom, rights should not be confused with other moral notions.⁶

This definition of a subjective (i.e., individual) right as corresponding to something that belongs to the right-holder does not presuppose a juridical order in which rights arise as a matter of positive convention. It is also possible to think of these rights in a pre-civil condition. Locke conceived the body and physical integrity of the agent as a form of pre-state self-ownership; in contrast, Kant did not conceive our relation to our own body as a relation of private property akin to possessing an external object.⁷ Instead we are at liberty to be *our own masters (sui iuris)* because individuals (as private persons) lack the authority to bind others unilaterally to follow their judgments about how they should live their lives (in other words: there is *no duty* to follow another's judgment on one's own personal affairs, as long as one is not wronging anyone thereby). By virtue of

²A paucital right is Hohfeld's term for a right *in personam*, that is, a right possessed by A against B or against a specified number of persons. A multital right is a right *in rem*, a right possessed by A against all or nearly all others. Since all legal relations are against persons, this is no direct right in a thing or against a thing.

³Pufendorf and Hugo Grotius are examples of modern political thinkers for whom the concept of the *suum* played a central role. See Alejandra Mancilla, 'What We Own before Property: Hugo Grotius and the *suum*' (2015) 36(1) *Grotiana* 65.

⁴This view is at the core of Kant's legal theory. See also Hillel Steiner, *An Essay on Rights* (Blackwell 1994). Steiner rightly observes that identifying rights with interests does not rule out clashes of rights, since the interests of different individuals can very well be incompatible at times. In principle, rights should not clash: they make sure that spheres of freedom are protected by being coordinated with each other and made co-possible.

⁵The view that rights impose a corresponding obligation on another or others can be understood in a purely descriptive way (a right in this sense is whatever claim that is connected to a duty). However, I believe that Kant understood this claim in a normative sense. A right that deserves the name must be able to impose an obligation in a Kantian sense, that is, it must be *binding* in a normative sense (as opposed to simply being artificially connected to incentives for compliance such as threats and sanctions). In my interpretation, the conditions under which rights can be genuinely binding are a central concern of Kant's *Rechtslehre*.

⁶HLA Hart, 'Are There Any Natural Rights?' (1955) 64(2) *The Philosophical Review* 175.

⁷See MS VI: 270.

what Kant calls the *innate* or *internal Mine and Thine* (*meum vel tuum internum*),⁸ persons have a claim-right to independence from the arbitrary choice of others (*Willkür*) and to physical integrity. This is not an acquired, but an original (innate) right. Kant also extends the *suum* to external objects in the private law section of the Doctrine of Right, a move which requires a special justification, since the acquisition of external things is not entailed by innate right.⁹ Further, one can also acquire rights by engaging in voluntary contractual relations with others.

2. Respecting rights and doing good

Kant recognises neither a *right* of the poor to welfare provision nor a *direct* duty of the state to maintain them. However, in a famous passage of the *Doctrine of Right*, he makes two peculiar claims. Firstly, he affirms that the state has *indirectly* taken over the duty of the people to maintain the members of society who cannot provide for themselves, and secondly, that the state has the right to tax the wealthy in order to discharge this duty (*General Remark C*, MS RL VI: 325–26). The reasons for this *‘taking over’* of the duty of the people by the state are not made clear in the text. This passage has been the object of much discussion in the recent debate about redistribution in the Kantian state.¹⁰ In my present analysis, I have chosen not to focus on this passage, since I am concentrating not on the justification of the *right of the state* to redistribute in order to maintain its poor (which in fact is the subject matter of this famous passage and often overlooked in the literature), but on accounting for the *prima facie* idea that there could be a *claim-right* to some minimal form of welfare provision. The focus of my paper is thus how one could regard some minimal form of welfare provision a *right of the destitute*. I have offered an interpretation of the passage and of the right of the state to redistribute elsewhere.¹¹ For the purposes of this paper, I will argue that focusing on Kant’s account of wide, non-enforceable rights is more promising. This approach will also throw light on why Kant believed it a duty of the people, and only indirectly a duty of the state, to maintain those who cannot provide for themselves, which is a claim Kant makes in the passage but does not explain.

Before we start, it is necessary to understand the place of equity within Kant’s legal theory. In his *Metaphysics of Morals* (1798), Kant distinguishes two separate domains of Morals (*Sitten*): the domain of Right (*Recht, Jus*) and the domain of ethics or virtue (*Tugend*). Kant calls the set of juridical duties whose compliance can be externally coerced *‘strict right’* (*striktes Recht*). If a duty can be externally coerced without losing its meaningfulness as a duty, this implies that the motive from which the agent acts is juridically irrelevant and that mere *external* compliance is sufficient to satisfy the

⁸MS VI: 237. For the sake of simplicity, I will refer to *suum* instead of *meum vel tuum* (*Mine and Thine*).

⁹For an excellent account of Kant’s justification of the right to become owners of external objects and his extension of the *Mine and Thine*, see Byrd and Hruschka, *Kant’s Doctrine of Right. A Commentary* (Cambridge University Press 2010).

