

BYRD, B. Sharon; HRUSCHKA, Joachim. *Kant's Doctrine of Right. A Commentary*
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REVIEW

THOMAS MERTENS

(Radboud Universiteit Nijmegen/ Netherlands)

The contrast could scarcely be bigger. Kant's theory of law is a very bad book, writes Schopenhauer at the beginning of the 19th century, a collection of mistakes hanging together. It must have been Kant's old age! The book is indeed badly composed, writes Ludwig some 30 years ago. It must have been due to the process that led from manuscript to printed book! Therefore Ludwig provided us with a new, not uncontested, edition of Kant's theory of law, in which various parts of the text are presented in a different place.

None of this is true, say Byrd and Hruschka at the beginning of the 21th century. Kant's 'doctrine of right', as it is now often called (I always hesitate when I find 'Rechtsphilosophie' translated as 'philosophy of right'; why not simply: philosophy of law, and thus here: doctrine of law?), is a highly structured and meticulously formulated masterpiece on legal and political philosophy. From a very limited number of assumptions Kant develops here, so we are told, in a Euclidean manner a complete system of individual rights. Subsequently, Kant indicates what these rights entail for the constitution of the legal order of the state, the order between states and for the cosmopolitan legal order. Nobody before or after Kant has drawn in a such a radical manner the consequences of what it means that human beings have the innate right of freedom to own external objects as their property. While it must be admitted that Kant did not make life easy for his readers, it must also be presumed that he was primarily interested in 'getting the theory right', not in presenting his theory in an easily accessible manner.

Herewith the first assumption of this commentary is presented: Kant got it right in his doctrine of right, according to Byrd and Hruschka; where Kant's text seems impenetrable or confused, the problem lies not with Kant but with the reader who should feel encouraged to try harder to understand him. Therefore, the doctrine of right should not be criticised as inconsistent or contradictory but interpreted in such a manner that it comes out as a unique, complete and logically consistent whole. The second assumption of this commentary is that

Kant's earlier texts in legal and political philosophy, such as 'On the common saying' and 'Towards perpetual peace' are of limited use for interpreting Kant's system of legal philosophy as developed in the doctrine of right. In comparison with these earlier texts, Kant has not only drastically extended his position by adding a treatise on private law but has also drastically changed his position, most notably with regard to war and peace. Thirdly, according to this commentary, the influence of Achenwall on Kant's mature philosophy of law, both with regard to substance and to formulations, is of such importance that the difficulties with Kant's text can only be solved with the help of Achenwall's works. The final assumption follows from this: Kant's text should be understood within the context of his contemporaries, most notably Achenwall, and thus references to much of the contemporary literature on Kant's doctrine of right is neither needed nor very helpful. Kant was familiar with much of his contemporary literature and therefore that body of texts helps us understand his texts.

The result of this approach is, in one word, stunning. Following the introduction of these assumptions, one finds a highly structured book in which Kant's doctrine of right is reconstructed on the basis of an extensive analysis of Paragraph 41. In this crucial Paragraph, Kant not only sketches the transition of private law to public law, but also introduces the three so-called *leges* (*lex iusti*, *lex iuridica* and *lex iustitiae*) which are then subsequently connected to the three essential institutions of the Kantian state: the legislative power, the market and the juridical power. The book subsequently discusses, respectively, the opposition between the state of nature and the juridical state; the right to freedom; the juridical postulate of practical reason on the basis of which property is possible; the distinct forms of property that Kant distinguishes; the state and the international and cosmopolitan order. The authors do not shy away from well-known textual difficulties, such as the meaning of the many adages stemming from Roman law that Kant uses, among which the already mentioned 'leges' and the three rules of Ulpian. They also discuss e.g. Kant's statements that the criminal law is a categorical imperative and that ought implies can.

This all leads to the picture of a Kantian state as a minimal state, the sole aim of which is to protect and secure the natural rights of human beings and (thus) to guarantee the functioning of the market in which humans are fully free to buy and sell their property: *volenti non fit iniuria!* The state is prohibited from interfering within the sphere of private relations between citizens since these relationships should develop autonomously on the basis of the freedom of contract. Since Kant rejects any form of paternalistic government and rejects Cicero's dictum that public well-being is the first law of the state, this commentary

concludes that the welfare state is incompatible with Kant's principles. The free market interpretation of Kant's doctrine of right is not restricted to the state alone, but leads to an interpretation of Kant's cosmopolitan legal order as a plea for facilitating and securing international commercial trade.

