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# **The Right to Education: An Analysis through the Lens of the Deontological Method of Immanuel Kant**

**Kavana Ramaswamy.**

*The framework of categorical imperatives is one of the most famous deontological theories of rights that have been formulated. The framework has often been used to justify human rights policies all over the world. While they have been subject to several criticisms over the last two centuries, some of these include improvements to the original framework. This paper analyses the framework of the categorical imperatives and suggest certain modifications to improve internal coherence.*

*The paper then seeks to apply this framework to the right to education, a right that is under fire in the conservatively-charged political arena today. This is done to attempt to find a deontological, rather than consequentialist, justification for certain modifications to the education policies often pursued by the conservative right. This paper provides a more robust theoretical justification for certain forms of education policy to be pursued by governments.*

## INTRODUCTION

Kantian ethics have influenced the legal discourse on philosophical justifications for human rights for the last two centuries.<sup>1</sup> The idea of a comprehensive framework of rights being developed on purely secular theoretical justifications<sup>2</sup> appealed to legal thinkers of the 18<sup>th</sup> and 19<sup>th</sup> centuries who were increasingly inclined to separate religious morality from laws. Despite its formulation prior to a number of historical events that have more or less shaped the human rights rhetoric<sup>3</sup> of today, the Kantian model of rights provides a foundation for philosophical inquiries on the viability and enforcement of various human rights. While the positive framework of law is the primary means by which human rights are enforced, legal theory deals with the reasons for normativity human rights. A sound theoretical justification for the universal enforcement of a right is one step towards its enforcement.<sup>4</sup>

Kant's theoretical framework involving the use of categorical imperatives has been subjected to criticism and counterarguments. This necessitates a closer inspection of the framework itself prior to its application to any human right. While many of these criticisms are directed at examples provided by Kant, it has been reasoned that the examples used were symptomatic of the social mores of his times.<sup>5</sup> Nonetheless, the idea of every person being entitled to certain rights on account of their humanity, a concept captured within Kant's categorical imperatives, has dominated the language of international human rights law since the conclusion of the Second World War.<sup>6</sup> Scholars have also modified the categorical

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<sup>1</sup> See generally BARBARA HERMAN, *THE PRACTICE OF MORAL JUDGMENT* (1993).

<sup>2</sup> See Leslie Green, *Legal Positivism*, in *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed., 2009), <https://plato.stanford.edu/archives/fall2009/entries/legal-positivism/>.

<sup>3</sup> The rhetoric of human rights refers to the idea that human rights are an inalienable incident to human existence. This idea was potentially propounded prior to the horrors of the holocaust, as will be detailed later in this paper, but were brought to the forefront thereafter as may be seen in the formulation of the German Constitution and in subsequent discussions during the preparations of the various human rights treaties.

<sup>4</sup> It has been argued by some scholars that it does not matter whether or not a unified theory may be found to justify a right as long as the right remains protected. See DUDLEY KNOWLES, *POLITICAL PHILOSOPHY* 155–76 (John Shand ed., 2001). It is nonetheless essential to have at least one theoretical justification for a right to be protected. Jacques Maritain, in his introduction to the symposium edited by the United Nations Educational, Scientific and Cultural Organisation (“UNESCO”) on Human Rights, deals with the need for rational theoretical justifications for human rights. Quoting one of the participants at a UNESCO National Commission meeting on Human Rights, who explained the reason for agreement on a list of human rights by those of violently opposed ideologies by saying that they all agreed about the rights as long as nobody asked them why. Maritain claims that as long as there are conflicts regarding the justification of rights, there would be conflicts regarding their interpretation. Jacques Maritain, *Introduction to Human Rights Comments and Interpretations: A Symposium* Edited by UNESCO, U.N. Doc. UNESCO/PHS/Rev. 3 (July 1948), <http://unesdoc.unesco.org/images/0015/001550/155042eb.pdf>.

<sup>5</sup> For instance, Kant has made many statements regarding the status of women in society that are quite blatantly misogynistic. Analysis of the theoretical principles espoused by Kant himself, however, (particularly with the categorical imperatives) provides various counter arguments against such sexist stances. See CAROL HAY, *KANTIANISM, LIBERALISM, AND FEMINISM* 50–88 (2013). The primary problem with the analysis by Kant, as it turns out, was more the fact that Kant did not apply the categorical imperatives to women in the same way as they were applied to men due to his belief that they were not rational beings in the same manner (or to the same extent) as men were, making women ‘less human’ and therefore, unentitled to the rights that accrued to rational beings under the Kantian framework. See Sally Sedgwick, *Can Kant's Ethics Survive the Feminist Critique?*, in *FEMINIST INTERPRETATIONS OF IMMANUEL KANT* 77–100 (Robin May Schott ed., 1997). While this does question the applicability of Kantian thought to contemporary discourses on human rights, the foundational principles that Kant derives his theories from have been used by various feminist scholars in countering discrimination both within Kant's writings and without. See generally *FEMINIST INTERPRETATIONS OF IMMANUEL KANT* (Robin May Schott ed., 1997).

<sup>6</sup> See *supra* note 3.

imperatives to overcome process flaws identified in the criticisms.<sup>7</sup> Some of these improve the coherence of the Kantian model, which will be discussed in this paper. The problem remains that Kant's theories had vulnerabilities that need to be addressed. However, the importance of having a secular theoretical framework to justify certain human rights does not abate. The right that I intend to focus on in my paper is the human right to education.

There are three primary reasons for singling out the right to education as a focal point of this paper. Education (whether in a formal system of schooling or in a more informal context) shapes an individual's character<sup>8</sup> and opinions<sup>9</sup>. The quality of one's education can determine one's quality of life.<sup>10</sup> Lastly, particularly with children, there is little or no agency in the kind of education one receives. It usually depends on the resources available to each child's parents, the opinion of the parents on the kind of education the child *ought* to receive, and the education policies of the state in which the child resides.<sup>11</sup> The combination of the high stakes (the quality of one's life being determined primarily on the nature and quality of one's education) and the lack of any real autonomy of choice in the matter for most people (since children are the primary target group) makes it important to ensure two things: first, that the education system promotes the full development of individuals and minimises indoctrination and second, that quality education be easily accessible. Both goals invariably require the state to take positive steps in ensuring the right to education.

The right to education faces new challenges with the wave of endorsement that conservative politics has received in the recent past. These conservative governments appear to be pulling out of funding education in general.<sup>12</sup> There is a move to shift the funding of primary education to voucher-based systems, despite studies showing these to be ineffective.<sup>13</sup> Many studies have shown that voucher programmes to facilitate access to

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<sup>7</sup> See generally NEIL MACCORMICK, *PRACTICAL REASON IN LAW AND MORALITY: LAW, STATE AND PRACTICAL REASON* (2008).

<sup>8</sup> See generally, Bo Ekehammar, Ingrid Nilsson & Jim Sidanius, *Education and Ideology: Basic Aspects of Education Related to Adolescents' Sociopolitical Attitudes*, 8 POL. PSYCHOL. 395 (1987).

<sup>9</sup> *Id.*

<sup>10</sup> See generally, David M. Cutler & Adriana Lleras-Muney, *Education and Health: Evaluating Theories and Evidence* (Nat'l Bureau of Econ. Research, Working Paper No. 12352, 2006),

<http://www.nber.org/papers/w12352>; Philip Oreopoulos & Kjell G. Salvanes, *How Large Are Returns to Schooling? Hint: Money Isn't Everything* (Nat'l Bureau of Econ. Research, Working Paper No. 15339, 2009), <http://www.nber.org/papers/w15339>; Katarina R.I. Keller, *How Can Education Policy Improve Income Distribution?: An Empirical Analysis of Education Stages and Measures on Income Inequality*, 43 J. OF DEVELOPING AREAS 51 (2010).