¹⁰See for instance Sorin Baiasu, ‘Kant’s Justification of Welfare’ (2014) 39 *Diametros* 1, Alexander Kaufmann, *Welfare in the Kantian State* (Oxford University Press 1999), M LeBar, ‘Kant on Welfare’ (1999) 29 *Canadian Journal of Philosophy* 225, Sarah Holtmann, ‘Kantian Justice and Poverty Relief’ (2004) 95(1) *Kant-Studien* (95), 86, Allen Rosen, *Kant’s Theory of Justice* (Cornell University Press 1993), Helga Varden, ‘Kant and Dependency Relations: Kant on the State’s Right to Redistribute Resources to Protect the Rights of Dependents’ (2006) 45 *Dialogue* 257, Jacob Weinrib, ‘Kant on Citizenship and Universal Independence’ (2008) 33 *Australian Journal of Legal Philosophy* 1.

¹¹Alice Pinheiro Walla, ‘When the Strictest Right is the Greatest Wrong: Kant on Fairness’ (2015) 3(1) *Estudos Kantianos* 39.

requirement.¹² In contrast, Ethics commands the free, i.e., *voluntary* adoption of certain ends. Therefore, as a matter of definition, ethical duties cannot be externally coerced.¹³ Because ethics has to do with duties to adopt certain ends, ethics is paradigmatically the domain of *wide* obligation and of *imperfect duties*. Right, in contrast, has to do with *narrow* obligations (requirements to do or refrain from doing specific actions, i.e., *perfect duties*).¹⁴ This is why right is said to give laws for *actions*, while ethics gives laws only for *maxims of actions*.¹⁵ However, the dividing line between right and ethics is not always clearly cut. Kant also subsumes perfect duties to oneself and others under ethics in the *Doctrine of Virtue* and acknowledges that there are non-coercive juridical duties in the *Doctrine of Right* (the domain of *equity* or *Billigkeit*).¹⁶ There is a remarkable omission in Kant scholarship in regard to equity.¹⁷ I will argue that Kant's conception of equity can offer a foundation for welfare rights as genuine claim-rights. Kant's account of general injustice is also important for my argument because it shows how systemic injustice or the injustice of the government can give rise to equitable claims to assistance. In order to understand Kant's view on general injustice, it is necessary to bear in mind how he conceived the lexical priority between different types of duties or grounds of obligation.¹⁸ Perfect duties have priority over imperfect ones: they impose constraints on the way one can discharge one's imperfect duties and have precedence in case of conflict. In the *Groundwork*, the priority of perfect over imperfect duties is established on the basis of the universalisation requirement imposed on maxims by the categorical imperative, more precisely, on the kind of universalisation a maxim *fails* to satisfy. While perfect duties correspond to maxims which would generate a contradiction in conception, imperfect duties arise from maxims which could be conceived as laws of nature without contradiction, but nevertheless could not be *willed* by rational agents. Kant describes the priority of perfect duties of right over our imperfect duty of beneficence as follows:

Now, certainly, if such a way of thinking [a maxim of indifference] were to become a universal law of nature, the human race could very well subsist, and no doubt still better than when everyone chatters about compassion and benevolence, even develops the zeal to perform such actions occasionally, but also cheats wherever he can, sells out the right of human beings, or infringes it in some other way.¹⁹

¹²Bernd Ludwig, 'Die Einteilung der Metaphysik der Sitten im Allgemeinen und die der Metaphysischen Anfangsgründen der Tugendlehre im Besonderen' in Andreas Trampota, Oliver Sensen and Jens Timmermann (eds), *Kant's Tugendlehre. A Comprehensive Commentary* (De Gruyter 2013). Although the prudential interest in avoiding sanctions is permissible and sufficient as an incentive, the possibility of *ethical motivation* in compliance with juridical duty is not ruled out. If the agent who complies with right also takes into account the fact that it is an ethical duty to do so, her conduct is not merely compatible with right, but also has moral worth.

¹³MS VI: 383.

¹⁴MS VI: 390.

¹⁵MS VI: 388–89.

¹⁶The distinction between Right and Ethics is thus based not on the fact that they involve perfect or imperfect duties, but on the specific principle underlying them: the principle of ethics (concerning the agent's internal freedom) or the principle of right (which has to do with the external freedom of a plurality of persons). I will argue that external freedom presupposes the idea of a *sum* (what belongs to a person). This *sum* can be original and internal (what Kant calls 'innate right') or acquired and external (e.g., rights to external objects and contractual rights).

¹⁷A few exceptions can be found in German Kant scholarship: Daniel O Dahlstrom, 'Ethik, Recht und Billigkeit' (1997) 5 *Jahrbuch für Recht und Ethik / Annual Review of Law and Ethics* 55, and Jean-Christophe Merle, 'Die Billigkeit bei Kant' in Violetta Waibel, Margit Ruffing and David Wagner (eds), *Natur und Freiheit: Akten des XII. Internationalen Kant-Kongresses* (De Gruyter 2018).

¹⁸On different types of obligations (grounds of obligation) and why in principle they cannot collide, see Jens Timmermann, 'Kantian Dilemmas? Moral Conflict in Kant's Ethical Theory' (2013) 95(1) *Archiv für Geschichte der Philosophie* 36.

¹⁹GMS IV: 423.

