KANT ON THE RELATION BETWEEN DUTIES OF VIRTUE AND OF RIGHT[1]

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1. Introduction

The relation between law and ethics has been a perennial problem in social and political philosophy. One can even argue that the major division within the field of Western legal philosophy, i.e. the division between legal positivism and the natural law theories stems from a disagreement over whether legal normativity is conceivable as independent of ethical normativity. The history of the debate between natural law theories and legal positivism is too long and the positions taken in this debate turn out to be too intricate to be presented in detail here. However, for the purpose of this introduction, a focus on Immanuel Kant is sufficient; although the significance of role he played in the development of ethics and political philosophy cannot be exaggerated, he nevertheless seems to present a position concerning the nexus between ethics and law which is so intricate that even his most dedicated readers cannot agree on which construal is most accurate.

A particularly controversial issue within Kant studies is how we are to make sense of the *Metaphysics of Morals*, the work in which Kant presents his political and legal philosophy in the most systematic and elaborate fashion. One can argue that, if this difficult work did not exist, we would probably consider Kant as a figure proposing *only* a reconstruction of the political sphere, both national and international, along the lines of the ethics of autonomy he vindicated as being of universal validity. The *Metaphysics of Morals*, by contrast, introduces a sharp distinction between the sphere of justice and law (*Rechtslehre*) and the sphere of virtue (*Tugendlehre*). The following turns out to be the troublesome question then: how are these two spheres related, or are they related at all?

It is then no surprise that the *Metaphysics of Morals*, and particularly its first part, the *Doctrine of Right*, has usually been glossed over even by those who claim to be following the Kantian heritage or his critical outlook in the field of social and political philosophy. More

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recently, however, Kant's text has received a great deal of attention. Unlike Schopenhauer who attributed the problem of interpretation to Kant's old age, contemporary authors devoting their time to the reading of the *Metaphysics of Morals* should think that the difficulties in this work arise because Kant had insight into the distinctive natures of justice and law, on the one hand, and, on the other, ethics, an insight which was not liable to clear articulation. Despite the recent interest in Kant's text, the controversies over the meaning of his argument have increased. Hence, the *Metaphysics of Morals* still stands as a puzzling text for many. This special issue includes works by Kant scholars, who elaborate on different aspects of Kant's *Metaphysics of Morals* and point out methodological and substantive avenues for the resolution of difficulties we come across there. As the reader will see, the answers offered by our authors are not always congruent with each other; however, each provides insights derived from years of immersion in Kant's philosophy and each is worth being further pursued.

2. Kant's Legal Philosophy and Its Problems

In his paper, Thomas Mertens presents an overview of the difficulties Kant's *Metaphysics of Morals* engenders in a way that intends to be particularly helpful for those who are "beginners" to Kant's text. The first of the difficulties is the problem of the "independence thesis". Mertens thinks that at least one way of understanding the categorical character of normativity is that the moral law excludes any normativity derived from elsewhere. However, this is precisely what Kant appears to be suggesting in the *Doctrine of Right*, namely that there can be no simple derivation of legal normativity from ethical normativity. Drawing upon Marcus Willaschek's "independentist" interpretation of Kant, he argues that juridical laws cannot be both external and prescriptive at the same time. This means that the independence thesis suggests that Kant's conception of law was not very different from the Kelsenite conception of law as a system of norms founded upon a basic norm.

The second problem, which Mertens calls the problem of legal positivism, is closely connected to the first one. Here the question is whether Kant subscribes to the Hobbesian motto of *auctoritas non veritas facit legem*. In Mertens's view, the Kant of the *Doctrine of Right* that insists on our almost unconditional duty to obey the authority that has power over us seems to respond affirmatively to this question. Then, the difficulty is how we are to

square Kant's insistence on the autonomy of the moral agent in his ethics with such a duty of obedience to the state authorities.

The third problem concerns what we call today human rights or basic individual rights. Mertens points out that, although Kant is often hailed as the arch-father of human rights, because of his emphasis on human dignity, and although he seems to ground the idea of law on an idea we might consider to be capturing the core aspects of human rights in a nuclear form, namely, the freedom as the innate right of humanity, a closer reading of Kant's text will reveal that he is far from acknowledging many of the most fundamental civic and political rights. Indeed, Mertens suggests, Kant had very little room for the idea of pre-positive or supra-positive rights; even the innate right to freedom amounted more to the recognition of an equal status, rather than entitlement to rights with substantive content.