<sup>11</sup> See generally Phillip Brown, *The 'Third Wave': Education and the Ideology of Parentocracy*, 11 BRIT. J. SOC. EDUC. 65 (1990).

<sup>12</sup> Tracy E Gilchrist, *Trump Deals a Blow to Michelle Obama, All Women*, THE ADVOCATE (May 1, 2017), <http://www.advocate.com/women/2017/5/01/trump-deals-blow-michelle-obama-all-women>; Lisa Lambert, *Trump Seeks to Shrink Federal Role in Education With New Order*, REUTERS (Apr. 26, 2017), <http://www.reuters.com/article/us-usa-education-trump-idUSKBN17S2U8>; Tom McCarthy, *Trump Administration May Scrap Michelle Obama's Health and Education Programs*, THE GUARDIAN (May 3, 2017), <https://www.theguardian.com/us-news/2017/may/01/michelle-obama-school-lunch-let-girls-learn-scrapped-trump>; Greg Toppo, *Donald Trump Takes Aim at Michelle Obama Efforts on Child Nutrition, Girls' Education*, USA TODAY, (May 1, 2017), <https://www.usatoday.com/story/news/2017/05/01/trump-michelle-obama-efforts/101164922/>.

<sup>13</sup> Erica L. Green, *Betsy DeVos Calls for More School Choice, Saying Money Isn't the Answer*, N.Y. TIMES, (Mar. 29, 2017), <https://www.nytimes.com/2017/03/29/us/politics/betsy-devos-education-school-choice-voucher.html>; Valerie Strauss, *Study: Private School Vouchers Favored by DeVos Don't Offer Real Advantage Over Public Schools*, WASH. POST, (Feb. 27, 2017), [https://www.washingtonpost.com/news/answer-sheet/wp/2017/02/27/devos-favors-private-school-vouchers-but-new-study-says-they-dont-offer-real-edge-over-public-schools/?utm\\_term=.abe9abc5ccc0](https://www.washingtonpost.com/news/answer-sheet/wp/2017/02/27/devos-favors-private-school-vouchers-but-new-study-says-they-dont-offer-real-edge-over-public-schools/?utm_term=.abe9abc5ccc0); Leah Askarinam, *What a New Study on Vouchers Means for Trump's Agenda*, THE ATLANTIC, (Apr. 28, 2017), <https://www.theatlantic.com/education/archive/2017/04/do-vouchers-actually-work/524676/>.

primary education are likely to fail, unless coupled with governmental funding and support.<sup>14</sup> The focus on vouchers appears to be primarily a result of conservative ideologies and free market ideals.<sup>15</sup> Alternatives that are more effective than the voucher system that have been suggested by scholars in the past include increasing public spending on the education sector as a whole, rather than leaving it to open competition to improve educational institutions.<sup>16</sup> Conservative policies may also result in an exodus of academics from universities in the United Kingdom.<sup>17</sup> These policies are likely to have severe and long-term impacts on children without access to quality education. One way of addressing these issues is to clarify the nature of the rights in respect of education that a state ought to grant. A sound philosophical justification in deontological ethics may persuade governments to consider reasons for pursuing specific policies in respect of education. Arguments for state funding of education based on the ineffectiveness of the voucher system (essentially consequentialist arguments) do not seem to be convincing policy makers. Theoretical justifications for specific education policies might render support to this goal.

In this paper, I analyse the categorical imperatives delineated by Kant to determine the permissibility of acts and, consequently, the regulatory duties of an ideal state in relation to such acts. In relation to the criticisms thereof, I utilise modifications to Kant's categorical imperatives suggested by jurists such as Rawls and MacCormick to arrive at a more coherent framework of rights. Thereafter, I apply this modified framework to the right to education. The question I address in this paper is whether a robust theoretical justification for the right to education may be conceived in Kant's theory of rights (I argue that it may). I have divided the paper into two parts. In the first, I provide a brief overview of the categorical imperatives and their vulnerabilities, together with modifications that strengthen the framework. In the second part, I identify the obligations imposed on states in relation to the right to education within this modified Kantian system, and the implications this has on state policies.

## INDIVIDUAL RIGHTS AND THE DEONTOLOGICAL METHOD

The existence of 'inherent rights' for all humans has been the cause of much debate in legal theory. Secular philosophising in legal academia around the time of Kant dismissed the ideas propounded earlier by scholars such as Thomas Aquinas<sup>18</sup> of "natural law" and "natural rights" in favour of other means of circumscribing the notion of law and its evolution.<sup>19</sup> One of these was Kant's attempt to bring in the scientific method into the question of ethics.<sup>20</sup> Other forms included the Declaration of Independence of the United States and the Declaration of the Rights of Man as aftermath of the French Revolution.<sup>21</sup> The value of

<sup>14</sup> Martin Carnoy, *School Vouchers Are Not a Proven Strategy for Improving Student Achievement*, ECON. POL. INST. (2017), <http://www.epi.org/files/pdf/121635.pdf>. See also Martin Carnoy, *National Voucher Plans in Chile and Sweden: Did Privatization Reforms Make for Better Education?*, 42 COMP. EDUC. R. 309 (1998); Andrea Tokman Ramos, *Is Private Education Better? Evidence from Chile*, (Central Bank of Chile, Working Paper No. 147, 2002), <http://www.bcentral.cl/eng/studies/working-papers/147.htm>; Martin Carnoy & Patrick J. McEwan, *Is Private Education More Effective and Cost-Effective Than Public? The Case of Chile* (2011).

<sup>15</sup> Carnoy, *School Vouchers Are Not a Proven Strategy for Improving Student Achievement*, *supra* note 14, at 10.

<sup>16</sup> Carnoy, *National Voucher Plans in Chile and Sweden*, *supra* note 14, at 329.

<sup>17</sup> See Cherry James, *Brexit: What Now for Study Mobility Between the UK and the EU?*, PÉCS J. INT'L & EUROP. L. 7, 20 (2016).

<sup>18</sup> See generally Mark Murphy, *The Natural Law Tradition in Ethics*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2011), <http://plato.stanford.edu/archives/win2011/entries/natural-law-ethics/>; BRIAN TIERNEY, THE IDEA OF NATURAL RIGHTS (1997).

<sup>19</sup> See Green, *supra* note 2

<sup>20</sup> IMMANUEL KANT, CRITIQUE OF PURE REASON (John Miller Dow Meiklejohn trans. 1855).

<sup>21</sup> It has been opined that the two declarations sparked the beginning of secularisation of the rights discourse. TRISTAN MCCOWAN, EDUCATION AS A HUMAN RIGHT: PRINCIPLES FOR A UNIVERSAL ENTITLEMENT TO LEARNING 22 (2013). However, this may be disputed in the light of the fact that the French Declaration on the

Kant's theory of rights, particularly because the content of the rights elucidated being largely parallel to the rights already delineated in the French and American Declarations and by various philosophers prior to Kant, was in the process of deduction of these rights as opposed to the subject matter and content of the rights so derived.<sup>22</sup> Kant sought to apply his categorical imperatives to all aspects of human life, including education.<sup>23</sup> In his view, it was education that distinguished humans from other animals.<sup>24</sup> He believed that the education of children often resulted in the treatment of children as instrumentalities rather than ends in themselves, in violation of his second categorical imperative. However, some of his own assumptions about education were also problematic, as will be discussed later in this paper.

