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Human Rights in a Kantian Key

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Abstract

This article discusses Luigi Caranti's *Kant's Political Legacy*, which argues, among other things, that a Kantian reconstruction of dignity can provide a foundation for human rights. Caranti's book is one of the most powerful recent reconstructions of Kant's political philosophy. Four main points are argued in response. First, to what extent can dignity understood as a value ground the essentially relational character of human rights claims? Second, does Caranti explain why our mere rational *capacity* to set moral ends has dignity rather than the *realization* of that capacity in a morally righteous will? Third, how can the argument provided avoid the conclusion that, because people's capacities vary, their dignity varies too? Fourth, is Kant's political philosophy incompatible with our modern understanding of human rights and, in particular, their function in international law and practice?

Keywords: Kant, human rights, dignity, rational capacity

Luigi Caranti's *Kant's Political Legacy* (Caranti 2017) is a rich and illuminating study of Kant's continuing relevance in three areas: human rights, democratic peace and the ethics of statesmanship. Caranti's book is a welcome addition to the recent revival of interest in Kant's political philosophy. It is also wide-ranging and has the notable (and rare) advantage of being accessible to non-specialists while not losing in sharpness. Caranti's overarching thesis is that Kant can be used to fill gaps in current accounts in each of the three areas mentioned. In this article, I will focus on his Kantian account of human rights.

Caranti is right that there has been relatively little written on what we might call the *deep foundations* of human rights, namely on what might provide ultimate grounds for either any single human right or the group

of all human rights. While human dignity is often mentioned as such a foundation, little has been said to explain what dignity is and how it grounds. There is an easy explanation: philosophers of human rights have wanted to remain ecumenical, following in the spirit of the Universal Declaration and the various human rights covenants, practices, movements, organizations that have followed in its wake. Providing deeper grounds for human rights, it is widely thought, will limit their appeal. A better way forward is to find middle-level commitments, for example, to normative agency, security, basic needs or interests, and to leave any deeper justification to be filled in by individuals and societies, each in their own way. 'Dignity', on this picture, is best thought of as a placeholder.

Caranti demurs. 'Kant', he writes, 'cuts deeper'. Rather than '*start* from the intuition that humans are inviolable or from the assumption that they have "dignity" … Kant explains *why* that is the case' (p. 6). And from this more secure foundation, Caranti goes on to show how a Kantian can derive a conception of human rights that can still remain ecumenical. This is welcome especially because there are few philosophers who have tried to reconstruct what we might call a *truly* Kantian account of human rights, an account, that is, that is not just Kantian in inspiration but Kantian in execution as well.

Caranti begins his account with the 'innate right' to freedom. According to Kant, innate right is the only right we have merely in virtue of our humanity; all other rights (for example, rights that flow from contract and property) are 'acquired' rights. Innate right is therefore a natural right. Innate right gives each human being a right to freedom understood as a kind of independence:

> Freedom (independence from being constrained by another's choice), insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only original right belonging to every man by virtue of his humanity. (DR, 6: 237)[1]

This single innate right entails, Kant claims, several further 'authorizations', namely the right to equal and reciprocal coercion (according to which one cannot be 'bound by others to more than one can in turn bind them'), the right to be one's own master, the right to be 'beyond reproach' (i.e. to preserve one's reputation against, for example, libel) and the right to communicate one's thoughts and to make promises (whether insincerely or sincerely). These are all entailed (Kant claims) by the several

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parts of the initial formulation. The right to equal and reciprocal coercion is entailed by the 'coexistence under universal law' qualification; the right to be beyond reproach by the supposition that no one has yet entered into any relations with others and so must be innocent of all charges against their person; and the right to communicate one's thoughts by the fact that no right would be possible without such communication. From these more abstract rights, Caranti argues, one can derive a further set of more concrete rights that are consonant with the rights we believe central to human rights practice, such as rights against torture, enslavement and forced labour. Caranti does not further specify which rights are derivable in this way; instead, he focuses on what can provide a foundation for them.