In light of the fact that Kant is more concerned with the idea of law than substantive subjective rights, it turns out that he might not be the liberal thinker he is often portrayed to be. As Mertens maintains, it is undeniable that the concept of freedom is pivotal to Kant's entire philosophy as well as to his political and legal philosophy particularly. However, two problems come to the fore when Kant is read as a liberal thinker. First, it is not clear to what conception of liberty – a negative one favoured by liberals or a positive one favoured by republicans – Kant subscribes. Second, it is also not clear whether he suggests a "political liberalism" or a "comprehensive liberalism", as John Rawls famously distinguished them, at the level of politics. Furthermore, Kant does not sound very liberal when he starts to talk about the rights of women and citizens that do not own property.

The last but not the least problem is that of consistency. Mertens suggests that there are tensions and even contradictions between Kant's arguments in the *Doctrine of Right* written at the end of the 90s and the arguments he presents in the political and historical writings between the 80s and the mid-90s.

In the face of all these difficulties, Mertens suggests, the best thing to do is "to interpret Kant's doctrine of law in such a manner that is as consistent as possible with Kant's general conception of moral philosophy, and…[to take] into account Kant's earlier legal and political writings" . He stresses that this suggestion includes reviving the teleological understanding of history found in the earlier writings. He then concludes his paper by pointing out three

avenues – themes which originate in different parts of Kant's legal philosophy, but need to be developed by integrating them with other parts of Kant's moral and political philosophy: 1) Kant's arguments for the separation of the states and the rejection of a world republic, which should be developed along the lines of a conception of the states as the contexts not only for the duties of right but also for the duties of benevolence; 2) Kant's arguments concerning marriage, the elaboration of which will bring out how much his legal philosophy depends upon his ethics, particularly his views about sexual relations in this case; and 3) Kant's argument for "honeste vive" as the first duty of right, which can be best elaborated as the duty to moral integrity, displaying the unity of law and ethics in Kant.

3. Kant's Practical Philosophy and the Innate Right to Freedom

Contrary to what Mertens suggests, Sari Kisilevsky presents an interpretation of Kant's legal and political philosophy focused on the *Doctrine of Right* and appreciating the independence thesis. Following in the footsteps of Arthur Ripstein's influential exposition of Kant's legal philosophy, Kisilevsky takes Kant's conception of freedom as independence, i.e., the innate right of humanity, as the ground of Kant's legal and political philosophy. She argues that her interpretation slightly differs from Ripstein's in that, while the latter begins with the concepts of coercion and the general will, she directly begins with the notion of freedom as independence.

In her representation of Kant's concept of innate right to freedom, Kisilevsky emphasizes that the fundamental function of this concept is to "vindicate the equal and distinct standing of each to choose and act for herself". Concomitant to this is a separation between "the person" and her particular needs, desires, or interests, on the one hand, and, on the other, the particular needs, desires and interests of the people around her. Hence, the innate right to freedom leads to a principle of right that is strikingly abstract and formal. She also notes that this abstract and formal principle has the status of a final court of appeal, i.e., plays the role of a trump over any substantial ethical consideration concerning contested issues at the political-legal level. Then, she argues, the question is why Kant thought such an abstract and formal principle should be held prior to substantive political values and goods that a political community might specify and advance, and even prior to the substantive political rights that a state should specify and protect.

Kisilevsky suggests that what matters for Kant is the distinction between the juridical solution of conflicts and the arbitrary solution of them. The latter is a condition where the private judgment of one person or one group prevails over the others'. No matter however such a judgment might seem to be fair for all, i.e., compatible with everyone's rights as far as its substance is considered, the condition is a state of violence considered formally. On the other hand, if a public authority is instituted and this public authority decides upon the issues as the omnilateral will of each citizen as an independent person, the condition is that of justice and peace, whatever the substance of the decision might turn out to be. In this vein, Kisilevsky argues, Kant centres political philosophy on the notion of right as a formal-juridical ideal, while leaving open the substance of these rights and the interests and values underlying these rights.

To further clarify why freedom as independence requires the establishment of a public authority, Kisilevsky suggest that we should contrast Kant's freedom as independence with slavery. This is evidently reminiscent of Philip Pettit's strategy to present his republican conception of freedom as non-domination. Kisilevsky notes that although there is some similarity between Pettit's freedom as non-domination and Kant's independence, the former is different from the latter in that it refers to the interests of the ruled as the standard of the distinction between domination and legitimate ruling compatible with freedom as non-domination. On the other hand, she notes, Kant thinks that it is the fact that a public order provides authoritative standards for action that relieves people from subjection to one another, rather than the fact that the public order protects their substantive interests.