The deontological process in Kant's theories involves the application of Kant's categorical imperatives to any given choice of action in order to determine the legitimacy of the act.<sup>25</sup> Kant intended the categorical imperatives themselves to be universal, affording respect to each person and to their personal autonomy.<sup>26</sup> In contrast to the French and American declarations,<sup>27</sup> the categorical imperatives are arguably derived by logic, which, as a foundational norm, is not based on empiricism but on a principle that is valid universally.<sup>28</sup> While any sound moral theory will have to withstand the test of empirical validity, their formulation cannot be entirely based on empirical grounds. If the formulation of the categorical imperatives is coherent and based on a universally acceptable principle, the categorical imperatives (derived solely from the foundational principle) themselves would have to be accepted. For Kant, this foundational principle is that of rationality or reason. 'Reason' as a faculty of humans that bears consequence on will allows us to make decisions not based entirely on instinct but also on the understanding of the nature of the acts we perform.<sup>29</sup>

Naturally, the first question one faces in the justification of such a theory is on the value of its foundational norm.<sup>30</sup> There have been various criticisms of the idea of pure reason being hierarchically more important than, for instance, emotion: one of the feminist critiques to Kantian ethics is its disregard for emotions that may be seen to be equally important as a foundational norm of human action.<sup>31</sup> This has been criticized by scholars such

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Rights of Man uses language such as "sacred rights" and "in the presence and under the auspices of the Supreme Being," DECLARATION OF THE RIGHTS OF MAN pmbl. (France 1789), and the United States Declaration of Independence describes all men as being "endowed by their Creator with certain unalienable Rights." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). While the language of the two declarations was probably instrumental in both the initiation and popularisation of the rights rhetoric as we know it today, labelling them 'secular' might not be entirely warranted.

<sup>22</sup> Roger Hancock, *Kant and the Natural Right Theory*, 52 KANT-STUDIEN 440, 442-43 (1961).

<sup>23</sup> See generally IMMANUEL KANT, ANTHROPOLOGY, HISTORY, AND EDUCATION, 437-85 (Günter Zöller & Robert B. Loudon eds., Mary Gregor et al. trans., 2007) (hereinafter ANTHROPOLOGY).

<sup>24</sup> *Id.* at 439.

<sup>25</sup> See generally Elijah Millgram, *Does the Categorical Imperative Give Rise to Contradiction in the Will?*, in ETHICS DONE RIGHT PRACTICAL REASONING AS A FOUNDATION FOR MORAL THEORY 89-132 (2005).

<sup>26</sup> *Id.* at 90.

<sup>27</sup> Cf. ANTHROPOLOGY, *supra* note 23.

<sup>28</sup> See IMMANUEL KANT, FUNDAMENTAL PRINCIPLES OF THE METAPHYSIC OF MORALS 1 (Thomas Kingsmill Abbott trans., 1873) (hereinafter FUNDAMENTAL PRINCIPLES).

<sup>29</sup> See *id.* at 13.

<sup>30</sup> See NEIL MACCORMICK, LEGAL RIGHT AND SOCIAL DEMOCRACY: ESSAYS IN LEGAL AND POLITICAL PHILOSOPHY 90 (1984) for an example of a similar problem in the identification of theories of justice, whereby the value of impartiality as a measure of justice being done is only relevant to someone who believes that impartiality in decision-making is inherently valuable. There is no known way of modifying the stance of someone who rejects the idea that impartiality in decision making is desirable.

<sup>31</sup> Authors such as Carol Gilligan put forward the idea that a justice system based on pure rationality was inherently patriarchal in its dismissal of human emotion as being hierarchically subordinate. Such a system was

as Barbara Herman and Catherine MacKinnon. Herman argues that while emotions are very often the prime drivers of human action, emotions are bereft of any normative morality and are too subjective to provide grounding for moral theory.<sup>32</sup> MacKinnon posits that to glorify differences imposed on women is to support the disempowerment of women as a class.<sup>33</sup> The reality of human rights enforcement and conceptualisation is primarily focussed on its normativity and its universality. Carol Gilligan's theory does not reject the idea of universal application of the relative importance of emotion in legal theory, but fails to acknowledge the lack of universality in its foundation. Acts driven by emotion are neither accurately predictable for the purposes of a moral theory that seeks to regulate human behaviour, nor can any normativity be achieved in respect of such acts (or their regulation) without foregoing impartiality. While acts dictated by emotion may very well coincide with acts dictated by reason or morality, this may just be a matter of luck as opposed to a basis of grounding the regulation of human behaviour.<sup>34</sup> Further, there have been counters from within the feminist discourse that have squarely placed the ethics of care within the Kantian framework as well.<sup>35</sup> A sound theory of ethics of care is perhaps essential for the justification of any so-called welfare right, which I will discuss in due course.

The categorical imperatives derived by Kant are primarily principles to be used to determine the legitimacy of any act. Under his theory, a system of regulation (the state) must exist and prohibit acts that are deemed to be impermissible by application of the categorical imperatives. Kant further formulates the ideal system of government and the manner of regulation of individual behaviour under such an ideal system through the implementation of the categorical imperatives, which will be discussed in the next chapter.

There are four categorical imperatives to test the legitimacy of any act. First, the act must not be frustrated if the maxim of the act were to become a universal law.<sup>36</sup> Second, that the act should always treat humanity, every individual including the actor, as an end in themselves and never as a means to an end.<sup>37</sup> Third, that the maxim of the act, as the will of a rational being laying down universal law, should not frustrate the will of every natural being.<sup>38</sup> Fourth, that the act should not contradict the autonomy of the will when the maxim of the act is universalized.<sup>39</sup> Any act must necessarily be compatible with all four categorical imperatives in order to be deemed legitimate and permissible. If an act is rendered impossible or redundant by application of even one of the four imperatives, the act, per Kant, must not be performed.

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responsible for what Gilligan describes as a clash between morality based on rights and reason and morality based on ethics of care and responsibility. One example of such a clash, as described by Gilligan, was the dilemma of a lawyer with information that would support the claim of the opposite party at a trial – the lawyer has a duty to the client not to reveal this information, but withholding it frustrates an otherwise meritorious claim by the opposite party, rendering the adversarial system that allows such a clash as inherently anti-care and possibly unjust, if the ethics of responsibility and care are viewed as being as important as rationality. CAROL GILLIGAN, *IN A DIFFERENT VOICE* 128–60 (1982); see also Lawrence A. Blum, *Kant's and Hegel's Moral Rationalism: A Feminist Perspective*, 12 CAN. J. PHILO. 287, 294 (1982).

<sup>32</sup> See Barbara Herman, *Integrity and Impartiality*, 66 THE MONIST 233, 234 (1983).

<sup>33</sup> See CATHERINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 39 (1987).

<sup>34</sup> Sedgwick, *supra* note 5, at 81.

<sup>35</sup> See generally Robin May Schott, *Introduction to Feminist Interpretations of Immanuel Kant*, *supra* note 5, at 6–15; Herta Nagl-Docekal, *Feminist Ethics: How it Could Benefit from Kant's Moral Philosophy*, in *id.* at 101–24.

<sup>36</sup> FUNDAMENTAL PRINCIPLES, *supra* note 28, at 38.

<sup>37</sup> *Id.* at 45.

<sup>38</sup> *Id.* at 48.

<sup>39</sup> *Id.* at 51–53.

Certain primary assumptions regarding the nature of human existence are made prior to the derivation of the categorical imperatives; first, the human instinct of self-preservation, and second, the social nature of human existence. The absence of either renders the entire exercise of deriving legal theories and moral philosophies for the regulation of human conduct rather irrelevant. In our bare states, stripped of all knowledge, society and experience, the sole aim that drives us will necessarily be our instinctive will to survive.<sup>40</sup> Self-preservation thus stands as a basic rule of existence independent of all others and incapable of contradiction from any field.<sup>41</sup> Consequently, under no circumstances can any act seek to infringe on survival of the individual, which is where the concept of universal respect for each person is originates. I would have to insert the caveat that when I speak of an ‘act’, I speak of acts performed by humans and therefore subject to regulations as may be enforced under societal regimes. Naturally, there are acts that may be performed that may contradict the instinct of self-preservation; one may decide to end one’s life without regard to any regulatory prohibition of it. However, in the event of every individual choosing to end their life, the question of legal theory to regulate or prohibit such extermination is once again rendered irrelevant.<sup>42</sup> The same logic also applies to the assumption of the existence of a society to or against which a legal theory may be applied or tested.