As Kant stresses in this passage, humanity would be better served if agents were indifferent about beneficence but strict about respecting each other's rights than if the opposite were true. In fact, this priority is constantly disregarded: beneficence is often used in an attempt to camouflage or compensate violations of rights, even though 'one cannot wipe out injustice by doing beneficent acts' (Moral Collins, XXVII: 433). Kant sharply criticises the self-complacent attitude of those agents who view their duties towards others as meritorious and consequently want to believe that nothing is owed to others as a matter of right. Relevant for my argument in this paper is Kant's acknowledgment that the idea of meritorious duties is problematic in a world in which dependence on the beneficence of others is often a result of injustice in the first place:

One may take a share in the general injustice, even though one does nobody any wrong by civil laws and practices. So if we now do a kindness to an unfortunate, we have not made a free gift to him, but repaid him what we were helping to take away through a general injustice. For if none might appropriate more of this world's goods than his neighbour, there would be no rich folk, but also no poor. Thus even acts of kindness are acts of duty and indebtedness, arising from the rights of others.²⁰

In this passage, Kant denies the status of meritorious duties to some instances of beneficence, namely aiding the poor. Kant allows social inequality on the basis of differences of talent and merit, but social inequality, as Kant recognises later in the same lecture notes, is also the result of the general arrangement of the civil order.²¹ Further, Kant claims that one can take a share in general injustice, in a way that does not presuppose the violation of any specific laws of the state. In other words, it is possible to do wrong without doing any form of injustice identifiable by the system of laws. Kant's claim presupposes two different concepts of justice and injustice: one that can be recognised with reference to the positive laws of the state and one which cannot be recognised from a positive legal perspective.

²⁰ Moral Collins, XXVII: 416. Later on in the same lecture, Kant stresses this point again:

If we have taken something away from a person and do him a kindness when in need, that is not generosity but a poor recompense for what has been taken from him. Even the civil order is so arranged that we participate in public and general oppressions, and thus we have to regard an act we perform for another, not as an act of kindness and generosity, but as a small return of what we have taken from him in virtue of the general arrangement. All acts and duties, moreover, arising from the right of others, are the greatest of our duties to others.

Moral Collins, XXVII: 432.

One may object that the Collins lecture notes (mid 1770s) are too early to use as a source for a claim that is not explicitly formulated in Kant's later writings. However, references to the idea of general injustice can also be found in later writings, such as in a footnote of the *Critique of Practical Reason*, where Kant notes that

one will always find a debt that he has somehow incurred with respect to the human race (even if it were only that, by the inequality of human beings in the civil constitution, one enjoys advantages on account of which others must all the more do without), which will prevent the self-complacent image of merit from supplanting the thought of duty.

KpV V: 155n. As Kate Moran shows, the idea of general injustice underlies Kant's criticism of 'unwarranted self-congratulation' in matters of beneficence. See Kate Moran, 'Neither Justice nor Charity' (2017) 47(4) *Canadian Journal of Philosophy* 477. The idea of humility in the exercise of charity is in my view a pervasive aspect of Kant's views on beneficence and there is reason to assume that his attitude is at least partially motivated by his awareness of the social injustice of his time. Further, explicit criticism of social injustice in the published writings would probably be considered too subversive in Kant's time. Kant's sparing use of such remarks is thus understandable.

It must be noted that the connection between general injustice and equity is not one drawn by Kant himself, it is my own. Kant's references to equity in his lectures, for instance, in *Vigilantius* XXVII: 573, focus solely on contractual relations and are unrelated to any claims about general injustice. I do not think this detracts from the Kantian argument for welfare rights I am defending here, which is my own construct. I thank an anonymous reviewer of the *Canadian Journal of Philosophy* for raising these objections and pressing me for clarification.

²¹ See [n](#) 16.

Having the resources to practice such beneficence as depends on the goods of fortune is, for the most part, a result of certain human beings being favoured through the injustice of the government, which introduces an inequality of wealth that makes others need their beneficence. Under such circumstances, does a rich man's help to the needy, on which he so readily prides himself as something meritorious, really deserve to be called beneficence at all?²²

Kant formulates his view as a *casuistical question* within his discussion of the duty of beneficence in the Doctrine of Virtue. He presses the reader to reflect about the causes of social inequality and need that makes persons dependent on the charity of others. However, a problem with addressing systemic injustice is that given Kant's formal conception of justice, anything that happens within a rightful or lawful framework, is *per definition not* unjust. Social inequality, as *material* inequality, is formally compatible with the basic principles of right.

But what does Kant mean by the 'injustice of governments' in this context? If a legal system is such that it allows violations of rights, one may wonder if such a system is *just* after all. But it is important to ask which normative standards are being used for such a judgment about the justice of a legal system. From the perspective of the juridical system itself, it is possible that no positive violations of rights are taking place and yet we do have a strong sense of social injustice. I take Kant's point in the passages just quoted to be a distinction between two kinds of judgments about justice (or injustice, as the case may be): justice as defined with reference to the positive laws of a given juridical system (justice as defined by a specific legal order) and justice defined with reference to some juridical but extra-positive standard (justice as defined by a priori principles of Right). The idea is that although justice as positive legal order should be guided by a priori judgments about justice and ideally coincide with these, they may *de facto* shift apart. This is precisely the case of social injustice where no one is discriminated in regard to legal status, no positive laws are being violated, and one is nevertheless treated unjustly.

