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B. Sharon Byrd and Joachim Hruschka, *Kant's Doctrine of Right: A Commentary*
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Kant's legal and political philosophy has in recent years enjoyed something of a renaissance. One of the latest contributions in this regard is *Kant's Doctrine of Right: A Commentary* by B. Sharon Byrd and Joachim Hruschka.[1] In line with a growing number of scholars, the authors identify the first part of the *Metaphysics of Morals* as key to his position on the subject and provide a methodical and in-depth analysis of the 1797 work. Their main aim is to explain 'Kant's system of individual rights' presented here, as well as his 'idea of the state which provides the apparatus for ensuring these rights' (2) to show how and why this previously often overlooked work gives us his most coherent deliberations on law and politics. But whereas I am in full agreement with the authors on this important claim, I am—as I later will go on to argue—in some disagreement with quite a few of their interpretations.

As one would expect, the *Commentary* is a thorough investigation of what the authors hold to be the chief constituents of the Doctrine of Right and pays close attention to details during the span of its 300 pages. Bar extensive comparisons to Achenwall, references to past and present scholarly discussions, even to Kant's earlier texts, have been cut to a minimum. The scholar or student interested in a basic introduction to his philosophy of right might want to search elsewhere; the book does not stray far from the original sections and presupposes a fairly good knowledge of the subject beforehand. Appropriately, it demands a lot from the reader as it delves into the minutiae of the work.[2]

Byrd and Hruschka are at their most convincing when they go into the finer details of the Doctrine of Right to highlight its ingenuity, even as

compared to Kant's earlier writings. Due emphasis is given to the discussion of private right with its new justification of property relations. This is first and only accomplished by Kant in this work and not possible to deduce from previous publications. Seeing that the very form of rightful relations between human beings stems from the concept of external freedom and its subsequent application to matters of choice addressed in the first half of the Doctrine of Right, it is surprising that more attention has not previously been brought to this natural background for his legal and political thought. With their emphasis on his system of private right and their efforts to untangle the difficulties here, the authors largely make a valuable contribution to Kant scholarship. At its best, the *Commentary* clarifies difficult and/or ambiguous passages and provides the scholar interested in Achenwall's influence on Kant's philosophy of right obligatory reading. Analogies drawn to the first *Critique* are also instructive and pave the way for further studies.

Still, I find the interpretational approach problematic. Byrd and Hruschka do not start with Kant's point of departure (freedom), but rather with parts of his §41 on the transition from private to public right. The *Commentary* thus completely hinges on the importance and correctness of the authors' interpretation of the three different *leges* Kant refers to in this section.[3] On this reading, the realm of the free market surprisingly takes the place of the executive authority in his tripartite system of public justice along with the legislative and the judiciary (cf. pp. 32ff.). The authors thereby substitute a necessary and public state institution with a feature of society that it must be possible to partake in (for private individuals). I believe this interpretation is wrong for a number of reasons. Not only does it lead the authors to admit the difficulty of explaining the nature of the executive authority and its rightful use of coercion (cf. p. 143). It also results in certain consequences for the rest of their interpretation of Kant's overall position.

The authors envision a Kantian state which merely guarantees people's private rights, as the judiciary peremptorily secures private ownership. They hold that this turns the market itself into a just, public market to regulate (all?) human affairs, thus becoming an instance of 'public[!] justice' (e.g. p. 36) to ultimately render all legislative state authority 'superfluous' (pp. 167, 187). This leaves Kantian public justice primarily—and in a 'perfect juridical state' (ibid.) entirely—in the hands of the free market and the judicial system.