The first categorical imperative deals with the problems raised by the fact of man’s social existence. If humans were to live as isolated creatures who never met each other, any physically possible act would be permissible simply because other people would not be affected by it. Once we take into consideration the fact of human interaction, we are necessarily limited in the scope of our acts by the existence of other independent actors possessed of wills of their own. By universalizing the maxim of any act performed by one individual, Kant implicitly incorporates an idea of equality between the wills of each individual actor in the thought experiment. There would be no need to consider the effects of universalization of these maxims if it were acceptable that one person’s will was of greater value or more authoritative than the will of the other people, whether or not such people are affected by this exercise of will. Although this categorical imperative touches upon the autonomy of every individual, the underlying assumption, as elucidated by scholars such as Ronald Dworkin<sup>43</sup>, is the equality of such freedom amongst the individuals.

One of the criticisms to the universalization of the maxim of the act has been the lack of clarity as to what exactly is to be universalized when one speaks of the ‘maxim of the act’.<sup>44</sup> From the perspective of critical legal studies, for instance, every single factor that affected the decision of the actor must be taken into account – the person’s upbringing, the circumstances of the person at the time of commission of the act, and any identifier that may distinguish the responses of one particular individual from that of another.<sup>45</sup> This may lead us down a slippery slope of every act becoming permissible one every possible parameter affecting the actor is taken into consideration. For instance, a genetic predisposition towards aggression coupled with a history of abuse may well lead a person to violence to the detriment of society; would one, in order to determine the permissibility of the act, have to universalize such a predisposition and the history of violence in order to justify the act, or

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<sup>40</sup> Nina Bull, *The Biological Basis of Value*, 53 THE SCI. MONTHLY 170, 170–74 (1941); THOMAS HOBBS, LEVIATHAN 103 (1651).

<sup>41</sup> TIERNEY, *supra* note 18, at 70.

<sup>42</sup> Kant’s rejection of suicide as being an act in contravention of the categorical imperatives will be discussed in detail later in this chapter in the analysis of the third categorical imperative.

<sup>43</sup> See generally, Ronald Dworkin, *What Is Equality? Part 3: The Place of Liberty*, 73 IOWA L. REV. 1 (1988).

<sup>44</sup> See generally, Paul Dietrichson, *When is a Maxim Fully Universalizable?*, 55 KANT-STUDIEN 143 (1964).

<sup>45</sup> Sedgwick, *supra* note 5, at 84.

could the autonomy of agency be nonetheless assumed?<sup>46</sup> The argument sought to be made by such theories is that the idea of autonomy of the will is a myth, and that any act can be explained as a summation of circumstances and predispositions. However, the idea of autonomy under the categorical imperatives does provide an answer. Kant relates the morality of an act on the basis of its performance due to the capacity of humans to act in a manner that contradicts their personal desires out of an obligation to do so.<sup>47</sup> While circumstances may (and do) influence one's acts, the point of human rationality is our capacity to nevertheless be deliberate in the exercise of our will.

The second categorical imperative follows directly from the foundation of the first. If no person's will ought to be of greater force or authority than anyone else's, it must automatically mean that no person may be made to act against their own volition in accordance with the will of any third person, subject again to the restraints placed upon the will by the fact of human interaction under the first imperative. The second imperative provides the foundation for the concept of a minimum standard of dignity that ought to be afforded to every individual to sustain human co-existence without subjecting anyone to coercion by anyone else.

This idea of dignity provides the grounding for several rights within the categorical imperatives – the idea that no person ought to be treated as a means to an end and ought to be treated as an end (a rational and free-willed agent) in themselves does not preclude human interaction based on consent. I may request a person to do something for my benefit, but this does not entitle me to demand performance. The person is free to perform the act or not, as they deem fit. They might request some consideration for such performance. The primary factor would have to be the consent of the parties. The same is evidenced in contract law, which provides for the nullification of contracts that are not completely volitional, where consent was induced by unfair means (through coercion, misrepresentation, or fraud).<sup>48</sup> The absence of coercion and the need to be informed (particularly where a fiduciary relationship exists between the contracting parties) have long been essential elements of any contract.<sup>49</sup> Likewise, one may present a conceptualisation of human dignity where the lack of education may, in certain circumstances, repudiate the validity of consent due to lack of information. A lack of education may affect a person's capacity to enjoy their right to autonomy. An uneducated person may face undue influence or coercion by those who are educated. The state, as a regulator of such behaviour as contradicts the categorical imperatives<sup>50</sup> may now be seen to be bound to either inspect each private contract to ensure that such coercion is not being affected or seek to ensure that the conditions for such coercion cannot arise, through the provision of education.<sup>51</sup>

<sup>46</sup> See generally BRUCE N. WALLER, *AGAINST MORAL RESPONSIBILITY* (2011).

<sup>47</sup> IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 200 (Mary Gregor tran., Cambridge Univ. Press 1991).

<sup>48</sup> For example, section 19 of the Indian Contract Act, 1872 makes contracts which were agreed to without free consent voidable at the instance of the party whose consent was not free. The Indian Contract Act, No. 9 of 1872, INDIA CODE (1993), vol. 2, <http://indiacode.nic.in>. Likewise, in *Barton v. Armstrong*, the Privy Council held that consent obtained under duress rendered the contract voidable. 3 ALR 355, 271 (Austl.).

<sup>49</sup> See Herbert A Holstein, *Vices of Consent in the Law of Contracts*, 13 TUL. L. REV. 560, 564, 571, (1939); Saul Litvinoff, *Vices of Consent, Error, Fraud, Duress and an Epilogue on Lesion*, 50 LA. L. REV. 1 (1989).

<sup>50</sup> The concept of the state as a regulator of human behaviour puts the state in the position of being analogous to an extremely powerful person, such as the one proposed by Hobbes (HOBBS, *supra* note 40, at 107). In such a conception, the state acquires the capacity to behave as a person through its agents, who act on behalf of the state. This state may now exert its influence on the behaviour of other people, thus becoming one of the factors that may limit a person's freedom to act. Since the state is in effect run by people, it stands to reason that the power granted to it over other people should not restrain people beyond the amount they would have been in the absence of the state (but with the assumption of peaceful co-existence).

<sup>51</sup> One may question the nature of rights vested in a person unaware of the right; can a person without the knowledge of entitlement to a right be capable of being vested with the right nonetheless? This would

The second imperative, however, contradicts one of Kant's theories on the obligations and rights of the state. Per Kant, states are permitted to tax individual basic goods to support organizations providing to those who cannot fend for themselves.<sup>52</sup> However, taxing an individual is a way of using the person as a means rather than as an end, unless such contributions to the tax fund were entirely voluntary. The model also does not account for a state focused on the protection of individual freedoms and/or property (to the extent permissible under the categorical imperatives), simply because any such state would require resources to perform such a role. The primary means of gaining such resources for use by the state has historically been through taxation. Funds raised through the provision of public utilities (in an entirely libertarian set up) are likely to be inadequate to cover funding security – any service would require a profit margin to be maintained, meeting that profit margin would necessarily prevent subsidising the rate at which the service may be offered to the public and such a rate is unlikely to be able to compete with private service providers whose only concern would be personal profits. If the service is monopolized by the state, the fourth categorical imperative is contradicted as the autonomy of the individual to provide that service is stifled. Therefore, the state can either charge for the services of protecting individual autonomy, which would lead to the lack of protection of the autonomy of certain individuals, contradicting the first<sup>53</sup> and fourth imperatives, or impose taxes to fund security. The existence of the state as an agent to protect (everyone's mutually compatible) individual autonomy (and by implication, its right to tax people for the purposes of funding security) becomes necessary. The imposition of taxes for the protection of individual liberties could be based on an implied consent given by the individuals taxed in order to bypass the second imperative.<sup>54</sup> Taxation imposed by the state on various transactions or acts could be avoided by the individual insistent upon refusing to pay taxes in the same manner as regulation of activities may be avoided by such an individual – by not participating in the civil society.

