

Kant, Nietzsche and the Moral Prohibition of Treating a Person Solely as a Means

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Abstract

The concept of human dignity is central in many constitutions world-wide. It plays a particularly central role in the German foundational law. Kant's concept of dignity is particularly influential in this context. There are two aspects that German law inherited from Kant and both of which are highly problematic. Firstly, even though it is acknowledged by the German constitution that animals are not objects, they are supposed to be treated like objects. Hence, the categorical dualistic separation of animals from human beings is implicitly contained in this judgment. Secondly, it is legally forbidden to treat a person solely as a means. This insight applies both to oneself as well as to other persons, which becomes clear in the following two regulations. Firstly, peep shows in Germany are legally forbidden, even if it is the case that it is the dancer's autonomous wish to earn money in that way. Secondly, it is forbidden to shoot down a hijacked airplane, even though it seems to fly directly into a nuclear power station, as long as there are innocent persons on board. In both cases, the regulation was justified by reference to the Kantian thought that it is morally false to treat a person solely as a means. In the following reflections, firstly, I will question a basic assumption on which this regulation rests; secondly, I will consider which options follow from these reflections; and thirdly I will analyze the challenges related to the options mentioned. Thereby, it is supposed to become clear that the German law needs to be altered concerning the moral prohibition of treating a person solely as a means.

The concept of human dignity is central in many international constitutions.. It plays a particularly central role in the German foundational law (Sorgner 2010, 23-29). Kant's concept of dignity is particularly influential in this context (Sorgner 2010, 82-108). There are two aspects which German law inherited from Kant and both of which are highly problematic. Firstly, even though that it is acknowledged by the German constitution that animals are not objects, they are supposed to be treated like objects. Hence, the categorical dualistic separation of animals from human beings is implicitly contained in this judgment. Secondly, it is legally forbidden to treat a person solely as a means. This insight applies both to oneself as well as to other persons, which becomes clear in the following two regulations. Firstly, peep shows in Germany are legally forbidden, even if it is the case that it is the dancer's autonomous wish to earn money in that way (Welti 2005, 397). Secondly, it is forbidden to shoot down a hijacked airplane, even though it seems to fly directly into a nuclear power station, as long as there are innocent persons on board (BVerfG, 1 BvR 357/05 from the

15.2.2006). In both cases, the regulation was justified by reference to the Kantian thought that it is morally false to treat a person solely as a means. In the following reflections, firstly, I will question a basic assumption on which this regulation rests, secondly, I will consider which options follow from these reflections and thirdly I will analyze the challenges related to the options mentioned. Thereby, it is supposed to become clear that the German law needs to be altered concerning the moral prohibition of treating a person solely as a means.

1. Challenging Kant's Basic Assumptions

The Kantian moral prohibition of treating a person solely as a means rests on the distinction between persons and things. Persons participate in the world which is governed by the laws of nature and the laws of freedom. Things, however, participate solely in the world which is governed by the laws of nature. This distinction implies that only persons do not solely belong to the natural world (Kant 1902ff, vol. 4, 428-434). Kant did not affirm an anthropocentric conception of personhood, but a logocentric position of personhood, as it was not necessary for him that only human beings are persons. In the German legal context, however, the distinction between persons and things turns into an anthropocentric conception, as only human beings are seen and legally treated as persons.

Is this a plausible anthropology today? Darwin, Nietzsche and contemporary posthumanist thinkers might have reasons for doubting this conception (Badmington 2000, 9). Given recent biological research; given that human beings and great apes have common ancestors and given that a basically naturalist understanding of the world applies, it is more plausible to hold that there is merely a gradual difference between human beings, great apes, plants and maybe even stones. Nietzsche's anthropology provides a possible non-dualist anthropology, which attempts to grasp the related concepts philosophically. Thereby, all entities turn into constellations of power-quantum and organisms and human beings are seen as a specific type of animal, sometimes even a "sick animal" (KSA, GM, 5, 367). However, this sickness in Nietzsche is not necessarily a deprecation of human beings. The aspect of sickness has several

implications. It means that they have developed a special capacity, namely the capacity of not immediately having to follow their instincts. This can have both beneficial as well as problematic consequences. It can be beneficial as it enables human beings to create culture, develop technologies and enable them to realize sublimation processes. It can be problematic, as it separates acts from the immediate realization of instincts whereby instincts in many cases are more reliable concerning one's own interest than intellectual reflections. (Sorgner 2010, 184-191)