I have to admit I find it more than difficult to subscribe to such an interpretation of the Doctrine of Right; it seems to me that Byrd and Hruschka overstretch the points Kant makes in the discussion of private right. This comes at the expense of the status of the legal order he argues for in the discussion of public right and its relation to that of private right with its set of rights. Granted, Kant's claim in §41 that the state or condition

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(*Zustand*) of public right 'contains no further or other duties of human beings among themselves than can be conceived in the former state [of private right]; the matter of private right is the same in both' (6: 306) holds true for the rights between individuals that the state (with its coercive, executive power) is to secure. But this claim holds true for precisely these rights, which are exclusively of a private nature. It does not exclude the possibility or even necessity of specific state obligations, i.e. rights the state has against the individual and also the individual has against the state. This is, of course, exactly what Kant devotes his discussion of public right to. Not only does this part lay the normative grounds for citizens' rightful claim to a republican form of government similar to a modern representative democracy, an assessment the authors make as well. It also grants, among other things, full legal rights to subsistence (cf. 6: 325ff.), and this in a manner that can be seen to resemble modern welfare state arrangements.

In line with their overall take, however, the authors for their part insist on categorical, but to my mind questionable, claims such as that 'Kant rejects the welfare state' (p. 42). This they do on the basis of his refusals of paternalistic regimes and happiness as a state maxim (cf. ibid.). But welfare state arrangements surely can be (and mainly are) based on the need and rightful claim of citizens to independence from the arbitrary choice of others (as Kant argues); they are not grounded in citizens' personal happiness, however positively influenced this in a second instance may (or may not) be by such arrangements. For this reason, too, I believe Kant's philosophy of right is best developed from his concept of external freedom,[4] and not a politico-economically laden account of private right turned into public justice.

The free-market interpretation also finds its way into the authors' discussions on Kantian international law. For instance, his concept of cosmopolitan law is understood very narrowly and exclusively in a commercial sense. The final end of the Doctrine of Right and of mankind is on this reading not a right to refuge or universal legal recognition, but rather 'something on the order of but more far-reaching than today's General Agreement on Tariffs and Trade' (p. 209). It is nothing but 'indeed the idea of a perfect World Trade Organization' (7), driven solely by 'mutual self-benefit' (p. 210, cf. 8: 368). Not only is practical reason and its public use left out of the picture here, long gone is also his peace essay defence of China and Japan and their right to exclude trade companies for the good of their own economic development. The authors can only square their reading by supposing something of a clean break from Kant's previous publications on legal philosophy; these are 'useful … only to a limited extent' (p. 13).

However wholeheartedly I agree with the authors on a significant shift of perspective involved in parts of the Doctrine of Right, I do not think it is as complete and radical as they believe. True, concepts and principles such as

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Recht, legality, sovereignty, the separation of powers, and others are decidedly different or adjusted in the Doctrine of Right (or even brand new, as in the case of property and property relations). But I cannot see that his position on international law is all that different here, even if it includes discussions of the rightfulness of warfare. Byrd and Hruschka claim to the contrary that it is: 'Kant abandons his position in *Perpetual Peace*'; states are now not only 'in exactly [!] the same situation' as individual persons in a state of nature, they are also 'permitted' to 'coerce' other states and thus 'wage war' to force the latter to 'enter a juridical state of states' (p. 195). It is for the authors 'obvious that Kant favors this model', i.e. a 'state of nation states' (p. 199) with 'courts backed by coercive enforcement powers' (p. 188) to implement international and cosmopolitan law with force. I fail to find such an interpretation equally obvious.

For one thing, the interpretation is significantly aided by the ambiguity of the English term 'state', and so speaks of a 'juridical state of states', meaning a world state (*Völkerstaat*). But the original reads 'rechtlichen … Zustand' (6: 344), which rather must be rendered as 'rightful condition' (as also Gregor translates it). Also, advocating the world state as Kant's final stance, the authors do not appear to spot any further difficulties in having a state of states, hence skipping the very definition of statehood so crucial for Kant, that is, sovereignty. Considering his meticulous elaborations on this central concept as a strict precondition for the rule of law, I cannot understand how a world state would not by definition rule out the very international (i.e. inter-state) dimension, however successful it may (or may not) be in establishing rightful relations worldwide.