Although individuals may violate no positive laws in their conduct, they may still be acting unjustly towards certain persons and groups. The obvious explanation would be that the state itself deviates from ideal standards of justice and thus allows systemic injustice. However, Kant would not conclude that such a state would be illegitimate or that there is a right to overturn that state. Since the positive system of laws is what defines what counts as wrong in a way that is univocally *binding* to all its subjects, it is authoritative regardless of its imperfection, that is, how much it falls short of the *ideal* Kantian state. In other words, an imperfect legal order does not immediately undermine its legitimacy. Nevertheless, the tension between 'justice as legal order' and 'a priori justice' i.e., the *institutions we have* as opposed to how institutions *should be*, is an ineradicable feature of Kant's juridical thought; a certain positivism in regard to the state is required for protecting emerging legal orders, which we have a duty to improve through gradual reforms and never bring down or destroy with the claim that it is unjust. A lawful condition, no matter how imperfect, is always superior to the lawless state of nature.²³ There is a *duty* to leave the state of nature and live in a civil condition with others.²⁴

²²MS VI: 454.

²³There is of course the question of how imperfect a legal order can be and still qualify as a lawful condition. See Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Harvard University Press 2009).

²⁴MS VI:255–57.

Formally just governments, that is, a government that does not violate its own positive laws and respects its own constitution, can therefore preserve structural injustice and informal forms of violence. As I will show later, this idea is also reflected in Kant's conception of equity as a form of juridical judgment that may differ from the judgment of a court of justice. We end up with two conceptions of justice which may be at odds with each other. Although their tension may indeed be an indissoluble feature of legal practice, it plays an important epistemic function towards improving positive legal systems.

By structural injustice I mean socially caused asymmetric constraints on the exercise of external freedom that make the fulfilment of basic human needs extremely difficult, if not altogether impossible. This asymmetry gives rise to vulnerability and economic dependency of some individuals on others and can therefore be regarded as an unjustified restraint on the *economic freedom* of individuals.²⁵ For instance, Prussia in Kant's time was a heavily agricultural economy not only with extremely unequal distribution of land but largely based on a system of serfdom, which persisted until reforms were introduced in the early nineteenth century. This meant not only radical social inequalities, lack of civil and political rights but also structural constraints on the ability of a great number of individuals and their families to satisfy their basic needs and improve their condition through hard work. As Kant observed in a note, 'my powder takes away the flour of someone else (...) and I am always unjust when I take away from many a considerable amount of their welfare to add only an insignificant amount to my own.'²⁶

To apply this line of thought to our time, it is useful to consider how poverty is 'expensive'.²⁷ A system of finance that excludes the poor imposes considerable financial burdens on them, to which better off people are not exposed. Given their disadvantage, these costs have a great impact on the range of options available to them, constraining them to make 'bad choices' from financial and prudential perspectives. For instance, not having access to banking services, such as a bank account, due to fees they cannot afford, means having to pay more later when having to transfer money or withdraw cheque payments. Being denied credit because of one's low income means that those who need it most are not able to make upfront lump sum payments such as a deposit when renting a home, and will be forced to spend more to live in a motel and on meals they cannot prepare at home; not having a car in places with underdeveloped public transport and in which shopping facilities are concentrated in specific areas, will lead them to pay more for groceries. Eating badly will be a result and this will in turn have an impact on their health and ability to work. The poor may thus be trapped in a system that disadvantages them, while others may greatly benefit from the low wages and bad working conditions they are forced to

²⁵The idea of avoiding dependence on others is a well known Kantian theme. Although Kant himself did not explicitly write about economic freedom, I think it makes sense to extend the Kantian idea of the equality and independence of persons to economic relations. Kant assumes that individuals have freedom to enter contractual agreements and that private property and possession of land are permissible, among other reasons, because they do not deprive others of the capacity to provide for themselves and work their way up by engaging in contractual relations.

²⁶(...) was ich habe: müßen andre entbehren: – mein Puder entzieht andern das Meel: (...) Nach der Proportion des Erwerbs steigert sich nicht die Summe der Wohlfahrt: und ich bin stets ungerecht, wenn ich vielen einen beträchtlichen Zusatz zu ihrer Wohlfahrt wegnehme: da ich nur einen unbeträchtlichen meiner eignen zusezze. *Praktische Philosophie Herder*, XXVII: 51, my translation.

²⁷See 'Tackling Poverty: It's Expensive to be Poor. Why Low-income Americans Often Have to Pay More' *The Economist* (5 September 2015), and Joseph Heath, *Economics without Illusion. Debunking the Myths of Modern Capitalism* (Broadway Books 2010).

accept. This is an example of injustice that does not result from the violation of any specific positive laws. Kant's notion of general injustice, in which no one 'does nobody any wrong by civil laws and practices' could thus be applied to this kind of situation.

For Kant, in grandiloquently exalting charity and beneficence we are doing no more than trying to address the effects of structural injustice with beneficent means. The poor must rely on the good will of others, to which they (ostensibly) have no right, and we congratulate ourselves for being so generous. Kant thus recommends that we regard meritorious duty as much as possible as a matter of justice rather than kindness.²⁸ The implication is that we should not dismiss beneficence as a less important duty, but attempt to regard it as if it was a *strict* rather than a wide duty (which, however, is not always possible without rendering beneficence far too demanding). Nevertheless, if poverty is systemic, its root causes cannot be addressed by means of individual virtue.²⁹ In the next section I will show how Kant's legal theory can account for rights which fall short of strict right (rights which can be recognised and enforced by legal systems of justice), and how these so called 'wide' rights are exactly what we need when arguing for a right to welfare.

