

Neither property nor contracts

The need of *Das persönliche Recht auf dingliche Art*
in *The Metaphysics of Morals*

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topic of my paper

“The Right to Persons Akin to Rights to Things” is introduced in the Rechtslehre in order to legitimate family relationships.

In fact, according to Kant, family relationships neither can be equated to relations with things, nor are merely contractual.

But why?

outline of my presentation

1. The “Rights to Persons Akin to Rights to Things”

2. The familial matter:

a. Eherecht

b. Elternrecht

c. Hausherrenrecht

3. The implications of family right in Kant’s political philosophy -

and:

what can it suggest for nowadays issues?

I. Definition: Rechtslehre, § 22

This right is that of possession of an external object as a *thing* and use of it as a *person*. - What is mine or yours in terms of this right is what is mine or yours *domestically*, and the relation of persons in the domestic condition is that of a community of free beings who form a society of members of a whole called a *household* (of persons standing in *community* with one another) by their affecting one another in accordance with the principle of outer freedom (*causality*). - Acquisition of this status, and within it, therefore takes place neither by a deed on one's own initiative (*facto*) nor by a contract (*pacto*) alone but by law (*lege*); for, since this kind of right is neither a right to a thing nor merely a right against a person but also possession of a person, it must be a right lying beyond any rights of humanity in our own person, from which there follows a natural permissive law [*Erlaubnisgesetz*], by the favor of which this sort of acquisition is possible for us". (MdS, 6:276)

“Rights to Persons Akin to Rights to Things”

1. “**possession of an external object *as a thing* and use of it *as a person*.”**
2. **object** of the new claim is neither an object nor a service but **the condition of a person** (§4)

Moreover:

3. the structure of the family right is innovative (§23): the marriage assumes a logical preminence.

2a. Marriage Right

“*Sexual union (commercium sexuelle) is the reciprocal use that one human being makes of the sexual organs and capacities of another (usus membrorum et facultatum sexualis alterius).*

....

Sexual union in accordance with law is *marriage (matrimonium)*, that is, the union of two persons of different sexes for lifelong possession of each other's sexual attributes.

....

– The end of begetting and bringing up children may be an end of nature, for which it implanted the inclinations of the sexes for each other; but it is not requisite for human beings who marry to make this their end in order for their union to be compatible with this right, for otherwise marriage would be dissolved when procreation ceases” (MdS 6: 277)

NB: Kant here introduces an important innovation in the tradition.

Why?

the *Verdingung* problem

“

For the natural use that one sex makes of the other's sexual organs is *enjoyment*, for which one gives itself up to the other. In this act a human being makes himself a thing, which conflicts with the right of humanity in his own person. (MdS, 6:278)

”

NB. As far as I know, only a few scholars underlined this aspect of Kantian family right. See in particular B. Herman, C. MacKinnon (cited in the paper).

Kant's solution

1. Reciprocity. While one of the two persons abandons themselves to the other and in doing so places themselves at disposal just as they were a thing, the other in turn takes completely this person, who at the same time experiences an equal process of loss and acquisition of their own personality. **Reciprocity is a necessary, but not sufficient condition in order to solve the moral problem.**

2. Marriage. Stemming from the obligation of not setting up a sexual union but by means of marriage, the domestic society begins as a civil community that, as a socially crucial institution, acknowledges to the man and the woman the juridical (thus moral) subjectivity, since it can compensate for reciprocal deficiencies and faults. **This condition is sufficient to amend the immorality of the act.**

equality

“the relation of the partners in a marriage is a relation of *equality* of possession [*Gleichheit des Besitzes*], equality both in their possession of each other as persons (hence only in *monogamy*, since in polygamy the person who surrenders herself gains only a part of the man who gets her completely, and therefore makes herself into a mere thing), and also equality in their possession of material goods. As for these, the partners are still authorized to forgo the use of a part, through only by a separate contract.” (MdS, 6:278)

2b. Parental Right

“Just as there arose from one’s duty to oneself, that is, to the humanity in one’s own person, a right (*ius personale*) of both sexes to acquire each other as persons *in the manner of things* by marriage, so there follows from *procreation* in this community a duty to preserve and care for its *offspring*; that is, children, as persons, have by their procreation an original innate (not acquired) right to the care of their parents until they are able to look after themselves, and they have right directly by law (*lege*), that is, without any special act being required to establish this right.” (MdS, 6: 280)

equality

“From this duty there must necessarily also arise the right of parents to *manage* and develop the child, as long as he has not yet mastered the use of his members or his understanding: the right not only to feed and care for him but to educate him, to develop him both *pragmatically*, so that in the future he can look after himself and make his way in life, and *morally*, since otherwise the fault for having neglected him would fall on the parents. They have the right to do all this until the time of his emancipation (*emancipatio*), when they renounce their parental right to direct him as well as any claim to be compensated for their support and pains up till now.” (MdS, 6: 281)

the child as a Weltbürger

“For the offspring is a person, and it is impossible to form a concept of the production of a being endowed with freedom through a physical operation*. So from a practical point of view it is a quite correct and even necessary idea to regard the act of procreation as one by which we have brought a person into the world without its consent and on our own initiative, for which deed the parent incur an obligation to make their child content with his condition so far as they can. - They cannot destroy their child as if he were something they had made (since a being endowed with freedom cannot be a product of this kind) or as if he were their property, nor can they even abandon him to chance, **since they have brought not merely a worldly being [Weltwesen] but a citizen of the world [Weltbürger] into a condition which cannot now be indifferent to them even just according to concepts of right**". (MdS, 6: 280-281)

2c. Family right

1. The world family appears only in § 30, referring to the relation between the child and his parents.
2. How children obtain independence from their parents?
3. Care-relations must be legally recognized; here, again, the necessity of the new claim of acquisition is justified.

a synthesis

It is possible to draw several inferences regarding the structure of *oikos* and the position of the domestic society within the *polis* and the *cosmopolis*.

According to Kant, the *oikonomìa*, strictly intended, is based on three fundamental facts: sexual union (between a man and a woman), procreation and care relations (among family members and servants).

Under which conditions may these moments and relationships, reifying in themselves, turn to be moral relations?

The answer is the new claim of acquisition, that introduces a system of rights and duties aimed at ensuring freedom and equality to the subjects involved.

The domestic society thus emerges as a midget republic, subjected to the laws of the State .

conclusions

By considering the right to the cosmopolitical citizenship an innate attribute of the human being, the Rechtslehre thus attends to outlining the conditions of possibility starting from the first human associative form, the family, through the State, to the world republic.

If the institution of an authority which is generally acknowledged in every spot of the world, that may and must be always controlled by the public debate and by a side-taking of its citizens, is a condition of peace in the world, in the Rechtslehre the extension of the a priori principles of the Right to the domestic society, the first school of morality hosting the world citizen, turns out to be another essential condition in order to achieve the final end, that is peace.

Why is interesting to
discuss about all this
today?

The validity of a Kantian approach

a. From a logical and philosophical point of view

b. Juridically

c. From a political point of view

put it in practice..

Which moments and relationships are reifying in themselves and need to be turned into moral relations? Is the Kantian analysis still sufficient?

Accepting Kant's methodology, it is possible to apply his solution to all the relationships which:

- a. are based on sexual intercourse (not necessarily only heterosexual);
- b. are centered on care relations (such as the PActe civil de solidarité (PACS) in France).

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