1 Kantian Theory and Human Rights

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In

Andreas Follesdal and Reidar Maliks, eds.

Kantian Theory and Human Rights (Routledge 2014), 1-7

Human rights and the courts and tribunals that protect them are increasingly part of our moral, legal, and political circumstances. Commonly understood as inalienable and fundamental rights that persons are entitled to by their humanity, international treaties and conventions and the bodies they establish have come to include civil, political, social, and cultural rights as human rights.[1] These international human rights, as we shall refer to them, and the various judicial bodies together make up the contemporary human rights regime. They have, inter alia, the practical function of setting limits to state sovereignty. These treaties thereby provide a justification for international monitoring and other forms of intervention against states that transgress them.[2] Their power in justifying political action render human rights and their courts controversial and a source of frequent disputes. Many controversies have to do with their justification. The moral foundation of human rights was not part of the legal conventions that established them. The philosopher Jacques Maritain, who was among the drafters of the Universal Declaration of Human Rights, described the approach this way:

> So long as minds are not united in faith or philosophy, there will be mutual conflicts between interpretations and justifications. In the field of practical conclusions, on the other hand, agreement on a joint declaration is possible, given an approach pragmatic rather than theoretical, and cooperation in the comparison, recasting and fixing of formulae, to make them acceptable to both parties as points of convergence in practice, however opposed the theoretical viewpoints.[3]

But while the framers managed to create a consensus, this strategy of avoidance left the difficulty of making sense of human rights to judges on human rights courts, to lawmakers in domestic and international fora, and to critics in the public sphere.

It is a striking feature of the bourgeoning field of human rights philosophy that many of the most significant contributions reach for Kant in justifying human rights. James Griffin considers human rights as a way of protecting

the supreme value of moral personhood, which he takes from Kant's writings on ethics.[4] John Rawls builds his notion of an international society of peoples protecting rights on Kant's writings on international law.[5] Jürgen Habermas employs Kant's egalitarian and universalist concept of dignity to explain the legal status of rights.[6] Thomas Pogge's notion of human rights as moral claims on the global institutional order continues the spirit of Kant's cosmopolitanism.[7] This use of the Enlightenment thinker is perhaps not surprising, considering Kant's prominence as a philosopher and the universalism and egalitarianism, which is the foundation of almost all he wrote. The turn to Kant is also understandable, considering his pioneering international and cosmopolitan theory, based on the view that nations are connected in a community where "a violation of right on *one* place of the earth is felt in *all*".[8]

Few of those who build on Kant's foundation stop to explore what he really thought, however. Most of those who refer to Kant today have no ambition to provide a philosophically accurate insight into his philosophy. Kant is used only as a means (as it were) to the end of understanding a contemporary phenomenon better. This is neither surprising nor regrettable. Although Kant is remarkably prescient, the problems facing an eighteenth-century thinker were different, and it would be unreasonable to expect his answers to speak directly to contemporary questions. Indeed, many of his views, such as his defense of state sovereignty, seem at odds with the current practice. Such differences should not be a reason to dismiss Kant out of hand. To the contrary, his arguments are a source of interest because they can lead us to see and assess the current human rights regime in a better light.

This book aims to bring together two fields of growing current interest, to aid us in understanding better a striking international development of our time, and the thinker who, perhaps more than anyone else, was its progenitor. The essays are animated by the idea that if we get a better grip on Kant's philosophy of right, we can energize the creative endeavor of developing philosophical theories of human rights, inspired by his particular way of thinking about the relation between rights and the rule of law. It is, perhaps, not by chance that the steep increase in theories of human rights has been matched by a renaissance in studies of Kant's political philosophy. Writings by Arthur Ripstein, Pauline Kleingeld, and B. Sharon Byrd and Joachim Hruschka have contributed to shining a light on what has been a relatively underexplored theory.[9] These recent contributions join a small stream of valuable scholarship from decades back, including that of Howard Williams.[10]

Three features characteristic of Kant's thinking frequently crop up in the following chapters and help explain why so much recent scholarship may indeed properly be called 'Kantian'. These features concern rights, legitimacy, and institutions. First, the centrality of legal rights. Kant tended to think of legal rights as grounded in noninstrumental terms: they are not just means or strategies to achieve other ends we desire, such as well-being or happiness for the greatest number. Rights are not even considered mere

instruments for achieving freedom. Rather, freedom is *constituted* by the rights and duties that enable individuals to be subject to the rule of law instead of arbitrary power. Second, political and legal authorities that establish human rights through law derive their legitimacy from being capable of justification to individuals. This is based on Kant's view of individuals as free, equal in dignity, and capable of being their own masters. Third, the public institutions at the domestic and the international level are considered part of the same system. Thus, municipal law cannot be seen in abstraction from the international and cosmopolitan political community in which states are situated. Nor can international human rights law neglect the rights to independence of existing political communities.