3. Kant on equity (*Billigkeit*)

Kant introduces the concept of a wide right in his discussion of *ius aequivocum* (ambiguous right). In the Introduction of the *Doctrine of Right*, he distinguishes for methodological reasons between ambiguous right and the 'firm basic principles' of strict right, which are fit to be made into laws by legal institutions. Ambiguous right lies in the tendency to confuse or conflate what is right *in itself* (in accordance with 'the court of conscience') with the verdict of a court of justice, which is *subjectively right*. This confusion is a *vitium subreptionis*, or error of subreption.

As Kant stresses, 'without making incursions into the domain of ethics, there are two cases which lay claim upon a decision about rights'.³⁰ These are equity (*aequitas*, *Billigkeit*) and the right of necessity (*Nothrecht*, *ius necessitatis*). Both equity and necessity are instances of *ambiguous right*, although only equity turns out to involve genuine rights. While equity is *right without coercion*, necessity is merely *coercion without right* and consequently no true right at all.

The right of necessity (*Nothrecht*) is the alleged right to kill an innocent in order to save one's own life. Kant uses the classic example of the plank of Carneades: someone sees herself 'necessitated' to push an innocent person from a plank in order to save herself from drowning. In contrast to other theorists who recognise a right to self-preservation, Kant argues that such an action can never be in accordance with right. The agent would be *wronging* an innocent person by pushing her off the plank. However, actions from 'necessity' cannot be punished by law, since *deterring* agents with threats of punishment would be useless.³¹ This is because a 'threat of an ill that is still *uncertain* (e.g., death

²⁸Moral Collins XXVII: 417.

²⁹The duty of beneficence is not restricted to remedying injustice. We also need the help of others due to our shared human condition which makes us vulnerable to injuries, sickness and natural disasters. The above criticism of the duty of beneficence is thus restricted to the context of 'general injustice' and does not necessarily apply to other instances of beneficence.

³⁰MS VI: 233.

³¹MS VI: 236.

by a judicial verdict) cannot outweigh the fear of an ill that is imminent and *certain* (drowning).³² The impossibility of deterring anyone in such a situation of necessity creates the illusion that one has a *right* or is at least *permitted* to kill an innocent to preserve one's life. This is why the right of necessity must be included under *ius aequivocum*:
 410 because a court of justice cannot punish such actions, there is a tendency to assume that a genuine right is at stake.

Although equity³³ also belongs to *ius aequivocum*, equity claims are *genuine* although not *coercive* rights. They are juridical in nature because they are derived from the principle of right (what belongs to someone), but non-coercive because no judge is in a position to
 415 render a publicly binding verdict concerning this right.³⁴ This is why equity belongs to *ius latum*, or wide right ('right in general', as opposed to 'strict right'). The authority to coerce must be determined by a law. The difference between *ius strictum* and *ius latum* is that in the latter a law authorising coercion cannot be determined. It is interesting to note the way in which Kant reinterprets the traditional understanding of equity as a form of lenience or
 420 forbearance meant to correct the strictness of justice under specific circumstances. In Kant's reinterpretation, equity *by definition* is outside the scope of strict right, as a distinctive form of juridical reasoning.

Kant gives the example of a trading firm (*Maskopei*) whose agreement is that partners
 425 are to share profits equally. However, one partner has worked more and therefore loses more than the others when the company meets hardship. By equity, the harder working partner is entitled to more compensation than the other partners. Another example is the domestic servant whose initially agreed wage loses value due to inflation.³⁵ Equity would require that the servant be compensated for the financial loss. However, unless such possibilities are specified in the employment contracts, the judge has no *determinate*
 430 conditions for addressing these claims, since she must base her decision on what is *publicly declared* in the contract (*Declaration*).³⁶ Although it can only be heard by the 'court of conscience', Kant stresses that equity is nevertheless not a matter of beneficence or kindness to others, but of *right*, since it is based on the principle of right (concerning external freedom and the *summ*) and not on the principle of ethics (concerning internal freedom).

435 Equity (considered objectively) is in no way merely a basis for calling upon another to fulfill an ethical duty (to be benevolent and kind). One who demands something on this basis stands instead on his right, except that he does not have the conditions that a judge needs in order to determine by how much and in what way his claim could be satisfied.³⁷

440 A condition of public right requires that rights conflicts be settled by a public court of justice and not by the private agents themselves, as in the state of nature. Although

³²MS VI: 235–36.

³³The term 'billig' means 'preiswert' or 'günstig' (cheap) in modern German. Originally, Billigkeit comes from the old German 'biliden' or 'bilethen' which means to make equal (*gleichmachen*). In Middle High German (*Mittelhochdeutsch*), 'billig' meant 'appropriate' or 'adequate' (as in 'angemessen'). This reflects the meaning of the term *Epieikeia* in Aristotle. While Justice (*Dikaiosyne*) means a general application of the law, equity is meant to compensate the strictness of justice. *Epieikeia* is justice that takes into account the details and nuances of the particular situation, as opposed to laws that are strictly applied in the same way across different scenarios (Aristotle, *Nicomachean Ethics*, Book V, 14). Kant is thus following Aristotle in the idea that equity plays a corrective, complimentary function to strict Right when he adopts Cicero's maxim *summum ius, summa iniuria*, the highest law, the highest injustice (*De officiis*, I, 10, 33).