At this juncture, it may be relevant to note that the primary counter to the egalitarian nature of universalizing the act of the individual (and indeed, to the idea of human interaction being the basis of deriving 'natural' rights in Kant's theory) has been that posed by Henry Sidgwick, what he refers to as the strong man argument:<sup>55</sup> a policy of egoism favours the strong man capable of independent sustenance, while egalitarian models are more likely to be endorsed by those who perceive themselves to be incapable of a completely independent existence.<sup>56</sup> The strongman argument posits that a person who is, or believes himself to be,

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necessitate a foray into the conflict of will and interest theories on the nature of rights, which is beyond the scope of this paper. However, for the purposes of this discussion, Kant's categorical imperatives are dictators on the permissibility of acts. Where acts contradict an imperative, such as the infringement on autonomy by the use of misrepresentation or fraud violates the second imperative by treating the uneducated person as a means to an end and therefore, the state, as the regulator of human behaviour in practice, is duty bound to prevent this, whether or not the person whose rights are infringed is aware of it.

<sup>52</sup> KANT, *supra* note 56, at 136.

<sup>53</sup> The act in such a case would be to refuse the protection of the state to those who are incapable of affording such protection, the maxim of the act being the incapacity to afford protection of one's liberty (or, in order to prevent the inclusion of the state as an individual actor for the CI process, the maxim could be the incapacity of preventing others from infringing upon one's liberty). This is only a problem when someone does actually infringe upon another person's exercise of their own liberty; the primary act therefore includes the fact of infringement, *i.e.*, a person infringes upon the autonomy of another and the other has no means of protecting themselves. This is in itself a contradiction of the fourth imperative whereby the autonomy of the will of a person is contradicted upon universalization of the maxim of the lack of protection of autonomy.

<sup>54</sup> Kant himself favours this interpretation, stating that the taxation must be done in such a way that the "people taxes itself;" thereby bringing in the necessary consent that bypasses the infringement on the categorical imperatives. KANT, *supra* note 56, at 135.

<sup>55</sup> HENRY SIDGWICK, *THE METHODS OF ETHICS* 362 (1874).

<sup>56</sup> See Michael Rohlf, *Kant on Determining One's Duty: A Middle Course Between Rawls and Herman*, 100 KANT-STUDIEN 346, 354 (2009).

strong enough to take care of all their own needs will never concede to a framework of justice whereby his acts are limited due to interaction with other people which, in the strongman's opinion, are wholly unnecessary given the strongman's capacity to take care of himself. Consequently, any model of rights that is based on the fact of human interaction fails due to the lack of applicability when the premise of interaction is itself rejected.

One objection to the strongman argument has been that it fails to consider unforeseen circumstances that may incapacitate the strongman, leading him to require both interaction with other people and their assistance. This objection, however, begs the question of whether the independence-valuing strongman would actually concede that unforeseen circumstances merit assistance – they may very well believe that incapacitation in any unforeseen circumstances would be merited and therefore, refuse assistance and interaction just the same.<sup>57</sup> Another counter to the strongman principle has been by Rawls through his modification of the Categorical Imperatives to include a veil of ignorance<sup>58</sup> at the time of formation of the framework of rights, thus precluding anyone from knowing whether or not they are actually capable of a completely independent existence. The decision makers (in the traditional veil-of-ignorance set-up) are, however, aware of the characteristics of the people without knowing which set of characteristics will apply to their own lives.<sup>59</sup> Therefore, there may be a chance that a large number of people do qualify as Sidgwick's strongmen and therefore, as a consequence of faith in the odds being in favour of them being strong enough to benefit from egoism, a majority of individuals could very well choose to endorse a policy of egoism to the detriment of the weak-men in the group. The only means of avoiding this consequence is if the second Rawlsian principle of justice<sup>60</sup> is applied, *viz.*, and the policy that enhances the status of the least benefited person is endorsed. Imposing the veil of ignorance does, however, provide a practical counter to the problem of Kant's misogynistic analogies<sup>61</sup>: it seems extremely unlikely that any misogynistic policy would be endorsed when there is an almost equal chance of being benefited by the policy as there is of the policy being to one's detriment. However, the entire veil-of-ignorance solution is more grounded on a prediction of human behaviour<sup>62</sup>, which may or may not pan out.

Another objection to the strongman argument is nonetheless possible. If the imperative were applied to universalize the maxim of every act, the maxim of independence held by the strongman would necessarily include the circumstances of such a maxim, *viz.* the fact of the strongman's capacity for independent living (or belief in its truth) would also similarly have to be universalized. Since such universalization of individual capacity is impossible, the maxim cannot truly be universalized without frustrating a fact of human

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<sup>57</sup> SIDGWICK, *supra* note 55. Sidgwick suggests this on the basis of the person valuing a policy of egoism being generally enforced without exceptions as being of greater benefit to the individual than the idea of certain exceptions being made to the policy whereby certain circumstances permit benevolence or obligate benevolence over the general policy of mutual indifference.

<sup>58</sup> JOHN RAWLS, LECTURES ON THE HISTORY OF MORAL PHILOSOPHY 175–76 (2000). Rawls inserts a modification to the framework of the categorical imperatives in order to prevent the individuals from first, knowing the particular features of persons and second, knowing (at the time of deciding on matters of policy such as whether or not to endorse a policy of egoism) what their place in the social set-up would be.

<sup>59</sup> JOHN RAWLS, A THEORY OF JUSTICE 17–21 (Harv. Univ. Press rev. ed. 1999).

<sup>60</sup> *Id.* at 60–64.

<sup>61</sup> *See supra* note 5.

<sup>62</sup> The prediction is that of rational agents, granted; it is unlikely that rational agents would act in a manner that is likely to be to their detriment. Humans as rational agents tend to be products of their circumstances, though: people raised to believe in the idea of patriarchy as being an absolute necessary and/or unquestionably beneficial to society need not necessarily reject the idea simply because it is detrimental to themselves as an individual or may not indeed believe in such a situation being detrimental. Which brings us back to the point of education being fundamental in shaping perspectives and empowering a more informed agency in individuals over their own lives.

existence, being the lack of uniformity in our individual strengths and weaknesses. While this does not necessarily frustrate a will of every natural being, it may be argued that the act is frustrated under the first categorical imperative due to the impossibility of universalizing the maxim.

The third imperative provides the primary grounding for Kant's objection to both suicide and homosexuality<sup>63</sup> – any maxim that is against the “will of every natural being” cannot be permissible. Taking our original assumption of self-preservation as a natural will of every living being into consideration, universalizing the decision to kill oneself to be rid of the pain of one's circumstances would annihilate humans.<sup>64</sup> As mentioned earlier, the annihilation of humans doesn't violate the categorical imperatives as much as render any need for the categorical imperatives (or any other regulatory regime) infructuous. With the question of homosexuality as well, the argument for prohibition rests squarely on the frustration of the “natural will” to procreate / propagate the species when the act is universalized.<sup>65</sup> However, one of the arguments against such a stance has been that procreation as an end is merely not advanced by homosexuality. The fact that it is not advanced does not necessarily frustrate the end entirely;<sup>66</sup> it is perfectly possible for homosexual people to indulge in procreative sex when the end of procreation is desired. Furthermore, imposing an absolute duty to procreate (or preventing a person from indulging in an activity that does not, by itself, contradict the categorical imperatives to further the cause of procreation) contradicts the second imperative as it considers individuals as means to the end of the propagation of the human species. Taking the fourth imperative into account, requiring every person to procreate infringes upon the autonomy of people to choose whether to indulge in procreation at all. The imperative would have to consider possible contradictions of other imperatives prior to enforcement of any restriction on an act; therefore, one would have to read in the words “subject to the fulfilment of the other imperatives” as a proviso within the third imperative as a safety valve against inherently contradictory restrictions.