This commentary is very useful for those who are already (somewhat) familiar with Kant's doctrine of right and who are prepared to read Kant's text anew alongside this commentary. This book is certainly not an easy introduction. As I belong to the first category of readers (at least, so I think), this commentary was at times very illuminating. Nevertheless, I also often disagree, for a variety of reasons, with the interpretations that Byrd and Hruschka present in an often quite apodictic manner. Let me summarize a few of my hesitations. First with regard to the relationship between Kant's earlier texts and the doctrine of right: How likely is the assumption that Kant fundamentally changed his views on the state and in particular on the international legal order between 1792 and 1795 on the one hand and 1797 on the other? Take the following example: in the doctrine of right Kant acknowledges, according to Byrd and Hruschka, the right to wage war as the permitted way for a state to assert its rights. This is 'the opposite to his position in Perpetual Peace'. I argue (in: Kant and the Just War Tradition, in: H.G. Justenhoven, W.A. Barbieri Jr. (eds.), *From Just War to Modern Peace Ethics*, De Gruyter Berlin 2012, 231-247) that Kant's remarks to this effect in the doctrine of right should be understood not as a prescription, but as a description of the state of nature between states. In other words, Kant does not acknowledge a *ius ad bellum*, which would not only make him into a 'sorry comforter' like all the other representatives of the just war tradition, but which would also destroy the prospect of a lasting peace. Nor is the portrait of Kant as a proto-libertarian entirely convincing. Whereas this commentary goes into great detail when commenting on certain passages of Kant's text, it is telling that no attention at all is given to General Remark C of Paragraph 49, in which Kant discusses, as is well known, the socio-economic duties of the state to support organizations for the poor. It could be argued more generally that certain provisions with regard to the redistribution of property by the state can indeed not be justified on the basis of paternalism (which Kant rejects indeed), but that they can be justified on the basis of protecting civil independence, on the basis of which no one should be dependent upon the choice of someone else (to which Kant subscribes).

There are quite a few other interpretations in this commentary with which one can take issue, but let me conclude with a general observation. Kant's *Die Metaphysik der Sitten* is a

diptych in which one finds a doctrine of law alongside a doctrine of virtue. Yet we do not find in this commentary any reflection on the unity of Kant's metaphysics of morals. Byrd and Hruschka suggest that the doctrine of right stands on its own and that it deals with individual rights and the implications of these rights only. Yet throughout the critical period, Kant consistently announced his intention to publish a 'metaphysics of morals' and, finally, at the end of his life, he published this book as one book in two parts. Writing and commenting on the first part of this book (with only a few comments on the doctrine of virtue) has far reaching implications. Think e.g. of the first of the Ulpian rules: 'honeste vive'. This rule is indeed found in the doctrine of right and is interpreted by Byrd and Hruschka as emphasizing the fact that everyone is a person with individual rights. Yet, it would seem to me that the duty to live an honorable life cannot itself be a 'right'. 'Honeste vive' seems primarily a duty, namely the duty someone has towards himself. Therefore it seems to fit badly within the doctrine of right. We know that Kant hesitated where to place the Ulpian rules: should they not fit better within the doctrine of virtue (see e.g.: A. Pinzani, *Der systematische Stellenwert der pseudo-ulpianischen Regeln in Kants Rechtslehre*, in: *Zeitschrift fuer philosophische Forschung* (59) 2005, 73-4)? And indeed, one can find the duty to lead an honourable life as a part of the doctrine of virtue as well. Such a reflection on Ulpian's first rule as a duty to self, however, forces us to abandon the narrow perspective on Kant's doctrine of right as a proto-libertarian treatise and to approach Kant's *Metaphysics of Morals* very different, namely as a rich and a rather classical work which takes its starting point in duties and then moves on to discuss not only rights, but virtues as well.