The key to this reconstruction lies in understanding what Kant means when he writes that we possess the innate right to freedom *in virtue of our humanity*. 'Humanity' for Kant refers to the capacity to set ends. But why should our mere capacity to set ends, Caranti asks, ground a right? For the capacity to ground a right, it must be something worthy or valuable. But we can set any ends whatsoever, even evil ones. Therefore, Caranti concludes, Kant must have in mind not merely the capacity to set ends in general, but our specifically *moral* capacity, the capacity to act, that is, in accordance with the moral law. That capacity empowers us to act not only in accordance with ends given by our empirical nature as animals, i.e. inclinations, but also in accordance with ends set entirely independently of nature, i.e. with ends given by the form of practical reason itself. So awesome in its power to strike down 'self-conceit' and to act from motives that are stripped of all sensuous necessity, this capacity demands respect in virtue of its *dignity*, understood as an unconditioned, absolute and incommensurable value 'above all price'. For Caranti, then, our right to *external* freedom – and the concomitant demand that others respect that right – is grounded in the dignity of our *internal* (moral) freedom.

The thesis of the dependence of external on internal freedom as well as the importance of dignity are controversial among Kantians. Here I leave those interpretative controversies aside. In the following, I assume that Caranti's is the correct reading of Kant. Instead, I will put pressure on the account in four steps. The first three target the idea of Kantian dignity as a foundation; the fourth targets the extension to human rights.

Caranti opens up space for his view by arguing that so-called 'instrumentalist' accounts of human rights – such as the one defended by James Griffin, who claims that human rights are instruments for protecting

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normative agency – do not provide a convincing way of bridging the gap between something of particularly important *value*, such as agency, and a conception of *rights*. Citing Joseph Raz approvingly, he claims that the gap is opened up because the mere fact that something is very important to the way one's life goes isn't sufficient to establish that one has a right to it. Whether you love me might be crucial to the way my life goes, but that doesn't mean I have a *right* to your love. But if that's true of instrumentalist, interest-based accounts, then why isn't that also true of Caranti's own dignity-based account? After all, dignity is a *value*, a *worth*, possessed by beings with the capacity to act morally. Why doesn't, therefore, a similar gap between value and rights open up?

Caranti responds that dignity's value is of a different kind than the value of, say, flourishing or welfare. The value of the latter gives one reasons to promote it. By contrast, the value of the former gives us reasons – indeed duties – to *respect* it, to bow down before it, to treat it with reverence; dignity gives us a *status* rather than merely a value. Our dignity as persons, for example, does not give us reasons to increase it, or to think that more of it is better, whereas our flourishing does. And duties to respect imply rights whereas reasons to promote do not. As Caranti puts it,

> We are saying that human beings are inherently worthy creatures and *for that reason* they ought to be treated in a certain way. ... [U]nlike Griffin, for our approach autonomy is not objectively valuable in the same way in which love or being loved is. It is not a commodity of some sort. It is a status. It means occupying a place in the universe that rules out certain forms of treatment as incompatible with that status. ... [O]ne cannot sincerely esteem the human status attached to our autonomy and at the same time engage in the sorts of abuses, discriminations and offences we usually understand as human rights violations. (p. 47)

The problem with this argument is that there is still a gap between dignity and rights, including human rights. This is evident when we consider that many, perhaps most, human rights are not just correlated with third-party duties to do or refrain from doing, but are *claims*. As claims, human rights have a relational structure: rights against torture, for example, give me a claim directed *towards you* (and everyone else) not to torture me. A right against torture, that is, establishes more than just a (non-relational, non-directed) duty not to torture; it establishes, rather, a (relational, directed) duty owed *to me* not to torture. If you torture me, you wrong

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me, rather than merely do wrong *in general*. Correspondingly, I have a claim *on you* not to torture me. The trouble is that the idea of inherent worth does not have a relational structure. To see the point, consider that we often refer to great paintings as possessing inherent worth – a worth that grounds duties to respect them, to bow down before them, to treat them with reverence. Great paintings of this kind have a dignity. But it would be bizarre to say such paintings have rights. The dignity of a great painting gives us duties, for example, to refrain from burning the painting, or otherwise destroying it; it also gives us duties to preserve and maintain it. But these duties are not sufficient to establish the existence of a right unless paintings also have claims on us – made, as it were, in their own name – to do or refrain from doing. The response to this charge must surely have *something* to do with agency; what I have suggested, however, is that merely pointing to the awesomeness of agency in a world of sensuous and non-sensuous causes is not enough to do the trick.