The fourth categorical imperative follows directly from the rationale behind the first imperative – that the autonomy of the will is paramount to the extent compatible with a similar manner of autonomy for everyone else in the social set up under consideration. It grounds the ideologically libertarian nature of the rights set up under the Kantian framework (and under the various declarations of human rights executed around the same time) – no person ought to be deprived of their liberty when the exercise of such liberty (a) does not interfere with the liberty of anyone else who may be affected by it and (b) does not otherwise contradict the categorical imperatives. While the categorical imperatives are targeted toward identifying acts of individuals that are to be regulated by the state, this imperative requires the state to prohibit restraints on liberty and autonomy, impliedly imputing that the state as well is bound to ensure that the autonomy of individuals is not transgressed.

The fourth imperative captures the pith of the argument that the difference between the CPRs and the ESCRs is that the former imposes restraints on the state while the latter imposes positive obligations thereon. A basic reading of the imperative itself provides one counter to

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<sup>63</sup> KANT, *supra* note 33, at 96–98.

<sup>64</sup> Self-sacrifice is only prohibited when done as an act of self-indulgence, however, under the Kantian regime. A voluntary act of self-sacrifice for a cause that is outside the satisfaction of one's own personal wishes, such as in aid of other people, need not be prohibited. See KANT, *supra* note 33. One may assume that (in the Kantian set-up) the universalization of such a maxim would nonetheless have to include a certain number of ‘others’ whom the act would protect as being outside the set of people whose lives are forfeit.

<sup>65</sup> See generally Matthew C. Altman, *Kant on Sex and Marriage: The Implications for the Same-Sex Marriage Debate*, KANT-STUDIEN 101 Jahrg., S. 309 (2010).

<sup>66</sup> *Id.* at 324.

this argument, however: that the state is not only required to restrain itself from generally infringing upon the liberties of individuals, but must also actively regulate the acts of individuals to ensure that people are prohibited from infringing upon the liberties of others as well. This not only requires the state to actively regulate the acts of individuals in this regard, but also demands that a regime is in place to ensure the enforcement of such restrictions, both in terms of civil and criminal law, the state must necessarily have a judicial system in place to provide effective remedies against unfair transgressions on personal liberties actuated by individuals. This has been a standard refutation against the notion of CPRs being ‘negative’ and ESCRs being ‘positive.’<sup>67</sup>

The four categorical imperatives as listed above provide the basic framework upon which all other theories of statehood and right may be worked out in the Kantian system. I shall now move into an analysis of the nature, rights and duties of the state in Kant’s theories to identify the primary obligations incumbent upon a state in relation to the education of its citizens.

### THE IDEAL STATE: RIGHTS AND DUTIES IN RELATION TO THE RIGHT TO EDUCATION

Kant, in his various works on state and right, provides a model of childcare, which may be used to determine a system for the right to education within the regime of the categorical imperatives.<sup>68</sup> According to Kant, children are brought into this world by their parents without their consent, placing the primary responsibility of care of children upon their parents.<sup>69</sup> They therefore, “incur the obligation to make the child content with his condition so far as they can.”<sup>70</sup> The duty imposed is absolute and would not violate any of the imperatives primarily because the original choice to procreate was (assumedly) a voluntary decision made in the exercise of one’s natural autonomy.. Despite the comparisons to property that Kant later draws to the children to elucidate the manner of rights available to parents in relation to their children, Kant explicitly states that the children themselves cannot be abandoned to luck or fate by their parents simply because they are in the unique position of being right-holders themselves despite their previous non-existence. The circumstance of being human entitles them to an equal claim to the rights derived from the categorical imperatives.<sup>71</sup>

Later on in the discourse, Kant describes the rights of parents in respect of the child corresponding with the duty of care imposed upon them: they have the right to educate the child in the manner that they deem fit for the purposes of the child’s development, with the caveat that this be aimed minimally at ensuring the capacity of the children to eventually look

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<sup>67</sup> For instance, Article 2(2) of the ICCPR reads, “. . . each State Party to the present Covenant undertakes to *take the necessary steps*, in accordance with its constitutional processes and with the provisions of the present Covenant, to *adopt such laws or other measures as may be necessary to give effect to the rights* recognized in the present Covenant” (emphasis provided), clearly iterating that the CPRs do require states to take active steps towards the effective realization of the rights enshrined therein. Other oft-cited examples include the right to life and the right to participate in public affairs. The right to life under Article 6(1) requires the state to actively protect the right to life under law, as opposed to merely being prohibited from infringing upon the right to life of an individual. Article 25 reads, “Every citizen shall have the right . . . to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors,” which imposes a comprehensive obligation on the state to conduct elections at regular intervals in order to guarantee this right.

<sup>68</sup> See generally KANT, *supra* note 28.

<sup>69</sup> KANT, *supra* note 47, at 99.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

after themselves.<sup>72</sup> Varden, in her analysis of the model proposed by Kant for the purposes of childcare, draws comparisons between the child in the childcare model and people in need of aid due to their incapacity to care for themselves in order to support the idea that the Kantian system may be compatible with a limited ethics of care model without actually destroying its foundation on individual autonomy.<sup>73</sup>

Varden posits that if such caregiver models are actual contracts entered into by consenting adults with no regulation whatsoever, it would be tantamount to a master-slave relationship.<sup>74</sup> The care-receiver contracts away decision-making to the caregiver.<sup>75</sup> Due to the assumed incapacity of the care-receivers, they become bound to accept whatever decision the caregiver makes for them. Varden argues that such an absolute submission of will is intuitively against the liberal ideology otherwise espoused in the Kantian regime.<sup>76</sup> Here, the state's role in regulating and enforcing such fiduciary relationships provides the necessary limitation: the care-giver cannot be arbitrary in decisions made that affect the person cared for and must take actions only in the best interests of the care-receiver.<sup>77</sup> Where a state regulates such fiduciary relationships, and is effective in enforcing good faith therein, Varden argues, the nature of these contracts is no longer slavish and unacceptable.<sup>78</sup> This is the basis of justifying the establishment of a public authority to regulate the way care is provided to individuals who require it.

Moving on, while the State is required to ensure good faith in childcare, the primary responsibility of it, as mentioned earlier, rests with the parents.<sup>79</sup> One may assume that indulging in the act of procreation when one does not have the funds to care for the child and raise the child until the child can take care of itself could be equivalent to borrowing a sum of money on the false promise that the debt can be repaid.<sup>80</sup> While borrowing with no intention to repay the debt, per Kant, is against the categorical imperatives,<sup>81</sup> there remains the problem of persons who, due to unforeseen circumstances become incapable of taking care of children that they have brought into the world. This could also be stretched to include those who are incapable of taking care of themselves because of unforeseen circumstances and therefore, require either the help of voluntary philanthropists or the help of a state that taxes individuals to provide for these situations.<sup>82</sup>

Furthermore, even if parents who procreate, knowing that they do not have the means of fulfilling their obligations of childcare, are to be held responsible for the same does not solve the problem of there being children who have been brought to the world without their consent and are incapable of looking after or raising themselves.<sup>83</sup> Since the private philanthropist

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<sup>72</sup> *Id.*

<sup>73</sup> See Helga Varden, *A Kantian Critique of the Care Tradition: Family Law and Systemic Justice*, 17 *KANTIAN REVIEW* 327–356 (2012).

<sup>74</sup> *Id.* at 340.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 341.