Having argued that freedom as independence is an artefact of law and is wholly explained by law, Kisilevsky discusses whether it has any independent moral significance. She responds affirmatively. She argues that freedom as independence releases persons from the burden of being publicly accountable for their failure to uphold others' needs, desires, wishes, and inclinations. It establishes that people can be held accountable only when their actions thwart one another's publicly protected freedom and only by the state.

In the end, Kisilevsky concludes that although it does not provide a complete picture of all that politics is about, freedom as independence, which demarcates the limits of personhood as a being that can be held accountable for her actions, serves as a morally sound foundation for the resolution of fundamental conflicts in politics.

4. Kant's Complex Relation of Dependence between Ethics and Right

Sorin Baiasu sheds new light on the controversies between dependentist and independentist readings of Kant's legal philosophy on the basis of certain claims from his *Doctrine of Virtue*. Baiasu's argument is indeed built upon a thesis he already developed elsewhere. There he argued that dependentist and independentist readings can be reconciled because there was indeed a relation of "complex dependency" between ethical and juridical norms in Kant. His thesis of complex dependency was based on a distinction between the objective validity of norms and subjective validity of norms, a distinction he thinks underlying, or suggested by, Kant's argument that all lawgiving has two parts: a norm (an objectively valid norm) and an incentive (a reason for the commitment to the norm on the part of the subject). Then, as far as the subjective validity of the legal norms is concerned, the independentist thesis that juridical norms cannot be derived from ethical norms is correct; however, when the objective validity of norms is considered, juridical norms are derivable from ethical norms through leaving off the condition of acting out of ethical motivation and bringing out the requirements of externality, being publicly observable, and enforceability.

In the current paper, Baiasu originally argues that when we closely examine some interesting claims Kant makes in the *Doctrine of Virtue*, the complex relation of dependence between juridical norms and ethical norms becomes even more complex. More precisely, he thinks that independentism might be correct beyond the limited sphere of subjective validity. The fountainhead for this contention is the idea that there are "ethical duties" which are not duties of virtue in Kant. Such ethical duties that are not duties of virtue do ground the duties of right in a complex way, but the ethical duties of virtue, being imperfect, are independent from duties of right. This means that there is not even a complex dependency of duties of right upon duties of virtue, but only a relation of simple independence.

Baiasu concludes with several comments that can be inferred from his argument. First, he argues that, since there are ethical duties which can in no way ground duties of right, the derivation of politico-juridical norms from certain ethical norms (i.e., ethical norms that are not duties of virtue) does not take place in virtue of the ethical character of relevant ethical norms. Second, politico-juridical norms are derived from certain ethical norms *in a complex way that withholds the ethical character of relevant ethical norms.* Political-juridical norms can be derived from ethical norms through freeing the latter from the motivation-condition,

while the ethical character of an action springs from the motivation that underlines it. That is, an ethical or virtuous action is essentially an action springing from respect for law.

As Baiasu highlights, there are then various questions which need to be pursued in the attempt to clarify the relation in Kant between ethical and politico-juridical law- or normgivings and in the attempt to reconcile the various dependentist and independentist interpretations offered by commentators in the literature. First: which feature of ethical duties, if not their ethical character, is important for the derivation of duties of right? Second:, Baiasu's complex dependency thesis needs to be qualified since, even from the perspective of the objective validity of ethical norms, duties are right are completely independent from duties of virtue – what is then the relation of complex dependency that does hold between ethical and politico-juridical law or normgiving? Third: there are important complications that the distinction between the ethical duties that are not duties of virtue and the ethical duties that are duties of virtue will cause in Kant's schema of duties; one of them is how we are to understand the relation between ethical duties and duties of wide obligation – should we count all ethical duties or only duties of virtue as duties of wide obligation? Baiasu notes that there are perhaps different senses of "ethical" in Kant, which would then be a fourth important question for the clarification of this Kantian puzzle.

5. Kant's Account of Ethics and Right as Dimensions of Freedom

In his paper for this special issue, entitled ""Only one obligation": Kant on the Distinction and the Normative Continuity of Ethics and Right", Stefano Bacin, too, argues for the complexity of Kant's view on the relation between ethics and right. Unlike Baiasu, however, he accounts for this complexity in light of the historical-philosophical debate on this issue. The controversy was between the Wollfian thesis of dependency and the Thomasian thesis of independency. Bacin contends that, although Kant embraces certain elements from both of these traditional views, he ultimately provides a novel position going beyond both the independency and dependency theses.