This leads me to my second point. As we have seen, Caranti emphasizes the capacity for acting in accordance with the moral law rather than the capacity to set ends generally. This is because acting in accordance with the moral law requires something worthy of reverence, namely acting against all sensuous causes and all selfishness. Caranti writes:

> We are not merely self-masters, but also, and most significantly, potentially righteous ones. We are not merely free; we are free to choose a path of integrity and mutual respect. And precisely because we have this capacity, precisely because morality is within our reach, we are entitled to an amount of respect unfettered by contingent circumstances. (p. 61)

This is odd: if what we revere is acting against sensuous inclination, etc., then why does possession of the *capacity* rather than its *realization* have dignity? After all, human beings can also use their capacity to act morally to act *im*morally. If we should not value the capacity to set ends in general because it can be used to do evil things, then why should we value the capacity to act morally since it, too, can be used to do evil things? According to Caranti,

> Obviously, humans are capable of highly immoral behaviour. But this is no obstacle for our approach. It is the human capacity to act on duty, no matter what its specific form, that is at the centre of our approach, not the actualization of that capacity.

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> We argue that this is the most fundamental layer of our worth, it is what our dignity consists of. And we assume that recognizing this feature in us generates respect for human beings. (p. 63)

I am puzzled by this response, since it seems just to assert what needs to be explained. I have no doubt that the virtuous demonstrate great dignity and deserve our respect as a result; but why should the vicious? Why should the mere fact (if it is a fact) that they could have done otherwise (or would have done otherwise had they been moved differently) make us bend the knee?

The third point is a more familiar one. Even if we grant that our capacity for acting in accordance with the moral law has dignity, and even if we concede that dignity can ground rights, why should we believe that individuals' capacities to act in accordance with the moral law are equal? Some individuals' capacities to act morally are very high – on average and in normal conditions, they display great moral strength, resoluteness, resilience and courage – whereas others' capacities are very low. So, if dignity resides in the (awesome) capacity to act morally, then why should not those with greater moral capacities have greater dignity, and therefore higher status? Why should not they deserve the treatment we once reserved for the nobility? Why should not, that is, their rights and privileges entitle them to more than the average, let alone the vicious, man or woman? One could, of course, respond that we are in fact all equally capable of acting in accordance with the moral law. The problem is that this seems self-evidently false as a matter of empirical fact. One might argue that our capacity to act morally is in fact not an empirical capacity at all. It is a capacity that stands behind and above our empirical capacities. On this picture, our empirical limitations merely mask our *real* capacity to act morally, which is pure and whole. But here we seem to have departed very far from a common-sense view of what a capacity is, and to have won the argument at the price of a highly controversial metaphysical view (and one that Caranti himself – see e.g. pp. 80–5 – seems anxious to deny).[2]

The difficulty comes out clearly when Caranti answers a slightly different objection, namely whether the account ends up giving dignity to non-human animals who display moral behaviour (such as some primates). According to Caranti,

> We can concede that behaviour inspired by a duty-based morality is not a prerogative of humans without denying the huge

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> differences in the degree to which different mammals display an ability to detach themselves from selfish drives. The freedom from natural drives humans have gained through their evolution is vastly superior to the distance even the most sophisticated primates display. ... In a sense, evolution has generated so great a difference between humans and non-human mammals in this regard that what used to be a difference in degree has now come to *appear* as a difference in kind. While animal moral behaviour suggests a general reconsideration of the way in which our relation to animals is usually conceptualized, nothing in the argument suggests that any worth one attributes to humans must be the same as what one should attribute to other mammals. (p. 70)