<sup>78</sup> *Id.*

<sup>79</sup> KANT, *supra* note 47, at 99.

<sup>80</sup> *Id.* at 73.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 136. Kant himself, as we will see hereafter, posits that wealthy people have incurred an obligation to the commonwealth to help sustain those incapable of surviving on their own on account of having acquired wealth through the support of the commonwealth.

<sup>83</sup> The children in this instance could then be referred to both as the individuals in the commonwealth that cannot sustain themselves without the aid of resources provided by others in the first instance. In the second instance, they may be referred to as potential for the future of the same commonwealth: the wealthy will now have an additional obligation to reciprocate to the commonwealth by helping the commonwealth preserve itself and secure its future through the children being raised in it.

model works solely on voluntary acts or contributions toward the cause, there may or may not be sufficient funds or manpower to cover the total costs of childcare for every child without access to care and education. Universalizing the maxim of the act of not providing for such children would violate the fourth categorical imperative as far as the children are concerned—the autonomy of their will has been violated since they have not consented to their own existence and are nevertheless forced to attempt survival (considering suicide to alleviate one of one’s painful circumstances was forbidden in the first place) with neither the means nor the knowledge of how to survive in society.

While the establishment of the authority to govern private care relations has already been justified in this paper, the role of such an authority thus far has been primarily regulatory. It is required to ensure that private contracts for care are not abused. There has been no argument for the establishment of a publicly funded or maintained care system to provide care to those who cannot afford it. The establishment of relations of fiduciary care, where such relations do not already exist or are not freely contracted into by the individual agents themselves is not yet accounted for. Libertarianism abhors the creation of such relationships: it states that caregivers should not be required to bear personal responsibility for the circumstances of those in need of care by the state.<sup>84</sup> Thus, the problem of there being people in need of care due to no fault of their own simultaneously with there being no people who personally owe such a duty of care to them remains to be addressed. An analysis of the role of the State in the Kantian framework can provide the necessary theoretical justifications for these obligations being imposed upon the State.

In Kant’s theories, the ideal state is largely envisaged as a regulator of human behaviour limited to the bare extent necessary to preserve personal autonomy and private transactions. For Kant, the state is the ultimate arbiter of human actions and makes regulations in accordance with the categorical imperatives and enforces prohibitions against acts that are contrary to the dictates of the imperatives.<sup>85</sup> Since the imperatives themselves are largely liberal in their ideology, the state conceived in this form is also similarly focused on maximizing the available autonomy for every individual on an equal basis – Kant rejects the idea of a paternalistic state as being extremely despotic in its treatment of all its subjects as children as opposed to moral agents with the ability to reason and the autonomous right to act thereupon. The state, in Kant’s conceptualization, is as much a moral agent as an individual.<sup>86</sup> In such a scenario, the state (and all its agents acting under its authority) would also be bound by the categorical imperatives. It would be counterintuitive if the imperatives were to be followed by all individuals but could be bypassed by agents of a state. Such agents are ultimately individuals themselves. The primary aim of every state is to pursue its own well-being. The “well-being” of a state here is not so much the welfare and happiness of its citizens, but a self-sustaining status or region of a constituted community where the principles of right are fully respected and maintained among the populace in accordance with the categorical imperatives.<sup>87</sup> This supports the idea that a state, as an entity that seeks to sustain itself, may be considered a moral agent.

In pursuit of these objectives, the state is fully entitled to tax citizens (in the form of taxes on ownership of land, excise or trade duties and in the form of mandatory services such as conscription) under the Kantian framework.<sup>88</sup> The only condition on such an imposition of

<sup>84</sup> Varden, *supra* note 73, at 347.

<sup>85</sup> KANT, *supra* note 47, at 127.

<sup>86</sup> *Id.* at 128. Kant describes the agent of the state as a “moral person” who is referred to as “the directorate” or “the government.”

<sup>87</sup> *Id.* at 129. See also Jeremy Waldron, *Kant’s Theory of the State*, in *TOWARD PERPETUAL PEACE AND OTHER WRITINGS ON POLITICS, PEACE AND HISTORY* 179, 179 (Pauline Kleingeld ed., David L. Colclasure tran., 2006).

<sup>88</sup> KANT, *supra* note 47, at 135.

tax by the state is that the taxes are imposed by the people or those deputized by the people in order to ensure compliance with the second imperative.<sup>89</sup> When the people are considered to be taxing themselves, the nature of the act of paying taxes to fund the activities of the state may be considered to be voluntary. The principle here is quite straightforward: the state provides services that enable the exercise of individual freedom and autonomy and facilitate private trade (through the regulation of private transactions by enforcing contracts, for instance, or by providing the conditions under which trade (both within the community and with other states) is safe and unhindered), but these functions require resources that are to be rendered by those benefited in a civil society.

Taxation for the purposes of facilitating care or welfare options for persons unable to care for themselves, on the other hand, is a little more problematic. Here, the people taxed are not necessarily those who are to benefit from the regime: if a person has enough resources to pay taxes to a state, the same resources could be used to fund self-care. The only people who require the state to fund their care are those who have so little in terms of resources that requiring them to pay taxes would be futile. Thus, the people taxed in such a scheme are necessarily those who do not (or may not) directly benefit from the services provided from the funds raised. While it is true that the taxation may serve as a form of insurance against future contingencies that the taxpayer may face (the state would then cover for the needs of the person under such circumstances), it is quite possible that such a contingency never actually arrives and the taxpayer never receives a direct benefit from the proceeds forwarded for the purposes of state-funded welfare schemes. There is no motivation then, for such a taxpayer (comfortable in the availability of private resources to cover for contingencies) to submit to or endorse a taxation scheme that funds public welfare schemes.

Varden again suggests a solution from within the Kantian framework: the nature of the Kantian state as a maintainer of individual freedom would be self-contradictory if the social, economic and political system of the state allowed for the creation of individuals incapable of exercising their freedom to the same extent as others in the system owing to no fault or choice of their own.<sup>90</sup> While the categorical imperatives aim to maintain autonomy and restrict undue interference, an incapacity to maintain oneself creates a different sort of problem: the autonomy of a person has been interfered with despite there being no direct agent for such interference.<sup>91</sup> However, the state is charged with the duty to prevent any form of interference in autonomy, as opposed to just preventing interference by individual actors. On the nature of the state's obligation, Varden states:

Kant's basic claim is that, once the state establishes its monopoly on coercion, it must reconcile this monopoly with each citizen's right to freedom. To accomplish this, it must establish certain public, systemic measures that ensure that all citizens' freedom is subject to public law and not to each other's arbitrary private choices.... In so doing, the state ensures that private dependency relations inconsistent with each citizen's innate right to freedom do not arise.... the state must ensure that the larger systems within which people exercise their private rights, such as the economy, the financial systems, the educational system and the healthcare system, are reconcilable with each citizen's right to freedom... For example, each citizen's freedom and equality is inconsistent with conditions in which poor persons' legal access to means is fundamentally dependent upon rich

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<sup>89</sup> *Id.* at 135.

<sup>90</sup> Varden, *supra* note 28, at 349.

<sup>91</sup> See generally Sarah Williams Holtman, *Kantian Justice and Poverty Relief*, 95 KANT-STUDIEN 86–106 (2004).

persons' choices to hire them or to help them with charity.<sup>92</sup>

Varden asserts that the duty arises due to the exercise of coercion.<sup>93</sup> Coercion is implicitly an interference in autonomy. Anyone exercising any form of coercion would be responsible here. If the state has a monopoly on coercion, the state bears a high level of responsibility towards those who have been coerced.