³⁴MS VI: 234.

³⁵*Verschlechterte Münzsorte*, MS VI: 234.

³⁶MS VI: 296.

³⁷MS VI: 234.

455 judgments of rights in the state of nature have a 'private' character (each individual must judge for herself but does not have authority to bind others), insofar as a verdict is derived from reason in the 'court of conscience', right is *objective*, that is, 'right in itself'. In contrast, despite its public character and capacity to bind omnilaterally, the verdicts of a public court of justice are *subjectively* valid. They follow from the *empirical principles* a judge is constrained to apply, that is, in accordance with statutory laws. Although a judge in her own personal judgement is able to recognise the equity claims of a certain person (what is 'right in itself'), in her public role as a judge her verdict is constrained by subjective principles, which may depart from what she would judge as a private person. As a judge she must follow the laws, not her private judgement.³⁸ There are two reasons for this. Firstly, allowing too much flexibility would ultimately make the system of public justice superfluous.³⁹ Secondly, private judgements do not have the authority to bind others. For this reason, equity must 'remain unheard' by a court of justice.

465 However, this does not mean that equity considerations cannot be accommodated in legislation *ex-ante* (for instance, as special clauses in contracts). This means that the conditions for compensation in case of a change in the circumstances (e.g., inflation) can be specified in advance in order to pre-empt a potential clash between the verdict of the court of justice and our private judgements about equity. There is thus a sense in which the *content* of equity judgments can be codified. However, Kant's point is that the appeal to equity cannot be *ad hoc*, since this would create instability and ultimately endanger a condition of public justice. By definition, considerations of equity that are codified cease to be equity: they have become positive law and are no longer *extrinsic* to the legal system. This suggests that equity is primarily defined not by reference to the specific *content* of a juridical judgment, but by its *modality*. When codified, equity judgments are no longer private judgments without authority to bind but have acquired *public* character. Equity *qua* equity is thus always extra-positive and as such a permanent feature of contractual law: 'Equity looks to the disposition and aims of the contracting parties; strict right, however, to the content of the contract. It is thus a contradiction to decide according to equity and yet to be a judge.'⁴⁰

480 *Summum ius summa iniuria*: the more strictly we apply the statutory right, the more we can *wrong* someone by not taking into account her equity claim. Although the duty bearer can freely choose to waive her right to enforce the precise terms of the contract, for procedural reasons this cannot be coerced. The ambiguity of equity lies in a tendency to conflate *commutative* with *distributive* justice, that is, confusing the way one would judge rights as a private person and the way a public court of justice must judge. In the state of nature, what belongs to each is determined by commutative justice (justice in private exchange or contractual relations).⁴¹ In a condition of distributive justice, however, what belongs to each person must be determined in accordance with public

490 ³⁸An exception is when the government voluntarily decides to reverse a past inequitable action concerning the rights of the judge herself. In this case, the judge would be acting as a government agent and would be permitted to follow equity. See MS VI: 234–35.

³⁹Similarly, Byrd and Hruschka argue that the rationale of the rules of distributive justice is to protect the proper functioning of the public judiciary itself. Unless contracts are enforced, distributive justice would lose its meaning. *Kant's Doctrine of Right: A Commentary*, 225–26.

⁴⁰Vigilantius lecture notes XXVII: 573.

⁴¹Kant defines *iustitia commutativa* as the *a priori* principles regulating mutual acquisition between individuals, see MS 6: 297, 302 and 306.

principles, which enable public justice to function *most readily* and *surely*. Although distributive justice is about ‘giving each what belongs to them’, this may be done differently from the way one would reason in the state of nature. For the sake of maintaining a functioning system of public justice, we must abide by what is laid down as right without bending the laws in accordance with our private judgment (even when there is good reason to do so). There is thus a ‘price’ to pay for upholding a condition of distributive justice. The reason we must be willing to pay this price is that we have a *duty* to establish a civil condition with others, and gradually improve existing constitutions and forms of government until the lawless state of nature has been fully overcome.⁴²

Nevertheless, equity can and should *inform* improvements and reforms of codified legal systems. This is why I will argue that equity-based rights can be used to create codified welfare programmes. Precisely because they are extra-positive judgments about rights, they can help us understand the shortcomings and limitations of existing formal legal systems we would not be able to identify from within them.

4. An equity argument for welfare rights

In this final section, I will provide an equity-based argument for welfare rights. I will argue that equity rights help us identify a distinctive sort of rights violations or wrongs, namely those that are *extrinsic* to formal legal systems. Further, what is *actually* owed to equity right-holders is compensation in proportion to their specific loss. But since it is often impossible to determine the extent of wrongs suffered as a result of systemic disadvantage and quantify what is owed to each individual as matter of compensation, universal welfare provision can function as a *proxy* for compensation for violations of rights.