The contributions explore these Kantian principles in different directions. The following is an overview of the book's chapters.[11] The first three chapters center on the nature and justification for human rights in a Kantian framework. In this first chapter, *Howard Williams* explores Kantian underpinnings for a theory of 'multirights', i.e. human rights institutions at intersecting national and international levels. The chapter stresses the holistic character of Kant's *a priori* view of right and law where private and domestic, international and cosmopolitan laws are intertwined with one another. This holistic doctrine is applicable to our present developing regimes of domestic and international law, especially in the European context, where the boundaries between the two are increasingly being eroded. The chapter demonstrates that the Kantian perspective is sensitive to the historical—generally national—origins of legal order, whilst seeking to present law from a universalistic standpoint. In conclusion, Williams shows how the Kantian account of right can be deployed to advance the regime of multirights. Kant's concept of innate right provides a foundation for cosmopolitan right, underpinning a multilevel system of law.

In chapter two, *Ariel Zylberman* looks at what he calls Kant's juridical idea of human rights. He argues that a right in a strict juridical sense bears three distinguishing marks. It is a relational claim against another, a claim that is logically correlated with the other's duty. A right is noninstrumentally justified as a first-order claim to independence against others. And a right is necessarily attached to a second-order power to enforce the right—a power that need not be exercised by the right holder. Thirdly, for Kant, human rights are a priori rights—those rights which play a unique discursive function as the constitutive conditions of any claim of right. A human right is noninstrumentally justified as an enforceable, direct requirement of a person's original right to independence.

In chapter three, *Sofie Møller* explores human rights jurisprudence through the framework of Kant's legal metaphors, particularly as they are deployed in the *Critique of Pure Reason* and in comparison with the *Doctrine of Right*. Instead of conceiving of the legal analogies as serving a merely expository purpose, Møller investigates which concepts of laws and judgment we find in these analogies. Part of Kant's legal imagery in the first *Critique* is the parallel

between original acquisition of property in theories of natural right and the original acquisition of the forms of intuition and the categories of understanding. This metaphor from the *Critique of Pure Reason* is comparedto Kant's later exposition of the original acquisition of property as being only provisional in a state of nature in the *Doctrine of Right.* In particular, Kant's use of the notion of a state of nature as parallel to the pre-critical state of reason shows a significant continuity between the two works.

The next two chapters center on the scope of rights in directions often thought utterly at odds with Kant's original account. In chapter four, *Luke J. Davies* provides a Kantian defense of the right to health care. First, in the case of preventative care, Davies suggests that its provision is a straightforward exercise of the state's obligation to protect our external freedom. That is, preventative health care is a necessary (though insufficient) condition for the protection of the means we already have. Second, in the case of emergency care, Davies claims that the state's obligation to maintain those citizens who cannot maintain themselves applies when a citizen requires immediate, life-saving medical interventions. Third, the argument for a more general entitlement is based on the obligation of the state to maintain itself in perpetuity, which requires institutions that increase the freedom of its citizens and which rules out that the freedom of some can come at the cost of the basic freedom of others. The benefit of the Kantian approach to the right to health care is that it takes as basic exactly the principle that libertarian objectors to the right employ: the state's requirement to secure the freedom of choice of each.

In chapter five, *Özlem Ayse Özgür* argues that even in the absence of supporting social institutions, people have affirmative rights to a certain measure of security and economic well-being. Her position involves the idea that everybody whose right to subsistence is threatened can claim that the rest have a collective duty to provide her with a system for accessing this right. She argues that our individual duty to relieve undeserved pain is shaped in accordance with this collective duty and that duties associated with human rights are collective duties of justice. Since civil, political, and socioeconomic rights give rise to collective duties of justice, it is a mistake to consider socioeconomic rights as mere manifesto rights on the grounds of the different nature of duties.

The next three chapters explore what might make international human rights courts legitimate, or more so. In chapter six, *Svenja Ahlhaus* explores a democratic paradox of international human rights courts and defends a Kantian solution. She makes three interrelated claims. First, international human rights courts constitute a democratic paradox, because they simultaneously protect and restrict citizens' democratic rights by interfering from outside in domestic political systems. Hence, democratic theorists have normative reasons both to favour and to oppose them. Second, she analyzes the most elaborated attempt to solve this paradox as presented by Richard Bellamy, and argues that his neo-republican intergovernmentalist framework

does not offer an adequate solution. Third, she argues that one can still solve the democratic paradox of IHRCs within neo-republican theory if one follows James Bohman's Kantian-inspired cosmopolitan framework.

In chapter seven, *Markus Patberg* considers the democratic legitimacy of international human rights courts from the perspective of Kantian democratic theory. The analysis starts from the observation that the current discussion about the legitimacy of international human rights review neglects the issue of legitimate institution building. Patberg addresses this deficit on the basis of a dualist conception of democracy that distinguishes between popular sovereignty in normal and extraordinary politics, i.e. between institutionalized democracy and the democratic politics of institution building. The main thesis is that the extraordinary dimension of democracy is essential to the legitimacy of international human rights courts and that the peoples of the member states enjoy the right to decide upon the creation of these institutions. Patberg frames this as an issue of constituent power beyond the state, which is to be understood as a democratic entitlement of the peoples of the member states to establish and reform political institutions in the global realm.