Vast differences in capacities to be moral, Caranti suggests, are *not* differences in kind. They are still differences in degree, but differences that justify treating non-human animals differently (with less concern?) than human beings. As he writes elsewhere, when answering the charge that Kantian accounts make no room for the respect properly due to non-human animals: 'prerogatives, rights and entitlements to moral concern are ... proportional to the possession of different capacities or of the same capacity at different degrees' (p. 66). But if such differences justify unequal treatment in the case of non-human animals, then should not they do the same with respect to differences among human beings?[3]

The final query I would like to raise concerns the derivation of human rights. In chapter 1 of *Kant's Political Legacy*, Caranti generously responds to an argument I made in an article titled 'Why there Cannot be a Truly Kantian Account of Human Rights' (Sangiovanni 2015). In that article, I defended the claim that Kant's account of the wrongness of unilateral imposition was incompatible with advocacy of human rights as we understand them today. I suggested that, on any plausible view about what human rights are, the systematic violation of human rights justifies (*pro tanto*) non-coercive, and in some cases coercive, interference with violators. Such interference can come both from inside states (where, say, domestic groups organize opposition to human-rights-violating regimes) and from outside them (where, say, NGOs 'name and shame' governments, international courts like the ECHR sanction human rights violators or states interfere via sanctions or military intervention). Caranti argues in response that Kant only forbids forms of internal and external *coercive* interference (see e.g. the fifth article of *Perpetual Peace*). Therefore, as long as we do not understand human rights as setting standards for permissible coercive interference (as e.g. Rawls does),

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there is no incompatibility between human rights and Kant's arguments against unilateral imposition.

If we are to take what Kant writes seriously, however, then his injunctions against divided sovereignty, external interference and unilateral imposition are much more restrictive than Caranti allows. Consider how Caranti himself characterizes human rights:

> Human rights today are not merely the official normative language that most politicians speak around the world (not always in good faith, of course). They are standards that determine (a) the conditions of legitimate sovereignty; (b) whether the international community has a right to intervene (in different forms, up to military actions) against governments or power groups that violate them massively and systematically; (c) whether countries are eligible to enter the European Union; (d) the accountability of the forty-seven governments that are members of the Council of Europe (including Russia, Turkey, Hungary) to an international tribunal such as the European Court of Human Rights, which delivers binding judgements often leading to an alteration of national legislation; (e) the backbone and *raison d'être* of a number of international institutions (e.g., the UN High Commission) and influential NGOs; (f) a source of inspiration for millions of activists around the world, providing them with a common language and a shared basis of political initiative. (pp. 3–4)

I believe this is exactly right as a characterization of the functions human rights are meant to play in international and domestic politics. The problem is that only (c) and (f) are compatible with Kant's political philosophy. The others violate the injunction against unilateral imposition. Let us take each item on this list. With respect to (a), human rights cannot set standards for *legitimate sovereignty* because, according to Kant, rights-violating regimes – as long as they secure the rule of law – remain legitimate, i.e. they retain the right to rule and citizens an obligation to obey. That is, they may be *unjust*, but not illegitimate. In 'Theory and Practice', Kant writes:

> [A]ny resistance to the supreme legislative power ... is the highest and most punishable crime within a commonwealth, because it destroys its foundation. And this prohibition is *unconditional*, so that even if that power or its agent, the head of state, has gone so far as to violate the original contract and has thereby,

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> according to the subjects' concept, forfeited the right to be legislator inasmuch as he has empowered the government to proceed quite violently (tyrannically), a subject is still not permitted any resistance by way of counteracting force. (TP, 8: 300; see also 8: 305)

While human rights may establish the boundaries of the original contract, and so the boundaries of *justice*, they cannot circumscribe the boundaries of *legitimacy*. If they did, then citizens living under right-violating regimes would no longer be bound by the law, which Kant clearly and unequivocally denies.