According to Bacin, Kant's account is based on the priority of the concept of obligation and the idea of freedom of moral subject entailed by the former concept. Right and ethics are aspects of the same realm, morality, within which there is a normative continuity of moral obligation, as Bacin thinks Kant suggests when he argued "[t]here are various duties though only one obligation overall in regard to the totality of duty. This latter has no plural". Within

morality, then, we have a differentiation between right and ethics, not because these are spheres separated in terms of their normative ground or force, but because there are two dimensions of freedom to which the awareness of moral obligation entitles the moral agent. First, there is the inner dimension of freedom as the moral agent's capacity for rational self-determination, the perfection of which is the function of ethics. Secondly, there is outer (inter-personal) dimension of freedom as independence from possible hindrance of the subject's conduct by other agents, the realization and protection of which is the function of right.

As a result, Bacin concludes, Kant provides a view that keeps right linked with ethics on the grounds of the general account of moral obligation, while avoiding the instrumentalist view of right as a form of applied ethics. In this way, we can say, Bacin suggests a reading of Kant combining the attractive features of the alternative accounts of Kant's philosophy of law while avoiding their backlashes.

6. Kant's Account of Moral Necessitation

Elke Elisabeth Schmidt and Dieter Schönecker dwell upon a section from the *Doctrine of Virtue*, which they think is more problematic than it might seem at a first glance. The section in question is: "Episodic section: On the Amphiboly in Moral Concepts of Reflection" . The claim that they find striking in this section is the following: "a duty to one subject or another is the moral *necessitation by that subject's will*". The problem with regard to this argument is that it does not resonate well with Kant's autonomy-thesis concerning the nature of moral obligation, i.e. the thesis that moral obligation is self-necessitation (free self-coercion). On their account, there "seems to be at least a tension, if not a contradiction" between the autonomy-thesis and the claim of moral necessitation by another human being's will.

To tackle with this problem, Schmidt and Schönecker revisit Kant's argument concerning the duties to oneself, as it is presented in §§1-2 of the *Doctrine of Virtue*. Impressively highlighting the distinction between being obligated to myself and obligating myself, they suggest that both duties to oneself and duties to other persons include self-obligation, that is, all duties are duties *from* myself since what necessitates me is my own practical reason (or my own autonomous will) in any case.

Schmidt and Schönecker engage then in a detailed analysis of §16. They first make the point that the duties involved in the "moral necessitation by other persons' will" include both narrow and wide duties. They also argue that contrary to a first impression, Kant neither speaks of the duties to oneself nor compares them to the duties to others in this passage. In the next step, they underline three probable mistakes in interpreting Kant's argument for moral necessitating by others' will. First, this argument refers only to one of the two elements of the moral obligation we have in the case of the duties to others, the other element being autonomous self-necessitation out of our respect to the moral law. Second, the human being's duty to another subject cannot be the moral necessitation by that subject's *actual* will. Third, we can also not interpret this necessitation as arising out of other's ethical rights, for we would then assume that there are the rights of others corresponding to our wide duties, which Kant clearly rejects.

Having presented and eliminated the probable mistakes in the understanding of the "moral necessitation by another's will", Schmidt and Schönecker suggest that the clue to a better interpretation lies in getting the sense of "having a duty *to a being*" right. Since "having a duty with regard to a being", too, entails an action directed or targeted to that being, we cannot simply say that "having a duty to a being" is distinguished by the fact that our obligation consists in an action directed or targeted to that being. In light of this, Schmidt and Schönecker formulate the difference between "duties to a being" and "duties with regard to a being" as follows: "an action is one's duty to a being if…this being is a given end, i.e., an entity with dignity, a person". Then, it becomes clear why there are duties to myself, since I am a person as well, and also there are duties to other persons on the condition that they are given in experience. This provides an understanding of Kant's "moral necessitation by another person's will" in a way that is congruous with his idea that moral necessitation is always autonomous necessitation, because what necessitates us in the case of duties to other persons is the very end that our own practical reason postulates as an end in itself, as this is precisely the same in the case of the duties to myself.

In the final part of their essay, Schmidt and Schönecker suggest that the interpretation they propose invokes a new debate concerning whether the human being's duty to another subject is the moral necessitation by a specific subject's will and its ends, or by another subject's noumenal will as an end in itself. In any case, however, if it is true that Kant had the idea that duties to a being arise out of the dignity of person, a being as an end in itself, this will have

implications for our reading of the *Doctrine of Virtue*, and perhaps even the *Metaphysics of Morals*, as a whole.

7. Kant's Account of Duty

Kenneth Westphal's contribution to this volume deals with the complicated nature of Kant's theory of duties and their classification into duties of right and duties of virtue, and strict duties and broad duties. He argues that the recent Anglophone philosophy has mostly failed to understand Kant's sophisticated account of duties. This is because the factitious dichotomies (individual ethics vs. political-social philosophy, deontology vs. teleology, universalism vs. contextualism) upon which the recent Anglophone moral philosophy has rested evaded the insight that Kant espoused a moral philosophy in which not only ethics and justice, but also education were integral dimensions indissolubly linked to each other.