2. Moving Beyond Kant's Basic Assumptions

As both philosophical and scientific reflections lead us to doubt the Kantian anthropology on which the German foundational law rests, what can be done to take these insights into consideration? It needs to be stressed that it is problematic to refer to the posthumanist insights as the ones who are generally accepted. This is not the case. In Germany there are many citizens who still uphold a Christian understanding of the world, which rather affirms the basic assumptions of Kantian reflections. Still, it needs to be asked whether a social-liberal democracy ought to be based upon a premise that affirms a strong metaphysical anthropology, namely one which is most consistent with an anthropology that sees only human beings as being constituted out of a material body and an immaterial soul. Animals, plants and stones on the other hand are regarded as objects and as not participating in any world outside the material naturalist one. This seems to go against the fundamental norm of freedom on which democracies rest. In the case of Germany it can be said that at least thirty per cent of citizens can be classified as naturalists, skeptics or atheists who are being treated paternalistically by this type of legal regulation. A problem related to this group of people is that that they are not politically organized enough to efficiently act against such regulations. Members of the Catholic and the Protestant churches on the other hand have strong institutions and hence have an enormous amount of power to influence political decision making processes. However, given that at least one third of the population is treated

paternalistically in an aggressive manner by these types of regulations goes against the central value the norm of freedom ought to have within a democracy. Therefore, these regulations ought to be revised.

What does it imply to revise the related premises of the foundational law? The current implications of the foundational law are such that it has strong metaphysical implications such that only human beings are seen as participating both in a material as well as in an immaterial world, but it is problematic that the foundational law of a liberal-democratic society has an ontological basis. It cannot be an appropriate way of reacting to these insights to simply replace this regulation by another one such that human beings and animals are seen as merely gradually different. In this case, one ontology would simply be replaced by another one. Instead of such a substitution, it would be more appropriate to stress the norm of negative freedom whenever the ontological implications of anthropology become relevant. However, the main question that I intended to address here was primarily the one concerning the prohibition of treating a person solely as a means.

So far I described that the Kantian moral prohibition implies the ontological distinction between persons and things. Persons have autonomy and hence dignity, which implies that no finite value can be attributed to them. Things, on the one hand, can have a finite amount of value, which is also the reason why they can be treated solely as a means. Persons, on the other hand, cannot be identified with a finite amount of value, and consequently must not be treated solely as a means.

Hence, the intellectual basis on which Kant's moral prohibition rests is a highly problematic ontological understanding, which currently is not shared by at least one third of the German citizens. Still, they are forced to be judged on this basis, as this regulation is part of the German law. It has consequences such as the prohibition of peep shows as well the prohibition to shoot down hijacked airplanes with innocents on board.

If the prohibition to treat a person solely as a means rests on the aforementioned ontological basis, the question needs to be addressed as to consequences it has concerning this prohibition, given that one merely sees a gradual difference between human beings, animals and other entities. Two immediate options come to mind: Firstly, due to there being merely a gradual difference between human beings and other entities, there are no more things and hence, it will have to be morally prohibited to treat any entity merely as a means. Secondly, it can be argued that the prohibition of treating a person solely as a means does not even apply today as a universally valid regulation; for instance if someone has been an offender, he can be put into prison or he can even be killed in specific circumstance, let us say if he threatens to kill someone else. Hence, treating a person solely as a means can be both morally legitimate as well as morally illegitimate (Hoerster 2013, 11-23). If this judgment applies to persons, then it applies also to all other entities, given that there is solely a gradual distinction between all entities in question.

3. Challenges related to these Moves Beyond Kant's Basic Assumptions

There were two major suggestions concerning these moves beyond Kant's basic assumptions. Firstly, the moral prohibition to treat persons solely as a means was reinterpreted such that all entities from stones to great apes and human beings turned into persons. Secondly, the moral prohibition mentioned was dissolved as the distinction between morally legitimate ways of treating a person solely as a means and morally illegitimate ways of treating persons solely as a means was introduced. The second case seems to imply that the prohibition in question no longer applies to any case such that the question has to be asked anew: What is moral and how can we conceptualize morality? The first reply, however, raises different questions, as then the questions come up what it means and which implications it has to treat someone solely as a means? Does it imply that I must no longer eat salmon? Is it morally problematic to walk on grass?

A further issue has to be considered in this context, too, which has been mentioned beforehand. If the moral prohibition was altered in one of these two ways, does this not imply that one ontology was simply replaced with another one within the legal context? Is it not problematic to have any ontology, which influences legal decisions, as a social-liberal democracy must imply openness to a great variety of ontologies and must not judge its citizens on the basis of any ontology due to the morally problematic implications involved? If this is indeed the case, then it might be advisable to move beyond any ontological discourse when dealing with any legal discourse, as this is the only way of remaining ontologically neutral such that no morally problematic intrusion of the state into personal decisions of its citizens occurs.

4. Conclusion

In the above-mentioned reflections, several challenges of legally dominant regulations have become clearer, which have a particular relevance for the German legal context. Given the above reflections, it seems appropriate and necessary to move beyond the prohibition of treating other persons solely as a means and also beyond the tradition of allowing ontological positions within a constitution of a social-liberal democracy, as both judgments contradict the initial premises of such constitutions and hence are self-contradictory.

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