Which rights are being violated in the case of equity based welfare rights? Equity rights arise from contractual relations. The content of these rights refers to what we can assume were the original intentions and aims of a party when making a contract. Equity is therefore a feature of contractual law. Equity tells us what a court of justice cannot take into account, namely what is not explicitly stated in the terms of the contract. Therefore, it seems that in order to speak of equity based welfare rights we would need some kind of contract to be in place. Which contract would this be? A possible candidate would be the idea of the *original contract* in Kant’s legal theory, i.e., the rational idea of the union of a plurality of individuals into a civil condition under a public constitution. However, I will not base my argument on this idea, since the original contract in Kant’s legal theory is a *heuristic* device for understanding the nature of the civil condition and spelling out its normative implications, and not a contract proper. Instead, I will follow the idea of *commutative justice*, that is, *justice in contractual relations*, in order to identify the specific wrongs underlying equity based claims to welfare provision.

⁴²Why do we have a duty to enter the civil condition? The common answer in Kant scholarship is that a civil condition is a condition in which rights can be effectively protected. Although this is certainly true, the main reason is that it is the condition for the permissibility of private property (this presupposes Kant’s freedom based argument justifying why we must assume exclusive possession of objects in the first place). It is only possible to impose an obligation on everyone else to respect each other’s acquisition if we have a global, omnilateral binding system of distributive justice. Only omnilaterality can make exclusive possession of external objects compatible with the equal innate right of all persons. I discuss this idea in my ‘Private Property and the Possibility of Consent. Immanuel Kant and Social Contract Theory’ in Larry Krasnoff, Nuria Sanchez Madrid and Paula Satne (eds) *Kant’s Doctrine of Right in the Twenty-first Century* (University of Wales Press 2018).

While equity tells us that victims of systemic injustice have a right to some form of compensation, strict right does not see their disadvantage as a violation of rights. No one is harming or taking away what is theirs from a legal perspective; no one is hindering them from working their way up as a matter of legislation. We thus have an *ambiguous right scenario* in which our private judgments about what would be just *differ* from the institutional conception of justice. These are problematic rights, which cannot be accounted for in a straightforward way simply by reference to the existing laws of the state.

Kant's examples in his discussion of equity concern underpayment for performed labour.⁴³ Equity in these examples requires *compensation* for performed work. In order to apply Kant's account of equity to systemic injustice, the position I defend here extends Kant's original account of equity to cases in which the *possibility* of labour is hindered. Equity would thus require compensation for labour not yet performed. I argue that systemic injustice can be understood similarly to interference with contract. However, it is difficult to identify the wrong in question and determine its extent due to its informal, systemic character.⁴⁴ The wrongs underlying equity based welfare rights follow from unjustified (because asymmetrical and non-reciprocal) restraints on the economic freedom of certain individuals insofar as they belong to specific social groups. Each individual should in principle be free to engage in voluntary contractual relations with others in a free market. By bringing their assets into the market, individuals can acquire the necessary means to maintain themselves and their families and possibly improve their own social and economic situation through exchange in society. Kant voices this idea as following from the *equality* of each member of a state:

Every member of a commonwealth must be allowed to attain any level of rank within it (that can belong to a subject) to which his talent, his industry and his luck can take him; and his fellow subjects may not stand in his way by means of a *hereditary* prerogative (privileges reserved for a certain rank), so as to keep him and his descendants forever beneath the rank.⁴⁵

A fundamental requirement of right is that external coercion be applied *equally* to all members of society. This means that no subject has the authority to coerce another; legitimate external coercion can only ensue from *public* law. It is therefore a right not to be bound in ways one could not bind all others in return. This right is also the basis for one's capacity to make contracts with others; without this right one would have only duties and no rights against others. It is therefore a right that cannot be given up by a voluntarily act and can only be forfeited through crime.⁴⁶

The requirement that external coercion be omnilateral is incompatible with the systemic exclusion of certain groups from economic competition as a means to preserve social and economic privilege of powerful groups. For instance, certain groups were formally prevented from access to education, from acquiring land or real property, from

⁴³*Maskopei* and *verschlechterte Münzsorte*, MS VI: 234. See my discussion of these examples in the previous section and MS VI: 296–97 for Kant's account of the tension between commutative justice in the state of nature and distributive justice in the civil condition.

⁴⁴I would like to thank a referee of *Jurisprudence* for making me aware of the need to make this argumentative step explicit in the paper.

⁴⁵TP VIII: 292.

⁴⁶TP VIII: 202.

590 inheriting or even from marrying whom they wanted. These hindrances may have followed from past formal inequality, that is, from the fact that women, people of colour and certain ethnic, religious and social groups were historically barred from enjoying equal status before the law by their societies. This created a material disadvantage, since unequal formal status before the law also entailed formal exclusion from economic opportunities. Even after the asymmetry in legal status has been corrected at a later historical stage, members of formerly disadvantaged groups often continued to be disadvantaged by stigmatisation, implicit bias and informal mechanisms of discrimination. Racism, misogyny and class hatred, while often regarded and evaluated from a moral lens, may be traced back to attempts to exclude potential competitors from economic opportunities. Structural injustice is the term I will be using for the set of informal discrimination mechanisms which perpetuate the privilege of powerful groups by excluding 'potential competitors' from economic and social opportunities.⁴⁷