Moreover, such a general permission to wage war is quite literally indefensible as a political maxim. I can neither see that it would lead to any kind of peace other than that of the graveyard, nor that Kant actually advocates it; he simply has no such *lex permissiva* operating at the international level. The so-called right to warfare discussed in the Doctrine of Right is not to create a 'state of nation states', as the authors think, but to discern criteria for a rightful use of coercion *outside* a full legal order—here identical with the task of the discussion of private right. Both Kant quotations Byrd and Hruschka use early on (pp. 14, 15) to warrant their assertions that he in 1797 supports a right to wage war make explicitly clear that such a right is merely a (provisional) right in an international 'state of nature' (6: 346, 9 and 6: 344, 26, respectively). It is neither a right in a legal condition as such nor a right to coercively bring about a world state.

Crucially, the authors do not see that when the league of states discussed (and in my view favoured[5]) by Kant in the Doctrine of Right has a right '*in subsidium* of another and original right' (6: 344), this latter right is not the right of a state of states which the league should turn into

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(cf. p. 201). It is rather, as Kant's next few words indicate, the right of states 'to avoid getting involved in a condition of actual war.' I find it difficult to understand that Kant is supposed unequivocally to favour the world state when his deliberations on international law in the Doctrine of Right (and the peace essay) have the free federation of the league of states not only as starting point but also as a final end.

Likewise, I cannot approve of the authors' worrying calls for the Kantian rightfulness of revolutions and interventions against (all?) non-republican states.[6] At least here I cannot help but be reminded of Kant's own critique of the 'sorry comforters' Grotius, Pufendorf, and Vattel, whose similar theories could not have the 'slightest *lawful* force' (8: 355, 10–11) and only aid the cause of warmongers. True, some changes are made, but Kant surely did not revoke and rebuild his entire legal construct in the less than two years that separate *Towards Perpetual Peace* from the Doctrine of Right. I do not think the *Commentary* is successful with this claim, let alone that it fully explains why he would go to such extreme measures.

So whereas I am enthusiastic about the project of unfolding Kant's legal and political philosophy on the basis of the Doctrine of Right, I am a bit puzzled by many of the authors' often one-sided interpretations. Some disagreements relate to what I hold to be mistaken views (e.g. cases of gratuitous promises being no different from cases of equity (p. 221)); others concern the consequences of the interpretational approach as such, going back to the very point of departure. For its contribution to greater emphasis on Kant's final take and position on the subject as well as to some of its details, the *Commentary* certainly deserves praise. Still, I cannot help but profoundly disagree with its main line of arguments and overall conclusions.

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Notes

1 References to the book, to which I will refer simply as *Commentary*, are indicated with its respective page numbers; references to Kant are listed according to the Akademie edition (volume.page).

2 For all their attention to the constitutive parts, I nonetheless miss an attempt at clarifying important passages in the general introduction to the *Metaphysics of Morals*, such as the relationship between morality and legality. This, surely, is highly relevant also for the sections specific to the Doctrine of Right.

3 Briefly, the §41 description of three types of justice—cf. *recht*, *rechtlich*, *Rechtens*—is for Kant clearly connected to 'possession of objects' and thereby the 'matter of choice', not its form. These are subordinated to the 'formal principle of the possibility of [public right, which is] considered according to the idea of a universal legislative will'

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(6: 306), i.e. the supreme lawgiving power of the state (and thus sovereignty itself). This latter aspect is related not only to what is *recht*, *rechtlich*, and *Rechtens*., but also to *das Recht*, i.e. 'the sum of the conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom', again 'connected with an authorization to use coercion' (6: 230–1). Also the crucial relationship between freedom and coercion remains in my view underdeveloped in the book.

4 As also argued by Ripstein (2009).

5 As also argued by Mikalsen (2011).

6 The claim that Kant discusses only the (republican) juridical state in the Doctrine of Right can hardly be turned into an argument for the rightful overthrow of despotic states and their rulers, as the authors seem to do (e.g. 182). If anything, the 'den of thieves with an alpha thief' (ibid.) to which they also compare dictatorships would equate to barbarism, not (state) despotism, according to Kant's later classification in the *Anthropology* (cf. 7.330–1). See also his second kind of permissive laws in the peace essay, allowing despotic states to postpone republican reforms when the state is not safe from intervention by external powers (cf. 8: 373, n.).

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