With respect to (b), foreign military or coercive interference is expressly outlawed by the fifth article of *Perpetual Peace*. Kant writes:

> 'No state shall forcibly interfere in the constitution and government of another state.' For what can justify it in doing so? Perhaps the scandal that one state gives to the subjects of another state? It can much rather serve as a warning to them, by the example of the great troubles a people has brought upon itself by its lawlessness; and, in general, the bad example that one free person gives another (as *scandalum acceptum)* is no wrong to it. (*TPP*, 8: 346)

As I mentioned above, Caranti grants this conclusion in his response to my article, but does not note the implication that, therefore, human rights cannot provide a basis for military or otherwise forcible intervention, and so cannot serve the role he assigns to them under (b).

With respect to (d) and (e), could the Kantian mandate the creation of regional human rights organizations (on the model of the European Convention of Human Rights [ECHR])? I shall argue that there is no space within a Kantian theory even for such regionally bounded human rights instruments.[4]

To fix ideas, let us imagine that a group of member states voluntarily creates both a Court with powers to oversee the implementation of innate right within each member state and an executive mechanism for enforcing its judgements. The institution of such a Court would, I shall now argue, divide sovereignty, and so be in violation of Kant's conditions for a rightful condition. This is easy to see. Imagine the Court came to a judgement that a duly enacted member state law was in violation of innate right. And

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let us say that the member state disagrees with the judgement. Who decides (as a matter of law)? If we assume that the higher level Court was acting within its powers, and that its judgements are supposed to be ultimately binding on its member states, then clearly the member state should either change its law or leave the organization. For a Kantian, if it leaves the regional organization, it would be violating a moral duty to enter into such regional units. So it must change its law. But, according to Kant's unitary conception of sovereignty, if it changed its law, it would be effectively recognizing that it is no longer sovereign. Having lost the ultimate (normative) power to decide in all cases, it has either dissolved (and hence returned to a state of nature) or simply transferred sovereignty to the higher level. In the latter case, the regional organization would now be the relevant 'state', and the former member state merely a subordinate jurisdictional unit within it. With respect to divided constitutions, Kant echoes Hobbes and Bodin:

> Indeed, even the constitution cannot contain any article that would make it possible for there to be some authority in a state[5] to resist the supreme commander in case he should violate the law of the constitution, and so to limit him. For, someone who is to limit the authority in a state must have even more *power* than he whom he limits, or at least as much power as he has; and, as a legitimate commander who directs the subjects to resist, he must also be able to *protect* them and to render a judgment having rightful force in any case that comes up; consequently he has to be able to command resistance publicly. In that case, however, the supreme commander in a state is not the supreme commander; instead, it is the one who can resist him, and this is self-contradictory. (DR, 6: 319; see also 6: 320 and *TPP*, 8: 303)

We might be tempted into thinking that the problem here lies with the 'outdated' view of sovereignty, not with Kant's arguments against unilateral imposition. Could the Kantian abandon the former while retaining the latter? No. Kant's commitment to a unitary conception of sovereignty follows from his account of unilateral imposition.

Here is why. For a coercing will to be omnilateral with respect to an individual or corporate agent, and hence rightfully binding, it must speak with one voice. If there were two (potentially) contradictory voices, then one of them must be 'external' to the agent. Kant writes:

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> The legislative authority can belong only to the united will of the people. For since all right is to proceed from it, it *cannot* do anyone wrong by its law. Now when someone makes arrangements about *another*, it is always possible for him to do the other wrong; but he can never do wrong in what he decides upon with regard to himself (for *volenti non fit iniuria)*. Therefore only the concurring and united will of all, insofar as each decides the same thing for all and all for each, and so only the general united will of the people, can be legislative. (DR, 6: 313–14)