600 Systemic injustice is often informal and contingent, giving rise to significant asymmetries between individuals in a way that requires extra-positive juridical judgment to be identified. There may thus be disagreement about if and when systemic injustice exists. This is partially due to the fact that we are addressing wrongs that have not been formally recognised or addressed by legal systems, and that are caused by pervasive and ubiquitous social mechanisms, of which we may not be aware due to socialisation and habit. It is only by looking 'beyond' the fact that no one seems to be violating any rights in an institutional sense that it is possible to recognise that there is something wrong in the civil condition. Equity judgments play an important epistemic role by revealing asymmetries in external coercion that undermine equality before the law in substantive and informal ways. While it is possible to consider systemic disadvantage from an ethical perspective, meaning our moral duties to others as fellow human beings, equity is a form of reasoning that is *juridical* in nature. It takes into account the idea of the distribution of external freedom among individuals who have equal juridical status and thus what belongs to individuals as a matter of *right*. An equity based right to welfare provision would not be a right to the beneficence of others (for there is no such right), but a right to reparation or at least *compensation* for *one's* condition of economic dependence and disadvantage, when it resulted (or can be reasonably assumed to have resulted) from the general arrangement of society. However, the problem is to determine how much is owed to each individual.

620 One of the reasons why equity must remain unheard by a court of justice is that it would impose considerable burdens on juridical systems. Equity claims may require extensive investigation in order to determine not only the title of the right-holder, but the extent of the wrongs done to her and the amount of compensation owed to her. This investigation may have to go back several generations. Another difficulty is that considerations of personal responsibility and desert are often difficult to separate from the consequences of systemic injustice. This is illustrated by the fact that the poor may tend to make poor economic decisions and discount the future as a consequence of the lack of hope for better economic prospects.

630 ⁴⁷I do not mean that there is a *right* to enter any specific contract with others. The idea is that one must not be hindered by other private persons in such a way that free exchange with others becomes impossible or extremely difficult. Further, the phenomenon I have in mind is a collective and systemic one, as opposed to an isolated occurrence.

If the poor have an *equity claim* to compensation due to systemic disadvantage in society, it follows that granting a right to basic subsistence would be, again, 'only a small return of what we have taken from [them] in virtue of the general arrangement.' Someone could be entitled to more compensation for suffered wrongs than mere basic provision, for instance a person whose grandparents were slaves and whose descendants continue to be discriminated and disadvantaged in society.⁴⁸ My proposal is to regard welfare provision as a second best substitute to actual reparation, given the indeterminacy of equity rights. Institutionalising welfare rights would thus be a means of addressing these wrongs, although only to a very limited extent (no full justice would be done to each particular case). The rationale for equity based welfare rights is thus different from a right to basic subsistence, although granting universal basic subsistence can also be a means to restore the economic freedom of agents wrongfully disadvantaged by systemic injustice. Further, equity based welfare rights would involve more than basic subsistence. They would require effective access to knowledge, skills and material conditions enabling persons to improve their own economic situation, as opposed to remaining marginalised members of the economic system. Public policy aiming at counteracting racism, misogyny and implicit bias, as well as promoting social and income mobility would also be necessary. Mere formal equality of opportunity is not sufficient.

Although it may be possible at times to identify individual perpetrators (for instance, when a specific person discriminates against another due to the latter's social class), mechanisms of social disadvantage are systemic. Therefore, the corresponding duty to compensate for systemic violations of rights falls on society as a *collective*.⁴⁹ Individuals, either separately or in groups may attempt to address social disadvantage as a matter of charity. However, thus is not only inappropriate but may also be humiliating to those helped, since violations of rights are at the source of the problem. A better way individuals and civil society at large could contribute would be through stimulating public discussion, activity in public protests and voting in a way that brings public awareness and pressures governments to ensure universal welfare provision and equality of opportunity. Nevertheless, due to their public character, states alone are in the position to discharge this collective social duty in a way compatible with the juridical nature of the violations in question. Firstly, as public agents, states are able to act on behalf of society as a collective. Secondly, only public institutions have the legitimate authority to coerce, including the right to tax for redistribution and the enforcement of public policies. While individual actions may bring relief in situations of emergency or dire need, systemic injustice calls for an institutional response.

⁴⁸Although past *de jure* wrongs may be causally related to present informal discrimination (and I believe they very often are), my argument does not depend on the presence of both past and present wrongs for an equity claim to arise. My aim here is to stress that when it comes to addressing wrongs the precise amount of reparation would need to be historically determined for each individual, which I argue is impossible. If we understand welfare provision as a *proxy* to reparation of wrongs such as systemic discrimination and disadvantage, we are most probably giving many people *less* than we actually owe them. The argument is thus meant to caution us towards *humility* in regard to welfare provision, which some may tend to regard as a form of institutional charity. Kant makes a similar point when he observes that the recipients of our charity may actually have a stronger claim to our performance than it may be clear to us, given our share in systemic injustice. See [Section 3](#).

⁴⁹This is what I take Kant to mean when he claims that the state has indirectly taken over the duty of the people when it taxes the wealthy in order to maintain those who cannot provide for themselves in society (MS VI: 325–28). The function of the state is to provide a civil condition. It is no *direct* duty of the state to provide welfare, but a duty of the people itself as a collective to maintain its poor. However, only the state has the authority to use coercive means for this purpose and redistribute in a way that is compatible with the dignity of persons.

In this article, I have proposed an argument for welfare provision based on a Kantian understanding of equity rights. My aim was to account for the prima facie idea that there may be a claim-right for some form of welfare provision. While my proposal is limited here to the domestic level, it may be possible to extend this argument beyond national borders to the international domain. But this will be the topic for another article.

Disclosure statement

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