Westphal contends that Kant follows the tradition started with Plato and Aristotle, which brings about an understanding of moral life based on what Curren called the 'Principle of Fidelity to Reason': "we should behave, individually and collectively, in accord with right reason (orthos logos), and decide to behave because so acting accords with right reason". This principle holds for both "individual ethics" and "justice", since it concerns both "individual" and "collective" actions. Furthermore, it makes education an essential dimension of moral life since we require nurture, upbringing, training, education, and enculturation by others, so as to acquire and develop our capacity to reason.

Kant's tremendous achievement within this tradition lies in the fact that he elaborated what the principle of fidelity to reason amounts to in a way that others before him have failed to do. Kant showed that to respect reason (rationality) as morality requires is indeed to respect persons as "ends in themselves". This requires us "to think, to decide and act only on the basis of reasons, principles, analysis and evidence which one address to all others, so that they too can think, decide or act on those grounds and in that way". This is indeed the universalisability requirement, which we can also call "universal communicability" requirement in the view of Westphal, who seems to be evidently influenced by Onora O'Neill in this respect.

The universalisability or universal communicability requirement is then a test Kant suggests for judging what can be held objectively valid in all non-formal, substantive domains.

However, Westphal argues that this is only one of the two main components of Kant's moral philosophy. The other component is a "practical anthropology", which is necessary to specify any of our duties. As he understands it, practical anthropology is an inventory and assessment of the constitutive features of our finite form of semi-rational agency. For instance, by employing practical anthropology, we recognize that human action depends upon material resources such as air, space, water and food; and we might then assess that human beings should be entitled to rights of acquisition, possession and use of such materials.

In light of all these, Westphal argues that Kant's distinction between strict duties and broad duties arises as a result of two-phased procedure of using the universalisability (universal communicability) test as a determinate criterion for classifying actions and their objects (ends) as permissible, obligatory, or prohibited. The first phase uses the universal principle of right and suffices (when, of course, we also take into consideration the basic, constitutive features of semi-rational form of existence of homo sapiens) to identify strict duties of omissions and commissions. Since this phase leaves us a very broad class of permissible actions, we then use, at the second phase, "Contradiction in Willing" test to identify broad duties of virtue. Although these duties have latitude in the sense they leave to individuals a broad scope of judgment regarding how, when, and to what extent to fulfil them under specific contexts they find themselves, they are nevertheless necessary and thus differ from other actions which may be entirely elective or optional.

In this way, Westphal provides a perspective to Kant's moral theory and to his theory of duties in particular, which underscores the constitutive purpose of moral practice (i.e., to realize and improve our rational nature), the role of judgment in using moral principles and rules, and the inter-subjectivity of moral practice disallowing any complete break between individual ethics, justice and education (social enculturation).

8. Conclusion

The focus of this special issue is on the relation in Kant between duties of right and duties of virtue. Whether approaching this topic head-on or indirectly by a consideration of significant relevant issues, the papers included illuminate in a variety of ways the Kantian account of the relation between ethics and politico-juridical philosophy, the implications of such an account and the ways other important aspects of Kant's philosophy fit together into the Kantian system. Particularly important for this special issue are~~is~~ the ways the papers included open

up new avenues for research and inquiry, either by raising further questions or by highlighting problematic aspects of Kant's thought which are in need of examination and resolution.

One theme which seems to run through all the paper is the significance of ethics for Kant's view of politico-juridical norms. To be sure, there is no straightforward legal moralism in Kant, but only an affirmation that political normativity cannot be completely divorced from ethical normativity, and that a society's laws are not merely conventions for the sake of avoiding conflicts between citizens' conceptions of the good life, but outward and enforceable norms for a genuine justification of conflict adjudications. Making politico-juridical norms ethics-sensitive is particularly apposite given the current context of normative disorientation in public and political life.

To be sure, this suggests a solution, but raises also significant questions given the modern context of pluralism. While an ethics-sensitive account of politico-juridical norms may sound like a good idea, one of the questions such a solution would need to answer is which ethics we are talking about. For even if we assume that we can find a formal, but productive set of ethical standards which can be justified to all, there is the further question of the epistemic framework within which such a justification would need to be conducted. And even if we were to assume that such a framework would be palatable and, again, justifiable to all, there would be yet another question concerning the metaphysical presuppositions of such a framework. All these questions and some additional related ones will have to be considered elsewhere.