This argument presents us with a dilemma. First horn: if our hypothetical Court speaks in the name of the regional organization, then its will must be *unilateral* with respect to the dissenting member state. It must be unilateral because it is deciding for 'another' (the member state) rather than solely for itself. As the above quoted passage makes clear, within a system of divided sovereignty, it will always be true that at least one of the coordinate bodies must speak with a unilateral voice to the other. Second horn: if we assume, on the contrary, that the hypothetical Court speaks with the *omnilateral* voice of a united people, then the *regional organization* must be sovereign, and the member state a merely subordinate unit within it. On the first horn of the dilemma we have unilateral imposition, and on the second we cease to have a federal league of *states*. This also explains why Kant is very clear that the only matters to be regulated by the regional organization *qua foedus pacificum* are matters necessarily arising *between* states, rather than matters arising only *within* them:

> This league does not look to acquiring any power of a state but only to preserving and securing the *freedom* of a state itself and of other states in league with it, but without there being any need for them to subject themselves to public laws and coercion under them (as people in a state of nature must do). (*TPP*, 8: 356)

It is important that, in this passage, Kant speaks of the freedom *of a state* rather than the freedom of *individuals within it*.

So innate right and its corollaries cannot provide the basis even for a regionally authoritative human rights instrument, let alone a basis for a system of (legal) human rights that has the status in international law of a peremptory norm (i.e. *jus cogens*). At most, if we want to remain within the Kantian framework, we might envisage an international body that provides merely advisory opinions (as many of the UN bodies currently do). Such bodies could issue recommendations to states on

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how to improve their protection of innate right (and the reciprocal system of equal freedom such right mandates), but they could not impose or demand enforcement of their judgements *in any form*. This is a far cry from the kinds of human rights that contemporary advocates and practitioners see themselves as fighting for.

What conclusions should we draw? I think we should conclude that a truly Kantian theory of human rights should be more critical of current human rights practice than Caranti intimates. True Kantians should argue that human rights at most provide a basis for internal and external criticism of rights-violating regimes. They do not, however, provide any grounds for coercive or non-coercive interference, and no grounds for delegating conclusive legal adjudication of human rights to international courts. Indeed, we can go further: States that delegate judgement over human rights to international bodies (such as the ECHR), or that coercively or non-coercively interfere with rights-violating states (e.g. via sanctions), are acting *against* right. And the same should be said with respect to domestic groups and actors that engage in civil disobedience or active resistance to rights-violating regimes (think, say, of the Civil Rights Movement, Mandela in the 1980s, Pussy Riot, Ai Weiwei, all of which were engaged in forms of resistance considered illegal by the governments they were protesting). Such agents are, each in their own way, actively undermining the conditions required for a rightful condition. At the international level, the most that a Kantian theory of human rights could argue for would be a set of toothless international organizations with powers to, at most, issue advisory opinions to member states.

None of these criticisms should take away from the fact that this book is a major contribution to our understanding of how one might reconstruct a Kantian account of human rights, and why it is so important to do so.

Notes

1 Citations from Kant will be from Kant 1999, using Akademie pagination for ease of reference. DR = Doctrine of Right in the *Metaphysics of Morals*. Subsequently, TP = 'On the Common Saying: That may be Correct in Theory, But it is of No Use in Practice'; TPP = *Toward Perpetual Peace*.

2 I discuss this and the previous point at much greater length in Sangiovanni 2017: ch. 1.

3 For similar arguments see, among others, McMahan 2002.

4 In the next few paragraphs, I draw from Sangiovanni 2015.

5 Kant is here thinking of *internally* divided constitutions (such as Britain's, which he discusses at *TPP*, 8: 303), but the point is still valid with respect to *externally* divided constitutions, in which some part of sovereignty is exercised by a foreign rather than an internal body. This was of course a central issue in the constitutional theory of the time, especially regarding the structure of the Holy Roman Empire. Compare e.g. Pufendorf's

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attempts to reconcile his theory of sovereignty with the possibility of (regular and irregular) composite states (Pufendorf 1729 (1672)): VII.5.15–22, but see also VII.2.22). It is relevant that Pufendorf took himself to be superseding (mainly Aristotelian) theories of mixed government (see e.g. VII.5.19).

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