Like the example of poor people's access to means, one could draw a similar parallel with the right of children to access education; indeed, the right of children is probably more justifiable given their innate incapacity to act as independent moral agents. Both due to their incomplete knowledge of the world's inner-workings and their incomplete development into their full potential (both in terms of mental and physical faculties), children cannot be *prima facie* assumed to be able to look after their own needs and therefore, must be provided for by the state to become fully independent moral agents of their own accord. To this end, the education of these children is an inherent part of the duties owed to children. Furthermore, where adults have not been provided with the opportunity to enjoy their rights to autonomy in the same manner as everyone else due to their not having received any formal education, the state would be duty bound to provide opportunities for such adults to avail of an equivalent education and therefore attain a more equitable access to the enjoyment of their autonomy.

Taking this one step further, there are different levels at which children may be provided for by their parents. It is possible that the children of those less capable of providing for them could be considered in a similar bracket as those whose parents are entirely incapable of doing so, for the purposes of determining the obligation of the state to provide childcare. Thus, the obligation of the state would extend to ensuring parity in the quality of education received by people, in addition to securing the right to education for those deprived of access.<sup>94</sup>

While this reasoning justifies a state's provision of welfare services, taxation of citizens unaffected by the needs of care-receivers thus far, can only be justified as a corollary to the state's obligation to provide welfare. The argument may be summarized as such: Those incapable of maintaining themselves have an inherent right to receive welfare from the state. The state is, therefore, obligated to provide these services. The state requires a source of funding for the services provided. Those receiving it are *ipso facto* unable to fund the state for the services provided and ergo, the state will necessarily have to tax other people for the provision of these services.

The corollary of taxation for the purposes of welfare has also been conceived of by Kant in the *Metaphysics of Morals*, where he states that the state has the right to impose taxes on people to support organizations providing for the poor, primarily under its right to self-preservation as a civil society.<sup>95</sup> A civil society implies the general will of the people to preserve themselves as a society in perpetuity<sup>96</sup> and therefore, the state has a right to tax people (operating upon the implied consent of the people to endorse the maintenance of the civil society through their continued participation therein). As stated earlier, the existence and interest in maintaining a civil society is a *cine qua non* for the existence of ethical rules to govern conduct. This goes with the idea of an established state having a right to use some coercion for self-preservation, as long as it does not invalidate the consent of the individuals

<sup>92</sup> Varden, *supra* note 28, at 349–50.

<sup>93</sup> *Id.* at 350.

<sup>94</sup> A Marxist analysis of the way the system works today espouses the idea that the child's success in the world is entirely dependent on the resources available to the child's parents for the purposes of raising the child — those with sufficient resources are invariably more likely to succeed than those without, rendering the idea of autonomy and free exercise of will in the actuation of one's potential once again impotent.

<sup>95</sup> KANT, *supra* note 56, at 136.

<sup>96</sup> *Id.*

in the state to be a part of such a society. To quote Kant,

For reasons of state the government is therefore authorized to constrain the wealthy to provide the means of sustenance to those who are unable to provide for even their most necessary natural needs. The wealthy have acquired an obligation to the commonwealth, since they owe their existence to an act of submitting to its protection and care, which they need in order to live; on this obligation the state now bases its right to contribute what is theirs to maintaining their fellow citizens.<sup>97</sup>

Thereafter, Kant moves on to the specific case of abandoned children and suggests that wealthy unmarried persons be taxed to provide for their care by institutions maintained by public funds.<sup>98</sup> Kant seems to imply, once again, a duty to procreate – remaining unmarried and failing to procreate is imputed to be a dereliction of a person’s duty to procreate and consequently makes such a person liable to take upon the duty of providing for the next generation of citizens through taxation for the upkeep of children who are not otherwise provided for.<sup>99</sup> However, as explained earlier, requiring every person to procreate amounts to using a person as a means to the end of preservation of the human race, which, by itself, is not automatically an end that is justifiable.

Self-preservation at the individual level may be a primary assumption of human existence under the Kantian model, but I would argue that it stands more as a matter of right than as a moral duty. While unmarried, wealthy elderly people may certainly be taxed for the purposes of maintaining children, they can only be taxed in the same manner as everyone else in society and such taxation must be justified solely on the basis of their continued participation and benefits already received from participation in civil society: having benefitted from the socio-political and economic structure that has been established by the state, they owe a duty of ensuring that the state has the funds required to maintain itself. It has been argued that under the Kantian framework, the nature of state-funded services required by individuals in the protection of their persons and property is no different from the services required by those incapable of maintaining themselves to sustain their lives and/or develop as fully functioning and independent moral agents and citizens of the state.<sup>100</sup>

One problem that may be faced in the conceptualisation of state-funded welfare schemes is the idea that the schemes may serve as incentives to laziness. In the framework conceived by Kant, the problem is not so much theoretical as it is empirical – the manner in which the state chooses to distribute basic necessities amongst the poor ought to ensure that it cannot be used as a means of acquisition by the indigent.<sup>101</sup> Naturally, with children, the welfare may be structured to cease upon the child’s achieving a level of moral agency sufficient to support independence, whereupon they are themselves likely to become contributing members of the commonwealth.

In conclusion, the Kantian framework of statehood and individual rights under the categorical imperatives does provide a comprehensive theoretical basis for welfare (in particular, for childcare) at three levels. First, the state is charged with the duty to regulate private relations of care (including those of childcare) to prevent abuse of the rights of the care-receiver, but must not interfere with the autonomy of the caregiver when the child faces no abuse. Second, where no caregiver exists, or where circumstances are such that the child receives inadequate care, the state is required to cover for the shortfall and maintain the child

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<sup>97</sup> *Id.* at 136.

<sup>98</sup> *Id.* at 137.

<sup>99</sup> *Id.*

<sup>100</sup> Holtman, *supra* note 100, at 102.

<sup>101</sup> KANT, *supra* note 56, at 136.

(including in providing for the child's education) until the child can lead an independent existence. Third, to comply with its duty of care towards such children, the state has the right to tax its citizens to raise the funds necessary for the maintenance of the institutions that provide childcare services.

The obligation of a state in relation to the education received by children additionally includes the obligation to ensure parity of the quality of education received by various groups. This is where the issue of vouchers may be considered: much like the misguided idea of 'separate but equal,'<sup>102</sup> leaving education to private regulation is unlikely to ensure parity in the quality of education received by children in different schools. States must make up for this problem by ensuring adequate funding is provided to improve and maintain the quality of all schools that need such funding. [The presumption of choice and the free market economy automatically pushing the quality of education in private schools without state investment, support and funding (particularly using the voucher system) has been known to fail].

### CONCLUSION

Most States provide for the enforcement of certain human rights within their national jurisdictions, making Human Rights Law a practical reality. However, dispensing with the need for philosophical justifications of the right may not be called for just yet: ideological divides bear witness to the unwillingness of many States to implement human rights that do not match the policies of their governments. Moreover, theoretical justifications for human rights are essential to answer the question as to why States must protect certain rights, and how these rights are to be interpreted and implemented.

The deontological approach to identifying a theoretical justification for the right to education in the system of rights deduced by Immanuel Kant provides three primary duties upon states: (i) to regulate private education and ensure that parents and/or guardians do not abuse their rights in respect of the child's education, (ii) to provide for free access to education for all persons who are incapable of accessing educational facilities on their own, and (iii) to ensure that the quality of education provided by the state is at par with the quality of privately provided education as well. The nature of education is such that it empowers the full enjoyment of all of one's rights – the entitlement to enjoy a right is largely irrelevant when one is either unaware of the existence of such a right, or if such right can easily be taken away. In either case, the state fails in its duty to guarantee the right by allowing circumstances or the acts of third parties to infringe upon a person's right. States are required to ensure that the right to education is granted on an equally accessible basis to all of its citizens. The shift to conservative policies may see several states alter their education funding policies, thereby failing to fulfil their obligations under the Kantian system.

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<sup>102</sup> See *Plessy v. Ferguson*, 163 U.S. 537 (1896), overruled by *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).