In chapter eight, *Reidar Maliks* explores the legitimacy of international human rights courts from a Kantian perspective. The chapter takes its point of departure in a critique of two recent Kantian attempts to understand the legitimacy of human rights courts. Contrary to a political view, maintained by Armin von Bogdandy and Ingo Venzke, and a moral view maintained by Martti Koskenniemi, Maliks argues for a view associated with the rule of law. According to this view, court legitimacy requires matching legislative organs that perform the twin functions of developing the law and checking courts from overstepping their boundaries. This functional differentiation between institutions of legislation and application is essential to maintain the generality of the law, and therefore to secure that no one is subject to arbitrary power. The implication is that the growth of the international judiciary should be matched by new international legislative institutions.

In chapter nine, *Aviva Shiller* argues that Kant is not a democratic peace theorist. His essay on *Perpetual Peace* is often used by political scientists as a theoretical basis for the theory that democracies do not go to war with each other. Shiller argues that reading the democratic peace back in to Kant's political philosophy obscures many of Kant's fundamental insights, which in turn diminishes our ability to heed the lessons of *Perpetual Peace*. The first section of the essay shows that Kant's political ideal of republicanism and our contemporary idea of democracy cannot be substituted for one another. The second section presents a critique of the various versions of democratic peace theory from a Kantian perspective. The third section shows that Kant does not fit neatly within our realist and idealist divisions in political theory. Shiller concludes that we would do better to heed Kant's advice that what guarantees perpetual peace is the gradual enlargement of the sphere of freedoms within states. How states organize their political institutions is secondary to their ability to secure the rule of law for citizens.

In chapter ten, *Andreas Føllesdal* offers concluding reflections on the contributions of the volume. These engage with the nature of human rights law, with the global basic structure, and with the possible democratic deficit of international courts, on what mechanisms would secure enough democratic input and/or checks and balances, and on what should guide the discretion of international courts.

The diversity of the contributions to this volume reflects some of the originality and imagination on display at the initial conference, from which most of these essays are drawn. The conference was held under the aegis of the European Research Council, which funded the MultiRights project at the University of Oslo. This project, which is led by Andreas Føllesdal and Geir Ulfstein, explores the legitimacy of the multilevel human rights judiciary. The conference was organized in close cooperation with the Norwegian Kant Society, the Center for the Study of Mind in Nature, and the Norwegian Association for Legal Philosophy. We would, in particular, like to thank Camilla Serck-Hanssen, Anita Leirfall, and Jacob Lautrup Kristensen for co-organizing the conference. Many contributed to making the conference a success, and we would like to thank, in particular, Erin Cooper, Svein Eng, Katrin Flikschuh, Christel Fricke, Robert Hoffmann, Øystein Lundestad, Peter Niesen, Thomas Pogge, Matthew Saul, Aviva Shiller, Shania Wang, and Howard Williams. Many thanks to Leiry Cornejo Chavez for organizational help and to Darcy Bullock and Natalja Mortensen at Routledge for their support in preparing the manuscript for publication.

NOTES

1. Examples of global conventions are the UN conventions, such as the Universal Declaration of Human Rights of 1948, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights (both in 1966). Examples of regional conventions are the European Convention of Human rights adopted by the members of the Council of Europe (in 1953) and the American Convention on Human Rights adopted by the Organization of American States (in 1969).
2. Charles Beitz, "Human Rights as a Common Concern" and *The Idea of Human Rights.*
3. Jacques Maritain, "Introduction," *Human rights: Comments and Interpretations. A UNESCO Symposium,* UNESCO (London: Alan Wingate, 1949), 11–12. Likewise, the drafters of the European Convention on Human Rights describes that the priority and strategy in creating the treaty was "to have a short, noncontroversial text which the governments could accept at once, while the tide for human rights was strong." See Harris and O'Boyle cited by François Tulkens, "Seminar: What Are the Limits to the Evolutive Interpretation of the Convention?" *Dialogue between Judges,* European Court of Human Rights (Strasbourg, France: Council of Europe, 2011), 6.
4. James Griffin, *On Human Rights* (Oxford: Oxford University Press, 2008).
5. John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999). To a significant extent, Charles Beitz follows Rawls in this.

6. Jürgen Habermas, "The Concept of Human Dignity and the Realistic Utopia of Human Rights," *Metaphilosophy* 41 (2010): 464–480.
7. Pogge, "The International Significance of Human Rights."
8. Kant, *Perpetual Peace*, 8:360.
9. Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Cambridge, MA: Harvard University Press, 2009); Pauline Kleingeld, *Kant and Cosmopolitanism: The Philosophical Ideal of World Citizenship* (Cambridge, UK: Cambridge University Press, 2012); B. Sharon Byrd and Joachim Hruschka, *Kant's Doctrine of Right: A Commentary* (Cambridge, UK: Cambridge University Press, 2010).
10. See for example Howard Williams, "Kant on the Social Contract," *The Social Contract from Hobbes to Rawls,* eds. David Boucher and Paul Kelly (London, Routledge, 1994), 132–146, and *Kant's Political Philosophy* (Oxford: Basil Blackwell, 1983).
11. Many thanks to the contributors to the volume in the preparation of the following remarks.

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